The National Labor Relations Board--An Appraisal

William P. Murphy

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2561

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
The National Labor Relations Board—
An Appraisal

William P. Murphy*†

I. INTRODUCTION

During the 1966-1967 academic year the author had the pleasure of serving on the staff of National Labor Relations Board Member Sam Zagoria and had the opportunity to observe the Board in action and in a small measure to participate in its work.

To one who spends most of his time in the cloistered atmosphere of a law school, a year with the Board was a rare and exciting opportunity to observe the internal operation and administration of an agency about which he had mixed feelings, including much puzzlement. The year removed some of the puzzlement, but also created a dilemma. If I am unduly critical, the people in Washington will think that I am biting the hand that fed me, and if I praise the Board, some will say that I was brainwashed. In any event, this Article is simply an assortment of information, impressions, observations, and evaluations of certain aspects of NLRB operation gained from one year of close association with this very interesting agency.

II. GENERAL NATURE OF THE AGENCY OPERATION

The National Labor Relations Board1 is not only interesting, it is unique among federal regulatory agencies. Since its inception in 1935,2 it has been a center of controversy. This was and is inevitable. The subject matter of its jurisdiction—labor-management relations—has been a source of contention, discord, strife, and even violence throughout much of our national history. In this area which is highly charged with emotion and strongly held economic views, there exist two groups of competitors, both of whom are well-financed, articulate, highly vocal, and aggressive in defense of their positions.

* Professor of Law, University of Missouri.
† Printed by permission of the copyright owners from the SWLF-14th Annual Labor Law Institute, published by Matthew Bender & Company, 235 East 45th Street, New York, New York 10017. Many of the footnote references have been provided by the editors, with the permission of the author, to aid the reader.
The Board directly affects and involves more Americans than any other governmental agency. It has no control over its caseload, which is determined solely by the filing of petitions and charges by private parties. It has the largest volume of cases of any governmental agency, and the number has been increasing annually to the current figure of around 30,000 cases per year. It has more cases before the courts than any other agency. In one recent year, between one-third and one-half of the federal government's actions in the courts of appeals were NLRB cases. The Board's decisions are probably more widely reported and more critically examined than those of any other governmental agency. The Board and the statute it administers have been under almost continuous investigation by Congress for over thirty years. Alternately over the years the Board has been damned as pro-labor and pro-management, but has seldom, if ever, been accused of being neutral and objective. There has never been a time when some group was not demanding that the Board be abolished.

Although strictly speaking "the Board" is only the five-member body, colloquially "the Board" refers to the total agency process—including the Office of the General Counsel, the field operations in thirty-one regional offices, and the Division of Trial Examiners. Compared to other federal agencies, the Board is not a very large establishment. Its total employment is only about 2,400, about two-thirds of whom are employed in the regional offices. The agency's budget for the current fiscal year is about $31 million, of which about eighty-five per cent is spent on people who actually process cases. The Board has a higher percentage of lawyers and supporting clericals than any other federal agency. Lawyers alone comprise about thirty-eight per cent of all NLRB employees. In short, the Board is a big, far-flung law firm. Compared with other agencies, the Board pays its lawyers fairly well. They keep professional hours in coming to work in the morning, but they leave with the clericals in the afternoon. Morale is reasonably good.

In Washington the Board is housed on eleven floors rented in a private office building at 1717 Pennsylvania Avenue, just a

3. The Board commemorated the 25,000,000th employee vote in Board elections on March 1, 1967.
4. The Board handled nearly 29,000 cases in fiscal 1966. 31 NLRB ANN. REP. 1 (1966). This number has been increasing annually and is almost double the number of cases taken in 1958 (14,965). Id. at 5.
5. In fiscal 1966, the Board had a budget of $28,257,213 of which $23,858,788 (82%) was allocated for personnel compensation and benefits. 31 NLRB ANN. REP. 33 (1966).
block and a half from the White House and its perennial picket line.\(^6\) The Washington operation includes the five-member Board, the Division of Trial Examiners, and the Office of the General Counsel. Supporting administrative services such as budgeting, personnel, library, and mail services are under the General Counsel by delegation from the Board.\(^7\)

One result of housing all the Washington personnel in the same building is a tendency to develop an agency point of view which may have some degree of influence on decision-making. This is not to say that there is any deliberate violation of the principle of separation of functions in specific cases. Rather this physical proximity creates continuous opportunity—in interoffice visits, at lunch, during coffee breaks, and in corridor contacts—for conversation, association, and exchange of information, and at the Board they talk about only two subjects—labor law and sports. No doubt all of this contributes to the development of expertise, but it also tends to inculcate a set of attitudes and reflexes which, consciously or otherwise, affects individual exercise of judgment. Of course, it can be argued that in administrative law enforcement this is a desirable rather than an undesirable state of affairs.

III. THE GENERAL COUNSEL

A. RELATIONSHIP TO THE BOARD

The Office of the General Counsel, created in 1947 by Taft-Hartley,\(^8\) is sui generis in the federal administrative process. The General Counsel is appointed, not by the Board as is customary in other agencies, but by the President for a term of four years.\(^9\) By statute the General Counsel is given authority over all agency attorneys, except trial examiners and legal assistants to Board members, over all personnel in the regional of-

---

6. One day this past spring the Board itself was picketed by about fifty skilled tradesmen whose craft severance petitions had been dismissed by the Board. This novel spectacle lasted only one day, however. Through a most unusual and fortuitous coincidence, a work crew began tearing up the sidewalk the next morning with triphammers. This is at least as good a way to stop a picket line as a court injunction.

7. Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the NLRB (as amended) § VII, LAB. REL. REP., LRX 4201, 4203 (1961).


offices, and over the investigation and prosecution of unfair labor practices cases. As to these matters he is, therefore, independent of Board control.\textsuperscript{10} In no other agency has Congress divorced the functions of investigation and prosecution and the personnel performing them, so completely from the function of adjudication and from the supervisory control of the agency heads themselves. Other regulatory agencies are governed by the Administrative Procedure Act\textsuperscript{11} which provides for internal separation of functions\textsuperscript{12} but leaves the agency as the overriding authority over all functions and all personnel. Only with respect to the NLRB did Congress create a separate office with independent statutory powers. Prior to 1947 the NLRB had, in fact, internally separated the functions and the personnel. The creation of the Office of General Counsel is simply an outgrowth of the political criticism of the Wagner Act Board and the influence of the critics in the Congress which enacted Taft-Hartley.

The administrative division has been a recurrent source of friction between General Counsel and Board since 1947. For a time the General Counsel assumed an independent power to interpret the statute and did not concede that Board interpretations were binding upon him in the handling of election petitions and unfair labor practice charges or in the conduct of judicial proceedings. Although this extreme view did not survive, sharp differences over administration continued to arise between some later General Counsels and the Board. In one instance relations were so poor that the Board requested the President to solicit a General Counsel's resignation.

In 1959 McKinsey & Company, a widely respected management consulting firm in Washington, submitted a report on the organization and administration of the Board.\textsuperscript{13} The report noted that the key problem facing the agency in its endeavors to improve management was the conflict over the rules and relative responsibilities of the Board and the General Counsel.\textsuperscript{14} In 1960 the Advisory Panel on Labor-Management Relations to the Senate Committee on Labor and Public Welfare, known as the Cox panel, made a report on the organization and procedure.

\begin{itemize}
\item {\textsuperscript{10}} Id.
\item {\textsuperscript{12}} Administrative Procedure Act § 5 (c), 5 U.S.C. § 554 (d) (Supp. II, 1967).
\item {\textsuperscript{13}} The McKinsey Report is printed in full in Hearings Before the Subcomm. on the National Labor Relations Board of the House Comm. on Education and Labor, 87th Cong., 1st Sess., pt. 3 (1961).
\item {\textsuperscript{14}} Id. at 1628.
\end{itemize}
of the Board, stating: 15

There is little doubt that the controversies between the General Counsel and the Board have hampered the enforcement of the National Labor Relations Act. The difficulty of administering one statute through two heads consumes time and energy in compromising differences even when the issues are not so sharp as to break out into open controversy. The differences are certain to continue so long as the present arrangement persists with the degree of intensity varying according to the personalities of individual officials. Therefore the panel unanimously recommends abandonment of the present hybrid compromise. 16

But, however unsatisfactory the structure and the experience under it, the fact is that everyone, and this includes the unions and employers who are the agency's clients, is accustomed to the arrangement, and it seems highly unlikely that Congress will change it in the near future. Fortunately, good men can make a poor system work adequately or even well. At the present time the two-headed division of labor is causing less friction and is operating more smoothly than it ever has. This is partly because of the scope of the present delegation of administrative authority from the Board to the General Counsel and partly because of the frequent joint consultations at which current problems are solved and emerging problems are identified and discussed. The principal reason for this harmony, however, is found in the identities of the Chairman of the Board and the General Counsel. Not only are Frank McCulloch and Arnold Ordman eminently sensible and reasonable men, they are also close personal friends. Before he was named General Counsel, Ordman was for two years Chief Counsel to Board Chairman McCulloch. So long as the present incumbents are in office, 17 it is difficult to imagine a recurrence of the friction and controversy of the past. However, it is also safe to predict that they will recur in the future when less reasonable persons are unable or unwilling to overcome the built-in statutory division of power.

B. Power To Issue Complaints

The General Counsel is a unique office in one other respect. The statute provides that the General Counsel shall have final

---

15. ADVISORY PANEL ON LABOR-MANAGEMENT RELATIONS LAW, REPORT TO THE SENATE COMM. ON LABOR AND PUBLIC WELFARE ON ORGANIZATION AND PROCEDURE OF THE NATIONAL LABOR RELATIONS BOARD, S. DOC. NO. 81, 86TH CONG., 2D SESS. (1960).
16. Id. at 4.
authority over the investigation of charges and the issuance of complaints in unfair labor practice cases.\textsuperscript{18} The power of the General Counsel to decide whether a complaint shall issue has been recognized by the courts as being unreviewable,\textsuperscript{19} either by the Board or by the courts themselves. This fact was realized in 1947 when Taft-Hartley was before Congress and led to charges that the General Counsel would become a "labor czar." In truth it is a very great and important power. A failure to issue a complaint is a denial of relief under the statute, leaving the party who claims to be suffering from an unfair labor practice without any remedy at all, since he is usually not entitled to relief in any other forum.\textsuperscript{20} However, if the General Counsel refused to issue complaints for a reason which was sufficiently arbitrary or capricious or which was unconstitutional, the federal courts would probably be resourceful enough to find a way, perhaps through section 10 of the Administrative Procedure Act, to bring the General Counsel up short.\textsuperscript{21}

Two separate offices in Washington, each consisting of twenty or more attorneys, perform special functions with respect to the issuance of complaints. One is the Office of Appeals, which reviews, on request of a disappointed charging party, a Regional Director's dismissal of his charge. During the last fiscal year almost 1,800 such appeals were considered. The regional investigation files are studied and applicable Board and court precedents are carefully researched by junior and senior attorneys. The cases are then orally presented to the head and assistant head of the office. The charging party may appear and present an oral argument. Likewise, the respondent or his counsel may be heard separately. After full discussion a decision is made and a written report follows upholding or reversing the Regional Director. If the Regional Director is overruled, he must then issue the complaint. I sat in on several of these appeals agenda and was most impressed with the full and fair consideration given to these cases.

The second office is the Advice Section. This office considers requests for advice from Regional Directors on whether a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{18} Labor-Management Relations Act (Taft-Hartley Act) § 3 (d), 29 U.S.C. § 153 (d) (1964).
\item \textsuperscript{19} See, e.g., United Elec. Contractors Ass'n v. Ordman, 366 F.2d 776 (2d Cir. 1966), cert. denied, 385 U.S. 1026 (1967).
\item \textsuperscript{20} Employers may recover damages against unions for violations of § 8 (b) (4), under Labor-Management Relations Act (Taft-Hartley Act) § 303, 29 U.S.C. § 187 (1964).
\item \textsuperscript{21} Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (Supp. II, 1967).
\end{itemize}
\end{footnotesize}
complaint should issue on a given charge. Regional Directors will seek such advice in cases which present novel or unusually difficult legal questions, which involve peculiar policy considerations or which have highly complicated factual situations, where Board and court precedents do not provide sufficient guidance. The problem presented undergoes careful research and analysis by one or more of the attorneys in the section and is then set down for group discussion by top level attorneys. In the most challenging cases the General Counsel personally conducts the meeting.

In a few instances the Advice Section has directed a Regional Director not to issue a complaint, and the charging party has then appealed the dismissal of the charge to the appeals office and obtained a reversal. Of course, if the General Counsel personally had decided that a complaint should not issue, an unsuccessful charging party is not apt to succeed through the appeal route, but at least he can obtain reconsideration of the problem and make an oral argument at the Washington level.

One of the key considerations for the General Counsel in exercising complaint issuance power is whether the case presents a question which the Board should have a chance to consider. In one instance he made a union very unhappy by directing issuance of a complaint covering practices which the union maintained were outside the scope of the unfair labor practice sections. The General Counsel's position was that this was a matter for the Board to determine, and that it was his duty to issue a complaint so that the Board would have the opportunity to make a decision. In other instances, the General Counsel will cause a complaint to issue in order to give the Board a vehicle through which to reconsider an earlier decision. This will happen when changed conditions or intervening Board cases lead the General Counsel to believe that the Board may be ready to overrule or modify an earlier decision. In short, in exercising his complaint power, the present General Counsel consciously subordinates his role to that of the Board. Washington lawyers on both the company and union side told me that they think the General Counsel has exercised his complaint power in a fair and responsible manner.

C. HANDLING OF LITIGATION

One very important function of the General Counsel's office, which is performed pursuant to delegation from the Board, is
the handling of litigation in the federal courts. This is done through separate district court, court of appeals, and Supreme Court branches. Washington labor lawyers express great respect for the professional calibre of this aspect of the agency's work, and one court of appeals judge told me that NLRB briefs are among the best he reads from all the governmental agencies which appear before him. There is no question today, as there once was, over the willingness of the General Counsel to defend the Board's position in court. Today the obligation to do so is taken for granted, even though frequently this requires the General Counsel to reverse the position he took in issuing the complaint.

A decision to petition the Supreme Court for certiorari is made after a joint session between the Board, the General Counsel, and supporting staff attorneys of each. Such discussions involve the very highest level legal and policy considerations. The General Counsel makes a recommendation, but the agency decision rests with the Board. Normally the Board accepts the General Counsel's recommendation, but in one "cert session" I attended, after a discussion in which the colloquy became warm if not heated, the Board decided to petition for certiorari against the General Counsel's recommendation. The final decision, of course, rests with the Solicitor General of the United States, and the General Counsel, having failed to persuade the Board that the case was not "certworthy," then had to try to convince the Solicitor General that it was. Normally Board cases before the Supreme Court are argued by Board attorneys, but the Solicitor General may reserve a case for his office or even for himself, as Solicitor General Marshall did in the Allis-Chalmers case last term. This does not make the Board's Supreme Court branch very happy.

D. Supervision of Regional Offices

One of the principal duties of the General Counsel is to supervise the operation of the regional offices. There could hardly be anything about the status of any of the regional offices, or their status relative to each other, that is not readily ascertainable from the charts in the celebrated NLRB "chart room," which are kept up to date daily. It was the most impressive thing I had seen since the operations room in Dr. Strangelove. My tour of the "chart room" was accompanied

22. Memorandum, supra note 7, §§ IB & VI.
by an explanatory lecture which emphasized the philosophy of regional office autonomy, but I got the distinct impression that the reins probably did not seem quite as loose in the regions as they did in Washington.

E. REORGANIZATION OF THE OFFICE

The incumbency of Ordman's predecessor, Stuart Rothman, was a key period in the history of the Office of the General Counsel. In January 1959, the McKinsey Report\textsuperscript{24} made many recommendations for the improvement of operations in the regional offices and in the administrative services performed by the agency in Washington. During Rothman's tenure—June 1959 to May 1963—much attention was given to these matters and to reorganization of the system for performance of legal functions in the General Counsel's Washington offices.\textsuperscript{25} As a result, the Office of the General Counsel which Ordman inherited was much improved in terms of structure and systems. Rothman is remembered by the career people in the agency, if not with affection, then certainly with respect as an administrator.

Ordman is the sixth person since 1947 to hold the title of General Counsel. He is the first General Counsel to be reappointed for a second term, and it is a tribute to the man and to the operation of the office that he was supported for renomination by both management and labor.

IV. THE DIVISION OF TRIAL EXAMINERS

A. ORGANIZATION

Many people in the agency think that the best job in the whole operation is that of trial examiner. Trial examiners have a GS-16 classification carrying a salary of from $20,000 to $25,000 per year,\textsuperscript{26} are almost completely their own boss in the performance of their duties, and have what in effect amounts to lifetime appointments.

On the basis of an applicant's experience in administrative law, a written examination, and oral interviews by an examin-

\textsuperscript{24} McKinsey Report, supra note 13.

\textsuperscript{25} The changes in the Office of General Counsel which were effectuated during this period are discussed in Rothman, \textit{Four Ways To Reduce Administrative Delay}, 28 TENN. L. REV. 332 (1961); Rothman, \textit{Office of the General Counsel of the NLRB}, 12 LAB. L.J. 698 (1961); Rothman, \textit{In Search of Improving the Administration of the National Labor Relations Act}, 13 LAB. L.J. 777 (1962).

ing committee, the Civil Service Commission maintains a special register of about ten or twelve persons considered to be qualified for appointment as NLRB trial examiners. The selection of a new examiner is made by the Board on the basis of a personal interview and the recommendation of the Chief of the Division of Trial Examiners. In making its selection, the Board must follow the “rule of three,” that is, it must choose from among the top three on the Civil Service register.\textsuperscript{27} The primary source for examiners is the agency itself.\textsuperscript{28} Other sources are unions, companies, other government agencies, and private law practice. As of last May, three examiners were women and two were Negroes. About eighty of the examiners are located in Washington, and the rest are in San Francisco.

After appointment an examiner undergoes a training period consisting of lectures and service as an observer on cases with an experienced examiner. He is then given relatively simple cases of his own, gradually working up to the more difficult ones. The people in charge of the Division estimate that it takes about a year for a Board employee to become a “journeyman” examiner and about two years for anyone else to reach that level.

The Administrative Procedure Act requires that cases be assigned to examiners “in rotation in so far as practicable.”\textsuperscript{29} Within this flexible guideline, an effort is made to see that each examiner gets his share of all kinds of cases. Examiners may hear unfair labor practice cases, objections to elections when consolidated with unfair labor practice cases, and back pay hearings. The assignments are made on Thursday for the following week. Hearing schedules are matched against the roster of examiners, whose availability is determined by the number, length, and difficulty of the pending cases on which he is already working. Sometimes an examiner will be assigned more than one case in the same city or locality. Hearings are usually held if possible on Tuesdays through Thursdays, thus leaving Monday and Friday free for travel to and from the place of the hearing. Any other system would require weekend travel, and in the federal service it is an imposition to interfere with an employee’s weekend.

Both in the field while holding a hearing and in Washington

\begin{footnotes}
\item[27] 5 C.F.R. § 332.404 (a) (1964).
\item[28] At the present time there are 101 examiners, about 70\% of whom were employees or former employees of the agency when appointed.
\end{footnotes}
while working on decisions, the trial examiner is his own boss. He does most of his own legal research, although there are half a dozen law students in Washington who are employed on a part-time basis to assist examiners who want help. The examiner decides the case by himself, possibly with a little help from his car pool, and writes his own opinion which is not subject to revision by any higher authority before issuance.30

B. ABILITY OF THE EXAMINERS

Opinions vary sharply as to the ability of the examiners. Within the agency I was given figures ranging between five and twenty on the number of examiners not considered to be really qualified for the job. The Division does not think any of its examiners are completely unqualified, but concedes that there are half a dozen who are not up to standard. Even the most inadequate performers, however, are virtually unremovable. The time and energy which a Civil Service proceeding would require are not thought to be worth the effort. The Board has never brought charges of incompetence against an examiner before the Civil Service Commission, although several examiners have been asked to resign, and others have been given warnings that their performance was below par.

Within the Division it is believed that many of the examiners are as good as the best federal district court judges, but no practitioner I talked to shares this view. A prevalent criticism of the labor bar is that examiners have too great a tendency to credit the General Counsel’s witnesses and discredit witnesses for the respondent. This is not too surprising since most of the examiners come from the agency. Since a trial examiner’s findings based on credibility are almost impossible to reverse, this is particularly disturbing to employers’ attorneys. Another criticism of practitioners is that too few of the examiners had substantial trial experience prior to appointment and that this shows up in the conduct of the hearings. In 1961 President Kennedy’s Reorganization Plan 531 would have made the decision of a trial examiner final subject to a certiorari-type review by the Board. The plan was defeated in Congress, largely due to opposition from the employer side. However critical they may have been

30. Every rule has its qualifications, however, and in one cute case an examiner who in a puckish mood wrote his opinion in verse was finally prevailed upon by the Chairman to rewrite it in conventional legal prose. In one sense this was regrettable, since there is certainly little enough humor in the law.
of the Board, on this issue many employers seemed to have more confidence in the Board than in the examiners and fought to retain their appeal as of right to the Board. In fact, twenty to twenty-five per cent of the decisions of trial examiners are accepted by the parties as final. Of the remainder in which exceptions are filed, about seventy per cent are upheld in full by the Board, another twenty per cent are upheld in part and only ten per cent are reversed. This is really a pretty fine record.

C. PRODUCTIVITY OF THE EXAMINERS

There is strong feeling in and out of the agency that the productivity of the examiners is too low.\textsuperscript{32} In fiscal 1966 the examiners rendered about 900 decisions of all kinds.\textsuperscript{33} Since some of the total of 101 examiners in the division are administrative officers, the average for the full-time examiners comes to between nine and ten decisions a year. The Division considers nine decisions a year to be a reasonable minimum and twelve a maximum for an average examiner. Actually, twenty-three examiners in fiscal 1966 issued less than nine decisions, whereas the top five producers issued a total of ninety-one or ten per cent of the total.\textsuperscript{34} The Division considers the matter in terms of working days per year. Subtract the maximum annual leave, Saturdays, Sundays, and holidays and you have only 235 days remaining. Allowing for settlements, an examiner will hear twelve cases in order to issue decisions in nine. Since the average hearing lasts three days, an average which increases a little each year, another thirty-six days per year are spent at hearings. Thirty days are allowed for travel and another twenty are allowed for such things as sickness, attending meetings, and correspondence. About 150 days remain for nine plus decisions, or about three work weeks per case. Considering that the average transcript is about 450 pages long, another average which rises annually, there is some basis for the view that productivity is too low. The answer is not in all cases slothfulness. A common complaint is that too many decisions of trial examiners are much too lengthy and detailed in their recitation of the evidence.\textsuperscript{35} In any event, whoever thinks the examiners are equivalent to United States District Court Judges is not speaking in terms of productivity.

\textsuperscript{32} See, e.g., McKinsey Report, supra note 13, at 1676-77.
\textsuperscript{34} The top five producers wrote 24, 18, 17, 16, and 16 decisions.
\textsuperscript{35} Cf. McKinsey Report, supra note 13, at 1680.
V. THE BOARD

A. ORGANIZATION

The organizational structure of the Board is simple. Each Board member has a staff of about thirty—two dozen lawyers and half a dozen clericals. The legal staff is headed by a Chief Counsel and there may also be an Assistant Chief Counsel. About six to eight senior grade attorneys are called supervisors and the remainder are lower grade attorneys called legal assistants. Approximately three legal assistants are assigned to each supervisor. There is also an Office of the Executive Secretary with a staff of about thirty, the Office of the Solicitor with a staff of four, and an Office of Information with a staff of about ten.36

B. HANDLING OF UNFAIR LABOR PRACTICE CASES

Unfair labor practice cases are handled as follows. As authorized by statute,37 the Board has created five panels of three members, each of different composition and each meeting one afternoon a week. For each panel there is a corresponding subpanel, made up of a senior attorney from the staff of each Board member. Subpanels also meet one afternoon a week. When exceptions are taken to a trial examiner's decision, they are filed with the Executive Secretary. After the supporting briefs are in, the case is assigned to a legal assistant on the staff of one of the Board members. In the assignment of cases, a rough effort is made to equalize the work load for each staff. The legal assistant is responsible for the case until a decision finally issues. He reads the entire record (usually the only person in the agency to do so) and studies and researches the case as necessary under the guidance of his supervisor. After much discussion with his supervisor, and perhaps also with the Chief Counsel, a course of action is determined.

If the case is relatively simple and the legal precedents are clear and controlling, a routine or short-form affirmance of the

36. Many of the matters touched on in the remainder of this Article are dealt with more fully in the McKinsey and Cox Panel Reports, supra notes 13 & 15. In addition, see REPORT OF THE SUBCOMM. ON NATIONAL LABOR RELATIONS BOARD OF THE HOUSE COMM. ON EDUCATION AND LABOR ON ADMINISTRATION OF THE LABOR-MANAGEMENT RELATIONS ACT BY THE NLRB, 87th Cong., 1st Sess. (1961) (Pucinski subcommittee report); Symposium on the National Labor Relations Board, 29 GEO. WASH. L. REV. 191 (1960).
trial examiner's decision is prepared and circulated to the other Board members. The other two Board members on the panel will normally concur, and the decision will issue as a panel decision. The remaining two Board members receive clearance copies which need not be signed. If the case presents more difficult factual or legal issues then, instead of being short-formed at that point, it will be referred to a subpanel for consideration. The subpanel, after discussion, may (1) decide that the case can be short-formed after all, in which case it will be circulated with a short memorandum called a flag; (2) refer the case to a panel; or (3) decide that the issue is important enough to be considered by the full Board. It is important to remember that every case decision is routed to every Board member, whether for signature or not, and that any Board member can at any level cause a case to be taken to the full Board.

If a case goes to the Board, then the legal assistant prepares a thorough legal memorandum which poses the issues and discusses the facts and the applicable law. Once the memo is prepared, the case is put on a Board agenda by the Executive Secretary. Normally the Board meets on Tuesday and Friday mornings to discuss and decide cases. Since the Chairman is no trencherman, sometimes lunch is very late. Present at the Board meetings are the five Board members, their Chief Counsels, the legal assistant and his supervisor, the Solicitor or his assistant, and the Executive Secretary or one of his assistants. After discussion, the Board reaches a decision. The legal assistant writes an opinion in accordance with the result and rationale of the Board. This decision circulates to all Board members. Some changes in language may be made, and the case then normally issues. Sometimes, however, a close case is put back on the agenda for further consideration. Of course, any Board member is free to concur separately or dissent in any case.

C. DELAY IN DECIDING CASES

In recent years the Board has often been criticized for the inordinate amount of time it takes in handling unfair labor practice cases.38 Some of the delay is attributable to the parties themselves, due to requests for continuances and extensions of time to file briefs. Within the agency, however, it is clear

38. McKinsey Report, supra note 13, at 1623-24. After spending a year with the NLRB, I decided that one of the main reasons for the delay is the slow elevator service at the Board offices.
that the problem of delay is most acute at the Board level. Much of the difficulty stems from the fact that there are five staffs—one for each Board member—instead of one Board staff serving all members. As an original proposition, one might think it far more sensible to have cases reviewed and abstracted for Board members by a central unit rather than incur the duplication of effort which inheres in five separate staffs. This is what the Board had before 1947 when Congress, suspicious that the review section was exercising a baleful influence on the Board and that the Board members were not giving enough personal attention to the cases, abolished the review section and saddled the Board with its present system of five separate staffs.

Even such a brief summary of the decisional process as was given above indicates the many built-in, time-consuming factors. Some of these are: too many simple cases go to and beyond the subpanel stage; circulating all decisions to all Board members undermines the expedition of the panel system; existing layers of supervision result in far too much rewriting of legal memos and too much redrafting of Board decisions before issuance. If present Board procedures were actually necessary to assure informed adjudication, then delay would simply be a required price to pay. But both the McKinsey Report and the Cox Panel Report were highly critical of unfair labor practice case procedure on the very ground that much of it was not necessary.

Both these reports offered constructive alternatives which were intended to increase output without sacrificing quality. The Board has not adopted them. This has not been because the present system is thought to be a good one; to the contrary, everyone at the Board seems to agree that the system is very unsatisfactory. A few years ago a top-level agency committee headed by Board Member Fanning spent much time and thought in formulating a report with recommendations on reducing the time between assignment and decision of unfair labor practice cases and on increasing production. The recommendations were for dramatic and far-reaching change, but were quite practical and feasible. The board has largely ignored them.

The Board's case load has been increasing steadily for the

The Board has no control over the number of unfair labor practice charges which have been increasing due primarily to economic factors. The trend seems more likely to increase rather than to abate. The delegation of authority to Regional Directors in representation cases alleviated the unfair labor practice case problem for several years, but now the increased number of unfair labor practice cases is about to put the Board back where it was. Eventually something will have to be done if the Board is not to fall farther behind in its decisions, with consequent injustice to the parties who suffer from unfair labor practices. The Board continues to be very disappointed that Congress, in 1961, defeated President Kennedy's Reorganization Plan 5, which would have given finality to trial examiners' decisions subject to a certiorari-type review by the Board. Many persons in and out of the agency think that it is inevitable that some such plan will eventually be put into effect. In the meantime, however, the Board can improve the situation by reforming its own procedures if it has the sense of urgency and the will to do so.

It would be interesting to see what would happen if there were a top-grade screening unit which would sift out forty percent of the cases for short-form issuance; if in the remainder the layers of supervision and the legal memo were eliminated and cases were presented directly to Board member, panel, and full Board by a high grade attorney; and if panel decisions were issued without requiring clearance from nonpanel members. If a United States Court of Appeals Judge can hear and decide between fifty and sixty cases a year with the aid of a single law clerk, it is not unreasonable to believe that five Board members with, say, ten top or middle grade attorneys, should be able to handle the Board's case load faster and better than it is handled today. As an outsider, I was and am amazed that a Board which has been so imaginative and innovative in the area of substantive law is at the same time so hidebound and resistant to change in its methods of operation.

D. Handling of Representation Cases

The Board handles representation cases quite differently from the way in which it handles unfair labor practice cases. Since the delegation to the Regional Directors in 1961, represen-
tation cases come to the Board in the form of a request for re-
view of a Regional Director's dismissal of a petition, a ruling
made before an election, or a ruling on an objection to an elec-
tion. The criteria for granting review are set forth in the
Board's Rules and Regulations. The requests for review are
handled by a special unit of about ten attorneys drawn from
the staffs of all five Board members. Each request for review
is studied carefully by a legal assistant and a supervisor, and
an oral presentation is made to a three-man panel which decides
whether or not to grant review. This panel is composed of one
Board member and two senior attorneys, one each from the
staffs of two other Board members. The Board members rotate
this assignment every two months. The head of the unit notifies
the Board member when he has a group of cases ready for re-
porting, and the panel meets two or three afternoons a week at
the convenience of the Board member. The cases are analyzed
and discussed as thoroughly as the issues warrant. I have seen
half a dozen people spend an hour on the supervisory status of
a single individual, where it was crucial to the outcome of an
election. In about six out of seven cases review is denied, thus
leaving the Regional Director's ruling in effect. In the cases
where review is granted, the case will normally go either to a
panel or directly to the Board. From there on, the procedure
is similar to unfair labor practice cases except that the legal
memo will not be as exhaustive, and the case will reach the
agenda sooner. Although the representation case work of the
Board is not as dramatic and newsworthy as the unfair labor
practice work, many people consider it more important in a prac-
tical or bread and butter sense.

E. SOME ASPECTS OF BOARD DECISION-MAKING

Decision-making at the Board level is highly personalized.
Each Board member is briefed on every case on his panel agenda
or the Board agenda by his Chief Counsel and one or more staff
attorneys who have studied the case. In most instances, the
Board members will read the trial examiner's decision, the briefs,
and the legal memorandum. At the Board agenda most of the
discussion and argumentation is carried on by the Board mem-
bers themselves, although the Chief Counsels, the Solicitor, and

44. 29 C.F.R. § 102.67 (c) (1967).
45. In fiscal 1966 the regional directors issued 1,828 decisions in
contested cases. The Board received 427 requests for review. It granted
57 of the requests. 31 NLRB ANN. REP. 15 (1966).
the Executive Secretary also enter the discussion. There is no doubt that Chief Justice Hughes' requirement that "he who decides must hear" is fully respected at the Board.

The practice of the Board for many years has been to hear oral arguments only rarely. I believe I am right that *Excelsior Underwear*46 and the section 8(a)(5) compensatory remedy cases this past July are the only oral arguments the Board has had in the past two years. The labor bar would like to have more cases argued orally, but the Board's feeling is that its case load is so heavy that there is not time. The Board is correct, given the existing decisional process. One of the beneficial byproducts of streamlining Board procedures would be that more frequent oral arguments would be possible.

In important cases, the Board frequently solicits interested groups to submit amicus briefs on important questions. This was done in *Mallinckrodt Chemical*,17 and is a very useful aid to fully informed decision making. The Board has been criticized for relying solely on adjudication and for not using its rule-making power in certain areas.48 However, the critics are not very persuasive, and the Board seems eminently sound in its approach.

Certain Board practices in deciding cases are undesirable. Two of these result in concealing division or dissent on the Board. In a panel decision, sometimes a Board member who does not agree with his two colleagues will get another Board member who does agree to substitute for him on that panel, so that the case may be decided unanimously. If the point of disagreement is very important, however, the case will probably be taken to the full Board. Sometimes, after all five Board members have considered a case and there is a division, the dissenting Board member will simply not participate, and the decision will be issued as though only four members had participated. Occasionally, two dissenters will not participate and the case will issue as a panel decision. This may happen if the point of disagreement is not of basic importance, or if the Board member thinks the case is not a good vehicle to express his separate view. But whatever the reason, these substitutions and abstentions give a false appearance of unanimity to the decision. Occasionally the Board decides a representation case ques-

---

47. 162 N.L.R.B. No. 48, 64 L.R.R.M. 1011 (1966).
tion but does not write an opinion or publish the action taken in the official Board decisions. The labor bar has sharply protested against this practice with complete justification. During my year at the Board it was never clear just what criteria, if any, determined when a decision was not to be published.

F. BOARD REMEDIES

Throughout its lifetime the Board has demonstrated a marked willingness to keep its decisional and doctrinal output abreast of the times, more so than almost any other federal agency. It has made a conscious effort to modify old law and make such new law as is necessary to keep the statute responsive to constantly changing problems and newly emerging needs. The Board has done this in both unfair labor practice cases and in representation cases.

The Board has kept the law up to date more boldly and with more imagination in matters of substantive law than it has in the area of remedies. The unions have been complaining for years that Board remedies are inadequate to redress section 8(a)(1), (3), and (5) violations. The consensus at the Board is that there is much merit in the unions' complaint. The Board has made modest responses to the problem such as adding interest to a back pay award, rewriting the posted notice to make it comprehensible, requiring wider and more public promulgation of the cease and desist order, and enabling a union which loses an election to go for a bargaining order through sections 8(a)(1) and 8(a)(5) proceedings.

However, all of these remedies, except the last, are pretty innocuous. The Board has not yet adopted any of the tougher remedies which have been urged both in and out of the agency, such as a bargaining order where egregious section 8(a)(1) violations have prevented a union from attaining majority status, or an order requiring repayment of financial losses, in addition to wages, directly attributable to a section 8(a)(3) discharge. Pending at the present time is a group of cases in which trial examiners have ordered compensation under contract terms which presumably would have been negotiated if the employer


had not violated section 8(a)(5). The Board considered this question important enough to have oral arguments and amicus appearances.

Board orders, of course, are reviewable in the courts, and the law on the question of the Board's power is quite clear. Remedial orders are all right but penal orders are bad.\textsuperscript{52} These labels mean that the Board may go very far in its orders, but not too far. How far is too far is determined on a case-by-case basis. Up to now, the Board has taken a fairly restricted view of its remedial authority, but even so it has been reversed on several occasions.\textsuperscript{53} Since no agency likes to be reversed, it would be surprising if the Board does anything very dramatic in the area of remedies. However, if the Board believes its existing remedies are inadequate, it should devise and issue new ones which it thinks would be more effective, and then let the courts decide if the Board has gone too far. Hearings were held in the House of Representatives this summer on the need for stronger Board remedies, and bills have been introduced,\textsuperscript{54} but none of them has much chance of passing.

G. \textit{Per Se} v. \textit{Ad Hoc}

A frequent criticism of Board decisions is that there is not enough certainty in Board law and that the Board renders too many "ad hoc" decisions. This is such an unsophisticated observation that one is always surprised to hear it from lawyers. It ignores the fact that there is a huge corpus of Board law, much of it almost as old as the Wagner Act, which is as settled and stable as law ever can be. It is because there is so much settled law that over ninety per cent of the unfair labor practice charges are withdrawn,\textsuperscript{55} dismissed, settled, or adjusted without issuance of a complaint, and that over seventy per cent of Board elections are by consent.\textsuperscript{56} Bearing in mind the trial examiners' decisions to which no exceptions are taken, and the short-form affirmances, only about three per cent of the cases reach the Board. These cases are there because they involve novel or difficult factual situations, competing or conflicting lines of au-

\begin{itemize}
\item \textsuperscript{52} See, e.g., NLRB v. Seven-up Bottling Co., 344 U.S. 344, 346 (1953).
\item \textsuperscript{53} See, e.g., Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651 (1961); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938).
\item \textsuperscript{54} See, e.g., H.R. REP. No. 11725, 90th Cong., 1st Sess. (1967).
\item \textsuperscript{55} 31 NLRB ANN. REP. 10 (1966).
\item \textsuperscript{56} Id. at 19.
\end{itemize}
tority, or perhaps are even cases of first impression. They require a judgment on how to interpret the facts, what doctrines to invoke, and how to apply them. What is involved is an exercise of judgment where choice is necessary. This judgment, by the very nature of the case, must be a particularized one. In past years the Board was reversed by the Supreme Court in several cases for applying a "per se" approach. Naturally, the Board has responded by avoiding rigidity and inflexibility in other areas. The Board is no more guilty of "ad hocking" than any appellate court, but, illusory as it is, the demand for absolute and complete certainty is still heard.

H. POLICY DECISIONS

Another common criticism of the Board is that it is improperly engaged in making policy decisions instead of just applying the law. The short answer is that of course the Board makes policy decisions, but that there is nothing improper or even unusual in its doing so. It is, in fact, the Board's duty to make policy decisions. As noted, the cases which reach the Board are not cut and dried, and the decision cannot be made by mechanical application of rigid rules. There is an inevitable area of discretion in determining how the statute or the case law should be interpreted or applied to an infinite variety of factual situations. Within this area of discretion, decision-making has to turn on policy considerations. At this level, law and policy are inseparable. Law is policy, promulgated through the form of a case decision. In this respect the Board is no different from any high-level decision-making body, whether it be a state's highest court or the United States Supreme Court.

I. STARE DECISIS

Another related criticism, frequently heard, is that the Board has too little regard for the doctrine of stare decisis. Speaking of law generally, stare decisis has never been an inflexible rule but has always yielded to later judgment when reexamination in

---

58. See Summers, Politics, Policy-Making and the NLRB, 6 Syracuse L. Rev. 93 (1954). A recurrent recommendation designed to eliminate this policy-making is to abolish the Board and turn its jurisdiction over to a labor court. The unsoundness of this approach is amply demonstrated in Leedom, Judicializing the Administrative Process: Can Labels Really Change Facts?, 3 S.D.L. Rev. 1 (1958).
59. See, e.g., Browne, supra note 59, at 67.
the light of new conditions indicates that the law is not adequately responsive to contemporary needs and problems. As an old couplet has it, "Laws, like men, to time must bow; then was then, but now is now." Fortunately for society that philosophy has prevailed over the idea expressed in another old couplet—"Come weal or come woe, the status is quo." It is not surprising that in a period of dynamic transition stare decisis should have less relevance and binding effect than ever before. With every other institution in society undergoing dramatic evolution, how can law be expected to stand still? Labor law is certainly not insulated from the effects of economic and industrial change. The Board would be remiss in its duty if it did not seek to keep Board law abreast of the times, for the law not only must reflect, but must also influence the direction and the pace of change.

J. POLITICAL AND OTHER NONLEGAL FACTORS

Changes in Board law, however, reflect not only economic and industrial forces, but also political forces. Board members are appointed by the President for five-year terms, and the identity of the appointees is inevitably determined by the labor policy of the administration and the relative influence that competing labor and management groups can exert at the White House. These factors have produced the phenomena of an Eisenhower Board, which from 1953 to 1961 overturned much important Board law established before 1953, and since 1961 a Kennedy-Johnson Board, which has in many vital areas restored the pre-1953 law and in other areas has gone off in new directions of its own. This is not to suggest any impropriety. Board members have an allowable area of discretion in deciding cases, and their choice is based largely on policy considerations. The discretion can be exercised and the choice can be legitimately made in favor of employers or of unions, depending on the composition of the Board.

Many persons feel quite strongly that the term of Board members should be lengthened to ten or even fifteen years. Longer terms, it is argued, would insulate changes in Board law from political influences without precluding response to economic and industrial factors. Longer terms would also minimize the unseemly solicitation of political support which frequently occurs in the last year of a Board member’s term. On the other

---

hand, many persons believe that the winds of political change should blow also in the corridors of the Board. Congress so far has not seen fit to lengthen the terms of Board members, although in other agencies it has provided for longer terms. So long as Board members have five-year terms, this flip-flop characteristic in Board law whenever a new administration comes into power will continue. To me it seems a little unfair to lay the blame for it on the members of the Board themselves whether in the 1950's or in the 1960's.

Under the Wagner Act the Board had only three members, but the membership was increased to five in 1947. A current suggestion is that the size of the Board be increased to seven or nine, the thought being that the increasing case load could be handled more expeditiously. The best answer to this problem, as indicated above, is reform in the decision-making process. If this were done, there would be no great advantage to having a larger Board. The nature of the agency and its institutional characteristics would inevitably undergo many alterations not possible to predict. However, there is no magic in the number five; other federal regulatory and adjudicative agencies have more than five members, so there is no reason why Congress should not reexamine the question.

Since the enactment of the Wagner Act, a total of twenty-five persons have been members of the Board. The average length of service is about five and one-half years. Ten of the twenty-five have served less than a full term. Eight, including three on the present Board—McCulloch, Fanning and Brown—have been appointed for second terms. John Fanning is the only Board member ever to be appointed by both a Republican and a Democratic President and is the first third-termer in Board history.

A point frequently overlooked is that, even if politics could be removed from Board appointments, it would still be difficult to find men of ability who are both knowledgeable and impar-

64. Someone recently suggested that the size of the Board be increased by one, the sixth member to be a psychiatrist for the other five, but I assume, without being positive, that this was facetious.
tial. Knowledge in labor law is based on experience, and experience is usually acquired on either the company or the union side of the table. A built-in set of predilections certainly may affect decision-making, although some past Board members who were predicted to be employer or union oriented fooled everybody after they were appointed. One way to deal with this problem is to appoint someone who has had no experience in the field and therefore, presumably, has no biases. Boyd Lee-dom says that when he came to the Board from the Supreme Court of South Dakota he knew so little about labor law that when asked his opinion of the Taft-Hartley bill his reply was that if we owed it we ought to pay it. He learned from scratch, became a fine Board member, and is today one of the best trial examiners. In the Wagner Act days several Board members, including the first chairman, Warren Madden, were drawn from the academic world. Over the years, Board members have come from varying occupational backgrounds. Several have been economists, two were members of Congress, one was a naval officer, one was an industrialist, and one was a printer.

In recent years the practice has been to appoint government officials. Among present Board members, Frank McCulloch was administrative assistant to Senator Paul Douglas; John Fanning is a career government lawyer; Gerald Brown has been with the Board since 1942 and was regional director in San Francisco for fourteen years; Howard Jenkins was a top lawyer in the Labor Department, and for a brief period a law professor; Sam Zagoria was administrative assistant to Senator Clifford Case for ten years and before that was a prizewinning newspaperman on the Washington Post. So far as ability is concerned, I doubt there has been a stronger Board in the history of the agency. Unlike some other agencies, there has never been any scandal at the Board because of improper ex parte influence, and no one in the agency has been accused of being a Communist since the Wagner Act days.

More than one-third of the twenty-five members who have sat on the Board have been nonlawyers. A suggestion was recently made in the Labor Law Section of the American Bar Association that the President be requested to appoint only lawyers to the Board. This is a poor idea. The board is amply staffed with highly skilled legal talent. It is doubtful that you could assemble any group which would have more purely legal

knowledge of the National Labor Relations Act and the thousands of decisions rendered under it than the top three lawyers on the staffs of each of the five Board members. The caliber of the supporting staffs, with only a few exceptions, ranges from adequate to excellent.

However, Board members need something more than legal ability; they need a sense of the practical, the economic, and even the political consequences of their decisions. This is not a quality attained by reading opinions. There is much truth to the old saying that the law sharpens the mind by narrowing it. At more than one Board meeting last year when the legalese was knee-deep and the air was filled with colliding cases, Gerald Brown and Sam Zagoria brought the matter into truer focus by raising practical nonlegal considerations. Law is too important to leave it solely to the lawyers, and it would be a great misfortune if the Board were deprived of the experience and wisdom of men like Brown and Zagoria simply because they do not have a law degree.

The Board needs all the insight it can muster to evaluate the practical consequences of its decisions, for it lacks the personnel and resources to ascertain by research and investigation the impact which its decisions have on labor relations and on the economy generally. This was not always the case. Prior to 1947 the Board had an Economics Division which did attempt to compile the economic data relevant to decision-making and impact analysis. In 1947 Congress, having been led to believe that the Board's chief economist was an American Rasputin, put a provision in section 4(a) which prohibits the Board from employing persons for the purpose of economic analysis. Research dwindled away to nothing until 1964 when the Board created an Operations and Analysis Section which has a chief, two professionals, and one clerical. Research possibilities are limited to study of case files, statistical reports, and data obtained from the regions. Within its limitations, the Section has produced many useful studies. Outside the agency, most of the studies of Board decisions consist of case and doctrinal analysis in the law reviews. Only a few studies have been made of the

---

actual impact and effect of Board decisions. One source the Board does have—feedback from companies and unions—is not always reliable because too often it involves mere polemical special pleading. Congress could do everyone a good turn if it would remove the know-nothing prohibition of economic analysis.

K. **CHARGE OF PRO-UNION BIAS**

Without a doubt the most frequent and usually critical observation made about the Board is that it is biased in favor of labor to the point of being a union partisan. Within the agency these charges are rebutted by assertions that the figures simply do not support the accusations. The Board finds violations in about eighty per cent of its unfair labor practice cases. This is true of cases brought by employers as well as of cases brought by unions, and it was just as true under the Eisenhower Board as it is true today. Employer unfair labor practices are more visible since there are more of them, comprising about seventy-five per cent of the total. Board decisions are subject to judicial review, and consistently over the years the courts of appeals have enforced Board decisions in full or in part in eighty per cent of the cases. Last term the Board had six cases before the Supreme Court and won them all. Furthermore, the Board has a duty to implement the fundamental purposes of the statute which are to encourage unionism and collective bargaining. To the extent that the Board really is pro-union, it is because the statute makes it so.

Certainly the Board is not pro-union in any invidious or opprobrious sense. There is no wilful and conscious flouting of the language of the statute or the legislative history where they are clear and unambiguous. There is no disregard of the record in a case and no conscious distortion of the facts or the law. If the charge of pro-unionism goes to the integrity of the Board members, then it simply is not true.

There is a sense, however, in which I think that the Board may fairly be said to be pro-union. I believe that all five members have a common belief that the spread of unionism and

---


collective bargaining is "A Good Thing" and therefore, that they want to give assistance and encouragement through their decisions to the extent that it can fairly be done. This general philosophy has its impact on decision-making at crucial stages—where the facts in the case are open to more than one interpretation, where two or more provisions of the statute collide and must be accommodated, where there are different lines of authority which will lead to different results, or where there is no law to fit the case and creativity is required. In all of these discretionary situations a philosophy friendly to unionism may tip the decision one way rather than the other.

For example, in the area of unit determination, this philosophy has led the Board to facilitate unionization of white collar workers, and top agency people will concede that extent of organization is a more important factor than ever before. This philosophy is leading the Board to reexamine its jurisdictional policies, and the result may well be an extension of its jurisdiction to businesses heretofore excluded.71 In the area of employer speech, this philosophy results in decisions which in my opinion are too restrictive. A leading union attorney told me that the unions are getting more favorable decisions from the Board today than at any time since the Board's inception.

I do not want to push the point too far. I have heard the Board express indignation over a trial examiner's decision which it thought was biased in favor of a union and, while I am not a union partisan myself, in many instances I heard the Board decide issues against unions where I would have gone the other way. The philosophy of friendliness to unionism is not monolithic or all pervasive. Board members have a sense of fair play and justice which can be shocked by union as well as employer misconduct. However, there is no one on the Board today who instinctively reacts on the basis of an employer-oriented philosophy as was true of some former Board members. Consequently, the employer positions and points of view are not articulated as fully and persuasively within the bosom of the Board—or for that matter anywhere within the agency—as would be desirable.

L. Nature and Effect of Criticism

Let me say a few words about the critics of the Board.\textsuperscript{72} The NLRB has been consigned to purgatory more frequently than all the other federal agencies put together. This has been going on since 1935, but Board members are sensitive souls who, despite the experience of their predecessors, still have a human yearning to be loved, or at least understood, or at the very least respected. It saddens and disturbs them that so much of the criticism directed against them is uninformed, unfair, and irresponsible, which of course it is. In one notable instance a former top official, not a Board member, after leaving the agency made a speech in which he lambasted the Board in certain particulars. Afterwards an agency official said to him, “You were in the agency, you know better, why did you say those things?” The reply was, “Well, a lot of my clients were in the audience and I had to say what they wanted to hear.” Not just lawyers, but employer spokesmen, employer-oriented groups, publications, and commentators regularly write and speak of Board decisions in a way which has to reflect either ignorance or conscious distortion. The same thing, of course, was true of labor leaders and the labor press during the days of the Eisenhower Board.

Such methods of persuasion and influence are inherent in our democratic system which rests on freedom of speech. Rationality is a quality notably absent from much of our political discourse and also, I might add, from pre-election campaigns under the Board’s so-called “laboratory conditions.” By and large Board members accept this kind of criticism as one of the crosses which goes with the job. But they still wince when one of their decisions is twisted and warped and ridiculed in an editorial which reads as though it had been written by a common scold. Criticisms of this nature may be made simply to “keep the Board on its toes” or to keep the Board from “going too far.” It is commonly believed in Washington that Board members are highly sensitive to this kind of criticism from certain sources, however irrational it might be, and that it has some degree of effect, intangible and unmeasurable though it may be, on the Board’s decisions. While Board members are reconciled to carrying the cross, they very much wish to avoid the crucifixion.

\textsuperscript{72} See Wollett, The Performance of the National Labor Relations Board—A Clinical View, and Dunau, The Role of Criticism in the Work of the National Labor Relations Board, both in N.Y.U. 16th Lab. L. Conference (1963).
M. PUBLIC RELATIONS

In recent years, the Board has been making a studied effort to improve its relations with those groups which are the source of most of the slings and arrows. After bargaining to an impasse some years ago with the Labor Law Section of the ABA, negotiations were resumed and have resulted in agreement on a number of matters of importance to the practitioner. A series of meetings between representatives of the Board and the National Association of Manufacturers (NAM) in recent years has not brought about any love affair but has at least created a respectful and cordial acquaintanceship. When the Board celebrated the twenty-five millionth vote in Board elections, an unforgettable cocktail party in the State Department diplomatic reception rooms was financed jointly by the NAM and the AFL-CIO. Both W. P. Gullander and George Meany had high words of praise for the Board, and they stood together cutting up a cake instead of each other. But the Board has had very little success in its advances to the United States Chamber of Commerce which still insists that the Board should be abolished. If it is true that the NAM represents relatively larger companies whereas the Chamber's constituency is basically smaller employers, then the Board's different experience with the two groups may indicate the source of most of the hard core feeling against the Board. Board members also spend a fair amount of time speaking to management, labor, and professional groups around the country. Although they have been criticized for thus diverting their energies from deciding cases, this activity is important in increasing understanding of the agency and voluntary compliance with the statute.

VI. FINAL EVALUATION

It is difficult to know just how to evaluate the performance of an administrative agency. Real problems exist in isolating the proper and relevant criteria for evaluation, and in assigning the proper weight to each factor in the overall judgment. The literature of the administrative process, vast as it is, has little to say on the question. Obviously, there is no calculus that will yield a definite result, but some standards can be identified which clearly are valid. Some of these are: the fairness of the agency's procedures, the caliber of its personnel, the clarity

of its decisions for the guidance of its clientele and the courts, its success in keeping its substantive law in tune with the times, and the success of its decisions on appeal. In all these respects, the Board's record is outstanding. Other standards include: the efficiency of its internal organization, the speed with which it is able to give a case thorough consideration, the effectiveness of its remedies in redressing the violations found, and public confidence in the agency's impartiality. By these criteria, the Board does not measure up as well.

Perhaps the ultimate standard is the agency's success in effectuating the legislative purposes and policies it administers. It is, of course, difficult to judge the Board's performance by such a broad standard. Therefore, in passing judgment, certain things should be kept in mind. There is no labor policy of the United States. There are a lot of labor policies, emanating from different sources—legislative, executive, judicial, and private as well as governmental. These policies are administered by a number of different departments, boards, commissions, and services. They are frequently inconsistent or in conflict with each other. The Board is just one decision-maker among many in the field of labor law, performing limited functions in limited areas. It is an important but independent factor exerting some unmeasurable influence on activities which are also affected by numerous other legal and nonlegal forces. Sometimes we Board-watchers inflate the role of the Board and exaggerate its influence on labor relations and the economy. Perhaps what the country needs is a Labor Code of the United States, on the order of the Judicial Code or the Criminal Code, which would synthesize and regularize all of the present disparate statutes and policies. This might give us more clarity of purpose and consistency of achievement than we now have. But only Congress can bring this to pass. Until it happens, the Board still has its job to do.

The Wagner Act was a clean and simply written statute, with purposes that were clear and internally consistent. The 1947 and 1958 amendments were quite the opposite. Their purposes frequently are obscure and, even where clear, they introduce conflict and tension with other provisions. They were

74. See Graham, How Effective is the National Labor Relations Board?, 48 Minn. L. Rev. 1009 (1964).
incorporated in provisions which, in many instances, may fairly be called drafting monstrosities. I fully agree that the rights of employees, neutral employers, and the public should be protected against certain kinds of union conduct. But the way it was done created very difficult problems of interpretation, application, and accommodation which would tax the resources of a Solomon. Even under the original Wagner Act provisions, many of the factual and legal problems have become more difficult and subtler, and the caseload always keeps increasing. In short, the task of the Board in effectuating the policies of the Act is challenging and difficult.

In 1939 *Fortune Magazine* published a study of the agency under the title, still popular after thirty years, "The G— D— Labor Board." 77 The article noted that everybody—Congress, management, and labor—was mad at the Board. But the conclusion was that most of the criticism was unfounded and misdirected and that actually the Board was doing a pretty good job. On net balance, the Board still does a pretty good job today and deserves fewer brickbats and more bouquets than it is going to get.

---
