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EXPEDITING REFUSAL TO BARGAIN CHARGES THROUGH REGIONAL ADMINISTRATION

JANICE R. BELLACE* and BERNARD L. SAMOFF**

I. INTRODUCTION

In 1979, the National Labor Relations Board once again experienced an increase in the number of unfair labor practice charges filed. With the annual announcement of an increase in unfair labor practice charges having become routine, the cumulative impact of the increases seems to have escaped general notice. During the decade just ended, the number of unfair labor practice charges filed with the NLRB nearly doubled, from 21,038 in 19701 to 41,259 in 1979.2

Unless the unexpected occurs, the NLRB’s caseload should continue to grow at the same pace during the 1980s, but it is highly unlikely that the NLRB will be able to add staff in sufficient numbers to cope with such an increased case intake. Economic constraints on the federal budget dictate little or no real growth in the NLRB’s operating budget in the 1980s. In addition, both political parties advocate less federal regulation of business. Such a political climate is not hospitable to increasing the staff of the NLRB which has had no additional statutory responsibilities since 1974.

Unless the NLRB takes action to halt the increase in its case intake, it may find that its present staff is incapable of satisfactorily discharging its statutory responsibilities. In the hearings on the Labor Reform Bill3 in 1978, supporters

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1. 35 NLRB ANN. REP. 154, table 1 (1970). NLRB annual reports cover the fiscal year which ends September 30.
charged that ineffective remedies and delays in resolving cases were thwarting the fundamental purposes of the Labor Management Relations Act. The delays occurring in the NLRB's routine processing of section 8(a)(5) charges were seen as particularly destructive to the Act's purposes. Critics of the Board asserted that a bargaining order issued to an employer one or two years after an election was a hollow remedy since the union was hardly in a position to bargain effectively after such a delay reduced its support among the workers.

In 1979, section 8(a)(5) charges represented 31.6 percent of all unfair labor practice charges against employers. Since one-third of 29,026 charges constitutes a substantial number and since the AFL-CIO is publicizing vigorous new organizing campaigns, the number of such section 8(a)(5) charges will most likely increase. This article addresses the problem created by this situation and suggests a systematic framework for dealing with this problem. This proposal is compatible with the NLRB's statutory responsibilities and consistent with the collective bargaining practices endorsed by the NLRB and the courts. The proposal is simple and builds upon current operating procedures. It requires no statutory changes but merely calls for minor changes in NLRB rules and regulations. It is based upon the premise that the NLRB can and should show the determination, innovation and administrative skills necessary to meet the problem.

Initially, a classification scheme is needed for section 8(a)(5) charges based upon the particular fact pattern in each case, preliminary to deferral to contractual grievance/arbitration procedures or expanded regional decisionmaking. Each feature of the overall proposal is tightly connected to every other element, and the entire scheme constitutes an interrelated system. This proposal can be easily implemented and its

5. Labor Management Relations Act, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 151 (1970)). Section 8(a)(5) of the statute states: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." [Hereinafter cited as 8(a)(5)].
7. Id.
implementation will further public policy. Based on the con-
tinued criticism of the current system by participating parties,
the proposal will likely be accepted by the bar, employers and
unions. Furthermore, this proposal would merit implemen-
tation on a trial basis if only for the reason that there is a nota-
ble dearth of suggestions for meeting the serious problem
addressed.

II. Classifying Section 8(a)(5) Cases

The first step in the more efficient processing of cases
arising under section 8(a)(5) begins at the case intake stage.
At that point, cases must be placed on the track that will pro-
vide the most appropriate case handling in order to save time.
This can only be achieved by implementing a classification
system at the case intake point. In light of the recurring fact
patterns in 8(a)(5) cases, two classifications should be estab-
lished: pre-contract and post-contract. In this system, 8(a)(5)
cases in which the union and employer have yet to conclude a
collective agreement would be targeted for more immediate
treatment than those cases which involve an established col-
lective bargaining relationship.

This distinction between pre-contract and post-contract
cases reflects the priorities underlying the LMRA that "the
making of voluntary labor agreements is encouraged by pro-
tecting employees' rights to organize for collective bargaining
and by imposing on labor and management the mutual obliga-
tion to bargain collectively."8 Designed to protect the rights of
employees to select representatives of their own choosing who
will bargain with the employer on their behalf, the LMRA's
principal concern is getting the parties to the bargaining table
so that they can make their own agreement rather than hav-
ing government dictate the substance of that agreement. Al-
though such a narrow view of the statute's purpose has been
challenged,9 section 8(d) reinforces this narrow view.

9. See, e.g., P. Ross, The Government as a Source of Union Power (1965). La-
(1970)). Section 8(d) of the statute reads in part:
"[T]o bargain collectively is the performance of the mutual obligation of
the employer and the representative of the employees to meet at reasonable
times and confer in good faith with respect to wages, hours, and other terms
Section 8(a)(5) pre-contract cases arising in a post-organizational bargaining situation present a formidable challenge to the NLRB's administration of the Act. Effective enforcement of the employees' rights at this particular point is crucial because failure to remedy the 8(a)(5) violation in a pre-contract situation may result in a failure to conclude a contract. Deliberate agency consideration of such cases results in delay which can be fatal to the union's chances of ever concluding an agreement. For this reason, pre-contract 8(a)(5) cases demand accelerated case handling which can best be achieved by devolving the initial responsibility for attempting to settle the charges to the Regional Director, the authority closest to the situation.

Since Congress did not intend for the government to regulate the content of collective agreements, once a union and an employer have signed a collective agreement, the NLRB should not intervene to resolve differences that arise in a post-contract dispute. Intervention is warranted only in procedural areas, for instance, when an employer's unilateral change is alleged to be on a mandatory subject of bargaining, thus violating 8(a)(5). In post-contract disputes, the NLRB should be sensitive to the availability of private dispute resolution mechanisms by which the parties have voluntarily agreed to abide. Not only is this approach in keeping with the spirit of the Act, which encourages private, voluntary agreements, but it also results in diversion of potential NLRB cases into private channels freeing the agency's resources for other cases.

This twofold classification of section 8(a)(5) cases includes both inter-contract and intra-contract disputes in one category of post-contract disputes. As discussed below, post-contract dispute cases should be deferred to arbitration when possible. Inter-contract disputes, those which arise during negotiations about a new contract to succeed one which has terminated, will not normally be suitable for arbitration.

and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

Inter-contract disputes may be bitterly contested, particularly those which involve a change in the relative bargaining power of the parties based on the structure and scope of the bargaining arrangement. Issues which typically arise in such inter-contract dispute cases are: the employer's right to close a plant, the employer's right to sub-contract work, the validity of successor and assigns provisions, the union's claim that new enterprises should be brought into the bargaining unit, the employer's demand for a single employer versus multiemployer unit, the demands for performance bonds and interest arbitration. In *NLRB v. Wooster Division of Borg-Warner Corp.*,\(^{12}\) the Supreme Court scrutinized bargaining subjects and identified three distinct types: mandatory, permissive and illegal. The immediate, practical consequences of a bargaining demand being slotted in a given category are of extreme importance.\(^{13}\) For example, labeling a subject of bargaining mandatory rather than permissive is crucially important because it places that subject matter firmly within the realm of joint regulation by the parties. Since determinations of this sort go to the very heart of the Act, they are peculiarly within the province of the NLRB. As such, neither of the previous proposals (deferral to arbitration nor accelerated case handling) is suitable for processing inter-contract disputes.

In some inter-contract disputes, one party may file an 8(a)(5) charge as a tactical maneuver in bargaining. Such charges are frequently not taken seriously by either party and are usually dropped once agreement is reached on a new contract. Since delay in such cases does not imperil the existence of the collective bargaining relationship, and in fact may actually aid the bargaining process, the present methods of processing cases should continue to operate in inter-contract disputes.

### III. Arbitration and the NLRB

In considering how the NLRB can reduce its caseload, one underused mechanism with obvious potential is deferral to arbitration. To improve its efficiency in handling section 8(a)(5)

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13. Some examples include whether a party may insist on a bargaining proposal to impasse, and whether an employer may make a unilateral change.
cases, the NLRB should defer to arbitration in those disputes that arise during the life of a contract when there is no allegation of an independent section 8(a)(1) violation. Continuing adherence to such a policy has the beneficial effect of encouraging employers and unions to resolve contractual differences through the use of a private, voluntary and universally accepted arrangement. In addition, it would have the positive consequence of placing more discretionary responsibility upon the regional offices which are better equipped, at an earlier stage, to determine whether the facts of a particular case do not satisfy the requirements of Spielerguson Co.\textsuperscript{14} or Collyer Insulated Wire.\textsuperscript{15}

Since 1955, when the NLRB decided Spielberg, there has been a trend to defer unfair labor practice cases to arbitration. In Spielberg, the Board held that it would defer to the award of an arbitrator where the arbitration proceedings appeared to have been fair and regular, where all parties had agreed to be bound by the award, and where the arbitrator's award was not clearly repugnant to the purposes and policies of the Act.\textsuperscript{16} The policy of deferring to arbitration took a significant leap forward in 1971 with the decision in Collyer. This case involved an employer's unilateral change made during the life of a contract, allegedly violating both the contract and section 8(a)(5). In Collyer, the Board held that where the contract clearly provides for grievance and arbitration machinery, where no evidence exists that the employer is seeking to undermine the union, where the employer is willing to arbitrate, and where the dispute is well suited to resolution by arbitration, then the Board would defer to arbitration.

Collyer, however, never found acceptance among all members of the Board,\textsuperscript{17} and it is not surprising that the changing composition of the Board has resulted in a slight shift in the policy of deferring to arbitration. In 1977, in General American Transportation Corp.,\textsuperscript{18} the Board held, three-to-two,

\begin{thebibliography}{9}
\bibitem{14} 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).
\bibitem{15} 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971).
\bibitem{16} 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).
\bibitem{17} The 1971 decision was three to two with Member (now Chairman) Fanning and Member Jenkins dissenting.
\bibitem{18} 228 N.L.R.B. 808, 94 L.R.R.M. 1222 (1977). Cases involving alleged violations of sections 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2) would not be deferred.
\end{thebibliography}
that it would no longer defer cases to arbitration involving alleged violations of individual employee rights. At the same time, however, a bare majority of the Board held in Roy Robinson Chevrolet, Inc.\(^\text{19}\) that contract dispute cases, raising issues under section 8(a)(5) or 8(b)(3), would still be referred to resolution under that contract's arbitration machinery.

Since deferral to arbitration under Collyer was a self-imposed policy not mandated by the LMRA, the Board's decision to change its stance and not to defer in certain categories of cases was clearly within the area of discretion accorded the Board by the Act. The demise of deferral to arbitration in individual employee rights cases as dictated by General American Transportation has been sharply criticized by labor relations practitioners.\(^\text{20}\) Additionally, the courts of appeals have been less than enthusiastic about some of the NLRB's pronouncements on points of substantive law which have been made in individual employee rights cases.\(^\text{21}\)

With Collyer cut back so severely, there is a question whether Spielberg will remain unscathed. Although Spielberg may have continuing validity, it is becoming evident that the Board will not defer unless the criteria for deferring to the arbitrator's award have been fully met. In particular, the requirement that the arbitrator's decision not be clearly repugnant to the purposes of the Act is being interpreted to mean that the arbitrator must have made all findings of fact relevant to the unfair labor practice issue and that the arbitrator must have applied Board law in making his award.\(^\text{22}\) The Board's backsliding on Spielberg has met with judicial disap-

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21. See, e.g., Indiana and Michigan Electric Co. v. NLRB, 599 F.2d 185 (7th Cir. 1979), cert. denied, 444 U.S. 1014 (1979); Gould, Inc. v. NLRB, 612 F.2d 728 (3d Cir. 1980), cert. denied, 49 U.S.L.W. 3233 (Oct. 7, 1980). In both cases, the courts of appeals rejected the Board's view that union officers and stewards do not have a special duty to prevent wildcat strikes and to take action to end them.
proval. In NLRB v. Pincus Brothers, Inc. — Maxwell, the Third Circuit held that the Board had to defer to the arbitrator's award because the court found that the arbitrator's award was not clearly repugnant to the purposes of the Act. The court took the firm view that once the Board has articulated a standard, it is an abuse of discretion for the Board to refuse to adhere to the criteria which it itself had clearly defined.

It is imperative that the Board not retreat from the view it expressed in Roy Robinson Chevrolet. Although the desire of some Board members to entertain charges in post-contract 8(a)(5) cases is understandable, such a view if accepted by the majority would place enormous strain on an already overworked system. The justification for putting such a strain on the system is difficult to perceive. It is extremely unlikely that five Board members, inundated by post-contract 8(a)(5) cases, could provide a speedier, more equitable resolution than an arbitrator in the overwhelming number of cases. The experience and training of the staff of regional offices should adequately enable them to recognize post-contract 8(a)(5) cases that should not be deferred to arbitration under Spielberg or Collyer.

Board member John A. Penello, a former regional director, is an outspoken supporter of deferral to arbitration, as his speeches and separate opinions emphasize. But the NLRB, with its changing composition over the years, has never approved the operationally feasible deferral position advocated in this article. However, contemporary conditions, particularly

23. 620 F.2d 367 (3d Cir. 1980).
24. Id. at 372. Judge Rosenn believed that Spielberg was a discretionary administrative doctrine and not the law of Board deferral, Id. at 372 n.8, whereas Judge Garth, concurring, believed the Board was acting pursuant to its delegated rule making authority. Judge Gibbons, dissenting, stated that the majority was doing something almost unprecedented, "holding that there are instances where the Board must decline to hear an unfair labor practice charge made by the General Counsel." Id. at 384.
a heavy caseload, may induce the Board to accord the appropriate weight to arbitration that the Supreme Court indicated it should be accorded in the Steelworkers trilogy cases.  

IV. EXPANDED REGIONAL DECISION MAKING

Enlarging the regional directors’ scope and authority to handle section 8(a)(5) cases is critical to this proposal for speeding up their disposition. Assessing the crucial role of regional offices, former NLRB Chairman (and current management lawyer) Edward B. Miller noted: “Most of the decisions which affect our daily practice are made by the Regional Offices, which, while not perfect by any means, are by and large prompt, efficient and conscientious.”

Mr. Miller’s assessment seems acceptable to many management and union lawyers and scholars familiar with NLRB operations. Regional officers, where all cases are filed, dispose of about eighty-five percent of all cases. Because of this fact, any system proposed for accelerating case handling must begin with intake in regional offices.

The aim of expanding regional office power in 8(a)(5) cases is to maximize the efficient use of the NLRB’s present resources. However, it must be done in a manner compatible with the collective bargaining framework without disturbing existing structures. Regional disposition of representation and section 8(b)(7) cases serve as models. Although the lat-

27. Remarks of former NLRB Chairman Edward B. Miller at the American Bar Association’s Annual Meeting, supra n.16 at D1.
29. There are 33 regional offices in the United States and Puerto Rico.

It shall be an unfair labor practice for a labor organization or its agents—
to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 8(c) of this Act.
ter category requires priority under section 10(1) of the Act, the Board has the authority to accelerate section 8(a)(5) cases by developing procedures patterned after those used in the above-mentioned types of cases.31 Quite clearly, this sort of administrative innovation is long overdue.

Since May 1961, when the Board implemented section 3(b), a 1959 amendment to the Act, by delegating its section 9 powers to regional directors, approximately eighty-five percent of formal representation decisions have been issued by the regional directors.32 The reality is that the regions, except for novel, complex and unusual cases, close almost all representation cases without Board involvement.

There has been virtually no employer, union, congressional, or public criticism of either the process or its results. The only complaints come from some unions who dislike the delays stemming from employer appeals to the Board of regional directors’ decisions. Indeed, delegation is often praised, processing time has been reduced, and staff resources have been used more efficiently. Several of the major elements of the delegation process can and should be adapted to section 8(a)(5) cases.

Among the elements which can be adapted to section

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).


8(a)(5), several are prominent in this proposal. The principal ingredient is the regional director's power to marshal and direct professional resources. Second, his firsthand knowledge, visible responsibility and decentralized authority facilitate speedier decision making. Third, regional directors are concerned about promptness and efficient use of staff resources because they must implement their decisions and live with the parties' reactions. Fourth, regional directors' authority is enhanced because the NLRB will only grant a request for review of their decisions "where compelling reasons exist therefor," and these are limited. And fifth, this entire process is incorporated in the region's learning and feedback system so that the professional staff develops practices, skills, strategies and relationships contributing to time saving and better use of staff resources.

The main features of the process for expediting section 8(b)(7) cases are the regional director's broad authority and the parties' sharply restricted appeal rights. Union picketing for recognition and strategic avoidance of a NLRB election are characteristic of these 8(b)(7) cases in which an employer's charge and petition generally provoke the union's countercharges. These, and perhaps the union's challenge to the employer's appropriate bargaining unit, are obviously intended to wrest recognition and thwart an election. Faced with these intertwined cases and required to act expeditiously, the regional director must proceed promptly, either with or without a formal hearing in the representation case. The adversely affected party has a sharply reduced appeal period. For example, in contrast to usual procedures, parties may not file briefs in a formal hearing without special permission. The same expedited procedure is followed if the regional director dismisses the petition; again, special permission is required for an appeal. Finally, should the charge be dismissed, the party has only three, instead of ten, days in which to appeal.

Several additional aspects of section 8(b)(7) case handling minimize delays: cases are well supported with documentary and testimonial evidence, parties know the evidence must be submitted immediately, the charging employer has a strong

33. 29 C.F.R. § 102.67(c) (1980); Also, 29 C.F.R. §§ 102.77(b), 102.80(a), 102.81(1) (1980).
self-interest for speedy handling, and unions and employers expect fast action and act accordingly. In all aspects section 8(b)(7) case processing provides useful guides for marshalling resources and diminishing case-handling time in section 8(a)(5) cases.

Undoubtedly, much time would be saved by giving regional directors more authority and responsibility in 8(a)(5) cases. The suggested model for these cases is based upon the procedures developed in processing section 8(b)(7) and related representation cases. This proposal, then, is not merely a blueprint to identify some constructive guides and tested criteria. These recommendations have worked efficiently and effectively for many years and deserve adaptation for expediting section 8(a)(5) pre-contract cases.

Other procedures may also prove beneficial. To reduce delay, to improve case handling, and to insure due process to the parties, a joint conference between parties should be held in a number of special cases. The joint conference would be conducted by staff members under the careful supervision of the regional director. However, instead of a field investigation in every section 8(a)(5) pre-contract case, the regional director would decide which cases warranted the joint conference procedure. Having targeted a case, the regional director would assign a professional to conduct the conference. The Board agent would not be bound by rules of evidence, the conference would be informal, and it would be structured to obtain the pertinent facts. There would be no briefs or transcripts, and it is expected that local union and plant personnel would present the evidence.

This arrangement is patterned after the highly successful joint conference in representation cases where many consent election agreements are signed. It is designed to speed handling and to provide unions and management with an opportunity to present evidence of their positions. The Board agent is a facilitator, familiar with the law and procedures and skilled in helping parties achieve an acceptable outcome. The parties know that the agent also has authority to recommend action, a power conducive to effective case handling.

The regional professional would submit a report, including a summary of the facts, an analysis, and findings and recommendations through the supervisory chain ending with the re-
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Regional director. This report would not be furnished to the parties to avoid exceptions which would require more time through another review level. This system comports with present practice in which a professional investigates each party's case and submits an internal final investigation report similar to the one described above. After the regional director has decided, the parties would be informed orally and then the current practice (withdrawal, dismissal, settlement or complaint) would be followed. It is emphasized that this procedure would be experimental, on a selective-case basis.\(^\text{34}\)

The joint conference substitute for field investigations has several advantages. First, it is an excellent forum for prompt disposition of cases. When parties hear adverse and challenging evidence, they must re-examine their own positions. Cases that lack merit would be withdrawn more promptly, and meritorious ones would be settled more quickly. Second, investigation of cases would be accelerated because the regional director would schedule the time, date and place of the conference. Instead of a situation in which the Board agent has to spend time to locate and interview witnesses, to re-interview witnesses because contrasting and missing evidence is developed, and to accommodate his schedule to the available time of the charging party and respondent and their lawyers, all relevant witnesses and documents would be available at the conference. Third, trivial and tactical cases, and those outside the ambit of the Act, would be disposed of promptly. Fourth, knowing this procedure might be used, parties would be less likely to file strategic, blocking charges or unsupported cases. Fifth, professional time and energies would be more efficiently allocated and would be more productively used.

There are, of course, several shortcomings. First, charging parties would have a much heavier burden. Since most refusal-to-bargain charges are filed by unions against employers, the former would have to present legally sustainable cases, just as most employers do in priority cases. With this heavier burden, a question arises as to what extent, if any, agency re-

34. A somewhat similar program adopted for expedited arbitration is being used by the United Steelworkers of America and some steel companies. See Fischer, Arbitration: The Steel Industry Experience, 95 MONTHLY LAB. REV. 7, No. 11 (1972).
sources should be used to assist complaining unions in supporting their charges. Although it may be argued that the proposed requirement upon unions fundamentally changes the NLRB’s responsibility to protect statutory rights, the current environment, within both the agency and the industrial relations community, supports such innovation. Forty-five years after the enactment of the Wagner Act, \(^3\) unions surely have the professional competence and resources to sustain this burden of proof.

The second possible shortcoming of this joint conference procedure would be that each party would know with substantial specificity the other party’s evidence. This, however, is the trend throughout our judicial system where responsive and detailed pleadings, depositions and interrogatories are encouraged, if not required. Proceedings of a judicial nature should not be a game between hunter and hunted. However, an informal, evidence-revealing conference may impair the general counsel’s, management’s, or union’s case should a formal hearing be held.

Two other potential problems cause concern. Respondents and charging unions could exploit the joint conference without forthrightly presenting evidence and arguments or attempting to settle. To prevent these problems, the NLRB professional would have to structure and conduct the conference in such a manner as to minimize the effectiveness of such potential strategies. Finally, the joint conference could end up as no more than an additional stage in the process without any savings in time or professional energies.

Although the joint conference should be tried in selected cases within regions, and experimentally targeted for certain regions, problems will arise. This is part of a broader system of proposed changes intended to cope with urgent administrative problems. Feasible and constructive, it helps regional directors stay close to the cases and provides them with authority and discretion for improving case handling. Since the regional directors will be familiar with the selected cases, will be able to allocate resources to their processing, and will be accountable for the results, the regional director can react

\(^3\) 49 Stat. 449 (1935).
promptly and effectively to strategies and untoward circumstances.

V. CONCLUSIONS AND EMERGING THEMES

A serious challenge facing the NLRB which is troubling both to employers and unions is a yearly rising caseload that shows no sign of abatement. Perhaps the more imposing challenge confronting the NLRB is the urgent need to take action to reduce delays. NLRB structures and procedures badly need revision and updating. Relief for these problems cannot be found by adding more staff or amending the statute. Mounting pressure exists for less government intervention, deregulation, and decentralized administration.

As one part of a larger system for coping with a mounting caseload and slow processing, an unvarying NLRB rule of deferral to arbitration should be adopted where there is no evidence of any independent employer interference with, or restraint or coercion of, employee rights. Although the NLRB currently defers, changing Board majorities and various exceptions render the present policy less than satisfactory. Such a rule would save professional time, give more discretion to regional directors, encourage unions and employers to resolve their own contractual differences through arbitration — their agreed-upon process — and would be consistent with the legal and operational features of collective bargaining. After more than four decades, the NLRB should have a clear and administratively workable rule.

Another part of the proposal is the establishment of two categories of section 8(a)(5) cases, pre-contract and post-contract. The union's inability to negotiate the first agreement because of the employer's allegedly unlawful refusal to bargain is the critical factor delineating the boundaries of the first category. In this stage the NLRB should marshal its resources to act promptly. Public policy demands that employers unlawfully resisting bargaining should not be allowed to use dilatory tactics. Unions are impaired in their ability to strike for a contract. Workers are not sufficiently cohesive, internal organization is weak, strike funds have not yet been built up, and fighting a war against the employer, a new and untried experience, has great potential for backfiring at this stage. In the post-organizational bargaining phase, the em-
ployer's section 8(a)(5) violation can be, and frequently is, successful.

The key during the pre-contract stage is prompt handling. The longer it takes to negotiate the first contract, the weaker the union becomes. By categorizing section 8(a)(5) cases, the regional director would either obtain a settlement or proceed to formal complaint. Singling out such cases for speedy processing is consistent with the statute's purposes and should improve the administration of the NLRB.

Transferring more decision making to the regions is an integral feature of such a proposal. In both representation and priority cases, regional handling has been most effective in allocating regional professional resources to reduce delays. Mindful of the differences between section 8(a)(5) cases on the one hand, and those noted above on the other, sufficient similarities exist to apply the case-processing techniques of the latter to the former. Although the law mandates priority handling for certain types of cases, it does not preclude the NLRB from adapting these procedures to section 8(a)(5) pre-contract cases.

Also, use of the joint conference technique in selected cases is another recommendation designed to save time. These would be conducted by a professional without a transcript, briefs or formal rules of evidence and would replace time-consuming field investigations. Relying upon the Board agent's report, the regional director would decide, the parties would be advised orally, and then current practice would be followed. While such a procedure offers both advantages and shortcomings, the former outweigh the latter to allow experimental implementation on an optional basis.

In an average year, about sixty-six percent of all unfair labor practice charges are withdrawn or dismissed, twenty-eight percent are adjusted and only six percent are litigated. These figures alone demonstrate that regional offices play the key role in case disposition. Unstated and unacknowledged is the assumption that regional directors and regional staffs are fully capable of exercising additional authority with restraint and sensitivity. Realism and experience suggest that this is not absolutely true for every regional office. Since regional of-

fficies have competently handled representation and priority cases, each one is presumptively qualified to undertake the new tasks. If the proposal were implemented and a particular regional office was not adequately handling the changed procedures, the general counsel should be able to correct whatever inadequacies are revealed.

The continuing themes undergirding this proposal are efficiency, better service delivery, fewer redundant actions, faster solutions and concentration of resources on feasible tasks. Efficiency, however admirable and important, is not the only or even the highest value in our government. Other factors to be considered are a growing case load, a hiring freeze, less government intervention, budgetary restraints, tactical charges and demands for better public goods.

Review of NLRB and court decisions during the past few years reveals fairly settled substantive law. Neither significantly new legal principles nor innovative breakthroughs in remedies have emerged. The Board and the courts have been fleshing out some statutory lacunae. In this context the NLRB's major task lies in administration, which has been neglected, if not ignored. Circumstances press strongly for better delivery of NLRB services.

While people familiar with the NLRB concur with this conclusion, few express their views publicly. An exception is former NLRB Chairman Edward B. Miller who observed that NLRB procedures and structures "badly need modernization and updating or they will soon break down." In the same speech, he said that the Board's operating machinery is "too cumbersome, too slow, too awkward and too inadequate to deal with today's caseload." Although there have been many critics of the agency, there have been virtually no reformers in a position to take corrective action. As Derek Bok once noted, in our "decentralized, adversary system of labor relations, there are no union and management organizations with authority or will to join together to improve the quality of legis-

38. Address by Edward B. Miller before the Hawaii Employers Council, Honolulu, Hawaii (November 16, 1972). See also Miller's address before the Central Illinois Industrial Association, Peoria, Illinois (February 1, 1973), which contained similar themes. Copies of these speeches are on file at the Marquette Law Review.

39. Id. For a fuller exposition of former Chairman Miller's views, see E. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB (1977).
lation and the administration and staffing of legal institutions." In such a situation, only the NLRB can be the catalyst for change.

The agency's structure and operations have reflected a continuing shift of authority to the regional directors. While originally only the NLRB could authorize complaints, most regional directors now have this authority. Although Washington must control the budget and staffing, coordinate planning, and furnish direction and leadership, the regional directors should be accorded an increased measure of decentralized discretion.

Library shelves are overflowing with diagnoses of what is wrong, but they are pitifully barren of practical suggestions for rectifying matters. This article and its recommendations contain a strong dose of enlightened practicality, eschewing utopian and nebulous means. Such practicality provides a basis for believing this approach will be accepted by the agency's clientele. The incremental alterations proposed may not be welcomed by all, particularly since they challenge embedded patterns. To decrease resistance to these changes, the NLRB must be prepared to use publicity, persuasion, exposition and determination.

The overall aim is to meet the needs of those who use, or might use, this proposal. The users of first importance are managers at all levels of the enterprise, union officers and lawyers representing both employers and unions. While this proposal may not be entirely satisfactory or necessarily an enduring solution, even an incremental move in the direction of improved output, better service delivery, faster disposition, justice in the workplace, and marshalling of resources is to the good. Others may analyze, support, criticize or suggest a substitute for this proposal. Whatever specific position is espoused, it must be borne in mind that the situation at present urgently demands that something be done now to meet the goals mentioned above.