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THE CASE FOR UNITARY ENFORCEMENT OF FEDERAL LABOR LAW—Concerning a Specialized Article III Court and the Reorganization of Existing Agencies

by

Charles J. Morris

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SPEAKING at the Williamsburg Conference on the Judiciary,¹ the President of the United States reviewed the condition of American law enforcement and concluded that there was an urgent need to improve the prevailing system of justice. Although he was referring primarily to criminal law enforcement, the same assessment might be made of certain components in our system of civil procedure. This is especially true of the enforcement of the multiple federal laws which regulate private sector labor relations. As President Nixon stated, "'More of the same' is not the answer. What is needed now is genuine reform—the kind of change that requires imagination and daring, that demands a focus on ultimate goals."²

This writer believes that the most urgent need in labor law today is procedural reform to improve the enforcement of the substantive rules already existing.³ It is my thesis that an imaginative restructuring of administrative and judicial machinery into a unitary system is required, and that such a system would provide a more effective means to achieve the ultimate goals of national labor policy.

These ultimate goals are firmly established. They are the basic substantive rules embedded in the language of the statutes and elaborated in key decisions of the Supreme Court. These rules shape the distinctive contours of American labor law.⁴ The legal doctrines in this system include the following:

1. A democratic means to establish or reject union representation.⁵

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² Id. at 422.
⁴ See generally C. Morris, THE DEVELOPING LABOR LAW (1971) [hereinafter cited as DEVELOPING LABOR LAW].
(2) A concept of exclusive majority representation by labor unions.\(^8\)
(3) An obligation by the employer and union representative to bargain with each other in good faith.\(^7\)
(4) Enforceability of collective bargaining contracts through grievance procedures, arbitration, and the judicial process.\(^8\)
(5) Regulation of the economic weapons which may be used in relation to collective bargaining.\(^9\)
(6) Protection of employees against various forms of discrimination by either employers or unions.\(^10\)

Changes in substantive law will continue to be needed and adopted. Relatively minor changes in the overall structure of labor law also will likely occur from time to time. For example, reform legislation regarding the handling of emergency disputes,\(^1\) and the extension of existing laws to cover agricultural employees,\(^2\) may be enacted in the near future. But the basic direction of the American labor law system will probably not be altered so long as our economic system remains relatively intact.

American labor law has now arrived at a stage in its legal development where the nature of the need for change invites, though, of course, does not guarantee, an attitude of statesmanship among the various interest groups which participate regularly in the labor law process, i.e., unions, management organization, minority groups, and public interest spokesmen.\(^3\) Their objective

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\(^5\)NLRB Chairman Miller, testifying recently before the Thompson Committee, commented: [T]he problems go wider and deeper than I think the testimony before you thus far has directly indicated. . . . [W]e need some new, creative thinking in order to develop proposals which are both sound and also as acceptable as possible to the sometimes divergent views of the several segments of the industrial relations community and of the variety of views represented in Congress. . . . [I hope there will develop] a joint labor-management initiative which would result in a mutually acceptable approach which could then be articulated in draft legislation for the consideration of the Congress.
should be a joint effort\(^1\) to achieve meaningful improvement in the administration and enforcement of existing labor laws in the private sector. I am aware of the great odds against the formation of any such program of togetherness among these diverse groups. However, within the procedural package presented here, there is perhaps enough mutual advantage to surmount innate suspicion—at least temporarily.

### I. The Urgent Need for Procedural Reform

Labor law enforcement is unduly complex. Administration of the various laws is spread among too many different agencies and tribunals whose jurisdictions overlap and conflict. The field has become a paradise for labor lawyers and other specialists in industrial relations. To the employees for whose protection the laws were designed, however, the field has become a veritable maze. In a bungling way the system works for most of the employees most of the time. But for many it does not work at all. There is nothing about the practice of labor law, any more than there was about the precarious art of common-law pleading, to merit special admiration. The intricacy of the system serves no social purpose when it fails to deliver on its promises to substantial numbers of employees and to other groups whose rights the law is presumed to protect. The sporting theory of jurisprudence should have disappeared with trial by combat.\(^5\)

It would be a mistake to focus only on the National Labor Relations Act\(^6\) in the search for areas in need of procedural reform. We need to be reminded occasionally that labor relations are also governed by other federal laws, such as the federal common law of the collective bargaining agreement under section 301 of the Taft-Hartley Act,\(^7\) title VII of the 1964 Civil Rights Act,\(^8\) and the 1866 Civil Rights Act,\(^9\) the Labor-Management Reporting and Disclosure Act,\(^10\) the various wage and hour statutes,\(^11\) and the Age Discrimination in

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\(^2\) Joint legislative action has not been the norm in the passage of federal labor laws. See *Developing Labor Law* 1-110. However, the railroads and railroad unions on several notable occasions have jointly sponsored legislation. See Railway Employees Dep't v. Hanson, 351 U.S. 225, 240 (1965) (Frankfurter, J., dissenting) (regarding the passage of the 1926 Railway Labor Act); Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 37 (1957) (regarding the passage of the 1934 Railway Labor Act).

\(^3\) See note 81 infra.

Employment Act of 1967, and, for two major industries, the Railway Labor Act. There are other federal statutes which further regulate the employment relationship. Employee relations simply cannot be divided into tight little compartments with convenient labels.

A general reassessment of the procedural devices which have been created in a piecemeal fashion to administer and enforce the half-dozen or more labor statutes regulating private sector employee relations seems warranted. In this age of computers and space travel it is surely possible to develop an integrated system of administrative and enforcement tribunals that would achieve two reasonable objectives: (1) a maximum of voluntary compliance; and (2) a fair and efficient means to enforce involuntary compliance.

The need for reform has grown more acute as the emphasis in labor problems has shifted markedly away from problems concerning union organization. Today, the fastest growing area of concern, at least in the private sector, is precisely where collective bargaining already exists. As collective bargaining has come of age, new problems and new laws have emerged. But old methods, characterized especially by inadequate NLRB action, still prevail. The new problem areas involve contract interpretation, arbitration, racial and sexual discrimination, and relations between the employee and the union which is legally authorized to represent him. Existing procedures for treating both the old and new problems are demonstrably inefficient or inappropriate.

A. The National Labor Relations Board—
   Its Perennial Problems

There is a growing awareness among interested observers that the NLRB has failed in its mission of providing adequate means to achieve the policy objectives which Congress intended. Severe criticism of the Board is of course an old story. For thirty-six years certain familiar voices have regularly denounced the Board, its members, and the underlying legislation which encourages the practice of collective bargaining. It is easy to dismiss such criticism as voices of reaction nostalgically crying for a return to a laissez-faire system of employer-employee relations. But it is not so easy to dismiss some of the newer voices of dissent. These voices often urge reform of the Board rather than its destruction or replacement. However, many of the current charges cut so deeply into the Board's vital parts that reform and repair are pitifully inadequate to correct what in reality are inherent procedural defects.

Consider the recent testimony before the Thompson Committee by Bernard Kleinman, General Counsel of the United Steelworkers. He scored the Board's "proven ineffectiveness against determined violators," a conclusion which he...
found reflected in the refusals to bargain in forty-four percent of employer violations of the Taft-Hartley Act.77 Jerome Cooper, a prominent attorney who represents unions in the South, told the same congressional committee that he had some tendency to believe that the Board should be abolished because it has come perilously close to being a fraud on unorganized workers in his area.78

In an earlier Article on procedural reform in labor law, I arrived at a similar conclusion, stating that "after 34 years, the National Labor Relations Act still requires vigorous enforcement, [and that] voluntary acceptance and compliance have not been achieved to the extent necessary for successful execution of the national labor policy."79 I concurred in the Thompson Committee findings that "there is a 'regrettable unwillingness on the part of some to accept the basic tenets' of the Act," and that "[a] growing body of evidence indicates that the freedom of choice guaranteed by Congress—to join a union or to refrain from so doing—has not worked well in practice."80

Administrative Delay. Many of the Board's friendlier critics consider delay to be the major obstacle to effective enforcement of the Act. Florian Bartosic predicated his proposal for reform on the need to eliminate delay.81 The Cox Panel82 in 1960 and the Pucinski Subcommittee83 in 1961 likewise focused on the delay factor. Delay is indeed a serious problem, but it is only a symptom

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77 See also Statement of Elliott Bredhoff, General Counsel for Industrial Union Dep't, AFL-CIO, Hearings on H.R. 7152, supra note 13, at 187: [E]ven after more than thirty-five years of purported legislative protection, there is still not presently any meaningful, effective or timely remedy to counter a hard core employer who engages in an unlawful refusal to bargain or discriminatorily discharges an employee to discourage membership in a union. . . . [T]he Board . . . has yet to fashion remedies which effectively protect employees in the exercise of their most fundamental rights under the Act.

78 Hearings on H.R. 7152, supra note 13, at 253. See also Harris, The Choice Before Us: Labor Board, Court, or District Court, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS—17TH ANNUAL INSTITUTE 331, 332-34 (1971).

79 The AFL-CIO has joined the ranks of critics of the National Labor Relations Board. At its Biennial Convention in Bal Harbour, Florida, it passed a resolution indicting the administration of the National Labor Relations Act. The resolution stated that the NLRB's efforts toward achieving the statutory objective of protecting the rights of workers to join unions and bargain effectively "raise doubts as to the continued viability of the Act and the law which administers it." It noted that one of the reasons for the increase in discriminatory discharges "is that the act as administered by the board and the courts, has in many cases become virtually useless." The resolution concluded that "the labor act is substantially failing in its purposes as far as workers and unions are concerned" and recommended that "the National Labor Relations Act should be essentially rewritten, and its administration by the board substantially changed, to make it effectively enforceable against employers and fair as between employers and unions." The resolution contained specific proposals which the labor federation contended would further these objectives. BNA, Daily Labor Report, at DI-3 (Nov. 22, 1971).

80 Morris, supra note 3, at 555-56.

81 See also Statement of Elliott Bredhoff, General Counsel for Industrial Union Dep't, AFL-CIO, Hearings on H.R. 7152, supra note 13, at 187: [E]ven after more than thirty-five years of purported legislative protection, there is still not presently any meaningful, effective or timely remedy to counter a hard core employer who engages in an unlawful refusal to bargain or discriminatorily discharges an employee to discourage membership in a union. . . . [T]he Board . . . has yet to fashion remedies which effectively protect employees in the exercise of their most fundamental rights under the Act.

82 Hearings on H.R. 7152, supra note 13, at 253. See also Harris, The Choice Before Us: Labor Board, Court, or District Court, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS—17TH ANNUAL INSTITUTE 331, 332-34 (1971).

83 Id. at 5.


of a more fundamental weakness: The Board's inherent inability to achieve either widespread voluntary compliance or sufficient involuntary compliance through the use of effectual procedural devices.

**Frequent Policy Shifts.** Among the Board's chief deficiencies, and one that has been the subject of widespread criticism, is that the political appointment of Board members for five-year terms creates a tendency for certain Board policies to make pendulum-type swings which reflect shifts in national political administrations. A typical comment regarding this phenomenon was the statement of Leonard Janofsky, speaking on behalf of the United States Chamber of Commerce: "What alarms the business community is that the NLRB restructures the Federal labor law to coincide with the political and socio-economic predilections respecting industrial relations of those individual members who happen to constitute a majority of the Board at any particular time." During the various time periods in which such majority shifts have occurred, the Board has been characterized, quite naturally, as the Truman Board, the Eisenhower Board, the Kennedy-Johnson Board, and now the Nixon Board. These labels are of course too simplistic, but there is truth in the general accusation regarding political swings of the pendulum, for the policy shifts can be easily documented. Regardless of the accuracy of the charges, however, and also regardless of the advantage that may be claimed for such policy shifts, such as the importance of national labor policy being responsive to political, economic, and social changes, the conclusion remains that the Board's public image has suffered from such shifts. Accordingly, widespread voluntary acceptance of NLRB rulings has been difficult to achieve. The Board has had a credibility problem in the matter of stare decisis.

**Lack of Effective Process and Equitable Remedies.** Another important problem area traceable to the Board's organizational structure is the unavailability of...
quick and certain equitable relief. Injunctive relief is, of course, fully available and mandatory under section 10(1) for most of the serious union unfair labor practices. But this is not always a desirable remedy, for a 10(1) injunction is usually issued without regard to the ultimate outcome of the case, and it is issued by a court which will have no responsibility for the final decision. The unfulfilled promise of the section 10(j) injunction, which requires General Counsel initiation plus specific authorization by the Board and then the convincing of a local federal judge that a temporary injunction should be granted, demonstrates that 10(j) is structurally incapable of being the swift and sure temporary remedy that is needed if the Act's guarantees are to be meaningful.

For the great bulk of unfair labor practice cases, the only remedy in contested actions is the one which waits at the end of the long road that winds tortuously from charge, to investigation, to issuance of complaint, to hearing before a trial examiner, to reproduction of the stenographic record, to filing of briefs, to the issuance of the trial examiner's intermediate report, to filing of exceptions with more briefs, to the internal Board procedures whereby the record is again read, analyzed, digested, and summarized as a memorandum, until finally a Board decision emerges. Then may come appellate review. The majority of NLRB orders in contested cases are either appealed or require appellate enforcement.

The absence of traditional judicial remedies encourages violations of the Act. After thirty-seven years, the largest segment of the Board's unfair labor practice business is still the discriminatory discharge. This should not be too surprising, for the Board's cumbersome process is itself an organizational gambit in the game of union versus management. When a respondent employer chooses not to settle a case, the Board has no option but to proceed through all the laborious steps of prolonged litigation. And this time-consuming process will exhaust the patience of any employee but the heartiest and most persistent. According to the Thompson Committee report, "administrative judicial remedies are"

41 See DEVELOPING LABOR LAW 847-51; cf. Terminal Freight Handling Co. v. Solien, 444 F.2d 699 (8th Cir. 1971).
45 See DEVELOPING LABOR LAW 820-40.
46 35 NLRB ANN. REP. 19, 76-84, 93-125, 194 (app. A, table 19) (1970). Obtaining appellate enforcement of the decision may prove to be more time consuming than appeal of the decision. See generally DEVELOPING LABOR LAW 874-80.
48 See Statement of Arnold Ordman, NLRB General Counsel [including charts compiled by NLRB Data Processing Section (May 24, 1971)], Hearings on H.R. 7152, supra note 13, at 383. The charts show 1970 fiscal year lapse time (median days) for handling of an 8(a) (3) allegation to be: From filing to complaint—55 days; from complaint to the close of a hearing—61 days; from the close of a hearing to a trial examiner's decision—81
delay in processing [8(a) (3)] cases vitiates any effective redress—economic pressures force these discharged employees to forego their right to reinstatement in exchange for a partial 'back pay' award . . . .

This conclusion is supported by the statistics in the Board's annual reports. During the 1970 fiscal year,\(^1\) 6,828 employees were awarded back pay. But for the same period only 3,779 employees were offered job reinstatement, and of these only 2,723 accepted reinstatement. If we assume that these figures refer to the same group of 8(a) (3) discharges (an assumption which is surely valid for the bulk of the cases), only thirty-nine percent of the discharges whose cases were meritorious actually obtained reinstatement. The average amount of back pay collected by the discharged employee was only $403 (a sum undoubtedly smaller than the average attorney's fee paid). Even the largest back pay awards, obtained after time-consuming appellate court enforcement of the Board's order, were relatively small. Because discharged employees are under a duty to mitigate damages,\(^2\) these awards averaged less than $888 per employee. If temporary injunctions were readily available—and this would be true for 8(b) (2)\(^3\) conduct by unions as well as for 8(a) (3) conduct by employers—it is likely that fewer discharge cases would require full litigation on the merits. Most would probably settle; but of greater consequence, the number and frequency of discriminatory discharges would probably decrease. There would be little if any tactical advantage to be gained from a discharge, and, because of the effect on other employees, an early reinstatement is something that the employer would ordinarily wish to avoid.

More meaningful remedies are required for all types of unfair labor practices. When an order to bargain is finally issued in an 8(a) (5)\(^4\) case, often after several years of frustrating litigation, the notice posted on the wall may seem hardly worth the effort.\(^5\) If the Board could tailor-make an equitable remedy and issue appropriate process early enough to preserve the vital positions of the parties, and if the Board had its own contempt authority to enforce its orders

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\(^3\) See, e.g., F.W. Woolworth, 90 N.L.R.B. 289 (1950).


\(^5\) Id. at § 158(a) (5).

\(^6\) E.g., Statement of Irving Abramson, General Counsel for International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Hearings on H.R. 7152, supra note 13, at 225:

Nothing so convincingly demonstrates the ineffectiveness of the collective bargaining obligation as reading opinions of the courts of appeals in the contempt cases, noting the date the union was certified, the date the court decided the contempt case, the reference to the loss of union majority, and the failure of the adjudication to do more than once again order the employer to bargain . . . . Legal scholars have repeatedly pointed to the ineffectiveness against a recalcitrant employer of the refusal to bargain obligation because of the absence of an effective remedy . . . .
both interim and final, there would be no need for an H. K. Porter-56 or an Ex-Cell-O-type remedy, and no need for the Board to intrude between the parties in fashioning collective bargaining clauses and benefits. It is in the exercise of its judicial function (in its "C" case jurisdiction and not in its role in representation cases) that the Board is basically weak. It is here that radical restructuring needs to occur.

It should be obvious to us, as it is obvious to many foreign observers, that the NLRB in the exercise of its unfair labor practice jurisdiction is in reality a court. But it is a court whose options for remedial action are severely limited. And this limitation is an Achilles' heel. The debate about a labor court is thus not whether there should be such a court, but what kind of a court it should be.

If there is any doubt that the Board is a court when exercising unfair labor practice jurisdiction, we need only to be reminded of the Board's long-standing inability to accommodate to the rule-making requirements of the Administrative Procedure Act. Only after a majority of the Supreme Court in Wyman-Gordon55 asserted that promulgation of the Excelsior name-and-address rule constituted rule-making did the Board begin to use APA rule-making procedures, and then only on a very limited basis. It is not just happenstance that NLRB rule-making makes more sense in representation cases than in un-

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56 H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). The Supreme Court held that the Board had no remedial authority to require a party to agree to a specific bargaining proposal or to incorporate a provision in a collective agreement (check-off provision) even though the refusal to incorporate the provision was found to be caused by the employer's desire to frustrate the collective bargaining process.

57 Ex-Cell-O Corp., 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740 (1970), aff'd, 449 F.2d 1058 (1971). The Board, after holding the case for 3 years following oral argument, refused to require the employer to compensate employees for wages and fringe benefits which arguably they would have obtained at an earlier date in the collective bargaining contract if the employer had not refused to bargain in violation of the Act. The Court of Appeals for the District of Columbia Circuit affirmed the order of the Board while noting that "[t]he time delay is unusual and vexing—reflecting principally three years in which the Board considered the Union's request for additional relief. In hindsight, the Board should have promptly ordered the bargaining as at least partial relief." 449 F.2d at 1063. See also International Union of Electrical Workers v. NLRB, 426 F.2d 1243 (1970).


58 "To a European, or at least a British, observer the United States harbors a strong 'labor court' in the National Labor Relations Board, as reconstituted by the Taft-Hartley Act in 1947. Its prosecuting arm (the office of general counsel) was thereafter distinct from its judgment board. Like the Swedish court, it is a central national tribunal. It enforces the 'peace obligation' under the provisions of the same Act. Essentially, it is surely a kind of labor court." Wedderburn, Conflicts of "Rights" and Conflicts of "Interests" in Labor Disputes, in DISPUTE SETTLEMENT PROCEDURES IN FIVE WESTERN EUROPEAN COUNTRIES 65, 74-75 (B. Aaron ed. 1969). "[T]he American NLRB... for practical purposes might be considered an American counterpart of the European labor courts." Schmidt, Conciliation, Adjudication, and Administration: Three Methods of Decision-Making in Labor Disputes, in DISPUTE SETTLEMENT PROCEDURES IN FIVE WESTERN EUROPEAN COUNTRIES 45, 49 (B. Aaron ed. 1969).

55 In the two years following Wyman-Gordon, the Board's single foray into rulemaking concerned the establishment of jurisdictional standards applicable to private colleges and universities. See 29 C.F.R. § 103.1 (1972).
fair labor practice cases. The difference between the two kinds of cases is the difference between judicial action and administrative or quasi-legislative action.

Institutional Problems. Among other shortcomings in the Board's process is the institutional unwieldiness of the organization. Chairman Miller has predicted that it would not be long before the Board would be asked to review so great a volume of cases that he could not perceive how it would physically be possible for each member to give the careful and judicious attention that the parties have a right to expect.

Vast duplication of effort within the Board's structure seems inherent in the system. A case begins with the gathering of affidavits by the charging party; then there is an investigation by an NLRB field examiner, evaluation by the NLRB regional office, and possible review by the General Counsel's office in Washington. Following the issuance of a complaint, the case is heard by a trial examiner, who eventually writes a detailed opinion after studying the transcribed record of the hearing, the exhibits, and the briefs of the parties. This is almost always followed by the filing of exceptions by one or more of the parties, and more briefs are submitted to the Board in Washington. At this point the typical case will be almost a year old. Then begins the long internal process whereby the case winds its way slowly through the legal staffs of individual Board members, with a decision by the Board finally emerging many months—and sometimes years—later.

Most of the Board's institutional problems are self-fed. To a considerable
extent, the Board's case-load increases because it takes so long to process a case, and it takes so long to process a case because there are so many cases. That cycle will not be broken until the number of cases can be reduced. The Board's inability to strike quickly, firmly, and with certainty against violators contributes to the staggering case-load. Certainty of enforcement would encourage more voluntary compliance, which would in turn reduce the case-load and also shorten the time required for the handling of contested cases.70

Another factor which contributes to delay is the absence of pretrial discovery. Its availability would shorten the time required for hearings and probably lead to fairer trials and settlements. This has been the experience under the Federal Rules of Civil Procedure,71 and there is nothing peculiar to the law under the National Labor Relations Act which would suggest a contrary result.

Appellate Review. Another shortcoming in the present structure, as several commentators have noted, is the high incidence of appellate review.72 Self-enforcing orders would tend to discourage frivolous appeals and would also expedite compliance with the Board's orders.

Unreviewable Power of the General Counsel. Another serious procedural problem, which many critics have tended to overlook or defend,73 is the unreviewable power of the General Counsel to determine whether and when a complaint should issue. Experienced labor law practitioners can usually cite numerous examples of cases which seemed especially meritorious to the charging party but which came to an early demise because the regional office refused to issue a complaint. Sufficient evidence may have been lacking in many such cases, but without the availability of pretrial discovery, all material evidence could never come to light. Other meritorious cases may have gone untried simply

70 This should encourage earlier compliance, especially if the decision-making tribunal has its own power of contempt; and it should also be conducive to more settlements. With fewer cases to handle, contested cases would be disposed of more expeditiously.


72 E.g., Bartosic, supra note 32, at 655. See also Administrative Office of U.S. Courts, Ann. Rep., table B-3 (1970). The high incidence of NLRB appeals is demonstrated by a comparison of NLRB appeals with those from all other federal agencies. Almost half (46.7%) of all cases of court of appeals review of administrative orders in 1969 were NLRB cases. The NLRB had three times as many appeals as the Tax Court, three times as many as the Immigration and Naturalization Service, more than four times as many as the Federal Power Commission, and more than four times as many as all the rest of the agencies combined.

73 E.g., Professor Bartosic, supra note 32, at 655, states that the alleged abuses have never been demonstrated. He may be correct if by "demonstrated" he has reference to a controlled study of the thousands of cases that have been dismissed or otherwise disposed of informally. It is hoped that such an empirical study will some day be conducted, though the task will be formidable. In the meantime, one must rely on personal observation and experience, which for this author (who actively practiced before the NLRB for 18 years) leads to the conclusion that a substantial number of meritorious cases have been dismissed by the General Counsel's office. Many such dismissals have been for lack of evidence, although the material facts establishing the unfair labor practice were usually suspected but not pursued. Since the charging party is generally required to produce evidence making out a prima facie case, and since discovery is not available, numerous meritorious cases which vigorous prosecution could save are never allowed to surface.
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because NLRB investigators and first-line agency attorneys conceivably exercised poor judgment in recommending dismissal of the charges. No one really knows how many valid charges have been thus denied a hearing.\(^{74}\)

Board personnel appear proud of the high number of cases which are disposed of informally. For example, Chairman Miller in his first major address after taking office, pointed to the fact that eighty-five percent of the charges filed with the Board were disposed of "without the need for a trial" and were closed out within forty median days, a record which he characterized as "fairly impressive."\(^{75}\) But most of those were dismissed or withdrawn and not settled. Chairman Miller would probably have been less impressed if it could be established with certainty that in some of those cases there was a need for a trial. The Board's Annual Report for fiscal 1969\(^{76}\) reveals an interesting analysis of what actually happened to the bulk of the unfair labor practice charges filed with the NLRB. During that year a total of almost 19,000 "C" cases were closed. Of these, thirty-one percent were withdrawn (ordinarily a withdrawal is only a polite form of dismissal) and thirty-six percent were dismissed without the issuance of complaint. These figures add up to a staggering two-thirds of all the cases filed. It is hard to believe that among those almost 13,000 unreviewable determinations there were not substantial numbers of meritorious cases that could have been proved had such elementary discovery devices as written interrogatories or oral depositions been available. Perhaps many others, particularly cases that hinged on credibility determinations, could have been proved had live evidence been heard and evaluated by someone in addition to the field examiner.

The defect in the system is in the office itself\(^{77}\)—in the absence of opportunity for review of the General Counsel's refusal to issue a complaint, and in the absence of a right of the charging party to process his own charge in lieu of action by the General Counsel. The problem of unreviewable discretion also raises a serious due process question.\(^{78}\) The solution, however, lies not in

\(^{74}\) Kenneth Culp Davis has noted the structures for internal review within the General Counsel's office and is high in his praise of those procedures. K. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY 205 (1969); [1970 Supp.] K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.08, at 194-95 (1971). Without citing any evidence, empirical or otherwise, on which to base his conclusion, Professor Davis says the system succeeds. He apparently measures that success by the smoothness of the operation, and he is unperturbed by the fact that there is no provision for review by an external tribunal, or by the fact that the internal procedure is not often used and rarely results in a reversal of the original action. No figures are presently available indicating the percentage of regional office dismissals which are appealed. However, of those which are appealed, on the average only about 6% have been reversed by the General Counsel's Office of Appeals. See 1 CCH LAB. L. REP. § 1150.05 (1968). Professor Davis apparently exempts the NLRB General Counsel from his general charge that: "Our system of justice has too long ignored the enormous discretionary power of prosecutors. Such power need not be unfettered. It can and should be confined, structured, and checked. The judicial habit of regarding prosecutors' discretion as unreviewable for arbitrariness or abuse is very much in need of reexamination." [1970 Supp.] K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16, at 990 (1971).

\(^{75}\) Address by NLRB Chairman Miller, Oct. 8, 1970, in LABOR RELATIONS YEARBOOK 206, 208 (1970).


\(^{77}\) This criticism is, of course, leveled at the statutory authority of the General Counsel, not at any individual who has held that office. The tradition of honesty coupled with outstanding ability was exemplified by Arnold Ordman, who recently retired from the position after eight years of distinguished service.

\(^{78}\) On the nonreviewability of the General Counsel's discretion (court without jurisdiction either to order issuance or to set aside refusal to issue complaint), see, e.g., Hamlet
destroying the office but rather in providing a viable legal alternative to the General Counsel's refusal to authorize a complaint. The office of General Counsel, or one similar to it, is essential to the scheme of the statute if legal promises are to become realities for the groups intended to be protected.

**Jurisdictional Conflicts.** Lastly, there is the matter of conflicting jurisdiction with other tribunals and other laws. Because unfair labor practice cases increasingly involve questions relating to enforcement and interpretation of collective bargaining contracts, circumstances requiring the accommodation of arbitration awards and court decisions under both section 301 and title VII.


If the General Counsel holds against the complaining party and refuses to issue an unfair labor practice complaint, the decision is apparently unreviewable. From the viewpoint of an aggrieved employee, there is no trace of equity in this long-drawn, expensive remedy. If he musters the resources to exhaust the administrative remedy, the chances are that he too will be exhausted. If the General Counsel issues a complaint, then he stands in line for some time waiting for the Board's decision. If the General Counsel refuses to act, then the employee is absolutely without remedy.

Prior to issuance of a complaint, the charging party has no right of participation in the settlement of his charge. Sears, Roebuck & Co. v. Solien, 450 F.2d 353 (8th Cir. 1971), cert. denied, 92 S. Ct. 1242 (1972). Once a complaint issues, however, the charging party is entitled to an evidentiary hearing on his objections to an informal settlement between the regional director and the respondent. See Leeds & Northrup Co. v. NLRB, 357 F.2d 527 (3d Cir. 1966). See generally DEVELOPING LABOR LAW 834-35. But cf. Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136 (5th Cir. 1971); Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970). The claimant, after first filing charges with the Equal Employment Opportunity Commission under title VII of the 1964 Civil Rights Act, may maintain a separate civil suit to judicially: (1) determine question of alleged employment discrimination even if the EEOC found no reasonable cause to charge employer violation; or (2) compel involuntary compliance with the law even if EEOC failed to obtain voluntary compliance by the employer. There is no presumption against judicial review and in favor of administrative absoluteness unless that purpose is fairly discernible in the statutory scheme. Congress simply did not intend for EEOC to preempt the ultimate rights of the claimant. See Goldsbery v. Kelley, 397 U.S. 254, 261-71 (1970), in which the Supreme Court held that a duly qualified welfare recipient is entitled to evidentiary hearing before terminating title IV Social Security Act benefits which are considered a matter of statutory entitlement. Procedural due process requires: (1) timely and adequate notice detailing the reasons for termination; (2) an effective opportunity to defend—confront adverse witnesses and present own arguments and oral evidence; and (3) the recipient be given a right to counsel. Moreover, the decision maker must: (1) be impartial, not having participated before in the determination under review; and (2) state the reasons for his determination and indicate the evidence relied on. The Court went on to state its policy grounds: "[T]he interest of the eligible recipient in the uninterrupted receipt of public assistance [which provides him with essential food, clothing, housing, and medical care], coupled with the State's interest that his payment not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." 397 U.S. at 265.


have become commonplace. Considerable amounts of time, money, and legal talent are expended on jurisdictional issues in these cases, but still the selection of an appropriate forum is at best a Hobson's choice. At worst, it may be the wrong choice. An aggrieved party might obtain only an incomplete remedy—or even no remedy at all—because he has chosen the wrong forum. Many types of cases involve the issue of conflicting jurisdiction. An examination of four currently active types will serve to illustrate some of the more critical areas where the proliferation of enforcement tribunals presents jurisdictional dilemmas: (1) cases concerning the duty of fair representation; (2) cases concerning successorship in collective bargaining; (3) cases concerning discrimination against minority employees; and (4) conflicts between NLRB action and the arbitration process.

(a) The Duty of Fair Representation. The dilemma which typically faces the Board in a common type of fair representation case was illustrated in Automotive Plating. The Board found a union in violation of the duty of fair representation because it had refused to process the grievance of a discharged employee. On the strength of the Supreme Court's decision in C & C Plywood, the Board asserted that it had jurisdiction to construe the collective bargaining contract to determine if in fact the discharge was in violation of the agreement. The problem, however, was the Board's lack of jurisdiction over the employer, for there had been no allegation of collusion with the union and neither section 8(b)(2) nor section 8(a)(3) was involved. The Board's remedy was to order the union to process the grievance and, if necessary, to carry it to arbitration. As might have been expected, the employer declined to arbitrate; whereupon the Board ordered the union to pay the aggrieved employee back pay from the date of the initial refusal to handle the grievance until such time as the union "fulfill[ed] its duty of fair representation" or the employee obtained equivalent employment, whichever was sooner. This remedy would seem to be in conflict with the more limited measure of union damages which

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81 See Bok, Reflections on the Distinctive Character of American Labor Laws, 84 Harv. L. Rev. 1394, 1462-63 (1971). The author takes issue with "the highly decentralized, adversary environment" of labor law practice, "the traditional preference for elaborate procedures, multiple opportunities for review, and highly particularized decisionmaking" and a mentality "motivated by individual, short term interests [which] encourages the search to find loopholes and exceptions or create tactical delays." All of this is productive of litigation, and adds to the legal burdens. He calls into question "the efficiency of the system" and asks "whether all of its forms and elaborations are worth the cost they entail." That is: "Are the various rules having their intended effect on the behavior of the parties? What are the costs of delay and in what types of cases are they most severe? What are the total costs of administering particular rules and are all these costs justified? And why do we continue to have a large and mounting number of elementary [discriminatory discharge] cases?" The author calls "for new methods of research . . . not favored by legal scholars [to confront] such issues and develop new ways of analyzing them . . . . Students of regulation must point to inefficiencies in the process and suggest simpler or more effective substitutes."

82 E.g., Automotive Plating Corp., 170 N.L.R.B. 1234 (1968), enforced, 454 F.2d 17 (2d Cir. 1972).


the Supreme Court approved in *Vaca v. Sipes*; and, indeed, the Second Circuit denied enforcement. What meaningful remedy could the Board have ordered, given the fact that it had no jurisdiction over the employer? Would any remedy have been appropriate in the absence of a finding of wrongful discharge? And could such a finding have been made without the employer being a party to the action? The most meaningful remedy, the remedy of reinstatement, could certainly not have been achieved without jurisdiction over the employer. Ideally, in *Automotive Plating* there should have been several claims for relief: one against the union, either as an unfair labor practice charge or a separate cause of action filed in court in the tradition of the Steele* and Huffman* cases; and a separate claim against the employer alleging a contract violation under section 301, since the Maddox doctrine of exhaustion of remedies had apparently been satisfied. It is preferable that such claims against multiple parties be joined in a single proceeding in order that complete relief, including reinstatement if the contract has been violated, may be awarded. If the action had been filed in a court, the appropriate remedy might have included a requirement for arbitration. But under the present system of divided jurisdiction, the employee in *Automotive Plating* had to choose between accepting the free legal service provided by the General Counsel through the NLRB, which could only render inadequate relief, or pursuing a more costly court action, which would have been handled by his private attorney.

(b) *Successorship.* Another area of jurisdictional conflict is found in the cases involving successorship in collective bargaining. The Supreme Court's recent decision in *NLRB v. Burns International Securities Services, Inc.* illustrates the folly of a system in which jurisdiction of the same subject matter is divided among different tribunals. The NLRB in *Burns* had held that "absent unusual circumstances," the national labor policy embodied in the National Labor Relations Act "requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor." The Board based its decision on *John Wiley & Sons v. Livingston,* in which the Court had held, in a case arising under section

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87 "The governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." *Vaca v. Sipes*, 386 U.S. 171, 197 (1967).

88 NLRB v. Local 485, Int'l Union of Elec. Workers, 454 F.2d 17 (2d Cir. 1972). The initial order of the Board requiring the Union to process the employees' wrongful discharge grievance was upheld. The court denied enforcement of the supplemental Board order for full back pay under the rule of *Vaca* which calls for apportioning liability for the employee's damage between the union and the employer based on the damage each caused. Yet the court raised the question of whether the Supreme Court's decision of *Czosek v. O'Mara*, 397 U.S. 650 (1965), had altered the apportionment test of *Vaca* which seems to limit a local's liability. *Id.* at 23.


95 376 U.S. 543 (1964).
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301,88 that a successor employer was obligated to arbitrate pursuant to a collective bargaining agreement which had been negotiated and agreed to by the predecessor employer, notwithstanding that the successor employer was not a party to the agreement.

In deciding that Burns had committed a per se refusal to bargain, in violation of section 8(a) (5), by refusing to honor its predecessor's collective agreement, the NLRB showed little understanding of the parallel problems involving arbitration under section 301, as to which the Board, of course, had no jurisdiction. The NLRB, in holding that Burns was bound to its predecessor's contract "as if it were a signatory thereto,"89 was relegating to itself the task of deciding which agreements applied to which successors. Seemingly oblivious of the role of the arbitrator under the Wiley decision, the Board indicated that "absent unusual circumstances" the successor would be bound to the entire contract. If the NLRB were to find unusual circumstances, however, the employer would be bound by no part of the agreement, which obviously meant he would not be bound even by a provision requiring arbitration.88 The Second Circuit reversed that part of the Burns decision which held that the employer was bound to honor its predecessor's collective bargaining agreement. It did not reverse the finding of refusal to bargain based on Burns' refusal to recognize the incumbent union as the bargaining agent for its employees.89 The Supreme Court affirmed the circuit court.100

This is not the occasion to embark on a detailed analysis of the Justices' opinions in Burns. One feature of the majority opinion, however, is especially relevant to the focus of this Article. Although the Court disagreed with the Board, it, too, fell into the trap of viewing the issue solely as one involving unfair labor practices. It is regrettable that the procedural and appellate structure applicable to arbitration and section 301 of the Labor-Management Relations Act is entirely separate from the structure applicable to sections 8(a) (5) and 8(b)(3) of the National Labor Relations Act. The Court, in its zeal to reverse the NLRB, contributed new confusion to the meaning of Wiley in the context of section 301 enforcement and the duty to arbitrate. True, the court restated the Wiley holding to the effect that the agreement to arbitrate "survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract."81 The Court then proceeded, however, to stress Wiley's "narrower holding [which] dealt with a merger occurring against a background of state law,"102 and ignored Wiley entirely in presenting the rationale as to why, under section 8(a) (5) the

89 74 L.R.R.M. at 1101.
88 In Emerald Maintenance, Inc., 188 N.L.R.B. No. 139, 76 L.R.R.M. 1437 (1970), the Board found the unusual circumstances because the successor was operating under a limited-term government contract. Thus, the employees lost their entire agreement, including the grievance procedure.
90 441 F.2d 911 (2d Cir. 1971).
100 92 S. Ct. 1571 (1972).
101 Id. at 1581.
102 Id.
successor employer should not be "saddled" with the terms and conditions of employment contained in the old collective bargaining agreement.

Where does this leave arbitration and section 301 judicial enforcement of any provision, including an arbitration provision, of a predecessor's agreement applied to a successor employer? The Court in Burns was not concerned with that problem. But the two problems are related, indeed they may be the same. They only appear different because parties to labor agreements in such cases must exercise choices as to both law and forum, and one choice generally precludes the other.

Burns and other successorship cases furnish additional proof of the need for one tribunal to have combined jurisdiction to determine both unfair labor practice charges and section 301 claims arising from common circumstances. As demonstrated by the jurisdictional conflicts in the successorship cases, a single tribunal should be able to do a better job in distinguishing contractual disputes from refusal-to-bargain disputes. At least it is reasonable to expect that a tribunal with combined unfair labor practice and section 301 jurisdiction would show more willingness to defer to arbitration than the NLRB has shown. Moreover, with one tribunal having such combined jurisdiction, the conventional doctrine of res judicata becomes viable. A party would thus be bound not only as to the claim he raises in the original action, but also as to any other claim which he could have raised on the basis of the same fact situation. It is within the capability of our legal system to fashion machinery which would accommodate such mixed claims, whether they be denominated unfair labor practices or simply claims for judicial relief arising under federal law.

(c) Employment Discrimination. The third area of potential jurisdictional conflict involves employment discrimination based on race, religion, or sex. These cases demonstrate that the present system cannot satisfactorily accommodate the doctrine of res judicata. Exemplifying the inefficiency of existing procedures, and also their unfairness, was the Sixth Circuit decision in Tipler v. du Pont de Nemours & Co. This was an action for reinstatement and damages brought by a discharged employee claiming racial discrimination in violation of title VII. The employer had successfully defended against an unfair labor practice charge by the same employee on the same facts. The employer was next brought before the Equal Employment Opportunities Commission and then before the federal district court on the title VII charge. Affirming the district court, the circuit court denied the employer's plea of res judicata and collateral estoppel, pointing out that, although the two laws are not totally dissimilar, "their differences significantly overshadow their similarities." Considering the divided jurisdiction between the Board and the courts, the appellate court had no other meaningful choice. Its decision meant re-trying the old facts under a new theory; an unsound practice which would not have been necessary had the doctrine of res judicata been available. This example is an-

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104 443 F.2d 125 (6th Cir. 1971).
105 Id. at 128.
other situation, and not an unusual one, where the objectives of two separate
laws could have been reconciled and been better served if a single tribunal had
jurisdiction to hear and determine claims arising under both laws.

Congress recently amended title VII to allow the EEOC to institute enforce-
ment actions in the federal district courts. There is nothing in the new amend-
ments, however, to prevent multiplication of actions and remedies among
different tribunals and different statutes. If anything, the conflicts will
probably increase simply because the volume of judicial enforcement of title
VII actions is now expected to increase.

(d) The Arbitration Process. Another conflict area, one which has existed
for some time, involves the relation of NLRB action to the arbitration pro-
cess. In such cases the Board may not choose to defer to arbitration; the
Board's power to make determinations in unfair labor practice cases is not
affected by any other means of adjustment, including arbitration. That is the
teaching of such cases as Cary v. Westinghouse Electric Corp. and Strong
Roofing. There is growing recognition, however, that the Board should ex-
ercise more restraint than it has previously shown in the issuance and processing
of complaints which might be handled through the parties' own grievance and
arbitration procedures. Even if the Board has now become more receptive to
arbitration, such an effort at accommodation can be only a palliative because
the Board has no direct control over the arbitration process and no responsi-
bility for review under section 301.

A more fundamental revision is required. Since arbitration of grievances
concerning the application or interpretation of an existing collective bargaining
agreement is favored by the national labor policy, as the Supreme Court re-
mined us in Boys Markets, it would be desirable, and less destructive of
established collective bargaining, for the tribunal which has jurisdiction in an
unfair labor practice case involving arbitration and/or the interpretation of
provisions in a collective bargaining contract also to have jurisdiction over any
related section 301 issue. Such jurisdiction should, of course, be exercised within
the familiar framework of Lincoln Milt, and the Steelworker Trilogy.
B. Other Federal Labor Laws
and the Tribunals Which Administer Them

Title VII Civil Rights Act Enforcement. An area of conflict is developing around the degree of accommodation which should be accorded grievance arbitrations when related actions are filed with the Equal Employment Opportunities Commission and the federal courts under title VII. Such a case was *Dewey v. Reynolds Metal Co.* Dewey was discharged for refusing either to work on Sunday or to provide a replacement who would work on that day. He based his refusal on religious beliefs. A grievance was submitted to contractual arbitration, and the arbitrator found that Dewey's discharge had been justified under the collective bargaining agreement. Subsequently, Dewey requested the United States Office of Federal Contract Compliance to review his discharge and to find that it was based on religious discrimination. The OFCC found no basis for that charge, whereupon Dewey turned to the EEOC and submitted a charge with that agency claiming the discharge had been motivated by religious discrimination. The EEOC determined that there was reasonable cause to believe that the company had engaged in unlawful employment practices in violation of title VII and authorized the filing of suit in federal district court. The district court ruled in Dewey's favor, ordering reinstatement with back pay and enjoining the company from requiring him to work on Sunday. The Sixth Circuit reversed, holding, *inter alia*, that by pursuing the grievance procedure under the agreement Dewey had made an election of remedies which thereby precluded his bringing an action in court. The court of appeals declared: "Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator . . . the arbitrator has a right to finally determine them."

The Fifth Circuit in *Hutchings v. United States Industries, Inc.* arrived at the opposite conclusion, holding that "[a]n arbitration award, whether adverse or favorable to the employee, is not per se conclusive of the determination of Title VII rights by the federal courts . . . ." Although the Supreme Court granted certiorari in *Dewey*, the conflict between contract arbitration and EEOC procedures remains unresolved, for the Court split four-to-four, affirming without opinion the Sixth Circuit decision. Although each federal district court already has jurisdiction under both title VII and section 301, if there were a single judicial body charged with specialized jurisdiction over the major areas of labor relations it is conceivable that earlier resolution would be provided for the type of problem that *Dewey* and *Hutchings* illustrate.

There were numerous shortcomings in the enforcement procedures provided


*428 F.2d 303, 311 (5th Cir. 1970).*
by the original title VII. In particular, reliance on private litigation, except perhaps in pattern-of-practice cases, meant that enforcement for some employees was difficult, and for others it was non-existent. Strong pressures were exerted in Congress to improve the enforcement procedures. Only weeks before passage of the 1972 amendments, the approach which seemed to be most widely favored was to confer cease-and desist power upon the EEOC. Such a solution would have traded one set of problems for another. The creation of another independent agency, with jurisdiction overlapping that of the NLRB and the lower courts in such areas as contract enforcement and fair representation, would have compounded the present jurisdictional problems even further.

What ultimately emerged from Congress may, in the long run, prove almost as unwieldy. As previously noted, Congress gave the EEOC authority to bring its own enforcement actions in the federal district courts. Should the courts become sufficiently clogged, should differences in interpretation and remedy among the various courts go unresolved for too long a period, and should jurisdictional overlaps and conflicts with NLRB action or arbitration awards increase, there may once again develop a recognized need for another approach to the enforcement of title VII. But the 1972 amendments will probably improve the record for enforcement of title VII, although this record may be achieved at the expense of other laws which also govern the employment relationship.

The state of labor law enforcement thus continues to be analogous to the six blind men touching and describing an elephant. The subject matter of employee relations, from the standpoint of the agencies and tribunals which enforce the many legal principles applicable to those relations, tends to be viewed as fragmented, unrelated parts, each bearing a different label: unfair labor practices; unfair employment practices (title VII discrimination); breaches of the duty of fair representation; grievances under collective agreements; or miscellaneous judicial actions for damages and injunctive relief. A unitary system of enforcement which would interrelate these parts, and thereby identify and vitalize the elephant-like subject matter of the various laws which regulate employee relations, would be a wiser course for EEOC reform, and for labor law reform generally.


122 E.g., the experience of one district EEOC office (Dallas, Texas) indicates the following case disposition percentages (working estimates): Of the "total number of charges filed" (TNCF), approximately 50% show "reasonable cause" the law has been violated after an investigation of the facts. Of this number, approximately 50% (25% TNCF) are successfully conciliated to the complete satisfaction of the respondent employer and the employee charging party. For the remainder (25% TNCF), there is no completely satisfactory conciliation—15 to 25% (4% to 6% TNCF) of this group go to court; 75 to 85% (19% to 21% TNCF) of this group go without any remedy, although in this number are some instances where the employer has partially complied with the EEOC requested remedy. Interview with Mr. Gene R. Renslow, Dallas District Director of Equal Employment Opportunity Commission, in Dallas, Texas, Sept. 18, 1971.


125 See Morris, supra note 3. See also Northrup, Will Greater EEOC Powers Expand
Pension Plans. Another area of conflicting jurisdiction involves employment pension plans. Such plans have long been subject to the mandatory bargaining obligation of section 8(a)(5) of the NLRA.166 Pension plans which result from, or are subject to, a collective bargaining agreement are enforceable contracts.157 When such a plan is expressly referred to in a collective bargaining agreement, a suit brought on the plan may be considered a suit under section 301 of the LMRA to which federal law would apply,158 and arbitration under that agreement should be applicable.159

Such plans are primarily subject to the requirements of section 302 of the LMRA. But federal district courts, in fact, also have jurisdiction, under section 301 of the LMRA, to review section 302 pension fund agreements and their administration. Exercising such jurisdiction, one court has allowed a class action by a committee of pensioned miners against the union to force the union as trustee to sue the mine operators for delinquent royalty payments due the retired miners as beneficiaries under the fund.160 Another court has struck down a "signatory last employment" clause as arbitrary and without rational basis, since it operated to deny pension benefits to an applicant who retired from an employer, non-signatory to a trust fund agreement, despite his previous employment by signatory employers who had made substantial contributions into the fund.161

Until recently, the picture was further complicated by an NLRB holding that retired persons were employees for whom the employer must bargain collectively with the union concerning retirement benefits. The Sixth Circuit reversed that holding and the Supreme Court affirmed.162

Obviously, the interrelation of these several statutes—not to mention the lingering impact of state law—suggests the advantage which might accrue from centering cases involving employee pension plans in a single tribunal with jurisdiction broad enough to adjudicate all the different issues.

Railway Labor Act Deficiencies. The Railway Labor Act163 is another statute which stands in need of reform. One of the infirmities from which that Act


156 E.g., Inland Steel Co. v. NLRB, 77 N.L.R.B. 1, enforced, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).


159 But see In re Mobil Oil Co., 43 Lab. Arb. 1287 (1965), Turkus, Arbitrator, holding that the parties could not rely on the arbitration clause in the collective bargaining agreement unless it incorporated the pension plan by reference. See also Sigismondi v. Queens Transit Corp., 73 L.R.R.M. 2479 (N.Y. Sup. Ct. 1969). The court took the position that pension plan disputes between an employer and the union were not arbitrable unless there was either an express arbitration provision in the plan or it was sufficiently incorporated into the collective bargaining agreement containing an arbitration clause.


suffers is that its enforcement depends primarily upon local federal district courts even though limited areas are by law carved out for separate determination by the National Mediation Board,194 by the various adjustment boards,188 and by the Civil Aeronautics Board.186 Just as the Tower bill197 would give enforcement of the substantive provisions of the NLRA to the regular federal district courts, the RLA already confers similar jurisdiction on these trial courts. The result is not a happy one.198 The result may prove to be even more unhappy if the Supreme Court's decision in the Chicago & Northwestern case199 stimulates a rash of new cases in which various United States district courts are called upon to determine: (1) Whether a union or a carrier is exerting under section 2(First) of the Act "every reasonable effort to make and maintain"140 a collective bargaining agreement (i.e., bargaining in good faith); (2) whether a strike or other economic action initiated by one of the parties constitutes a breach of that obligation; and (3) whether an injunction should issue if such a breach is found.

The task which Chicago & Northwestern imposes on the district courts is but typical of the many complex doctrines which hundreds of non-specialized federal judges have long been required to apply to the railways and airlines and to their employees and unions. The absence of a concentration of judicial experience under the RLA at the trial court level impedes development of a comprehensible body of law under this statute and renders its enforcement unduly difficult.141

Another serious defect in the enforcement of the RLA is the absence of an officer comparable to the NLRB's General Counsel charged with prosecuting cases arising under the substantive provisions of the statute. Such an officer is especially needed to enforce individual employee rights, including rights involving breach of a union's duty of fair representation.142

Among the other deficiencies that relate to the administration of the RLA are the following: The National Mediation Board is reluctant—or unable—to establish more realistic bargaining units, especially in the airline industry.143 The hearing procedures (or absence of procedures in many instances) in NMB representation cases are less satisfactory than those which the NLRB maintains in representation cases under its jurisdiction.144 Serious conflicts exist among

194 See Morris, supra note 3, at 546, 552. The absence of a single decisional authority other than the Supreme Court has also contributed to the confusion regarding the respective roles of courts and boards in the resolution of disputes based on statutory violations.
197 See Morris, supra note 3, at 552.
198 Id. at 553. See also Harlan, Developments: Past and Future in the NMB's Determination of "Craft or Class," 35 J. AIR L. & COM. 394 (1969); Heisler, Inconsistencies of the National Mediation Board in Its Interpretation and Definition of the Terms: Craft or Class, 35 J. AIR L. & COM. 408 (1969).
various RLA tribunals in the determination of inter-union jurisdictional disputes. The mingling within the same agency of the NMB's mediatory role with its quasi-adjudicatory role, which it exercises in representation cases, hinders fulfillment of both roles.\textsuperscript{146} The cumbersome and fairly inflexible procedures which have been developed under the RLA contribute to the stifling of collective bargaining under that statute.\textsuperscript{146}

It has become commonplace to criticize labor relations under the Railway Labor Act, and various reform proposals have been advanced.\textsuperscript{147} However, the most serious problems under the existing statute stem more from inflexible and unwieldy administrative devices created by or developed under the statute than from any shortcomings in the substantive duties which the statute imposes. When one considers the traditional attachment of both management and unions to the RLA—despite its shortcomings—it is apparent that procedural reform will be easier to achieve than outright repeal. But if it would be a mistake to create another NLRB to enforce title VII, it would be an even greater mistake to confer Taft-Hartley Act coverage of railroads and airlines on the present NLRB. There is nothing in the NLRB's record of coping with its present jurisdiction that would indicate a capability for handling the complicated collective bargaining problems which are common to the railroads and the airlines.

If enforcement of the Railway Labor Act were given to the same tribunals which are charged with enforcement of parallel provisions of the Taft-Hartley Act, in time a unified body of substantive labor law for all industry in the private sector might be attained.\textsuperscript{148} The need for procedural reform under the RLA is so urgent that the time may be ripe to devise and establish common procedures to provide more effective administration for both the RLA and the NLRA, along with the administration of other federal statutes regulating employee relations.

Other Relevant Federal Statutes. Included among the other federal statutes which regulate employee relations are the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act),\textsuperscript{149} the various wage and hour laws,\textsuperscript{150} the Age Discrimination in Employment Act of 1967,\textsuperscript{151} and the Veterans' Reemployment Act.\textsuperscript{152}

\textsuperscript{146}See Morris, supra note 3, at 552.
\textsuperscript{147}Id. at 554.
\textsuperscript{148}See, e.g., Redenius, Airlines: The Railway Labor Act or the Labor Management Relations Act?, 20 LAB. L.J. 293 (1969); Symposium on Air Transportation Relations, 35 J. AIR L. & COM. 313 (1969). Note in particular, Aaron, Comments on Papers Presented at the Symposium on Air Transport Labor Relations at 513-20. "With varying degrees of intensity, the speakers have expressed dissatisfaction with the application of the Railway Labor Act to airlines. . . . Suggested remedial measures have ranged from modest proposals for more research into existing practices to bold recommendations for a complete reorganization of labor law administration, including the creation of a labor court. . . . My own view, repeatedly stated for some time past, is that the Railway Labor Act has outlived its usefulness and should be repealed."
\textsuperscript{149}See Morris, supra note 3, at 559-74.
\textsuperscript{151}See note 21 supra.
A case could be made for inclusion of the enforcement procedures of each of these statutes, and perhaps others, within a unitary judicial system designed primarily for administration of the Taft-Hartley Act, the Railway Labor Act, and title VII of the 1964 Civil Rights Act. The advisability of including these additional statutes with the three statutes, which I have here arbitrarily designated as primary, would be predicated on two premises: (1) the closely related nature of the subject matter of their coverage makes them ideal for administration by a unitary judicial system, and (2) a unitary judicial system could provide a specialized forum ideally suited by experience and outlook to handle enforcement problems arising under an interrelated set of laws. Inclusion of the additional statutes, however, might well await demonstration of successful administration of the three primary statutes in the proposed unitary system.

II. AN APPRAISAL OF THE SCENE

The scene presented by the foregoing survey of enforcement problems besetting the nation's principal labor laws is one of confusion and frustration. It is a picture of inefficient administration and inadequate compliance; a jurisdictional nightmare of overlapping and conflicting decisions. There exists a tableau of never-ending campaigns to achieve accommodation among separate tribunals with related but different areas of interest.

We have witnessed the NLRB as a bull in the china shop of contractual rights, for the NLRB has no direct jurisdiction over contractual disputes and no claim to special expertise in handling such disputes. On the other hand, the NLRB can legitimately claim some expertise in its primary role of protector of the organizational rights of employees and enforcer of the collective bargaining process. The Board's chief problem in that role, however, is its lack of adequate process.

The jurisdictional picture in fair representation and minority discrimination cases is especially depressing. The minority employee has available to him a variety of laws and tribunals, but the remedy that he finally obtains from these tribunals is often inadequate. An aggrieved minority employee who claims discrimination may seek out the NLRB in a fair representation action if a union is involved, or he may file suit in state or federal court in the same situation; or, if the employer is also involved, the employee might attempt arbitration under a collective bargaining contract and then seek enforcement of his contractual rights in a judicial action under section 301. More likely,
however, he will pursue the title VII route through a state agency or the EEOC, then proceed to federal court, either in an action brought by the EEOC or in a private action, unless his interests are included in a pattern or practice case. Some minority employees might choose to bypass the EEOC and seek direct judicial enforcement of the right to contract for employment without discrimination pursuant to the 1866 Civil Rights Act. Another forum might be the Department of Labor and its Office of Federal Contract Compliance, in which the employee would assert his rights under the Presidential executive order relating to employment by government contractors and subcontractors. Notwithstanding the availability of these many forums, effective remedies for employment discrimination based on race and sex have so far proven to be quite illusive.

III. PROPOSED ALTERNATIVE: A UNITARY SYSTEM FOR THE ADMINISTRATION AND ENFORCEMENT OF FEDERAL LABOR LAW IN THE PRIVATE SECTOR

A. Other Proposals

Various alternatives have been advanced to improve the functioning of the existing agencies. It has been suggested that the unfair labor practice jurisdiction of the NLRB be transferred to the federal district courts, and also that the NLRB be converted into a legislative court somewhat similar in structure to the Tax Court, with judges serving for extended terms. Another proposal recommends retaining the Board but giving it certiorari-type review over trial examiners' decisions and making Board orders self-enforcing. There are also proposals to confer cease-and-desist power on the EEOC, and proposals to repeal substantial parts of the Railway Labor Act and bring railroads and airlines under the Taft-Hartley jurisdiction. These and many other recommendations for patches and palliatives to be applied to existing structures have been much debated. It is not my purpose to add debate to debate. It is sufficient simply to note a fundamental deficiency common to all of them: Each proposal repeats the errors of the blind men describing the elephant and fails to treat the interrelated subjects of labor law as a whole. Many of the proposals would probably provide some limited improvement over the present situation,

156 See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1163, 1195-1259 (1971); Peck, Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums, 46 WASH. L. REV. 455, 458-66 (1971). It is too early to appraise the success of the recent amendments to title VII. Although the volume of enforcement actions is likely to increase as a result of the new EEOC authority to bring direct judicial actions, congestion in the federal district courts is also likely to increase. See text accompanying notes 124, 125 supra.
160 See note 124 supra, and accompanying text.
but others might even reduce the degree of compliance from that now achieved. None would get at the root of the overall problem.

B. A Unitary System

The acute need for change within all the primary areas of labor law jurisdiction is sufficient to suggest that enforcement of these related statutory areas be entrusted to a coordinated and unified system. The devising of such a coherent regulatory mechanism will require the delicate blending of proper kinds and quantities of judicial and administrative authority. Innovation will be essential. There will be constitutional pitfalls to be avoided, particularly concerning the task of separating judicial function from legislative or executive function. However, the Supreme Court has already provided support for the basic plan here proposed, for it has recognized the constitutionality of a specialized article III court. Such a court is the keystone of the unitary system herein recommended. Labor law seems ideally suited for this bold venture.

Three years ago I advanced the proposition of a program of procedural reform in labor law which had as its core a specialized article III court. That
program, characterized as a "working hypothesis," was at that time primarily designed for the administration of the Taft-Hartley Act and the Railway Labor Act, although the possibility of extending it to other related statutes, including title VII of the 1964 Civil Rights Act, was noted. Further study and reflection about that program have reconfirmed my view that development of a unitary system is the most logical way to achieve substantial improvement in both compliance and enforcement under the federal labor laws. Moreover, the experience under title VII, which produced the recent congressional effort to strengthen the procedural arm of the EEOC, suggests that it would also be desirable to treat title VII ills together with the older and more familiar ailments that have long plagued the administration of the Taft-Hartley and Railway Labor Acts.

The administration of public laws designed primarily to protect employees requires the use of agency action. Hence, certain administrative machinery should be retained but modified. It is commonly accepted that an administrative board can determine questions concerning representation (e.g., decide appropriate bargaining units or conduct elections) better than a court. Likewise, mediation functions are peculiarly non-judicial in nature and thus require an administrative organization. An administrative general counsel—or public prosecutor—should be available to furnish investigatory and prosecutory services for alleged statutory violations. But a court is needed to provide a judicial forum and a strong judicial process. These administrative and judicial elements comprise the core structure of the proposed unitary system.

Stated briefly, this system would consist of a constitutional court with jurisdiction over the enforcement of the substantive rights and duties contained in the Labor-Management Relations Act, the Railway Labor Act, title VII of the 1964 Civil Rights Act, and perhaps other federal labor laws. The court might appropriately be called the United States Labor Court. Complementing this judicial structure would be a revised administrative structure. With regard to the three named statutes, a merger of both personnel and function of existing agencies would produce two new agencies and a new office for investigation and prosecution:


187 See Morris, supra note 3, at 560 n.154.

188 Consider the recent comment of NLRB Chairman Miller before the Thompson Committee:

Thus far in our history we have seen fit to let each of these policies be administered and adjudicated by independently isolated administrative and judicial bodies. This has a potential . . . of creating multiplicity of litigation even to the point of harassment of respondents. . . . If the Congress is seriously to consider action designed to produce a truly modern and effective labor judiciary, might it . . . be time now to establish some kind of consolidated or coordinated labor judiciary, both in order to achieve a consistent and unified administration of Federal policy and in order to avoid multiplicity of litigation over complaints growing out of the same conduct by a single alleged offender. . . . [W]e should be looking to develop a labor judiciary adequate not only to overcome our immediate problems, but adequate also to the total needs of our time.

Miller, supra note 13, at 23-24.

189 See notes 16-24 supra, and accompanying text.
(1) The representation functions of the National Labor Relations Board and the National Mediation Board would be combined for handling by a single board, which could be called the National Labor Representation Board—a new NLRB.

(2) The mediation functions of both the National Mediation Board and the Federal Mediation and Conciliation Service would be merged into a single mediation agency, which might be called the National Mediation Service—the NMS.

(3) The General Counsel of the NLRB would be retained, but the scope of his jurisdiction would be expanded to include authority to investigate, issue complaints, and prosecute actions under the Railway Labor Act and title VII, as well as under the NLRA. This additional authority would not require merger of function or personnel for any agency under the Railway Labor Act, though a merger of the Equal Employment Opportunities Commission and its regional offices with the office of the NLRB General Counsel and the regional offices of the National Labor Relations Board would be required. The new office would also prosecute pattern-or-practice cases under title VII. By virtue of his expanded jurisdiction, the holder of this new office should perhaps be called the General Labor Counsel—a more accurate identification of the broad functions of the proposed new position.

IV. COMPONENTS OF THE UNITARY SYSTEM

A. The United States Labor Court

Jurisdiction. The jurisdiction of this article III court would cover the enforcement of rights and duties under the three primary labor statutes, the Labor-Management Relations Act, the Railway Labor Act, and title VII of the 1964 Civil Rights Act, but it could also include enforcement of other statutes. Jurisdiction under the LMRA would cover not only unfair labor practices under section 8 of the NLRA, but also sections 208, 209, and 210 (the provisions relating to fact-finding and injunctions in national emergency disputes), section 301 (the provision for judicial enforcement of labor agreements), section 302 (the section relating to restrictions on payments to employee representatives), and section 303 (the secondary boycott damage suit provisions). Jurisdiction under the Railway Labor Act would be essentially the same as that now exercised by the regular United States district courts. In like manner, jurisdiction under title VII would also be transferred from the regular federal district courts to the United States Labor Court.

Judges. Inasmuch as the court would be organized under article III of the Constitution, its permanent judges would have life tenure and would be appointed with the advice and consent of the Senate. These appointments could

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174 For an alternative plan for title VII, see note 188 infra.
pose a serious problem of political imbalance if made all at the same time or if all or most of them were made by one President. Such an imbalance might be avoided if the appointments were spread over three presidential terms. These incremental increases in the number of judges would also be matched by corresponding incremental increases in the court’s jurisdiction. A timetable that might achieve considerable political balance in the initial appointments, and also provide for a gradual transfer of jurisdiction from the tribunals of original jurisdiction while the court gains in both size and experience, is here suggested.

A court of thirteen judges is proposed. The number is arbitrary. It is based on sheer speculation as to how many judges will be needed; and the need will be contingent on how the court is organized, the extent to which it makes use of adjunct judges (commissioners), and the amount of litigation which will be either generated or discouraged by the new system. The full complement of thirteen judges would not be attained for a period of from six to nine years, depending on the date of the enabling legislation in relation to the incumbent President’s term of office. Only five of the judges would be appointed immediately. The next four judges would be appointed during the first year of the next presidential term, and the last four judges would be appointed during the first year of the following presidential term. The appointments—all subject to close senatorial scrutiny—would thus be made by either two or three different Presidents. Since appointments would be national in scope, the political pressures at work would be oriented to the national rather than to the state or sectional level; the exercise of senatorial courtesy would thus be minimized if not altogether eliminated. This process is calculated to produce a bench of highly qualified judges with varied experiences and backgrounds. Should the need for more judges later arise, Congress could of course authorize the appointment of additional judges.

Acquisition of Jurisdiction. The full statutory jurisdiction of the court would be acquired in three stages over the same six-to-nine-year period during which judicial appointments are made. There are various combinations of statutory increments which could effect a reasonably smooth and satisfactory transfer of jurisdiction to the new court. One such plan is offered here. Immediate jurisdiction would be conferred over the principal statutory areas over which the United States district courts already have jurisdiction; i.e., over title VII actions, over enforcement of Railway Labor Act provisions, over actions under section

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177 NLRB Chairman Miller, testifying before the Thompson Committee, said “[A]ny reconstituted labor judiciary, to be truly effective, must not only be impartial but also appear to be impartial and the parties who appear before it must have faith and confidence in its impartiality.” Miller, supra note 13, at 293.

178 An alternative plan would be to confer the full statutory jurisdiction initially on the new court, but to have the appointment of the permanent judges still spread over three presidential terms in the manner set forth in the text. Under this plan it would be necessary to make heavy use of temporary judges borrowed from other federal benches in order to assist the regular judges of the court in handling the docket. This alternative approach might be more easily abused with one-sided political packing of the court than would be the case under the plan set out in the text. The alternative has the advantage, however, of effecting a speedy transfer of jurisdiction, and it eliminates problems that might arise from a lame-duck Labor Board. On balance, this writer favors the plan in the text, for it also encourages judicial specialization, thought to be an advantage in the field of labor law.
301 of the LMRA, over the issuance of temporary injunctive relief under sections 10(j) and 10(1) of the NLRA, and over enforcement of sections 302 and 303 of the LMRA.

Notwithstanding these limits, the court could exercise pendent jurisdiction over any action which would ultimately be included in its regular jurisdiction. The court, of course, would have complete discretion as to whether it would assert jurisdiction over the unfair labor practice charge, to avoid abuse by a party who might seek to extend jurisdiction through joinder of an unfair labor practice charge with a frivolous or minor claim under the court's direct and immediate jurisdiction. It is intended that during this initial jurisdictional period in the court's operations the National Labor Relations Board would continue to be the principal forum to decide unfair labor practice cases. Certain types of cases, however, would be especially appropriate for the exercise of pendent jurisdiction. For example, an unfair labor practice charge alleging that a union breached its duty of fair representation in failing to process a discharge grievance, thereby violating sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the NLRA, could and should be joined with a possible section 301 action against the employer and/or a judicial action against the union. This should be done where a breach of fair representation is claimed and where the validity of the 301 claim depends, in whole or in part, upon a finding that the employer has violated the collective agreement. Pendent jurisdiction likewise would be appropriate in a title VII case where unfair labor practices could also arise from the same fact situation.

The court's second jurisdictional stage is reached with the appointment of four more judges. Statutory jurisdiction would then be expanded to cover the unfair labor practice sections of the NLRA which are primarily concerned with the individual rights of employees: section 8(a)(1) (relating to interference by employers with protected employee rights); section 8(b)(1) (relating to union interference with protected employee rights); section 8(a)(2) (relating to employer domination and support of labor organizations); section 8(a)(3) (relating to discrimination in employment practiced by employers); section 8(b)(2) (relating to union induced employment discrimination); section 8(a)(4) (relating to protection of employees who file charges or testify under the Act); and section 8(b)(5) (relating to excessive union initiation fees).

The court's third and final jurisdictional stage is reached when the last four judges are appointed. The court would then acquire coverage over the remaining provisions of the NLRA. These relate generally to the forms of unlawful activity that unions and employers might direct against each other, rather than against employees. They include the unfair labor practices which are immediately concerned with operation of the collective bargaining process and use of economic weapons: sections 8(a)(5) and 8(b)(3) (defining the duty to bargain collectively); section 8(b)(4) (relating to secondary activity and jurisdictional disputes); section 8(e) (proscribing "hot-cargo" agreements);

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section 8(b)(7) (relating to picketing for organization and recognition); and section 8(b)(6) (relating to "feather-bedding").

None of the lines dividing the three suggested jurisdictional increments should be drawn too sharply, for the typical NLRB complaint case covers several unfair labor practice sections. During the court's early years it may be difficult to determine with precision whether certain cases should be filed with the lame duck NLRB\textsuperscript{184} or with the United States Labor Court. The court should have the authority to devise and announce guidelines to assist the General Labor Counsel and other parties in the selection of the appropriate forum.

Organizational Structure and Method of Operation. The court's method of operation should be organized for maximum efficiency consistent with judicial due process. It is contemplated that the court would make substantial use of adjunct judges who would act as hearing officers in most of the contested cases. Incumbent NLRB trial examiners would undoubtedly be eligible for selection to these positions.

To some extent the jurisdiction and duties of the adjunct judges would resemble that of referees in bankruptcy.\textsuperscript{185} They would be invested, subject to review by a judge of the United States Labor Court, with jurisdiction to hear cases, make findings, and issue orders. Like referees in bankruptcy,\textsuperscript{185} they would be appointed by the court and would serve as judicial officers.\textsuperscript{185} Their appointments would probably be for terms of six or more years. A final order issued by an adjunct judge would be a final determination of the rights of the parties involved in the controversy unless timely challenged by a petition for review to a tenured judge of the court. Most, although not necessarily all, cases would be heard initially by adjunct judges. The court, subject to statutory requirements and guidelines, would determine its own organizational structure and method of operation.\textsuperscript{185}

It may be assumed that the court's headquarters will be in Washington, D.C.; however, it should have authority to sit anywhere in the United States or its territories. Terms of court, with one or more judges and several adjunct judges sitting, would be held regularly in major metropolitan areas. The court would be empowered to sit and function through an adjunct judge, a single tenured judge, in panels, or en banc. Either a single judge or an adjunct judge could act on pleas for temporary injunctive relief. In addition to the court's permanent judges, other federal judges would sit from time to time to aid in handling the docket. Especially during the court's early years, before it acquires its full complement of permanent judges, it may be necessary to make regular

\textsuperscript{181} See Moris, supra note 3, at 565.


\textsuperscript{183} W. COLLIER, BANKRUPTCY §§ 22.05, 38.02 (14th ed. 1971); Weidhorn v. Levy, 253 U.S. 268 (1920); Mueller v. Nugent, 184 U.S. 1 (1902).

\textsuperscript{184} Although the adjunct judges would be judicial officers, their judicial authority would be delegated from one or more of the tenured judges of the court; they would not be full status judges in the sense of having life tenure and senatorial confirmation. They would, however, be addressed as "judge."

and extensive use of the common federal judiciary practice of borrowing judges from other federal benches.

The congressional objective in the establishment of the court's structure should be to allow the court sufficient operational flexibility to achieve the most effective and efficient employment of both judges and assistant judges, giving recognition, of course, to essential differences in their positions within the judicial system. Advisory councils of the labor bar would naturally be called upon to make recommendations for establishing rules of procedure and methods of operation. Inevitably, however, some trial and error will be essential in the development of an effectual plan of operation.

Prosecution of Actions. A key element in the proposed unitary system is that actions in the United States Labor Court could be initiated either by the General Labor Counsel (GLC)\(^{168}\) or by a private party. In most cases, however, the private party would have to give the GLC the first opportunity to bring the action. Initiating an action under the NLRA would be similar to the present practice. Under the new plan, when a charge is filed with the GLC it would be the responsibility of his office (acting, as now, through regional offices) to conduct an investigation; his office would then either dismiss the charge or file a complaint with the United States Labor Court, provided no settlement had been effected. In the event of dismissal, the charging party could file and process his own case in court—unlike the present procedure where the charging party has no recourse after the General Counsel refuses to issue a complaint.\(^{187}\)

Under the suggested plan, the GLC would have the right to intervene in any such action filed by a private party. This same procedure would be applicable to Railway Labor Act and title VII\(^{188}\) actions.

\(^{168}\) See text accompanying notes 196-202 infra.


If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

The Civil Rights Act of 1964, title VII, § 706(k), 42 U.S.C. § 2000e-5(k) (1970), both in its original form and as amended in 1972, allows reasonable attorneys' fees to be awarded by the court in its discretion, as part of the costs of the suit, to an individual plaintiff who prevails in his enforcement of the Act. Under the original Act, private suits were allowed only after the aggrieved party as complainant had filed charges with the Equal Employment Opportunity Commission, and the EEOC was unable to obtain voluntary compliance. Irvin v. Mohawk Rubber Co., 308 F. Supp. 152, 161-62 (E.D. Ark. 1970); Dobbins v. Local 212, Int'l Bhd. of Elec. Workers, 292 F. Supp. 413, 450 (S.D. Ohio 1968); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 521 (E.D. Va. 1968). See note 187 supra for a description of the amended procedure. Under the proposed unitary system attorneys' fees should also be available to the claimant after he has exhausted his remedy through the GLC and thereafter successfully processes his own action in the Labor Court.

\(^{188}\) An alternative plan applicable to title VII which may be feasible, though not favored by this writer, would be to retain the Equal Employment Opportunity Commission in its
All other actions of the type which may now be brought directly in federal
district court, such as actions to enforce arbitration under section 301 and
actions for damages under section 303, could be filed directly by the private
plaintiff in the United States Labor Court. Even in these actions, however, the
GLC might be allowed to intervene if determination of the issue could affect
the interpretation or enforcement of a law for which the GLC has the primary
prosecuting responsibility.

Plenary Judicial Power. It is contemplated that within its jurisdictional cov-
eration the new court would possess essentially the same authority, both legal
and equitable, as any United States district court regarding the issuance of
appropriate legal process, orders, and judgments. For example, the device of
dismissal of a complaint for failure to state a claim upon which relief can be
granted would be available to the court. Likewise, summary judgments, temporary restraining orders, and injunctions would also be available. The
court's ability to tailor and effectively supervise its remedial orders sharply
contrasts with the NLRB's lack of authority to exercise such remedial action.
No changes with regard to the Norris-La Guardia Act should be necessary,
other than to effect a transfer of jurisdiction from the district courts and the
courts of appeals so that the new court could issue injunctions now authorized
by statute. After minor procedural adjustments are made to reflect the restruct-
turing of the administrative-judicial relationship within the unitary plan, the
court would have injunctive authority under sections 10(e), 10(j), and 10(1)
of the Taft-Hartley Act. Substantial power already exists under the Railway
Labor Act and under section 301 of LMRA to enjoin strikes relating to arbi-
trable grievances under collective bargaining contracts. Such jurisdiction
would automatically be transferred to the labor court.

Legislative changes in judicial authority to review adjustment board awards
under the Railway Labor Act and arbitration procedures and awards under

new and present form, allowing it to investigate, conciliate, and otherwise function in the
manner prescribed by title VII, except that instead of bringing its enforcement actions in the
regular federal district courts it would bring them in the United States Labor Court. This
plan would duplicate some personnel and some agency activity, and it would tend to over-
emphasize statutory distinctions, at least at the investigatory stages, where a given fact situ-
ation might involve violations of several laws and comprise several causes of action. It is
conceded, however, that the need for vigorous enforcement to prohibit employment dis-
crimination against minorities is so great that an independent EEOC might be deemed de-
sirable by some interested groups. If such a plan were adopted, however, it would be neces-
sary to provide a suitable means to coordinate parallel activity and interests of the EEOC
and the GLC. This might not be impossible, but it would be difficult. The very existence
of two public prosecutors operating in overlapping fields of law will make coordination
hard to achieve and the operations are bound to be less efficient.

19 The granting of summary judgment, like the device of dismissal for failure to state
a claim upon which relief can be granted (see Fed. R. Civ. P. 12(b)(6)), should be
especially useful in disposing of frivolous claims.

198 Sections 3(p), (q), 45 U.S.C. §§ 153(p), (q) (1970); see Gunther v. San Diego
& Ariz. E. Ry., 382 U.S. 257 (1965); International Ass'n of Machinists v. Central Airlines,
372 U.S. 682 (1963); Air Line Pilots Ass'n v. Northwest Airlines, 415 F.2d 493 (8th
Cir. 1969); Brotherhood of R.R. Trainmen v. Central of Ga. Ry., 415 F.2d 404 (5th Cir.
1969).
section 301 are not contemplated. The present private and quasi-public systems for settling contractual disputes would not be superseded. Indeed, it is expected that these systems would be strengthened by the unitary approach. It is anticipated that the United States Labor Court's broad jurisdiction over both the collective bargaining process and the collective bargaining contract would stimulate the development of new and flexible remedies. For example, in an unfair labor practice proceeding under the NLRA the court would be able to require submission of an arbitral matter to an arbitrator while retaining jurisdiction for purposes of enforcing and/or reviewing the resulting arbitration award. The court could also refer or remand a question concerning representation to the new NLRB for its determination when appropriate. The detailed mechanics of such referral and remand procedures will have to be worked out in the enabling statute, by regulations, by judicial decision, or by a combination of these means.

It is intended that the court have ample authority to fashion remedies which would more satisfactorily achieve the congressional intent inherent in the three primary statutes than is now possible under the present system with its divided and inadequate powers.

Much of the court's jurisdiction would cover matters which will have initially been submitted to subordinate tribunals—to arbitration, to an adjustment board, or to the NLRB for determining a question concerning representation. However, the court would possess original jurisdiction over such matters in a judicial sense, just as it would possess original jurisdiction over all other matters under its statutory coverage. Thus the courts of appeals would review representation or arbitration matters only in the context of appeals from orders of the United States Labor Court. This would represent no change in the scope of appellate review. All of the orders of the new court would be self-enforcing.

A party to an action in the United States Labor Court would be entitled to appeal judgments and other appealable orders to a circuit court of appeals in essentially the same manner as an appeal is now taken from an order of a United States district court. No change is contemplated in appellate jurisdiction. It is intended that the present jurisdiction of the court of appeals for each of the eleven circuits be maintained. The continued scattering of appellate review among all of the United States courts of appeals is calculated to produce a healthy cross-fertilization of judicial attitudes. The minor disadvantage that results from differences in legal interpretations among the circuits is, in my judgment, offset by a larger advantage. Any diversity among the circuits should counterbalance the tendency toward over-specialized expertise which might otherwise develop within a single court of original labor jurisdiction.

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This procedure in itself should reduce substantially the high incidence of appellate review in NLRA cases. See note 72 supra. Under the present law a respondent found guilty by the NLRB of the commission of unfair labor practices need not appeal to obtain judicial review. A simple refusal to comply with the Board's order will cause the Board to initiate enforcement procedures in the circuit court of appeals, where the respondent, with much less effort and expense than would be required in an ordinary appeal, can obtain full judicial review of the Board's decision. See generally DEVELOPING LABOR LAW 873-86.
Final reconciliation of differences among the circuits, as under the present system, would be the responsibility of the Supreme Court through the exercise of its power of certiorari. It is hoped that in the long run the judicial stature of the United States Labor Court will be deemed so substantial that under the unitary system there would be fewer reversals on appeal than under the present system, so that ultimately the number of appeals would also be reduced.

B. The General Labor Counsel

Functions. The statutes under consideration were designed primarily to guarantee employee rights and protections. A federal administrative officer should be available to investigate charges of violations and to prosecute complaints under these laws, for to leave their enforcement entirely to private litigation would be to overlook the public’s interest in maintaining the labor relations system. Furthermore, private enforcement would mean no enforcement for substantial numbers of employees, especially those who are least able to protect themselves. And in private litigation too often the advantage lies with the party who can afford to hire the best legal talent—either the employer or the union, but rarely the employee. The need for a public prosecutor in many areas involving the public interest has long been recognized. Since its inception, the National Labor Relations Act has provided for a General Counsel. The Fair Labor Standards Act also provides a Wage and Hour Administrator who performs a comparable service. It is also commonplace for law enforcement to depend on both private litigation and governmental prosecution. This has been the pattern under the antitrust laws and, more recently, the pattern in school desegregation cases. Under title VII, the EEOC is authorized to investigate and conciliate, and under the 1972 amendments it now has authority to file and prosecute actions in the federal courts. Under the RLA, however, enforcement depends almost entirely on private litigation, although the scheme of that Act also provides for criminal penalties which theoretically could be enforced by the Justice Department.

The proposed unitary system would require a new federal officer, the General Labor Counsel (GLC). He would have a threefold responsibility: To investigate charges of violations under the NLRA, the RLA, and title VII; to attempt to achieve voluntary settlements of such charges; and to prosecute unsettled complaints which he deems meritorious. His role in the presentation of cases in the United States Labor Court, including his right of intervention in actions brought by private plaintiffs, has already been noted. The GLC would, of course, handle appellate cases in the various courts of appeals. He would also join with the Solicitor General in the presentation of cases submitted for review.

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[190 Railway Labor Act § 2 (Tenth), 45 U.S.C. § 152 (Tenth) (1970). In practice, these criminal provisions are not used, and injunctive actions by private parties are the chief means of enforcement. See Virginia Ry. v. System Federation, No. 40, 300 U.S. 515 (1937).]

[180 See text accompanying notes 186, 187 supra.]
in the United States Supreme Court. Unlike the unreviewable authority of the General Counsel of the present NLRB, the General Labor Counsel's authority under the proposed system would be subject to an effective check, for, as noted, complainants would have the right to initiate their own actions in the Labor Court whenever the GLC refuses to do so.

Organization and Personnel. Under the proposed plan, there would be a merger of the personnel and function of the NLRB General Counsel (including the NLRB regional offices) and the Equal Employment Opportunities Commission (including its regional offices). Personnel might also be drawn from employees of the National Mediation Board since its representation function, particularly the holding of elections under the Railway Labor Act, would be taken over by the new National Labor Representation Board. It is anticipated that the regional offices of the GLC would assist the new NLRB in processing representation cases in much the same manner as under present NLRB practice, where regional personnel, especially the regional directors, handle representation cases pursuant to delegation of authority from the National Labor Relations Board. The basic structure and function of the NLRB regional offices would thus be preserved, though expanded in personnel and function to cover the additional duties under the Railway Labor Act and title VII.

The success of the GLC function is essential to the validity of the proposed unitary plan. The office of the GLC would be so designed as to have considerable administrative flexibility in the carrying out of the day-to-day operations under these laws. The GLC will look to the United States Labor Court for adjudication and enforcement of contested cases. And it will be the responsibility of the GLC, pursuant to the orders of that court, to assist in achieving compliance with the court's orders and remedies.

C. The National Labor Representation Board

Functions. The National Labor Representation Board (also called the NLRB) would be expected to determine questions concerning representation under both the NLRA and RLA. The representation functions of the present National Labor Relations Board and National Mediation Board would thus be merged. The new board should be equipped to operate representation and election procedures under both statutes with a reasonable degree of uniformity even though the statutory language concerning representation, section 2 (Ninth) of the RLA and section 9 of the NLRA, is different. Both allow for wide agency discretion in the determination of "appropriate bargaining unit" or "craft or class." There is no apparent legal reason why election procedures under both statutes could not be made substantially identical, provided the new NLRB should choose to make them so. If the new board were to find sufficient reasons for making distinctions, however, the differences could be retained. This board should certainly be well qualified to recognize basic differences affecting representation among various industries and to apply differences which are already

201 It might prove to be desirable, or at least politically expedient, during the initial years of the new system for the EEOC personnel to carry their function under title VII as a separate division under the GLC.

Delegation of Duties. The single representation board should be able to operate with greater uniformity and improved efficiency as a result of the merger of personnel and certain of the functions of the present NLRB and NMB. As previously noted, the new NLRB would presumably delegate to the office of the new GLC certain duties relating to the determination of union representation. The regional offices could thus continue to exercise field responsibility for both "C" (complaint) and "R" (representation) cases.

D. The National Mediation Service

Consolidation of Mediation Agencies. The unitary plan also carries over to the mediation process. The National Mediation Board, which performs various mediation duties under the Railway Labor Act, would be merged with the Federal Mediation and Conciliation Service. The new service, as an independent agency, might be called the National Mediation Service (NMS). It would perform all of the mediation functions provided for by the Labor-Management Relations Act and the Railway Labor Act. It would also continue to assist parties to collective bargaining contracts in the selection of neutrals to serve on adjustment boards and as arbitrators.

Strengthening the Role of Mediation. The proposed unitary system should strengthen the Government's role in mediation. The voluntary nature of mediation and the absence of sanctions may well be its real strength. The federal mediator has nothing to sell but his good offices, consisting primarily of his personal ability to persuade, to listen, and to suggest. His mediation service is often the catalyst which makes collective bargaining work. Although mediation procedures and the conditions under which mediation is invoked differ markedly under the LMRA and the RLA, the personalized nature of the job of mediating is similar under both statutes. A merger of the mediation functions of the FMCS and the NMB would thus provide an opportunity for both groups of mediators to share valuable experiences and techniques. A single agency would also provide a more centralized and uniform direction to the service. The new service would be of special benefit to collective bargaining on the railroads and the airlines. For the first time, the mediation function for these industries would be separated from the quasi-adjudicatory function which the NMB also performs. If mediators can confine their efforts to mediation,

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296 It must be conceded that these mild attributes have on occasion been reinforced by "arm-twisting" and "jaw boning" emanating from the White House.

which the NMB, as an agency, presently cannot do under the RLA, their roles as neutrals might yield greater success in assisting the parties in reaching agreement.

V. CONCLUSION

American labor law has come of age. It is now time to shed some cherished myths. For instance, some may believe that the National Labor Relations Board is an administrative agency in the conventional sense; in fact, it is mostly a court, although not a very effective one. It is often assumed that discrimination cases concerning employment of minorities, where there is a union on the premises, can be settled without reckoning with the collective bargaining and arbitration process. In reality such cases are labor relations cases in the fullest sense. Where there is an established collective bargaining contract the determination of unfair labor practices cannot be divorced from the dispute-settlement machinery contained in that contract; in such cases, action under the NLRA must be accommodated with action under section 301 and with arbitration.

Another myth concerns the efficacy of the administrative process. Administrative agencies have substantial limitations; the one we are most concerned with here is rooted in the constitutional doctrine of separation of powers. The Constitution decrees: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

This is the power which is ultimately required for the enforcement of the federal labor laws. The administrative process—much admired in recent history—is a useful adjunct to the judicial process, but it lacks judicial power. When administrative power is used as a substitute for judicial process, the inherent weakness in agency action may impede rather than enhance the task of law enforcement. Beyond any doubt, the experience with the National Labor Relations Board establishes the existence of this weakness.

This Article is a plea for realistic examination of the procedural fragmentation which characterizes the administration of federal labor law. It is a plea to use the administrative process wisely, to use it as a vital supplement to judicial action, but not as a substitute for it. It is a plea for bold development of a new court system which could tie together and enforce the nation's complex set of labor laws which operate in the private sector.

The writer believes this is the direction in which procedural reform, if it is to be true reform, should inexorably move. The country needs a simpler system. The unitary system here envisioned is designed for simplicity of operation. If such a unitary system were to prove successful, legal promises would come close to achieving social realities. Absolute success would indeed be utopian, but any movement toward more effective administration would further the noble objectives of the federal labor laws.

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208 U.S. CONST. art. III, § 1.
209 This paper has been confined to private sector labor relations, but the jurisdiction of the proposed labor court could also be extended to federal labor laws applicable to public employees.