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Introduction

Wilma B. Liebman

National Labor Relations Board

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Whither the Board: The NLRA at 75
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Introduction

National Labor Relations Board Chairman
Wilma B. Liebman

It is fair to ask whether labor law still matters today, seventy-five years after enactment of this groundbreaking Depression-era law. Over recent decades, the National Labor Relations Board (NLRB or Board) has lost something of its former stature, with public confidence in decline and the enabling legislation viewed as irrelevant to the contemporary workforce and workplace. Recently, however, labor law and the NLRB are back in the public eye – a result of substantial controversy over decisions of the Bush-era NLRB – over proposed legislation which would revise the nation’s key labor law for the first time in over sixty years (the Employee Free Choice Act), and over President Obama’s nominees to fill three vacancies on the five-member Board. This controversy has generated public scrutiny, both overdue and welcome, however rancorous. The controversy is proof that labor law still matters. But, serious debate over labor policy has been missing from our public arena for too long. It is sorely needed if we are to address pressing social and economic needs, such as wage stagnation, glaring income inequality, and persistent unemployment.

In that spirit, I applaud Florida International University Dean Alex Acosta, my former colleague on the NLRB, as well as FIU Professor Kerri Stone, and the fine students on the FIU Law Review for organizing this Symposium. They have done an outstanding job. The Symposium has

assembled a distinguished group of scholars and practitioners to join in a dialogue about the state of American labor law today. I am pleased that several individuals from the Board's Florida Regional Office were able to participate in this Symposium and benefit from the discussion, including Tom Brudney, whose paper is included in this volume, as well as Miami-based Administrative Law Judge Jeffrey Wedekind. Several others also participating in this Symposium deserve special mention: Board Member Peter Schaumber, my sole colleague for twenty-seven months; former Member Marshall Babson; and my former colleagues Dennis Walsh and, of course, Dean Acosta. In other words, at this Florida location, if not back home in Washington, we had an undisputed quorum.

I wish to thank the scholars who contributed not only their time, but their insights and creativity, to this Symposium. Their presentations raised important issues. Catherine Fisk and John Sanchez offer timely reflections on the two-member Board. Jennifer Hill advocates that unions experiment with strategies used by workers' centers to improve employment standards in the low-wage sector and among immigrant workers. Anne Marie Lofaso describes the persistent and vexing "vanishing employee" issues presented by the statutory coverage definitions and how they were treated by the divided Bush-era Board decisions. Others propose novel approaches to legal issues that arise with regularity, such as James Brudney on backpay remedies for unlawful discrimination, Michael Harper on deferral to arbitration, Paul Secunda on captive audience meetings with workers during organizing campaigns, and Matthew Bodie on the "laboratory conditions" under which employees vote on representation (with suggested mandatory disclosure requirements). Others argue that the Board could do a better job: Samuel Estreicher proposes substantial administrative reforms that could be accomplished without legislative change, Jeffrey Lubbers urges the Board to explore opportunities for rulemaking, and Jeffrey Hirsch offers recommendations for better decision writing. The potential for rulemaking discussed by Professor Lubbers during the opening session and by Dean Acosta in his luncheon address generated particular interest. Indeed, for many years, academic commentators have urged the Board to consider making policy changes through rulemaking.¹ But all of the presentations – along with the comments of practitioners – were thoughtful and often provocative. Each warrants consideration in an effort to make our labor law work better.

¹ See, e.g., Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 166 (1985).

A spirited roundtable discussion concluded the Symposium following a presentation by Board Member Schaumber – whose strict-constructionist approach to this law only highlights how remarkable it was that he and I were able to narrow our differences and issue nearly 600 decisions during the two-member Board period. The discussion revealed sharp differences of opinion about this statute and its role in today's society and economy.

On this seventy-fifth anniversary of the passage of the Wagner Act, we have an ideal opportunity for reflection on the history, legacy, and future of the law. In 1985, on the occasion of the Board's golden anniversary, Judge Abner Mikva wrote, "although it is unusual to celebrate an anniversary by focusing on the guest of honor's shortcomings, only by understanding the limited effectiveness of the Act in today's economy can we contemplate a realistic and fair national-labor policy."² It is in that spirit that all of the contributors to this Symposium offered their observations and recommendations.

Yet, it is impossible to candidly assess national-labor policy at this moment divorced from the controversy of the past three years. The Board is no stranger to controversy.³ But recently the Board has become emblematic of Washington political gridlock. What we have faced represents a record accumulation of difficulties, and its confluence with the seventy-five year anniversary highlights faults in this aging system. For twenty-seven months, from January 2008 through March 2010, the Board operated with only two of five members – my Republican colleague Peter Schaumber and me. This two-member Board was probably the most obvious legacy of the Bush NLRB, with its deeply divided decisions and ensuing controversy. We faced protests outside of our headquarters, congressional scrutiny, and Senate gridlock over President Bush's final nominations to fill three Board vacancies in early 2008. The controversy over the Employee Free Choice Act, re-introduced in the Senate in March 2009, escalated as the year progressed, spilling over into the appointment battle over President Obama's July 2009 nominees to fill the vacancies. In February 2010, there was a

² Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1124 (1986).

³ "Since its enactment, the National Labor Relations Act (NLRA) has proven to be the most controversial and bitterly contested piece of New Deal legislation, alternately receiving support and condemnation from the parties it covers. But this is not surprising, given that the Act tries to interject reason into the emotion-laden reality of worker-management relations. *Fortune* magazine's early (1938) characterization of industrial relations under the Act still holds true: '[It has] become a battlefield of slogans and shibboleths, of coercion and propaganda, of intimidation and mutual accusation, of guerilla warfare and strikes' (p. 53). In order to administer a labor law in this setting, the NLRB must referee a holy war." John Thomas Delaney et al., *The NLRA at Fifty: A Research Appraisal and Agenda*, 39 INDUS. & LAB. REL. REV. 46, 46 (1985).

failed cloture vote over nominee Craig Becker, and the recess appointments of Democrats Craig Becker and Mark Pearce followed in late March.

Meanwhile during the twenty-seven months, Member Schaumber and I, somewhat improbably and despite our significant differences, successfully reached agreement in nearly 600 cases. Our authority to act as a quorum with only two members was challenged in the courts of appeals. On June 17, 2010, the Supreme Court ruled against the Board in *New Process Steel, L.P. v. NLRB*.⁴ The 5-4 decision authored by Justice Stevens concluded:

We are not insensitive to the Board's understandable desire to keep its doors open despite vacancies. Nor are we unaware of the costs that delay imposes on the litigants. If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than be swept aside in the face of admittedly difficult circumstances.⁵

In the dissent, Justice Kennedy countered, arguing that:

[T]he objectives of the statute, which must be to ensure orderly operations when the Board is not at full strength as well as efficient operations when it is, are better respected by a statutory interpretation that dictates a result opposite to the one reached by the Court.⁶

Needless to say, the decision was disappointing.⁷ In proceeding to issue decisions, we believed that our position was legally correct and that it served the public interest in preventing a Board shut-down. We brought finality to many labor disputes and remedies to individuals whose rights under our statute may have been violated. We will now do our best to rectify the situation in accordance with the Supreme Court's decision.

Today, we are dealing with the aftermath of *New Process Steel*. Member Schaumber's term is about to expire in late August 2010, my term will expire in August 2011, and Member Becker's recess appointment will ex-

⁴ *New Process Steel, L.P. v. NLRB*, No. 08-1457, slip op. (U.S. June 17, 2010). For a witty account of the oral argument before the Supreme Court, see Dahlia Lithwick, 5-3=3: *A Case Tests the Arithmetical Skills of the Supreme Court Justices*, SLATE, Mar. 23, 2010, available at <http://www.slate.com/id/2248664/>.

⁵ *New Process Steel*, No. 08-1457, at 13-14.

⁶ *Id.* at 1-2 (Kennedy, J., dissenting).

⁷ Press Release, National Labor Relations Board, Supreme Court rules two-member NLRB lacked authority to issue decisions (June 17, 2010), available at http://www.nlr.gov/shared_files/Press%20Releases/2010/R-2752.pdf.

pire in late 2011. Hopes (and fears) about a newly constituted NLRB, meanwhile, have been enormous. It remains to be seen what our record will be, and what our success will be in revitalizing this law and restoring confidence in it. I expect that the new Board will bring a more dynamic approach to the law than what we have seen over the last decade, an approach committed to attempting to adapt this statute to changing workplace realities and to taking into account the real-world consequences of our decisions.

It is important to keep in mind that, whatever its limitations, labor law still matters. It matters to working people and their employers. Its rights, obligations, and the collective bargaining regime it creates matter to our democracy and to a fair economy. In that spirit, on this milestone occasion, at this difficult historical moment, we must remain committed to achieving “a realistic and fair national labor policy.”⁸ To that end, I thank Florida International University Law School, its Dean, its students, and all Symposium participants for exploring *Whither the Board: The NLRA at 75* and for the dialogue we had on these important issues.

⁸ Mikva, *supra* note 2, at 1123.