THE LABOR BOARD'S EVER DEEPENING SOMNOLENCE: SOME REFLECTIONS OF A FORMER CHAIRMAN*

WILLIAM B. GOULD IV†

This is my second visit to Omaha, Nebraska — and both have been for the purpose of speeches to the Labor Relations and Employment Law Section of the State Bar of Nebraska. Both visits were arranged by David Larson of Creighton University School of Law, whom I have come to know since my Washington days. I know that all here in Omaha extend their heartiest congratulations to David — as do I — on his appointment effective tomorrow as Director of the Dispute Resolution Institute at Hamline University Law School. Congratulations and best wishes to you, David!

Both of my appearances here were timed fortuitously with the College World Series, though in 1996 Stanford, much to my surprise, did not make it to this level. Now after a succession of well deserved triumphs and the acquisition of the Pac Ten championship, Coach Mark Marquess and the Stanford Baseball squad have once again returned to the Promised Land of Omaha.

My previous appearance here three years ago incited Congressman Shays of Connecticut to investigate my attendance at baseball games and after reviewing my correspondence to San Francisco Giants' Manager Dusty Baker to then expend taxpayer monies to determine the gender of “Dusty” and of “Dusty’s” relationship to the Giants. Of course, all of this was too silly even by the standards of the 105th Congress to be pursued in any hearing. And thus I was advised on the eve of Shays' Oversight Hearings in July of 1997, that there was no intention of raising any such issue with me in the hearings because the committee was satisfied that no impropriety was involved. But you can imagine the reactions inside the Giants' clubhouse when I returned to California to regale them about the doings of their hard at work Congress!

Nonetheless, some of my memories of Congress and its relationship with the Board left me with the impression that most Members of Congress are responsible, sensible and hardworking — though a very substantial minority are not! In a difficult era when it appeared that

---

* Presented to the Labor Relations and Employment Law Section of the Nebraska State Bar Foundation, Omaha, Nebraska, June 14, 1999.
† Former Chairman of the National Labor Relations Board, 1994-1998. Presently, Charles A. Beardsley Professor of Law, Stanford Law School.
the overwhelming number of House Republicans opposed the National Labor Relations Act altogether, but could not get sufficient votes to put this idea across with the Senate, let alone override President Clinton's veto, we had help from both sides of the aisle.

The wisest Member of Congress that I met during my Washington tenure was a Republican. Indeed, this same person was the very best friend that the National Labor Relations Board ("Board" or "NLRB") had during my tenure in Washington, Senator Mark Hatfield, Republican Senator of Oregon, who was both thoughtful and Lincolnesque in his demeanor and behavior. Two other extremely valuable friends of the Board in Congress in this part of the country are Democrats — Senator Tom Harkin of Iowa and Senator Paul Wellstone of Minnesota. But along with Senator Edward Kennedy of Massachusetts, Congresswoman Nancy Pelosi and Congresswoman Anna Eshoo, both from my home state of California, others were vital to our work, such as Senator Jack Reed of Rhode Island, Senator John Chafee of Rhode Island, Congressman Donald Payne of New Jersey, Congressman Tom Sawyer of Ohio, Congressman Tom Campbell of California, Congressman Dennis Kucinich of Ohio, Congressman Santos of California — and I shall always be grateful for the eleventh hour intervention to support case production by Congressman David Bonior of Michigan and Bernie Sanders of Vermont and the role played by my friend of almost four full decades, Congressman John Conyers Jr. of Michigan.

The most arrogant and boorish individual that we encountered in Congress was a Democrat, David Obey of Wisconsin, someone completely swelled up with a sense self-importance — though Republican Ernest Istook of Oklahoma certainly took a close second! Neither party either then or now had a monopoly on wisdom or virtue.

Those four-and-one-half years in Washington D.C. were challenging, tumultuous, and from time to time, stressful periods of my life. I think that we were able to accomplish much during that period. My philosophy reflected, in both my written opinions and speeches, albeit within the confines of the National Labor Relations Act's parameters, was that of a "third way" which has come to be associated with both President Bill Clinton, who appointed me (but never interfered with any aspect of my work), and Prime Minister Tony Blair of Great Britain. Of course, our decisions were rendered within parameters of the Act itself. But, during the four-and-one-half years that I was Chairman of the Board, we were able to bring the Agency and the law back to the center, intervening as does the new Blair Government's British Employment Rights Bill of 1999, to support the establishment of the collective bargaining process while simultaneously adhering to the im-
partial administration of justice which promotes rights and obligations for both labor and management.

While the National Labor Relations Act promotes the practice and procedure of collective bargaining, Supreme Court precedent exhorted the Board to avoid in most instances the regulation of bargaining tactics. This is the approach that was followed by my Board. And my mantra became one of deregulation and promotion of autonomy for the parties so as to avoid wasteful litigation, which burdened the Board, the judiciary and the parties themselves.

In my last two years on the Board, it seemed that factors that were particularly prominent during my lengthy and difficult confirmation process of 1993-1994 came back into play. I became Chairman of the Agency at a time of rising polarization of the political process and divisiveness on the labor management scene, particularly as practiced by some right-wing Washington lobbyist organizations. Some of my speeches about labor law reform arose out of the attempt by the Republicans to quote my earlier academic writings in support of their position! For instance, on September 27, 1995, Congressman Steve Gunderson of Wisconsin distributed a Dear Colleague letter in response to the assertion by House Democrats that the so-called TEAM Act (Teamwork for Employees and Managers) was unnecessary, because the National Labor Relations Act provided no “barrier” to legitimate employee involvement programs. Congressman Gunderson’s letter bore the title Current Law Is A Barrier to Workplace Cooperation: Just Ask the Current Chairman of the NLRB. And the letter goes on to quote from my book, Agenda For Reform, that amendments to the statute are desirable in light of the ambiguity of the relevant statutory provisions, and thus, their potential for litigation. Senator Kassebaum was to pick up this theme in the Spring of 1996, and at that time I gave speeches in both Indiana and here in Nebraska, renewing the points that I had in my writings but providing criticisms of the TEAM Act.

One of the most prominent examples of conflict with Congress over law reform arose over the permanent replacement of strikers, the so-called Mackay doctrine. In a speech delivered in Yosemite, California, I had reiterated my view that Mackay was improperly decided and expressed support for President Clinton’s executive order, which would have reversed Mackay where certain government contracts were involved. On April 7, 1995, Congressmen Goodling, Fawell, and Hoekstra — some of them loudly supporting my writings on employee participation only a few months earlier — wrote me to say that I had “exceeded the appropriate and traditional role of the Chairman,” and thus, undermined “public trust” in my ability to carry out my obliga-
tions. My wife thought that the tone of the letter exhibited less respect than one would properly show to a prisoner, let alone a Presidential appointee. But I patiently outlined for them two weeks later the reasons why the expression of views about law reform by the Chairman of an agency is “in the greatest tradition of administrative agencies, including the National Labor Relations Board.”

This period, 1995-1998, was not the first time that Congress had clashed with the Board. Professor James Gross, in his three-volume chronicle of the National Labor Relations Board, has highlighted the traditional conservative hostility in the Congress to both the Board and the Act, beginning with the so-called Smith Committee hearings in 1939, and particularly when Congress was controlled by the Republicans from 1947 to 1949 and 1953 to 1955. But this appears to have been the first era when Congress systematically intruded on the Board’s responsibilities in connection with both adjudication and rule making. The National Restaurant Association (who it turns out bankrolled the very key Republicans who were blocking our rule-making initiatives), Caterpillar Company, Overnite Transportation Company, and Detroit Newspapers were all able to find leading Congressional Republicans who urged us to decide cases in a particular manner or not to decide them at all. The non-union associated Builders and Contractors also supplied a great deal of cash to the Republicans — and they, in turn, never tired of investigating our “salting” cases which frequently arose in the construction industry.

This was troubling in and of itself for, in my view, it raised the same concerns which Chief Justice Rehnquist expressed about the attempt by the very same House Republicans to interfere with the independence of the judiciary. And this was an ironic posture for the House Republicans, who purported to concern themselves with the rule of law during the impeachment proceedings involving President Clinton earlier this year.

But even more troubling was the impact of this pattern of behavior upon the Board. As Professor G. Calvin MacKenzie of Colby College has noted, the polarization about the political process has seen an increased tendency to appoint individuals to administrative agencies through “batching” of nominees of conflicting ideologies and legal philosophies.¹ This is the process that was practiced in connection with my nomination in 1993-1994 and it was repeated in 1997. The result was a lack of intellectual coherence on the part of the Agency in toto and a process in which virtually all appointees were Washington insiders, frequently from Capital Hill and part of the cliquish and rough

neighborhood of the nation's capital. And more than a lack of coher-
ence, it produced inaction, because: (1) some feared that identification
with controversial issues would produce retaliation and doom their
own candidacy for reappointment, or (2) there was no incentive or rule
requiring dissenters, or indeed anyone, to work promptly and
expeditiously.

The vulnerability of Board Members, and apparently members of
other regulatory agencies to these kinds of dynamics, is fundamen-
tally attributable to the identity of appointees who emerge in this new
environment. This is, as Professor Mackenzie has noted, attributable
to "the failure of contemporary elections to bring closure to political
debate." As Professor MacKenzie wrote two years ago:

[T]he tendency to select appointees to an Agency as teams
and to divide up control over the choices has become the norm
in Washington. The Senate, in fact, often delays confirmation
until several nominations to the same Agency accumulate,
thus allowing it to require that the President include some
nominees who are effectively designated by powerful
Senators.

This kind of batching of nominations rarely happened
before the present date. Even on the regulatory commissions,
whose original statutes require that only a bare majority of
appointees can be from any one party, a vacancy in an opposi-
tion party chair was usually filled by the President with an
enrollee in the opposition party who supported the President.
These appointments, common for most of this century, came
to be known as "friendly Indians" and were routinely con-
irmed by the Senate, even when it was controlled by the op-
position party. But they allowed the incumbent President to
control the appointment process and to shape the majorities
on most regulatory commissions.

That is nearly impossible these days. The membership of
the regulatory commissions has become little more than the
sum of the set of disjointed political calculations. Concerns
about fealty to leadership, effective teamwork, and intellec-
tual fealty to leadership and intellectual or ideological coher-
ce play almost no part in the selection of regulatory
commissioners. The juggling of political interests dominates.
That we as a nation often get inconsistent and incoherent
regulatory policies should be no surprise to those that follow
the shuffling and dealing that produces regulatory
commissioners.

An additional complicating factor in batching is that the
Republicans do not have the same incentive to make a deal
regarding a group of nominees for a particular Agency. This
is especially so of an Agency like the National Labor Rela-
tions Board, which operates under statutory principles in which a large number of Republicans do not believe. Accordingly, there is no incentive to arrive at an arrangement; to the contrary, all of the incentives are weighted towards crippling the Agency and to have it operate with minimal membership, including recess appointees, or to have the Agency come to a halt altogether!

What is most distressing ultimately is the transcendent loss of purpose in the appointment process. The American model did not always work perfectly, but it was informed by a grand notion. The business of the people would be managed by leaders drawn from the people. Cincinnatus, in-and-outers, noncareer managers — with every election would come a new sweep of the country for high energy and new ideas and fresh visions. The president's team would assume its place and impose the people's wishes on the great agencies of government. Not infrequently, it actually worked that way.

But these days, the model fails on nearly all counts. Most appointees do not come from the countryside, brimming with new energy and ideas. Much more often they come from congressional staffs or think tanks or interest groups — not from across the country but from across the street: interchangeable public elites, engaged in an insider's game.2

Thus, when my term expired in August of 1998, a whole host of policy issues — many of which had attracted the attention of the Republican Congress — remained unresolved. The appointment of insiders was a major element in this logjam. Foremost amongst the cases were those relating to the status of contingent employees who are temporary workers referred to an employer by an agency and the question of whether they can participate in the NLRB electoral process as part of the workforce to which they have been referred.

The plight of Microsoft's temporary employees has brought the position of these second-class workers, who are frequently denied fringe benefits including health care and are the recipients of other inferior employment conditions, to the attention of the public! Now, apparently a union has attempted to organize some of the temporary workers in Seattle. But they can only organize the employees at the supplier — not Microsoft itself where the employees actually work. The reason is a Board decision,3 handed down in 1973, which was expanded in a series of decisions by the Bush Board4 to preclude the

organization of employees through NLRB-conducted elections of permanent and temporary employees together, unless both employers, the supplier and the user provide their permission. Needless to say, permission is never provided! And thus, organization cannot take place.

A rise in this “non-standard” type of employment relationship has relegated an increasing number of workers to a second-class citizenship. And the Board’s decisions, which have required consent of both employers to obtain access to labor law, predicated as they were upon the law relating to multi-employer bargaining, have never made sense. Thus, the Board heard oral argument on this issue and the question of whether it should reverse the Bush Board’s decisions in December 1996.5 (Indeed, these cases have been pending at the Board since the fall of 1995!)

After a flurry of letters from Members of Congress advising the Board that it should not decide these cases, because it was not at full strength at the time of oral argument (it was not at full strength because the Republicans would not confirm the President’s nominees) — just as they told me that I cannot speak about law reform unless I am spoken to — the case sits with the Board now nearly one full year after my departure. I tried mightily to get these case issued and a vote was actually taken in January 1998. Now, eighteen months after the vote and a year after my departure, nothing has transpired.

The Supreme Court, when it rendered its opinion in *Marquez v. Screen Actors Guild, Inc.*,6 concluded that a union has no duty of fair representation to negotiate contract language in the collective bargaining agreement consistent with the Supreme Court’s holdings and with the Board’s own standards.7 This decision was dead wrong in my view. The Court’s assumption that workers do not read union security provisions in collective agreements which can lead to their discharge is totally unsupported in the record and in the reality of labor management relations. But at least the Court rendered a decision; in *Marquez*, the ruling was handed down one month after oral argument. This practice contrasts vividly with the ever-deepening somnolence of the Board in Washington.

Although eighteen *Beck* cases issued under my Chairmanship, I wanted more. But here the Board’s work compares favorably with the

---

fact that no Beck cases issued in the six years after that decision until the Clinton Board arrived in Washington in March of 1994. And the Board is to be congratulated for its record number of cases that went out last September and the large number of no-contest and easy cases that were pushed to one side as we focused upon some of the big policy issues in the summer months.

But the fact is that every major policy issue which was pending with the Board when I left office is still languishing there, notwithstanding the fact that most of them have been with the Board for years. The contingent worker cases were argued two-and-one-half years ago and have been in Washington for three-and-one-half years! And the Board's consideration of whether an incumbent union's status should be challenged exclusively through NLRB election procedures and the standards for invocation of the Board's machinery is still pending with the Board.\(^8\) Although this is not one of the older cases pending before the Board, the matter is pressing given Justice Scalia's rather cavalier reliance upon hearsay testimony provided by workers who are dependent upon an employer for work ("no one very much is interested in being represented by the union anymore") as a basis for protecting the employer against a refusal to bargain charge.\(^9\) Prompt resolution of this issue is vital to the administration of national labor law policy.

Another significant case which was pending before the Board when I left relates to whether dues checkoff provisions in collective bargaining agreements could survive the expiration of the agreement as do other terms and conditions of employment up until the point of impasse in negotiations between the parties.\(^10\) In some circumstances, the elimination of such clauses prior to impasse may lead directly to the elimination of collective bargaining. Yet another presents the issue of whether so-called Weingarten rights for unionized employees to have representation when confronted with potential discipline or discharge could extend to non-union employees, a point once accepted by the Carter Board in the 1970s.\(^11\)

A fourth case, coming out of Yale University, involves the question of whether graduate students are employees within the meaning of the Act and whether their refusal to submit grades under the circumstances of that case is protected and concerted activity.\(^12\) Both university administrators and unions are watching this case carefully, given the upsurge in union activity amongst graduate teaching assist-

\(^8\) Chelsea Industries, 7CA-36846; 7CA-37016.
\(^12\) Yale Univ., 34-CA-7347 (Aug. 6, 1997).
ants throughout the country — and the parties deserve to have guidance from the Board!

Then yet another case involved the question of whether Board precedent, which had declared interns and residents in teaching hospitals not to be employees within the meaning of the Act, should be overruled.\textsuperscript{13} The same point about the need for guidance made about \textit{Yale University} applies here.

An important case involving the question of whether an employer, which insists that it cannot accede to the union's demands because of competitive pressure, has the duty to disclose information which supports its position is there as well.\textsuperscript{14} The Supreme Court has required disclosure in the case of inability to pay and the question here relates to the circumstances under which a reliance upon the realities of competition is similar to the kind of inability to pay that is involved when an employer may go out of business altogether!

Further, the question of whether permanently replaced economic strikers have the right to vote more than twelve months subsequent to the commencement of an economic strike when they have a reasonable expectancy of recall in the near future is still there as well\textsuperscript{15} — and this case has been at the Board for twenty-seven months! Another important case involves the \textit{New York Post} and the question of whether employers have a successorship obligation in the wake of a newly-reorganized entity.\textsuperscript{16} It has been sitting in Washington for two-and-one-half years. Additionally, a case presenting a stipulated record involving important secondary boycott picketing and handling issues has also been before the Board awaiting resolution for the past twenty-seven months\textsuperscript{17} Indeed, a case involving a videotaping of employees and a question of whether employee rights were violated, argued before the Board at an ABA convention in August 1996, is still pending as well\textsuperscript{18}.

All of these cases remain unresolved until this very day! They were all there when I left. And we are now nearly one full year beyond the time that I departed for California.

To repeat, \textit{none of the leading policy cases} has issued beyond a few of the \textit{Beck} cases. Even taking into account the sharp ideological divisions that exist at the Board, surely the parties after years of waiting are entitled to some decision! And so many of the Democrats in Congress told me on countless occasions, the primary concern is not what

\begin{itemize}
  \item \textsuperscript{13} Boston Med. Ctr. Corp., 1-RC-20574 (Oct. 17, 1997).
  \item \textsuperscript{14} Pabst Brewing Co., 30-CA-13063 (Dec. 19, 1997).
  \item \textsuperscript{15} Thorsen-McCosh, Inc., 7-UD-457 (Mar. 7, 1997).
  \item \textsuperscript{16} NYP Acquisition Corp., 2-CA-26935 (Dec. 11, 1996).
  \item \textsuperscript{17} Visiting Nurse Health Sys., Inc., 10-CC-1335 (Mar. 27, 1997).
  \item \textsuperscript{18} Randell Warehouse of Ariz., Inc., 28 RC-5274 (Apr. 5, 1995).
\end{itemize}
the Board's decision is, but the primary concern is that there is a Board decision!

Now I fear that the dynamic of upcoming elections in the year 2000 complicates matters further. If the past is any indication of the present situation, no Board Members or the General Counsel will be confirmed as long the Republicans believe that they have a shot at the White House. And, of course, the experience during the Clinton Administration has been that the Republicans will not confirm any nominee unless they can “batch” one of their own as part of a deal. There are no Republican vacancies in 1999.

More recess appointments — always a contentious issue, particularly with the recent Hormel appointment — could produce more lack of continuity. And the prospect of the elections may be an additional justification for continued Board inaction.

Again, the problem is compounded by the fact that no procedure exists to which a deadline can be imposed upon the Board Members to do their work. I tried to get the Board Members to adopt such a procedure on a number of occasions but was always unsuccessful. Only Congress can mandate the deadlines, but that will only happen when there is a new Congress which is committed to the principles of the Act.

We were able to accomplish something during my tenure in Washington — particularly during the first couple of years when we had a broader commitment to productivity at the Presidential appointee level. But reforms such as bench decisions, approved of recently by the Court of Appeals of the First Circuit in Boston,19 were helpful in this regard. Because of the eleventh hour intervention of prominent Members of Congress who were concerned about the well-being of the Board, we were able to get some decisions out immediately before or on August 27, 1998.

Over most of the four-and-one-half year period of my Chairmanship, certain decisions stand out and will affect labor law for years to come. One is San Diego Gas,20 in which a Board majority consisting of myself and Members Fox and Liebman promoted a more substantial use of postal ballots than the Agency has utilized in the past. In San Diego Gas, a majority stated that ballots were appropriate where employees were “scattered” due to job duties or work schedules or where there was a strike or lockout or picketing in progress. In a separate concurring opinion, I took the position that postal ballots are appropriate when necessary to conserve Agency resources as well as enfranchise employees.

A second important case early on in my tenure was Management Training Corp., 21 in which the Board majority reversed precedent and asserted jurisdiction over government contractors, regardless of the amount of control that the contractor had over employment conditions which might be the subject of collective bargaining. The Court of Appeals for the Fourth, Sixth, and Tenth Circuits have all approved this doctrine, which eliminates wasteful litigation.

A third case related to the important impasse doctrine, which allows employers to unilaterally institute their own position regarding terms and conditions of employment subsequent to a bargaining impasse. In McClatchy Newspapers, Inc., 22 a Board majority held that an employer could not unilaterally implement merit pay proposals even when bargaining had taken place to the point of impasse. The Board said that if the employer was given carte blanche authority over wage increases with regard to time, standards, criteria, it would be "so inherently destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining." 23

Finally, Novotel New York 24 presented an important issue involving a union organizational drive amongst hotel workers, which took place in the midst of complaints about alleged irregularities involving the payment of overtime wages to the workers. The Board in Novotel held that a suit commencing action under the Fair Labor Standards Act of 1938 was not a "benefit" which interfered with the conduct of elections, but rather was part of a union program to advance its goals through litigation — as is the case with Training Programs and the advocacy and monitoring of legislation. The Board majority took the position that we would be "standing the statute on its head" if we were to rule such conduct impermissible under the Act.

A host of decisions involving important issues were issued on my last day in office, August 27, 1998, and I want to bring a few of them to your attention. The most celebrated case was Detroit Newspapers, 25 in which the Board, comprised of both Democrats and Republicans, ruled unanimously that the employer had committed unfair labor practice which caused the more than two-year-old strike there to be prolonged, and therefore, the strikers were unfair practice strikers entitled to reinstatement. While a majority of the Board dismissed portions of complaint, it unanimously affirmed the administrative law

judgment holding that the employer had refused to bargain in good faith by unilaterally implementing its proposals regarding merit pay, television assignments and by refusing to furnish requested information regarding both merit pay and overtime exemption proposals. The Board, over my dissent, refused to address the employer's duty to bargain with regard to conditions of employment for strike replacements — I wrote a dissenting opinion in which I expressed the view that there was an obligation to bargain. And when the employer did so the following spring, the vote was 3-2 to uphold the employer's position! Ironically, had the work been done as it should have been done — the previous summer — the vote would have been 3-2 to support my position inasmuch as both Fox and Liebman wrote dissents in March of 1999.

Next, in Telescope Casual Furniture, Inc., I joined Member Hurtgen to dismiss a complaint involving the lawfulness of an employer bargaining tactic which provided a final offer accompanied by a threat to implement an alternative position containing more onerous terms, if the final offer was rejected subsequent to impasse. I wrote a concurring opinion which I had drafted almost two years prior to its issuance in which I noted the fact that the parties had been able to resolve their differences on numerous occasions previously when the employer utilized the exact same tactic without a strike taking place. I viewed the tactic as both distasteful and inconsistent with my view of what constitutes good industrial relations:

I do not like the employer's tactics in this case and, like Member Liebman, I do not find them to be conducive to good industrial relations. Indeed, my personal view is that impasse — a concept inherently vague and thus conducive to perilous litigation for both sides — and unilateral implementation weight the scales against the labor movement improperly in a democratic pluralistic society such as ours. But, we are obliged to subordinate our personal views to the rule of law. In my view, the tactic was consistent with duty to bargain obligations under the Act. And my concurrence in Telescope Casual was logically related to one that I had expressed just a few weeks earlier in White Cap, Inc. In White Cap, the question was whether so-called regressive bargaining was consistent with the duty to bargain provisions. The Bush Board, in a curious decision, had held that good cause was required to justify withdrawal from a tentative agreement as a matter of good faith bargaining law. In my concurring opinion I rejected out-

right the good cause requirement and noted that, as a general matter unless agreed to otherwise, no tentative agreements are binding as to individual issues until a full overall contract is achieved. As in Telescope Casual, I noted that the collective bargaining under the Supreme Court’s “freedom of contract” line of authority was wide open and rough and tumble.

In another important case involving the right of an employer to engage in lockout tactics, Central Illinois Public Service Co., I joined with Member Hurtgen to hold that an employer could lock out union represented employees in response to its “inside game” strategies, which involved refusals to work overtime, strict adherence to safety rules and other “work to rule tactics.” The Board’s opinion noted that the Supreme Court in American Ship Building Co. v. NLRB had already held that an employer could respond through a lockout because of its apprehensiveness about a lawful strike protected by the Act. Regardless of whether the “inside game” tactics could be characterized as protected or unprotected, it seems that the same answer was dictated in Central Illinois that had been provided the Court in American Ship Building.

I also joined the Republicans to constitute a 3-2 majority in Farm Fresh, Inc., which involved non-employee organizer access to the snack bar of a grocery store. In Farm Fresh, I concurred specially noting that the Board was required to reverse its own precedent in light of the Supreme Court’s 1992 holding in Lechmere v. NLRB, which denied non-employees’ union organizers access in most instances.

Again, in Lafayette Park Hotel, I joined with Members Hurtgen and Brame to conclude that employers requiring employees to be “co-operative” and to support the company’s “goals and objectives,” not to divulge information to people who are not authorized to receive the information or to engage in “improper conduct” during non-working hours which affected the relationship with others in the “hotel’s reputation or good will in the community,” were rules which were facially lawful and did not implicate the provisions of the Act. I wrote a separate opinion because I was concerned that the dissent of Members Fox and Liebman failed “to appreciate the importance of civility and good manners for all people, including employees.”

Sometimes I was in solitary dissent. This was the case in which I advocated a new test to determine whether an individual was an in-

---

dependent contractor or an employee, an issue comparable in importance to the temporary worker matter argued years ago — or in which I concluded that one employee acting alone could engage in concerted activity where the subject matter affected the group. In a series of concurring opinions, I concluded that an individual who had a good faith belief in his employee status was protected by the statute even if subsequently determined to be a supervisor. Similarly, I concluded that Board precedent — which holds that whenever an employer seeks judicial review of the Board's certification of a union, the employer's subsequent willingness to bargain about a particular subject is further evidence of a refusal to bargain — was in error and should be reversed. I supported the view that union-supporting employees had the same right to solicit and distribute as that possessed by employers and their supervisors; however, I could garner no support for this view.

Finally, in an extensive concurrence in CBS Corp., I expressed my disagreement with Board precedent which concludes that an employer cannot alter terms and conditions of employment with an incumbent union unilaterally without obtaining a clear and unequivocal waiver from the union. More specifically, I found fault with the Board's application of the test in recent years. In essence, I stated that the Board should adhere to criteria more similar to that which was employed in the 1970's as well as utilized today by arbitrators, i.e., contract language, bargaining history and the circumstances relating to negotiation of causes addressing similar subject matter. Although I rejected the so-called "contract coverage" approach to waiver, which has been accepted by a number of the appellate courts, I stressed the importance of uniformity of result whether a party takes a case to the Board or to arbitration.

The highlights of the Board during my four-and-one-half year period, coupled with the decisions which finally emanated in my last day or two in office, demonstrate the balanced approach that the Agency took to very difficult issues. Scholars and practitioners alike will always find much to quarrel with on particular reasoning or outcomes. But, along with the quality of the opinions and decisions themselves, the fundamental obligation of the Board is to decide. It is to produce decisions.

In 1994 and 1995, we brought the backlog to its lowest level since records were kept. Since 1996, productivity at the Board has gone south. The career Board people are committed to productivity, notwithstanding the limits that have been imposed upon Washington and the field by the budget. The biggest cross that I had to bear during my time in office in Washington was to inculcate a similar culture amongst the Presidential appointees. Dealing with the House Republicans was relatively easy, because their hostility to the Act and the efforts to enforce it was so manifest. They were angry with us — not because of my speeches or writings, as some of the Washington insiders now contend, but rather because of: (1) the content of the National Labor Relations Act; (2) our vigorous enforcement of it; (3) the AFL-CIO's active involvement in the 1996 campaign and their attempt to punish all labor-related agencies to get back at the Federation; and (4) the fact that rule making and oral arguments put them on notice of what we were thinking about doing.

While rule making and oral arguments were desirable, clearly they enhanced the potential for retaliation. And that, in my judgment, undermined the commitment to case production both because of outright reticence and delay in the dissent-writing process. Yet, in the final analysis, there is no excuse for decisions to be pending before the Board that have been with the Agency year after year. No rhetoric or speech-making can explain away the failure to issue any of the major policy cases that were pending with the Board at the time of my departure almost a full year ago.

As Judge Noonan recently said:

No decisionmaking body is totally immune from the dilatory virus, and delay is sometimes the too human way of grappling with a thorny issue of policy. Nonetheless, the Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing. We have on other occasions indicated that extraordinary delay of this kind will itself be reason to refuse to enforce an order of the Board. See *Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372, 378 [134 LRRM 2657] (2d Cir. 1990). Although we have no occasion in this case to apply this doctrine, we call it to the Board’s attention as a reminder that, whatever its internal problems, the Board has a duty to act promptly in the discharge of its important functions.41

The business of the Board is to produce decisions and to devise procedures, which requires production within a given period of time.

---

And if these cases which have been pending all this time are not issued shortly, they run the real risk of colliding with more turnover on the Board and with new vacancies attributable to the upcoming 2000 election period, during which confirmation of the new appointments rarely takes place in any political environment. And, I am sure that it is not lost on those in Washington and astute observers throughout the country, that if these cases are not decided soon they may be decided by a new Board — perhaps even a new Bush Board — a year or so down the road.

Of course, the fundamental problem is the “batching” process, to which Professor MacKenzie alluded, and to the Washington insider game which subordinates prompt adjudication to all other considerations. The prohibition of a second term for Board Members and the General Counsel — consisting of a longer term like seven or eight years so that the benefits from experience could be obtained — would be helpful in concentrating the minds of appointees on the business at hand. Then their only job would be to decide without any concern about the decision’s impact upon reappointment. But it is unlikely that real improvements can be made unless the political environment of intimidation and hostility to the Act itself changes.

In any event, inaction, always intrinsically inexcusable, would politicize the outcome of these decisions as the prospect of postponement until the year 2001 looms larger. Board Members are paid handsomely to decide, and they should decide now or get out of the way to let someone else do the work at hand.