Review Essay — Administrative Delay at the NLRB: Some Modest Proposals

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I. Introduction

Despite significant changes in world of labor-management relations, the National Labor Relations Act of 1935 (NLRA or Act) has remained virtually unchanged since the Taft-Hartley amendments in 1947. While private sector unionism has declined from 35.7 percent of employees in 1953 to less than 10 percent today, and the U.S. has lost its dominance in union-dense industries, such as automobiles and steel, Congress has not significantly altered the regulatory framework for collective bargaining. Organized labor, though intensely interested in who gets appointed to the National Labor Relations Board (NLRB or Board), has over the years expressed considerable dissatisfaction with the NLRA; indeed, in 1984, then AFL-CIO president Lane Kirkland suggested (with tongue firmly implanted in cheek) that workers would be better off with the “law of the jungle” that prevailed before the 1947 amendments that deprived unions of their ability to engage in secondary boycotts. On a few occasions, labor has tried to refashion the NLRA more to its liking. However, the effort at what was called “labor law reform” (principally a bolstering of penalties for employer unfair labor practices) foundered during the Carter years; similarly, the campaign during the Reagan-Bush period to outlaw the hiring of permanent replacements for economic strikers failed to muster enough support to overcome threats to filibuster the Senate. When Bill Clinton’s Democrats came to power in 1992, labor was able to accomplish little more than the appointment of a blue-ribbon commission, headed by former Secretary of Labor John T. Dunlop, to identify needed changes in U.S. labor and employment; unfortunately, the Dunlop Commission issued its report in December 1993, just as the Gingrich-led Republican forces retook the House of Representatives with their “Contract with America.”

Generally speaking, U.S. management feels no great urgency to alter the NLRA, even if it finds the agency’s meddling in bargaining disputes an occasional annoyance. The one change some companies have been interested in — a loosening up of the statutory ban on employer-employee committees in the nonunion sector — managed to pass both Houses during the first Clinton administration, only to fall on the sword of a presidential veto.
In the end, what we have is a labor law that presently affects the lives of no more than 1 of 10 workers in the private sector and an essential deadlock between opposing political forces in Congress. One area where we believe both labor and management might find common ground is over the question of administrative delay at the NLRB. Unions understandably want the agency to move more quickly to reinstate workers who are fired for organizing activity, for they view the law's slow response to, and tepid remedies for, such retaliatory discharges a principal cause of their downward spiral in private companies. Companies from their vantage may prefer the status quo but understand that a situation that allows unscrupulous employers to get away with flagrant violations may in time provoke a legislative embrace of the kinds of expensive, distracting remedies — private civil actions for damages, tried before juries — that are now provided for employment discrimination cases.

We can thank former NLRB Chair Edward B. Miller for documenting the points in the process where delay occurs and for tracking over time how the problem has gotten worse. Miller's recently issued fourth edition of *An Administrative Appraisal of the NLRB* (Fairfax, Va.: John M. Olin Institute for Employment Practice and Policy at George Mason University, 1999) makes a valuable contribution to the debate. First written two years after his tenure as chairman had ended, Miller's *Appraisal* combined an insider's knowledge of the agency with a straightforward style that made it ideal reading both for those who practice labor law and for those interested in the Board more generally. In the latest edition, Miller continues to focus on the themes that he emphasized in the first edition, as well as during his chairmanship: the competence and comparative efficiency of the General Counsel's regional offices, in contrast to the delays and inefficiency of the five-member Board and its corps of administrative law judges. These themes are perhaps even more relevant today than they were when Miller first addressed them, as recent writings by former Chairs William B. Gould and John C. Truesdale suggest. However, Miller takes a fatalistic view towards possible solutions to the Board's problems, that fall short of major, improbable structural changes to the Board's decision-making pipeline. Without gainsaying the stubborn persistence of bureaucratic inefficiency, we believe that Miller is a bit too pessimistic, and indeed offer herein some approaches that could be readily incorporated into the current system to address the very real problem of delay at the Board.

**PART ONE: THE STATE OF THE BOARD**

II. *The "Threshing Machine" vs. the "Assembly Line"*

The NLRB is one agency but could be described as having two parts: a prosecutorial part and an adjudicatory part. The first part consists of the General Counsel's office and the thirty-two regional offices that report to the General Counsel. The second part consists of the Board's corps of administrative law judges (ALJs) and the five-member Board itself (and its staff). Within the agency these roles are blurred somewhat: The Board must approve motions for preliminary injunctions under Section 10(j) of the Act that are ultimately prosecuted by the General Counsel, while regional direc-