Indiana Int'l & Comp. Law Review

Volume 35 | Number 3 | 2025

NOTES

LABOR COURTS: PAST THE POLARIZATION OF THE NATIONAL LABOR RELATIONS BOARD AND TOWARDS STABLE LABOR LAW IN THE UNITED STATES

FARRAH GOODALL*

INTRODUCTION

The passing of the National Labor Relations Act of 1935 (NLRA) was a critical turning point in labor law within the United States (U.S.). The NLRA and subsequent creation of the National Labor Relations Board (NLRB/Board) was put into place in an effort to promote labor peace and give employees the right to organize labor unions to collectively bargain with employers about a variety of issues including wages, hours, and working conditions.[1] Since its creation, the implementation of the NLRA has failed employees and employers alike because the NLRB is an ineffective governing body.

THESIS

The NLRB is an independent administrative agency tasked with implementing the NLRA and protecting employees' rights.[2] The NLRB is not an effective way to carry out the primary goals of the NLRA—labor peace, rights for workers, good working conditions, and higher wages. The ineffectiveness of the NLRB has led to a confusing labor law landscape with negative effects on employers, employees, and the economy. The very structure of the NLRB has increased polarization and resulted in inconsistent decisions. In order to develop a more consistent and stable field of labor law, the U.S. should attempt to remove political agendas from the decision-making process by establishing labor courts. Creating labor courts and removing the need for

---

* J.D. Candidate, 2025, Indiana University Robert H. McKinney School of Law, Bachelor of Arts in Philosophy, 2021, from Butler University. The author would like to thank Professor Cari Sheehan for her guidance developing this note, the mentors who have given her the opportunity to explore employment law, all those in Indiana International & Comparative Law that were part of the editing process, and her family and friends for their support.

1. *See* Frank E. Gumbinger, *Collective Bargaining—Is it Working*, 4 LOY. U. L. A. L. REV. 361, 364-365 (1971).

2. NAT'L LAB. RELS. BD., *About NLRB*, https://www.nlrb.gov/about-nlrb/who-we-are/the-board [https://perma.cc/H679-MT5J] (last visited Nov. 3, 2023).

the NLRB would allow appointments to the labor courts to be merit-based and would eliminate the reliance on the political allegiance of Board members to influence labor law.

ROADMAP

This Note in Section I will provide a brief overview of the history of labor law in the U.S. while observing the path that has led to the highly partisan, polarized Board experienced today. In Section II, to demonstrate the polarization of the Board in recent years, this Note will walk through examples of both President Trump's Board, during his first term, and President Biden's Board. This Note will not attempt to cover all the decisions made by the NLRB in these past two terms. Rather, it will highlight the cases that demonstrate the notion that each Board seeks to achieve an agenda that is dependent on political allegiance. Next, Section III will provide an overview of the labor court systems in several countries paying close attention to Sweden's Labor Court and the resulting high union participation rates in other countries that have also adopted a system of labor courts. Additionally, Section III will recommend that the U.S. adopt a federal system of labor courts modeled after the federal bankruptcy courts to eliminate the need for the NLRB and largely remove politics from labor law decisions.

I. HISTORY

The NLRA was unique to other labor acts particularly because of Section 7 which provides "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[3] Unlike previous legislation, Section 7 gave employees the right to self-organize and collectively bargain. The NLRB was created because there was a need for implementation and enforcement of Section 7 along with other parts of the NLRA. The hope was that the NLRB would focus on the enforcement of rights including appropriate bargaining units, unfair labor practices, and appropriate remedies. If the NLRB focused on the enforcement of rights instead of mediation, it was supposed to avoid the implementation issues experienced with the National Recovery Administration.[4]

The NLRA passed in 1935 making it clear that workers had the right to form unions and collectively bargain. Rather than forcing employers to self-regulate like the National Industrial Recovery Act (NIRA), the NLRA sought to protect

---

3. National Labor Relations Act § 7, 29 U.S.C.S. § 157 (2018).

4. G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S.*, WHO RULES AMERICA? (2013), http://whorulesamerica.net/power/history_of_labor_unions.html [https://perma.cc/ZK55-MGY3].

workers' rights. The NLRA included provisions for the creation of the NLRB. The NLRB's purpose is to enforce and maintain the rights provided by the NLRA. The constitutionality of the NLRA was upheld in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[5]

Some other notable legislation in the aftermath of the NLRA includes the Fair Labor Standards Act of 1938 (FLSA) and the Taft-Hartley Act of 1947. The FLSA established a minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector in Federal, State, and local governments.[6] Similar to the NLRB, the Department of Labor is responsible for implementing the FLSA and can participate in rulemaking as an administrative agency that updates or revises the regulations of the FSLA.

The Taft-Hartley Act "made major changes to the Wagner Act [NLRA]. Section 7 remained, but new language was added to provide that employees had the right to refrain from participating in union or mutual aid activities except that they could be required to become members in a union as a condition of employment."[7] The Taft-Hartley Act defined six additional unfair labor practices and provided for four new types of election.[8]

The NLRA, the Taft-Hartley Act, the FLSA and other legislation after a history of labor strife in the U.S. were enacted to resolve that strife and create a balance between employer and employee rights, however the NLRB has not accomplished those goals.

NATIONAL LABOR RELATIONS BOARD COMPOSITION

The NLRB is made up of a five-person Board and a General Counsel (GC). Section 3 of the NLRA establishes the Board.[9] Board members and the GC are appointed by the President with the consent of the Senate.[10] Board members serve a five-year term with a member's term expiring every year. The GC is appointed to a four-year term and is independent of the Board, tasked with administering the agency's field operations.[11] The GC is responsible for investigating charges that employers or unions have violated federal labor law and for prosecuting violations; the Board then decides those cases. Although the GC has no independent, investigative authority, workers are dependent on the

5. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

6. U.S. DEP'T OF LAB., *Wages and the Fair Labor Standards Act*, https://www.dol.gov/agencies/whd/flsa [https://perma.cc/L99Q-3PFG] (last visited Nov. 5, 2023).

7. NAT'L LAB. RELS. BD., *1947 Taft-Hartley Substantive Provisions*, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions [https://perma.cc/E7X4-BEXC] (last visited Nov. 5, 2023).

8. *Id.*

9. National Labor Relations Act § 3, 29 U.S.C.S. § 153; *see* Gumbinger, *supra* note 1.

10. NAT'L LAB. RELS. BD., *1947 Taft-Hartley Substantive Provisions*, *supra* note 7.

11. *Id.*

GC to prosecute their case.[12] If the GC chooses not to prosecute a certain case, then there is no redress for that employee. Similar to other administrative agencies, the NLRB has the capacity to engage in formal and informal rule-making processes. However, unlike most agencies, the NLRB relies on case-by-case adjudications to shape the labor law landscape.[13] In fact, the NLRB has only engaged in rulemaking eight times.[14] The reliance on case-by-case adjudications has allowed the GC and the NLRB to pursue political agendas during their terms which has resulted in a confusing labor law landscape because the "rules" change depending on the case adjudications each term.

Furthermore, decisions by the Board can be appealed to an appropriate U.S. Court of Appeals, and eventually to the U.S. Supreme Court.[15] The GC has empowered twenty-six regional offices with headquarters located in Washington, D.C.[16] Regional officers at these offices investigate and prosecute alleged violations of the NLRA under the authority of the GC.[17] Once a Regional Director issues a complaint, an Administrative Law Judge (ALJ), will hear the case and make a decision.[18] That decision, by the ALJ, can be appealed to the Board in Washington, D.C., and the decision by the Board can be appealed to the appropriate court.[19] While the decisions of an ALJ are not binding legal precedent unless adopted by the Board, decisions by a U.S. Court of Appeals or the U.S. Supreme Court are binding on the NLRB and can further mystify the labor law landscape if the appellate courts decide to overturn Board decisions.[20] The very "interpretation and application of the [NLRA] by the [U.S.] Supreme Court, has led to the evolution of a confused national labor policy that does not effectively serve any of the basic social, political, or economic values" often associated with the NLRA.[21]

---

12. Celine McNicholas et al., *Unprecedented: Trump NLRB's attack on workers' rights*, ECON. POL'Y INST. (Oct. 16, 2019), https://www.epi.org/publication/unprecedented-the-trump-nlrbs-attack-on-workers-rights/ [https://perma.cc/HDL8-XKUU].

13. Blake Phillips, *NLRB Case Surge: What it Means and What the Board Can Do About It Right Now*, GEO. J. ON POVERTY L. & POL'Y (Feb. 16, 2023), https://www.law.georgetown.edu/poverty-journal/blog/nlrb-case-surge-what-it-means-and-what-the-board-can-do-about-it-right-now/ [https://perma.cc/WW6C-8A2G].

14. *Id.*; *see* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

15. NAT'L LAB. RELS. BD., *About NLRB, supra* note 2.

16. NAT'L LAB. RELS. BD., *Introduction to the NLRB*, https://www.nlrb.gov/about-nlrb/what-we-do/introduction-to-the-nlrb [https://perma.cc/ZTF7-ZEUJ] (last visited Feb. 11, 2024).

17. *Id.*

18. NAT'L LAB. RELS. BD., *Administrative Law Judge Decisions,* https://www.nlrb.gov/cases-decisions/decisions/administrative-law-judge-decisions [https://perma.cc/A3R9-5PTP] (last visited Feb. 11, 2024).

19. *Id.*

20. NAT'L LAB. RELS. BD., *Decide Cases,* https://www.nlrb.gov/cases-decisions [https://perma.cc/648D-ZP6G] (last visited Feb. 7, 2024).

21. Joan Baker, *NLRA Section 8(a)(3) and the Search for a National Labor Policy*, 7 HOFSTRA LAB. L. J. 71 (1989).

406118-IICL_35-3_TEXT.indd 166 5/15/25 4:40 PM

II. Discussion

The very structure of the NLRB has created a ripe environment for a political game of ping-pong.[22] The appointment of a new Board with each President combined with a general increase in polarization has changed the objectives of the NLRB. Overtime Board members' status as political appointees became apparent and it has become a "long-standing practice that a majority of sitting NLRB members are politically aligned to the current Presidential administration."[23] Instead of focusing on employee's rights under the NLRA, the NLRB focuses on reversing precedent and decisions of the previous Board. Since its enactment, "the [NLRA] has never required any kind of balance between Democrats and Republicans," a stark statutory difference from other types of regulatory legislation.[24] However, for many years, there was a political balance on the Board. An unspoken "tradition" encouraged presidents to achieve a 3-2 balance once the Board was expanded to five members after the Taft-Hartley Act; for example, "President Truman deliberately appointed one so-called liberal Senator… and one 'management person.'"[25] Since there was no actual rule regarding partisanship, though, the Eisenhower administration saw the first shift in policy regarding the NLRB. The Eisenhower administration realized its opportunity to influence labor policy when presented with three vacancies within the first year of President Eisenhower's term.[26] The Eisenhower Board favored employer free speech rights and made a few decisions undermining the previous Roosevelt-Truman Board.[27]

The Kennedy Board solidified this shift in policy for the NRLB as the Kennedy Board worked to combat the issues decided by the Eisenhower Board. This pattern continued supported by the increase in political polarization during Reagan's presidency.[28] Although the policy of the NLRB had shifted, it was not clear until the Clinton administration that the NLRB had also been severely affected by polarization. The first example of polarization of the Board was in the 1980s which led to the "batching" of Board member appointments during the Clinton administration; batching had not been seen since the expansion of the Board under the Taft-Hartley amendments.[29] In addition to batching of

---

22. *See* R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB*, 5 FIU L. REV. 347 (2010).

23. Daniel Pasternak & Scott Held, *The NLRB and Employers' Terrible, Horrible, No Good, Very Bad Week: A Deep-Dive Analysis of Recent Activist NLRB Decisions (US)*, SQUIRE PATTON BOGGS (Sept. 14, 2023), https://www.employmentlawworldview.com/the-nlrb-and-employers-terrible-horrible-no-good-very-bad-week-a-deep-dive-analysis-of-recent-activist-nlrb-decisions-us/ [https://perma.cc/476A-CBXF].

24. William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1507 (2015).

25. *Id.*

26. *Id.* at 1508.

27. *Id.*

28. *Id.* at 1513.

29. *Id.* at 1522.

appointments, administrations began to delay confirmations, choose not to appoint members to fill vacancies on the NLRB, and participate in other strategic, political moves to influence labor policy. These moves by various administrations surrounding the Board began to set a pattern of reversing previous, opposing political party decisions, leaving the NLRB stagnant and the labor law landscape confused.

Similar to their predecessors, both the Trump and Biden Boards focused and continue to focus on overturning decisions of the previous, opposing partisan Boards. Generally, Republican-leaning Boards focus their efforts on pro-employer decisions while Democrat-leaning Boards focus their efforts on pro-employee decisions.[30] However, the focus on overturning previous Boards' decisions creates an unstable labor law environment and leaves the NLRB stagnant. Employers are left to wonder what behavior will count as anti-union efforts or unfair labor practices, and employees are left to wonder what rights they hold in the workplace. Realistically, the NLRB does not advance any portion of labor rights whether for employers or employees because each Board simply reverses the decisions of the previous Board.

Polarization coupled with the NLRB's adjudicatory approach to rulemaking has encouraged this flip-flopping with each new administration. "Unlike federal judges, who are appointed for life, NLRB members are appointed for only five-year terms, and when a Board member's appointment is about to expire, it is not uncommon for the Board to release a large number of decisions on significant legal issues."[31] The common flurry of important decisions at the end of a Board's term strengthens the observation that the focus has shifted to overturning politically-opposed precedent. In turn, this observable shift incentivizes litigators to file cases with substantially similar issues in the hopes of getting a different decision.[32] This has led to situations in which employers and employees alike participate in strategic delay in order to get a more desirable decision by a new Board.[33]

A. Recent Major Decisions

Unit Size—Trump Board

In *PCC Structurals, Inc.,* the Trump Board overturned *Specialty Healthcare* to give employers more say in bargaining unit determinations.[34] The NLRA

30. *See* Gould, *supra* note 24; *see also* Theodore J. St. Antoine, *The NLRB, the Courts, the Administrative Procedures Act, and Chevron: Now and Then*, 64 EMORY L.J. 1529 (2015).

31. Pasternak & Held, *The NLRB and Employers', supra* note 23.

32. Phillips, *supra* note 13.

33. Emily Bazelon, *Why Are Workers Struggling? Because Labor Law Is Broken*, N.Y. TIMES (Feb. 19, 2020), https://www.nytimes.com/interactive/2020/02/19/magazine/labor-law-unions.html [https://perma.cc/WG4Q-5WSK].

34. McNicholas et al., *supra* note 12.; PCC Structurals, Inc., 365 NLRB No. 160 (Dec. 15, 2017); Specialty Healthcare & Rehab. Ctr. of Mobile, 357 NLRB No. 934 (Aug. 26, 2011).

gives workers the right to collectively bargain with their employer in "a unit appropriate."[35] When employees want to form a union, they must file a petition with the NLRB seeking an election. In that petition, the employees must specify the group that is organizing. Typically, the NLRB will approve that group as the bargaining unit. However, the Obama Board ruled in *Specialty Healthcare* that the bargaining unit sought by employees would be presumptively appropriate if the employees shared a "community of interest."[36] In other words, the burden was put on the employer to show why the bargaining unit was not appropriate, or else the bargaining unit would be approved. This decision created push-back from employers because it allowed for "micro-units" to be an appropriate bargaining unit which deviated from the traditional standard for bargaining units.

The ruling in *PCC Structurals, Inc.,* overruled the standard of *Specialty Healthcare* and reinstated the original standard—three guiding benchmarks—for determining bargaining units mandated by the NLRA. First, Section 9(a) of the NLRA provides that "employees have a right to representation by a labor organization…in a unit appropriate for such purposes."[37] This appropriateness is determined by looking at the purposes of representation. Second, in Section 9(b), Congress contemplated the questioning of a unit's appropriateness and determined that, in that event, the Board would conduct a "meaningful evaluation."[38] Essentially, a unit's appropriateness cannot be a blanket rule because it depends on the "employer unit, craft unit, plant unit, or subdivision thereof" in each case.[39] Therefore, the appropriateness of a bargaining unit must be determined in each case by the Board when a dispute over the bargaining unit arises.

Third, Section 9(b) of the NLRA resulted because of intentional choices by Congress giving the Board a role in determining appropriate bargaining units. The earlier versions of the Act were not as specific as the existing NLRA, which gives the Board a direct role in determining bargaining units. Because of Section 9, throughout most of history, "the Board applied a multi-factor test" when determining the appropriateness of a bargaining unit.[40] Although Democratic Boards and their supporters have argued that the ruling in *PCC Structurals, Inc.* gives employers a "greater ability to thwart workers who wish to form a union," the ruling reverts to the statutory mandate of the NLRA involving the NLRB in the bargaining unit decision and adheres more closely to the traditionally accepted standard.[41]

35. McNicholas et al., *supra* note 12.
36. *Id.*
37. PCC Structurals, 365 NLRB No. 160.
38. *Id.*
39. *Id.*
40. *Id.*
41. McNicholas et al., *supra* note 12.; *see* PCC Structurals, 365 NLRB No. 160.

Unit Size—Biden Board

In *American Steel Construction, Inc.*, the Biden Board overruled *PCC Structurals, Inc.,* and reinstated the rule from *Specialty Healthcare* decided by the Obama Board.[42] The new-old rule holds that a bargaining unit will be presumptively appropriate if the workers share a "community of interest."[43] This ruling, again, allows for unions to organize "micro-units" of employees and puts the burden on the employee to show the Board why a particular bargaining unit is inappropriate.[44]

The Board has interpreted Section 9(b) of the NLRA to deem a bargaining unit appropriate if the petitioning employees have a sufficient "community of interest."[45] The Board considers departments, skills and training, job functions and overlap in job descriptions, contact with other employees, distinct terms and conditions of employment, and whether employees are separately supervised to determine if there is a community of interest. Additionally, if the potential unit has a subdivision of employees the unit must be homogeneous, identifiable, and sufficiently distinct.[46] Employers will likely challenge the "sufficiently distinct" element of the unit, but the burden will be on the employers to show that any excluded employees have an "overwhelming community of interest" with the employees in the unit.[47]

Ultimately, the Board reverted to a standard that does not require the Board to decide in each disputed case whether a bargaining unit is appropriate even though this language can be found in the NLRA. It allows unions to seek convenient, small groups of employees and places the burden on the employee to overcome the presumption that the bargaining unit is appropriate. Any challenges by employers are likely to be decided in the union's favor or not pursued by the GC because this ruling suits the Biden Board's political agenda.

Management Rights Clauses—Trump Board

Other notable decisions from the Trump Board involved management rights clauses and enhancing employers' property rights. In a string of management rights clauses cases, the Trump Board overturned "precedent to make it easier

---

42. PCC Structurals, 365 NLRB No. 160; *See* Specialty Healthcare, 357 NLRB 83; Am. Steel Constr. Inc., 372 NLRB 23 (2022).

43. Daniel Pasternak & Scott Held, *NLRB Issues Flurry of Blockbuster End-of-Year Decisions (With More to Come?) (US)*, SQUIRE PATTON BOGGS (Dec. 21, 2022), https://www.employmentlawworldview.com/nlrb-issues-flurry-of-blockbuster-end-of-year-decisions-with-more-to-come-us/ [https://perma.cc/X4DA-RTXE].

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

406118-IICL_35-3_TEXT.indd 170 5/15/25 4:40 PM

for employers to adopt rules, policies, and handbook provisions."[48]

Management rights clause cases deal with the legality of various employer policies. Employer policies are often challenged for restricting activities that are protected by Section 7 of the NLRA. The Trump Board in *Boeing* overruled the previous standard regarding workplace rules from *Lutheran Heritage*.[49] However, *Boeing* has been subsequently overturned by the Biden Board.

Employers' property rights have always been a contested issue when pitted against employees' union activity rights. Several cases have dealt with when, where, and how employees and non-employees can talk to employees about unionization on the employer's property. The Trump Board sought to strengthen employers' property rights in *Bexar*.[50] The Trump Board held that off-duty employees could not handbill or engage in other union-organizing activity in nonwork areas of the workplace if their employer was a contractor at the workplace rather than the owner of the property.[51] The case involved off-duty orchestra musicians who were handing out material outside of the concert hall where they spent their working hours. While this temporarily enhanced employers' property rights, the Biden Board later refused to uphold this decision in *Bexar II* in 2022.[52]

Management Rights Clauses—Biden Board

In *Bexar II*, the Board held that an employer had violated the NLRA by prohibiting employees from protesting on its property.[53] The Board refused to follow its previous decision in 2019 which held that the employer could prohibit that same activity on their property. Employers only had to permit access if the contractors "regularly and exclusively" worked at the property.[54] Now, unless an employer can show that its property interests are greater than the Section 7 interests of the employees of contractors, the employer will commit an unfair labor practice if they prohibit employees from protesting or other union activities on their private property.[55]

The Biden Board still has a few notable pending cases. These pending cases follow the theme of the decisions already handed down by the Board—to

---

48. McNicholas et al., *supra* note 12.; *see e.g.*, MV Transp., Inc., 368 NLRB 66 (2019); The Boeing Co., 365 NLRB 154 (2017); Raytheon Network Centric Sys., 365 NLRB 161 (2017).

49. NAT'L LAB. RELS. BD., *NLRB Establishes New Standard Governing Workplace Policies, and Upholds No-Camera Policy in* Boeing, (Dec. 14, 2017), https://www.nlrb.gov/news-outreach/news-story/nlrb-establishes-new-standard-governing-workplace-policies-and-upholds-no [https://perma.cc/Q3K3-7DNX]; *see* The Boeing, 365 NLRB 154; Martin Luther Mem'l Home, Inc., 343 NLRB 75 (2004).

50. *See* Bexar Cnty. Performing Arts Ctr. Found., 368 NLRB 46 (2019).

51. McNicholas et al., *supra* note 12.

52. Pasternak & Held, *NLRB Issues Flurry, supra* note 43.

53. *Id.*; Tobin Ctr. for the Performing Arts, 372 NLRB No. 28 (2022) (colloquially known as Bexar II).

54. Pasternak & Held, *NLRB Issues Flurry, supra* note 43.

55. *Id.*

406118-IICL_35-3_TEXT.indd 171 5/15/25 4:40 PM

enhance employees' rights regardless of precedent or employers' rights.[56] The Board's decisions are guided by the GC and "are part of an effort…to overturn roughly 50 board precedents."[57]

Other Major Decisions—Biden Board

In *Thryv, Inc.*, the Board expanded the remedies available for relief for unfair labor practices.[58] The NLRA authorizes the NLRB to order "make-whole" relief remedies for unfair labor practices, but the Board cannot provide additional remedies that exceed that "make-whole" threshold like damages for emotional distress, pain and suffering, or punitive damages.[59] Disregarding this limitation, the Board held in *Thryv, Inc.*, that employers who violate the NLRA can be required to compensate employees "for all direct or foreseeable pecuniary harms suffered as a result of the [employer's] unfair labor practice."[60] The Board found that an employer had wrongfully laid off six employees before bargaining to an impasse with their union, and considered whether the employer should be required to pay damages in addition to back pay and reinstatement, the traditionally accepted remedy, and whether those additional damages could be added to the "make-whole" standard.

Section 10(c) of the NLRA authorizes the NLRB to remedy unfair labor practices by taking "such affirmative action including reinstatement of employee with or without backpay."[61] Reinstatement and backpay have long been held to be an appropriate remedy for wrongful termination. The *Thryv, Inc.,* majority did not adopt the term "consequential damages," but it did substantially broaden the remedy that the Board can order by holding that "make-whole relief encompasses, *at a minimum* . . . direct or foreseeable pecuniary harms that are a consequence of" an employer's unfair labor practice.[62] Seemingly, medical expenses, credit card interest, rental car expenses, and other losses can now be included in a remedy for wrongful termination.[63] These expanded remedies are available "in every case in which [the Board's] standard remedy would include make-whole relief, regardless of the egregiousness of the violation."[64] Likely, employers will be liable for all direct or foreseeable damages resulting from an unfair labor practice, but it is

---

56. *See id.*

57. Andy O'Brien, *Biden's National Labor Relations Board Issues Groundbreaking Decision to Strengthen Organizing Rights*, MAINE AFL-CIO (Sept. 1, 2023), https://maineaflcio.org/news/bidens-national-labor-relations-board-issues-groundbreaking-decision-strengthen [https://perma.cc/FB45-2LD8].

58. *See* Thryv, Inc., 372 NLRB No. 22 (2022).

59. Pasternak & Held, *NLRB Issues Flurry, supra* note 43.

60. *Id.*; Thryv, 372 NLRB No. 22.

61. Pasternak & Held, *NLRB Issues Flurry, supra* note 43; Thryv, 372 NLRB No. 22; National Labor Relations Act § 10, 29 U.S.C. §160(c).

62. Pasternak & Held, *NLRB Issues Flurry, supra* note 43; Thryv, 372 NLRB No. 22.

63. Pasternak & Held, *NLRB Issues Flurry, supra* note 43.

64. *Id.*; Thryv, 372 NLRB No. 22.

406118-IICL_35-3_TEXT.indd 172 5/15/25 4:40 PM

uncertain how far these damages will extend.

In August 2023, the NLRB disregarded and overturned more than fifty years of precedent in *Cemex*.[65] Historically, unions have two routes to representing private sector employees: 1) unions can request voluntary recognition from employers when they present proof that a majority of the employees want to be in a union; 2) unions can file a petition for a secret ballot election with the NLRB and hope to win a majority of valid employee votes in the election.[66] For over fifty years, employers could decline a request from a union for voluntary recognition and require the union to follow the NLRB election process. Typically, employers have opted for the secret ballot option. However, the *Cemex* decision overturned the cases allowing employers to refuse voluntary recognition and requiring the union to go through an election. Now, if a union presents proof that a majority of employees want to be part of a union, the employer must voluntarily recognize the union or file an election petition within two weeks.[67] Again, the burden has been placed on the employer. Instead of requiring the union to seek an election, the burden of refuting the union's proof of representation rests on the employer.

Additionally, if an employer files a petition for an election but engages in any conduct, deemed serious enough to set the election results aside, the employer's petition will be dismissed and the employer will be forced to recognize and bargain with the union.[68] Prior to *Cemex*, an election could be rerun rather than foregone altogether if the employer engaged in any serious, wrongful conduct. This decision incentivizes unions to encourage employees to sign authorization cards even though employees may not understand that signing a card could mean more than merely indicating interest in learning about unionization; the new rule allows for union representation without an election ever being held.[69] Furthermore, the decision encourages filing unfair labor practice charges after an employee has filed a petition for an election.

The GC also asked the Board to reintroduce the *Joy Silk* standard with *Cemex*.[70] The *Joy Silk* standard would have denied an employer the right to refuse a request for voluntary recognition of a union unless the employer had "an evidence-based 'good faith doubt' as to the union's claim of majority status."[71] The Board declined to reinstate this rule—a small win for employers, but it demonstrates the clear agenda of the Biden Board to increase employees' rights at all cost to employers' rights.[72]

---

65. Pasternak & Held, *The NLRB and Employers', supra* note 23; Cemex Construction Materials Pacific, LLC, 372 NLRB No. 130 (Aug. 2 2023).

66. Pasternak & Held, *The NLRB and Employers', supra* note 23.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

ANALYSIS

As demonstrated by the cases highlighted under both the Trump and the Biden Board, the NLRB, after over eighty years since its creation, continues to be an ineffective agency that encourages strife in labor law. Instead of advancing the principles of the NLRA, the NLRB fails employees and employers alike. Without engaging in formal or informal rulemaking, the NLRB uses case-by-case adjudications to capitalize on labor disputes, creating more work for themselves while not developing any real, concrete labor rules. If an employee or employer is disadvantaged by one or more of the current Board's decisions, they can comply and simply wait until the next Board overturns the decision in their favor. The reliance on case-by-case adjudications encourages employers and unions alike to file cases with similar facts to those already decided in hopes that a new Board will deliver a more favorable decision.[73] Furthermore, each GC of the NLRB can carefully select only the cases that will achieve their Board's policy agenda.[74]

For example, in 2014, Sean Caldwell attended a rally that was fighting to raise the minimum wage to fifteen dollars in Philadelphia.[75] At the time, Caldwell worked for a McDonald's as a janitor and had worked there for two years.[76] At the rally, Caldwell handed out fliers in support of the fifteen-dollar minimum wage and a union.[77] Shortly after the rally, Caldwell was late to his shift and subsequently terminated despite attempting to call in to report that he would be late.[78] Caldwell suspected he had been fired for participating in union organization rather than the stack of violations for tardiness and other infractions.[79] The Service Employees International Union, which was in support of the recent rally, took Caldwell's case, along with other complaints to the NLRB.[80]

Under the NLRA, it is unlawful to terminate workers for union participation and organizing.[81] In December 2014, the Obama GC assembled the cases for a trial against McDonald's and its franchisees.[82] The ALJ trial started in 2016, with McDonald's arguing that they were not responsible for the firing because Caldwell worked for a local franchise, and the NLRB arguing that McDonald's jointly employed Caldwell and helped discourage the minimum wage efforts.[83] Despite the start of arguments, McDonalds launched objections and canceled

73. *Id.*
74. *Id.*
75. Bazelon, *supra* note 33.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*

hearing dates in an effort to delay proceedings.[84] The trial was still ongoing after the inauguration of President Trump and the appointment of a new GC.[85] In January 2018, Trump's GC proposed a new settlement which was rejected by an ALJ.[86] However, the Board overruled the ALJ's decision in McDonald's favor.[87] McDonald's went on to resolve the matter further.[88]

While this example demonstrates an employer's strategic use of delay until the appointment of a new Board and GC, this tactic can be used by employers and employees alike. The Board's reliance on case-by-case adjudication combined with increased polarization since Eisenhower has provided and encouraged this behavior.[89]

III. RECOMMENDATION

At their core, unions were established to protect employees' rights and maintain a safe working environment that profited both employers and employees.[90] To an extent, the NRLA has achieved its initial goals, however, as evidenced by the Trump and Biden Boards and their predecessors, the NLRB has become stagnant and politicized. The NLRB's focus has shifted and no longer advances the goals of the NLRA or develops labor law. The solution to this is to remove politics and the ever-increasing polarization from labor law by creating independent labor law courts at the federal level in the U.S.

A. Sweden

Sweden was one of the first countries to establish a labor court system in 1929.[91] In Sweden, the Labor Court holds primary jurisdiction over labor issues, and other courts must refuse to take cases falling under the jurisdiction of the Labor Court.[92] Any decisions by the labor courts are final and not appealable, however the Supreme Court in Sweden can grant a new trial in cases decided by the labor court if there is gross miscarriage of justice, new evidence of a decisive character, or the like.[93] A chairman and seven members, appointed by the King, sit on the Labor Court.[94] The normal terms are three years and members are usually reappointed, but only the chairman's position is full time.[95] There are

---

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*; Phillips, *supra* note 13. *See* Bazelon, *supra* note 33.
90. NAT'L LAB. RELS. BD., *1947 Taft-Hartley Substantive Provisions*, *supra* note 7.
91. R. W. Fleming, *The Labor Court Idea*, 65 MICH. L. REV. 1551, 1551 (1967).
92. *Id.* at 1552.
93. *Id.*
94. *Id.*
95. *Id.*

three "public" members of which the chairman and vice-chairman are required to have legal and judicial experience while the third public member must have special knowledge and experience in the labor field.[96] The other members of the Labor Court are laymen--three members represent labor, and the other two members represent management.[97] The laymen do not all sit on a case at the same time. Rather, the Labor Court only acts when one layman from each side is present, and the make-up of which laymen hear a case will change depending on whether the case involves salaried employees.[98]

The nature of Sweden's Labor Court is representative of how labor is organized within the country.[99] Sweden has more organizations in need of representation, but despite who they represent, Court members are expected to be objective.[100] Members are not expected to further the agenda of their representatives.[101]-Rather, the Swedish Labor Court aims to use the specialized knowledge of its members to create a connection between the Court and major employer and employee organizations.[102]

Overall, the caseload of the Labor Court averages about 120 cases per year.[103] Once Sweden was able to establish key principles in labor law, many employer and employee federations could settle disputes without going to court.[104] Many of the cases still going to court, today, involve small employers with contracts with unions, but those employers are not members of the overarching employers' federation.[105] One facet of the Swedish Labor Court, lacking from the U.S. labor system, is that an employee in Sweden can, individually, pursue their case even if their union decides not to take their case.[106]

Additionally, it is important to note that the Swedish labor system and industrial relations are based more on agreement than actual legislation.[107] Essentially, one big bargaining association represents each side—the Swedish Employer's Confederation (SAF) for the employers and the Swedish Confederation of Trade Unions (LO) for employees.[108] However, similar to the creation of unions in the U.S., Sweden experienced strife-ridden years after the

---

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1554.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 1555; *see* Linda L. Rippey et al., *Alternatives to the United States System of Labor Relations: A Comparative Analysis of the Labor Relations Systems in the Federal Republic of Germany, Japan, and Sweden*, 41 VAND. L. REV. 627, 647-54 (1988).
108. Fleming, *supra* note 91, at 1555.

creation of both confederations.[109] This led to a "December Compromise" which was incorporated into legislation in 1936.[110] This Compromise recognized the mutual right to organize, a strong right of employers to dismiss an employee regardless of their membership in a union, and an understanding between the confederations that they would fix wages and other terms of employment through free bargaining.[111] This Compromise has been updated over the years, but it remains significant in the types of cases that appear before the Labor Court.[112] These Confederations have a large impact on the labor sphere, but Sweden has also held that a collective bargaining contract is binding on the organizations as well as its individual members.[113] Enough contract violations eventually led to the creation of the Labor Court in 1929.[114]

Fundamentally, there are stark differences between the labor system in Sweden and the labor system in the U.S. Notably, the jurisdiction of the Labor Court is broad and often handles issues that would normally go to arbitration in the U.S.[115] Additionally, there is no NLRB equivalent in Sweden—all of those cases go to the Labor Court.[116] The Labor Court also covers cases that would fall under federal court jurisdiction because those issues would be covered by the Fair Labor Standards Act in the U.S.[117]

From these differences, the Swedish Labor Court system could not be perfectly transplanted to the U.S. The caseload of the Labor Court in Sweden is likely very low in comparison with what the U.S. would expect to see.[118] Rather than just having one court, the U.S. would likely have to establish a system of federal courts to handle labor issues.

Furthermore, industrial relations in Sweden vary from what is accustomed to in the U.S.[119] The Confederations represent a centralized power in collective bargaining, and the U.S. does not have anything similar.[120] However, the Labor Court does much more than simply resolve differences over the interpretation of collective bargaining contracts by also resolving cases that concern what the U.S. refers to as "unfair labor practices" (ULPs).[121] Private arbitration is a less common option in Sweden because it cannot be used as a way to circumvent the Labor Court in cases of contract breach or invalidation.[122] In essence, the Labor Court in Sweden has broader jurisdiction than the NLRB does in the U.S., but

109. *Id.* at 1556.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 1557.
114. *Id.*
115. *Id.* at 1558.
116. *Id.*
117. *Id.*
118. *Id.* at 1555.
119. *Id.*
120. *Id.* at 1557.
121. *Id.*
122. *Id.* at 1558.

it does not always see the same types of cases that the NLRB routinely handles.[123] For example, seniority in collective bargaining agreements is often a contentious issue within the U.S., but seniority issues would never come before the Labor Court in Sweden because it is not a concept that is commonly practiced in Sweden.[124] Additionally, the December Compromise established the right of an employer to dismiss employees at the employer's discretion regardless of membership in a union.[125] The Labor Court interpreted "right" to mean that a terminated worker cannot bring the termination issue to the Labor or any other court.[126] Therefore, the Labor Court never handles discharge cases.[127] This idea would likely meet strong resistance in the U.S. because one of the foundational benefits of a collective agreement is thought to be the protection against arbitrary termination.[128]

Ultimately, the U.S. would have to decide which labor issues would fall under labor court jurisdiction if a labor court system was established. However, if this system was implemented at the federal level, it would allow FLSA as well as NLRB issues to fall within that jurisdiction since those issues are both governed by federal law.[129]

While Sweden's Labor Court does not map perfectly onto the U.S. labor system, there are important lessons that can be gleaned from its success. First, partisanship plays little role in the decisions of the Labor Court and in the appointment of Labor Court members.[130] Objectivity is expected of members and there is heavy reliance on the expertise of Court members within the labor field both judicially and as a litigator.[131] Secondly, Sweden allows an individual to pursue their case even if their union is unwilling to do so.[132] Incorporating these lessons into the U.S. labor law landscape would be the first step to adopting a labor court system.

The differences between Sweden's labor law landscape and U.S. labor law should not be a deterrence for implementing labor courts in the U.S. While the structure would differ, the idea is the important takeaway.

---

123. *Id.*; *see* Clyde Summers, *American and European Labor Law: The Use and Usefulness of Foreign Experience*, 16 BUFF. L. REV. 210, 219-20 (1996) (Section 8 of the NLRA, a source of much litigation, does not have an exact equivalent in other countries. Sweden has something similar, but many countries, including France, Italy, Belgium, and Holland have not created such a rule).

124. Fleming, *supra* note 91, at 1559.

125. *Id*. at 1560.

126. *Id*.

127. *Id*.

128. *Id*.

129. *See generally* Fair Labor Standards Act, 29 U.S.C. §§ 201-219; *see generally* National Labor Relations Act, 29 U.S.C. § 157.

130. Fleming, *supra* note 91, at 1563.

131. *Id*.

132. *Id*.

406118-IICL_35-3_TEXT.indd 178 5/15/25 4:40 PM

B. Success of Labor Courts Globally

Labor law reform is a topic in many countries. If the U.S. implemented labor courts, they would be on par with several other countries in Europe and Latin America as well as Mexico.[133] In fact, some of the countries with the highest union participation rates also have a system of labor courts including Iceland, Denmark, and Sweden.[134] In comparison, the U.S. has one of the lowest unionization rates of advanced economies.[135] While low union participation cannot be directly tied to the lack of labor courts, it is notable that almost all of the countries in the top half of union participation rates do have labor courts, except for the United Kingdom.[136] Admittedly, some other possible factors that might contribute to the low union participation in the U.S. are Right-to-work laws in many states, worker classification rules, and changes to the NLRB regulatory power.[137]

Regardless, labor courts seem to have a positive effect on countries'

133. Eusebi Colás-Neila & Estela Yélamos-Bayarri, *Access to Justice: A Literature Review on Labour Courts in Europe and Latin America*, https://www.ilo.org/static/english/intserv/working-papers/wp006/index.html

[https://perma.cc/6XYC-N2MS] (last visited Mar. 25, 2025); Oscar Margán Vega & Natalia Merino Morena, *Labor Courts Are Now a Reality in Mexico*, OGLETRE DEAKINS (Oct. 19, 2022), https://ogletree.com/insights-resources/blog-posts/labor-courts-are-now-a-reality-in-mexico/ [https://perma.cc/9V58-JZCD].

134. Jeff Goldstein, *How the US compares to the world on unionization*, ECONOGRAPHICS (Oct. 28, 2022), https://www.atlanticcouncil.org/blogs/econographics/how-the-us-compares-to-the-world-on-unionization/ [https://perma.cc/Q5F5-UMZH] (Iceland ranks first in union participation with 90.7%, Denmark is second with 67%, and Sweden ranks third with 65.2%.)

135. *Id*. (the U.S. has a 10.3% union participation rate ranking above only four other countries—Turkey, Hungary, Lithuania, and Estonia.)

136. *Id*. (the UK has 23.5% union participation rate, doubling that of the U.S., but still ranking far below other European countries.)

137. *Id*.; PB MARES, LLP, *What is a Right-To-Work State?,* (Sept. 17, 2022), https://www.pbmares.com/insights-what-is-a-right-to-work-state/ [https://perma.cc/3E5W-EVSJ] (In right-to-work states, private-sector employees have the option to choose whether they would like to join a union. In non-right-to-work states, a person can be required to join a union if they are applying for a job where the employees are unionized.); Nicole Fortin, Thomas Lemieux & Neil Lloyd, *Right-To-Work Laws, Unionization, and Wage Setting*, NAT'L BUREAU OF ECON. RSCH, (June 2022), https://www.nber.org/system/files/working_papers/w30098/w30098.pdf [https://perma.cc/NJ82-S9XL] (Workers covered under a collective bargaining agreement in a right-to-work state do not have to pay union dues even when they receive the same benefits as those workers who pay dues since they can choose whether to join the union. The Right-to-Work Doctrine was established under the Taft-Hartley Act in 1947.); Rachel M. Cohen, *The coming fight over the gig economy, explained*, VOX (Oct 12, 2022, 7:30 AM), https://www.vox.com/policy-and-politics/2022/10/12/23398727/biden-worker-misclassification-independent-contractor-labor [https://perma.cc/RA3S-GDDU] (highlighting another ideological struggle between the Biden and Trump Boards dealing with worker classification rules.); Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and NLRA*, PETERSON INST. FOR INT'L ECON. (June 2021), https://www.piie.com/publications/working-papers/2021/do-us-firms-have-incentive-comply-flsa-and-nlra (arguing that employers have to incentive to comply with the FLSA and NLRA which leads to lower unionization rates.).

economies and unionization rates.[138] Each of the countries that have adopted a system of labor courts has adjusted the labor court model to fit their unique industrial relation needs.[139] The U.S. may not want high unionization rates, so the implementation of labor courts might have no effect on union participation. However, labor courts would influence the ultimate goal of depoliticizing labor law in the U.S.

C. Bankruptcy Courts in the U.S.

From examining Sweden's Labor Court, we can see that it is not easy to simply transplant their model to the U.S. However, it is equally clear that there are severe issues with the current labor law process in the U.S. because of the structure and polarization of the U.S. One way in which the U.S. could implement a system of labor courts is by modeling them after the federal bankruptcy courts.

The federal bankruptcy courts in the U.S. are outlined under Title 11 of U.S. Code.[140] Article I, Section 8 of the U.S Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies."[141] Under this authority, Congress enacted the "Bankruptcy Code" in 1978.[142] The Bankruptcy Code is codified as Title 11.[143] Although the Bankruptcy Code has been amended several times since its enactment, it remains a uniform federal law that governs

---

138. Goldstein, *supra* note 134.

139. Many countries, in addition to Sweden, in Europe have a system of labor courts including France, Austria, Germany, Belgium, Norway, Denmark, and Finland. Fleming, *supra* note 91, at 1564 (The jurisdiction of these courts, as seen in Sweden, is broader than the jurisdiction of the NLRB or arbitration in the U.S. European countries recognize that employers are free to terminate employees, and courts cannot reinstate discharged employees. While an employee may be entitled to severance pay, the traditional remedy of reinstatement and backpay in the U.S. is not available in European labor courts. Labor court members are expected to be objective, and the make-up of members includes representation for both employers and employees with a focus on expertise in the field. Individuals can usually pursue their own case regardless of their union. In part, this is because the benefits provided by collective agreements in the U.S. are codified in labor legislation in European countries. Individuals have an avenue of recourse even if their union declines to take their case because the right is provided for by applicable laws); *See* Rippey et al., *supra* note 107 (Germany's labor system rests on "co-determination" in the form of employee representation on corporate boards. Like the U.S., Germany went through several different legislative acts surrounding labor law. By 1976, Germany created a detailed statutory system that established participation and the shop floor and management levels. Parts of Germany's labor law is included in their constitution. Like Sweden's Confederations, Germany's "Work Councils" are an organized body for negotiations between management and workers for individualized enterprises.).

140. United States Bankruptcy Code, 11 U.S.C. § 101-112.

141. U.S. CTS., *Process – Bankruptcy Basics*, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics [https://perma.cc/7CJ9-TYXT] (last visited Mar. 26, 2025); U.S. CONST. art. I § 8.

142. U.S. CTS., *supra* note 141.

143. *Id*.

all bankruptcy cases.[144] The procedural aspects of the bankruptcy process are governed by the Federal Rules of Bankruptcy Procedure, "Bankruptcy Rules," and the local rules of each bankruptcy court.[145] The Bankruptcy Code and Rules along with local rules set forth the formal legal processes for dealing with the debt problems of individuals and businesses.[146] Almost every one of the ninety-four federal judicial districts handle bankruptcy matters. As of May 2023, there are ninety federal bankruptcy courts.[147] The federal districts of Guam, the Northern Mariana Islands, and the Virgin Islands handle their bankruptcy cases directly rather than through a specific bankruptcy court, and the Eastern and Western districts of Arkansas share a single bankruptcy court.[148] All other federal districts have their own bankruptcy court.[149]

Under Article I, section 8 of the U.S Constitution, bankruptcy judges' offices are created.[150] Bankruptcy courts are "legislative courts" as opposed to Article III courts deriving their power from Article III of the Constitution.[151] Bankruptcy judges are appointed by the federal circuit courts to fourteen-year, renewable terms.[152] Generally speaking, bankruptcy judges are appointed by a majority vote of the circuit judges in that jurisdiction.[153] However, each circuit is free to shape its selection process, but across circuits, the selection process is merit-based.[154]

For example, in the Fifth Circuit, a merit panel presents the top candidates to the Judicial Council for the Fifth Circuit.[155] The merit panel consist of a Fifth Circuit judge, a bankruptcy attorney, and a district court judge.[156] Applicants fill out a form requiring them to detail their competency in bankruptcy, notable cases, bar activities, and community service.[157] The attorney on the merit panel collects the applications and assesses the merits of each applicant.[158] Once the applicants are selected for interviews and interviews are conducted, the panel

---

144. *Id*.
145. *Id*.
146. *Id*.
147. U.S. BANKR. CT., Northern District of Indiana, BALLOTPEDIA (May 31, 2023), https://ballotpedia.org/United_States_bankruptcy_court,_Northern_District_of_Indiana [https://perma.cc/9E27-6FXG].
148. *Id*.
149. *Id*.
150. Craig A. Gargotta, *Who are Bankruptcy Judges and How Did They Become Federal Judges?*, THE FED. LAW. 11 (April 2018), https://www.fedbar.org/wp-content/uploads/2018/04/Bankruptcy-Brief-pdf-1.pdf [https://perma.cc/8JFN-MTD7].
151. *Id*.
152. *Resources for Aspiring Bankruptcy Judges*, BRENNAN CTR. FOR JUST. (Sept. 26, 2019), https://www.brennancenter.org/our-work/research-reports/resources-aspiring-bankruptcy-judges [https://perma.cc/SEH4-ZM78].
153. *Id*.
154. Gargotta, *supra* note 150, at 11-12.
155. *Id*.
156. *Id*.
157. *Id*.
158. *Id*.

usually selects the top two candidates.[159] The circuit judge on the panel then presents the Judicial Council for the Fifth Circuit with those candidates.[160] The Judicial Council consists of Fifth Circuit judges and a district judge from each judicial district in the Fifth Circuit.[161] Once the merits of the candidates are discussed, the circuit judge member makes a recommendation, and all of the members vote on which candidate should be appointed.[162] After the candidate is selected, the candidate undergoes a detailed background check and vetting with judges and attorneys.[163] The process can take several months to complete.[164]

There are several differences between Article III judges and bankruptcy judges.[165] An Article III judge is appointed for a life term by the president and confirmed by the Senate.[166] Bankruptcy judges have a term of fourteen years and can be removed for incompetence, misconduct, neglect of duty, or physical or mental disability.[167] Unlike Article III judges, bankruptcy judges do not enjoy lifetime tenure or salary protection.[168] A bankruptcy judge's salary is determined under §225 of the Federal Salary Act of 1967.[169]

Jurisdictionally, federal district courts have original jurisdiction over all bankruptcy and adversary proceedings, but district courts "refer" bankruptcy cases to bankruptcy judges.[170] Bankruptcy courts have no independent jurisdiction and only hear matters that are "referred" to them by district courts.[171] Yet, bankruptcy judges rely on statutory authority from Title 28 of the U.S. Code, the Bankruptcy Code at Title 11 of the U.S. Code, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Evidence, and any local rules.[172] Bankruptcy judges are recognized for their expertise and Article III judges rely on bankruptcy courts to apply the Bankruptcy Code.[173] Under the current law after the Bankruptcy Amendment and Federal Judgeship Act of 1984, original bankruptcy jurisdiction lies with the district courts.[174] Under 28 U.S.C. § 157(a) each district court may issue an "order of reference" which can refer "any and all cases" to the bankruptcy court.[175] The bankruptcy court can determine "core" matters and render a final order or judgment, while "noncore" matters can be

159. *Id*.
160. *Id*.
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*.
165. *Id*.
166. *Id*.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 12.
175. *Id.*; 28 U.S.C. § 157(a).

heard by the bankruptcy courts but then their findings of fact and law are required to be submitted to the district court for *de novo* review.[176]

Orders from the bankruptcy courts can be appealed, but in order to have standing to appeal, a party must be a "party aggrieved" by that party.[177] The requirements to be "aggrieved" are more stringent than the requirements for Article III courts.[178] The requirements are supposed to be a limitation to avoid endless bankruptcy appeals.[179] Generally, district and circuit courts can hear appeals from bankruptcy court if they so choose.[180] Yet, the time limits for bankruptcy appeals are shorter than other federal appeals.[181] A notice of appeal is required within ten days of the entry of the order or judgment appealed, and the ten days include holidays and weekends.[182] There can be exceptions, but, again, the stricter limits are intended to avoid endless bankruptcy appeals and allow most bankruptcy proceedings to be final.[183]

D. Labor Courts in the U.S.

The model of the federal bankruptcy courts would be a good model for establishing labor courts in the U.S. for several reasons.

First, the merit-based approach to judicial appointments, demonstrated in the bankruptcy courts, would solve the polarization issues illustrated by the NLRB. The establishment of labor courts would eliminate the need for the NLRB because all disputes falling under the Board's jurisdiction could be given to the labor courts. Much like Sweden's Labor Court and the merit panel for U.S. Bankruptcy Courts, labor courts within the U.S. could create a panel made up of attorneys and judges with experience in labor and employment law to select and vet applicants. Then, the top candidates could, ultimately, be chosen by the circuit judges in each jurisdiction. Similarly, each candidate could be required to detail their competency in labor law, notable cases, bar activities, and community service. Instead of relying on presidential appointments and political allegiance, the judiciary of the labor courts would be appointed based on their merit and politics would be largely removed from labor law decisions.

Secondly, jurisdictional issues between the FLSA and the NLRB could be resolved by creating a labor code codified in the U.S. Code. Like Sweden's Labor Court, labor courts in the U.S. could have a broader jurisdiction than the NLRB does today. Some relief could be provided to other federal courts by making the jurisdiction of labor courts include "all things labor" including wages, leave, and termination. Ultimately, jurisdiction, currently, divided

176. Gargotta, *supra* note 150.
177. *Resources for Aspiring Bankruptcy Judges*, *supra* note 152.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*

between federal courts and the NRLB would fall under the jurisdiction of the U.S. labor courts to create one forum for resolution. Additionally, the creation of separate labor courts would allow for the option that individuals could pursue their own cases regardless of their union's willingness to take the case. As long as an individual can find recourse under the labor code, they would be entitled to bring their case before the labor courts. Furthermore, like bankruptcy courts, limitations could be placed on appeals by strict standing requirements and shorter time limits to prevent endless appeals and recognize the legitimacy of the labor court decisions.

Third, labor courts would provide the stability that the labor law landscape has been lacking. Employers and employees alike would know what to expect from labor court decisions based on the labor code. Litigation would be more effective and predictable. There would likely not be the drastic shift that the Board experiences at the end of each term because labor courts would not be pursuing a political agenda by choosing which cases to hear like the GC of the NLRB. Rather, if recourse was provided under the labor code, labor courts would hear the case. Ultimately, labor law would not be guided by politics so the pendulum would not be swinging widely back and forth.

IV. CONCLUSION

The NLRA and subsequent creation of the NLRB were put into place in an effort to promote labor peace and give employees the right to organize labor unions to collectively bargain with employers about a variety of issues including wages, hours, and working conditions. Since its creation, the implementation of the NLRA has failed employees and independent administrative agencies tasked with implementing the NLRA and protecting employees' rights.[184] The NLRB has failed to create a balance between employer and employee rights. Rather, the NLRB has focused on shifting the scales in favor of the employer or the employee depending on political allegiance within any given term.

The NLRB is not an effective way to carry out the primary goals of the NLRA—labor peace, rights for workers, good working conditions, and higher wages. The ineffectiveness of the NLRB has led to a confusing labor law landscape with negative effects on employers, employees, and the economy. The very structure of the NLRB has increased polarization and resulted in inconsistent decisions. In order to develop a more consistent and stable field of labor law, the U.S. should attempt to remove political agendas from the decision-making process by establishing labor courts. Creating labor courts and removing the need for the NLRB would allow appointments to the labor courts to be merit-based and would eliminate the reliance on the political allegiance of Board members to influence labor law. In the meantime, the NLRB should engage in formal rulemaking rather than relying on case-by-case adjudications

184. NAT'L LAB. RELS. BD., *About NLRB*, *supra* note 2.

406118-IICL_35-3_TEXT.indd 184 5/15/25 4:40 PM

to shape the labor law in the U.S.

This Note has attempted to provide an overview of labor law in the U.S. while observing the path that has led to the highly partisan, polarized Board experienced today. Then, to demonstrate the polarization of the Board in recent years, this Note walked through examples of both President Trump's Board, during his first term, and President Biden's Board. This Note did not attempt to cover all the decisions by the NLRB in these past two terms. Rather, it highlighted the cases that demonstrated the notion that each Board seeks to achieve an agenda that is dependent on political allegiance. Next, this Note provided an overview of the labor court systems in several countries paying close attention to Sweden's Labor Court and the resulting high union participation rates in other countries that have also adopted a system of labor courts.

Lastly, this Note recommended that the U.S. adopt a federal system of labor courts modeled after the federal bankruptcy courts to eliminate the need for the NLRB and largely remove politics from labor law decisions.