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A CRITIQUE OF SUPPLYING THE NLRB WITH SOCIAL SCIENCE EXPERTISE THROUGH PARTY/AMICUS BRIEFS

By Xenia Tashlitsky

I. INTRODUCTION

Established in 1935 to administer the National Labor Relations Act (NLRA),¹ the National Labor Relations Board (NLRB) once employed a staff of economists to develop policy analyses² and a Board of nonpartisan government employees and academics to decide labor disputes.³ By relying on both its Division of Economic Research (DER) and specialized external sources for social science statistics, the early Board enriched its understanding of complex labor questions, established a practice of considering diverse perspectives, and acknowledged the importance of rigorously assessing the socioeconomic impact of labor policy.

Over the years, the agency's ability to evaluate data has eroded drastically. At the height of America's anti-Communist hysteria, Congress eliminated a source of evidence by stopping the NLRB from employing economic experts.⁴ Since the 1950s, presidents have politicized the process of nominating Board members⁵ by appointing mostly attorneys with connections to labor or management⁶ and virtually no social science skills.⁷ Accordingly, the NLRB now employs

¹ NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 33 (1997).

² Robin Stryker, *Limits on Technocratization of the Law: The Elimination of the National Labor Relations Board's Division of Economic Research*, 54 AM. SOC. REV. 341, 344 (1989).

³ Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB*, 61 OHIO ST. L. J. 1361, 1367 (2000).

⁴ 29 U.S.C. § 154(a) (2010) (stating that "Nothing in this subchapter shall be construed to authorize the Board to appoint individuals...for economic analysis.").

⁵ Flynn, *supra* note 3, at 1392.

⁶ Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L. J. 2013, 2019 (2009).

⁷ James A. Gross, *Economics, Politics and the Law: The NLRB's Division of Economic Research 1935-40*, 55 CORNELL U. L. REV. 321, 347 (1970).

neither economic nor social science experts,⁸ has no capacity to research labor realities,⁹ and lacks independent access to social science studies.¹⁰

Instead, Board members receive most social science evidence from appellate-level party/amicus briefs.¹¹ Unlike other federal regulatory agencies, the Board creates policy by deciding disputes, not writing regulations.¹² Consequently, it must apply the data from briefs toward assessing the policies in question.¹³ Without the expertise to evaluate data independently, Board members could theoretically delegate the task of gathering and testing this data to the fact-finding phase of the Administrative Law Judge (ALJ) proceeding, relying on parties to subject it to rebuttal, counterevidence, and cross-examination.

However, the ALJ-level option is incompatible with Board members' need for expensive economic evidence. During NLRB decisions, ALJs behave like trial courts enforcing its policies, while members behave like appellate courts evaluating its precedent. Once the parties file appeals, the Board can choose to revisit the policies or merely to review their applications.¹⁴ Thus, when prosecuting multiple cases that involve similar issues, the General Counsel cannot predict which case will become the vehicle for reexamining the regulations. Considering the

⁸ Stryker, *supra* note 2, at 344.

⁹ Fisk & Malamud, *supra* note 6, at 2065.

¹⁰ *Id.*

¹¹ *Id.*

¹² Myron Roomkin & Roger L. Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1441, 1462-63 n.89 (1977).

¹³ See Stryker, *supra* note 2, at 344. Indeed, it is unusual for an agency to establish policy on complex social and economic issues without being able to generate and evaluate empirical evidence on the needs for and effects of its activities. Thus, many federal regulatory agencies have economic research divisions. These include the Department of Agriculture's (DEA) Economic Research Service (ERS), the Secretary of Commerce's (SOC) Bureau of Economic Analysis (BEA), and the Department of Labor's (DOL) Bureau of Labor Statistics (BLS) and Division of Economic and Labor Research (ELR).

¹⁴ See NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 35-36 (1997).

cost of generating specialized evidence, the General Counsel lacks the resources to incorporate statistics assessing the NLRB's existing policy into every labor case.

Instead of relying on trials, the Board has bridged the gap by admitting appellate briefs as social science evidence. Given the members' special qualifications on thorny legal issues, most analysts agree that "greater laxity may be permitted in a court which adjudicates both on the law and on the fact,"¹⁵ allowing the Board to admit expert input without observing the formalistic procedural requirements of rules of evidence, including the Federal Rules of Evidence (FRE).¹⁶ In the "spirit of *Daubert*,"¹⁷ the Board can rely on evidence "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,"¹⁸ even if the evidence would be inadmissible in a federal court case under the FRE.¹⁹

Because the discretionary *Daubert* standard can raise the risk of arbitrariness or bias, it increases the importance of assessing when/how the NLRB engages evidence. In *Dana II*, the Board admitted four party briefs, 24 amicus briefs, and four reply briefs, but cited three sources of social science statistics, all from within the NLRB;²⁰ in *Dana III*, the Board admitted three party briefs, 14 amicus briefs, and two reply briefs, but cited no social science statistics.²¹ While

¹⁵ 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 707 (4th ed. 2002).

¹⁶ *Id.* at 705.

¹⁷ RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 265 (Supp. 2009). Pierce is referring to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

¹⁸ *Daubert*, 509 U.S. at 597.

¹⁹ Pierce, *supra* note 17, at 265.

²⁰ *Dana Corp.*, 351 N.L.R.B. 434 (2007) ("Dana II"). For a list of links to all briefs in *Dana II*, see NLRB, DANA/MELTADYNE BRIEFS, <http://www.nlr.gov/nlr/about/foia/danametaldyne/danametaldyneamicusbriefs.html> (last visited Jan. 12, 2010) (discussed in detail in section IV *infra*). While the website lists 25 amicus briefs, this appears to be an error because the Brief of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO and Amicus American Federation of Labor & Congress of Industrial Organizations is listed twice.

²¹ *Dana Corp.*, 2010 N.L.R.B. LEXIS 489 (N.L.R.B. Dec. 6, 2010) ("Dana III"). For a list of links to all briefs in *Dana III*, see NLRB, INVITATIONS TO FILE BRIEFS,

some imagine the NLRB encounters a “gaping hole” in relevant research,²² the admission/citation imbalance may cast this conjecture into question.

Recognizing the disadvantages of relying on amici, certain scholars suggest that Congress should authorize a social science unit that evokes the Board’s “early days.”²³ However, the NLRB is different from similar agencies that employ economists for specialized analysis. First, Congress’s standard criteria for qualified Board members have evolved to limit the ability of academics without industrial workplace experience to influence national policy. Second, the Board’s adjudicatory body only requires economic research on specific appellate issues, not general labor policy. Third, the Board receives a substantial quantity of expert evidence from amicus briefs, not internal sources.

To recall the era of scientifically supported adjudications, Congress should refrain from encouraging a panel of admittedly political appointees to exploit the research of ostensibly apolitical authorities. Instead, Congress should accommodate the NLRB’s unique needs by authorizing an economic research unit to generate policy analyses and appointing a cross-disciplinary group to evaluate these analyses. By expanding the pool of Board members to include lawyers *and* social scientists, Congress may succeed in cultivating a spirit of cooperation across specializations while utilizing the members’ combined expertise in legal rights issues and social science statistics.

II. THE NLRB’S RELIANCE ON AMICUS BRIEFS FOR EXPERT EVIDENCE

A. Evidentiary Rules for Administrative Agencies

http://www.nlr.gov/about_us/news_room/notice_for_briefs/index.aspx (last visited Jan. 12, 2010) (discussed in detail in section IV *infra*). Because the original employer withdrew its request for review, the briefs are listed under *Lamons Gasket Co.*

²² Adrienne E. Eaton & Jill Kriesky, *NLRB Elections vs. Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 160 (2009).

²³ Roomkin & Abrams, *supra* note 12, at 1459-60 n.79.

Like courts, agencies receive argument and evidence from amici. Unlike courts, agencies are not subject to the FRE. As a result, the rules of evidence for courts are complex and technical, while the rules for agencies are simple and practical²⁴: “Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”²⁵ Acknowledging both systems, the NLRB’s own rules only require the Board to obey the FRE “so far as practicable.”²⁶

To justify this distinction, analysts observe that evidentiary rules for judicial trials are designed with juries in mind. Accordingly, these evidentiary rules assume that triers of fact are (1) separate from judges who adjudicate the issue of admissibility, (2) lacking in knowledge on legal psychology or technical reliability, (3) susceptible to error in assessing probative value, (4) inclined to emotionality, and (5) hence restrainable only by restricted exposure to prejudicial evidence.²⁷

By contrast, agencies try cases using panels of professionals, not juries of laypeople.²⁸ (For example, the NLRB mostly employs labor lawyers.²⁹) Considering their “specialized expertise in the subject matter,” they do not share the aforementioned five characteristics of juries: separation of responsibility, inexperience on topic, susceptibility to error, inclination toward emotionality, and restraint through lack of exposure. Consequently, they are trusted to examine the evidence without strong FRE safeguards against misuse.³⁰

²⁴ Pierce, *supra* note 15, at 705.

²⁵ Administrative Procedure Act, 5 U.S.C § 556(d) (2010).

²⁶ NLRB, RULES AND REGULATIONS § 102.39 (2010).

²⁷ Pierce, *supra* note 15, at 706-07.

²⁸ *Id.* at 706.

²⁹ Fisk & Malamud, *supra* note 6, at 2019.

³⁰ Pierce, *supra* note 15, at 706-07.

Because an agency adjudicator “is equally exposed to evidence whether he admits it or excludes it,” reviewing courts reason that rigorous exclusionary rules for agency proceedings make little sense.³¹ Given the adjudicator’s presumptive competence to disregard or discount the inadmissible or inapplicable, courts see little harm in letting agencies receive disputed evidence. By contrast, they discern great danger in eliminating “that which is competent and relevant by mechanistic application” of exclusionary rules.³²

Accordingly, courts advocate a highly “critical view of exclusionary rulings by administrative agencies”³³ and admonish that exclusions “may well result” in due process reversals.³⁴ Simply put, they “strongly advise administrative law judges: if in doubt, let it in.”³⁵ By effectively eliminating the procedural protections against admitting incompetent evidence, these cases increase the importance of evaluating the evidence—without affording an alternative for agencies that lack the requisite scientific expertise to resolve technical ambiguities.

B. The Daubert Standard for Evaluating Evidence

In *Daubert*, the Supreme Court suggested that FRE 703 (the only FRE relevant to advising administrative agencies³⁶) permits experts to rely on evidence “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,”³⁷ even if the evidence would be inadmissible in a federal court case under the FRE.

³¹ U.S. Steel Mining Co. v. Dir., Office of Workers Comp. Programs, 187 F.3d 384, 388 (4th Cir. 1999).

³² Multi-Medical Convalescent & Nursing Center v. NLRB, 550 F.2d 974, 977 (4th Cir. 1977).

³³ Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945).

³⁴ Multi-Medical, 550 F.2d at 977.

³⁵ *Id.* at 978.

³⁶ Pierce (2002), *supra* note 15, at 708.

³⁷ Daubert, 509 U.S. at 597.

Although *Daubert* is inapplicable directly to administrative decisions, the spirit of *Daubert* still influences their approach.³⁸

When analyzing the scientific validity of specialized evidence, the Supreme Court admonishes trial courts to assess two factors: reliability and relevance.³⁹ To do so, the Supreme Court envisions a “flexible” inquiry⁴⁰ and identifies five generally relevant issues: (1) Can (and has) the theory or technique been tested? (2) Has it been subjected to peer review/publication? (3) What is the known or potential error rate? (4) Does it have standards of operation? How are they being maintained? and (5) Does it enjoy “general acceptance”?⁴¹

Applying these principles to current NLRB cases may pose two problems. First, vigorous cross-examination and strong counterevidence “are the traditional and appropriate means of attacking shaky but admissible evidence.”⁴² However, evidence introduced in amicus briefs is never subject to cross-examination. Additionally, briefs filed last or simultaneously are unlikely to receive a response. As a result, amicus briefs can always avoid cross-examination and often avoid rebuttal.

Additionally, the agency’s evidentiary inquiries must “focus...solely on principles and methodology, not on the conclusions that they generate.”⁴³ However, the absence of expertise in principles and methodology could raise an inference of relying on conclusions by process of elimination. Indeed, NLRB adjudicators are often accused of switching sides in response to shifting politics. As a result, some critics suspect the Board of creating conclusions first and citing evidence afterward.

³⁸ Pierce, *supra* note 15, at 707.

³⁹ Daubert, 509 U.S. at 597.

⁴⁰ *Id.*

⁴¹ *Id.* at 593-94.

⁴² *Id.* at 596.

⁴³ *Id.* at 595.

Considering the complexity of the NLRA and the sophistication of the NLRB's policy problems, the Board has encountered an array of occasions for social science statistics. However, without a social science staff, the NLRB often relies on agency experience, not scientific evidence. When the Board does attempt to incorporate specialized input, it finds itself "poorly equipped to evaluate it."⁴⁴ Recently, the NLRB has filled the gap by relying on data from party/amicus briefs.

In relying on amici, the agency encounters two important critiques. Proponents of social science scholarship are wary of basing NLRB decisions on "untested suppositions" about human behavior.⁴⁵ Using "the best available data,"⁴⁶ they urge the Board to conduct empirical studies and employ expert theory and research in order to assess the assumptions of cause and effect in regulated labor processes.⁴⁷ This way, the NLRB could determine the impact of potential workplace policies,⁴⁸ especially in areas that exceed the members' own experiences.

Opponents of amici are skeptical of agency reliance on amicus briefs (or even party briefs) that implicate factual issues. Because the Board usually solicits amicus briefs on appeal, they possess the potential to derail a litigation. Because amicus briefs can introduce factual information without obeying the rules of evidence or receiving vigorous cross-examination, the NLRB cannot rely on parties' adverse interests to keep them honest. Instead, it must evaluate evidence independently—a challenge for lay Board members in hyper-technical cases.

III. DECISIONMAKING UNDER DER

⁴⁴ Stryker, *supra* note 2, at 344.

⁴⁵ JAMES A. GROSS, *THE RESHAPING FOR THE NATIONAL LABOR RELATIONS BOARD* 265 (1981).

⁴⁶ Derek C. Bok, *Forward* to JULIUS G. GETMAN STEPHEN & B. GOLDBERG, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY*, at xi, xii (1976).

⁴⁷ Stryker, *supra* note 2, at 344.

⁴⁸ Gross, *supra* note 7, at 347.

To aid the Board in producing good policy, the early DER performed independent research and wrote detailed reports that provided an economic/historical explanation for pressing labor problems. The DER's reports appeared in opinions from NLRB Board members and other federal agencies, often without opposition.⁴⁹ When parties did object to general DER statistics, they argued the data was immaterial, unverified hearsay "of no evidentiary value."⁵⁰ Rejecting this reasoning, the Board noted the well-settled "propriety of introducing in evidence economic data...obtained from governmental or other authoritative sources."⁵¹

For example, in *NLRB v. Crowe Coal Co.*, the General Counsel charged a bituminous coal company with discharging two employees for joining a union, thereby affecting interstate commerce and violating NLRA § 8(1).⁵² When the company denied operating a business that affected interstate commerce, the opinion cited a DER bulletin entitled *The Effect of Labor Relations in the Bituminous Coal Industry upon Interstate Commerce*, which specifically stated that "production is customarily not undertaken until orders are received and a supply of cars [for interstate coal shipments is] assured."⁵³

Likewise, in *H. J. Heinz Co. v. NLRB*, the General Counsel charged an employer that reached a unionized workplace agreement but declined to sign a contract with refusing to bargain in violation of NLRA §§ 8(1) and 8(5).⁵⁴ To explain why failure to sign a contract necessarily violated the duty to bargain and undercut the Act's express aims, the opinion cited a DER

⁴⁹ See, e.g., *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 517 (1941) (citation to DER by Board); *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 547 (1937) (citation to DER by National Mediation Board, which covers workplace disputes under 45 U.S.C. § 152 (Railway Labor Act)).

⁵⁰ *NLRB v. Crowe Coal Co.*, 104 F.2d 633, 634 (8th Cir. 1939).

⁵¹ *Id.* at 634 n.1 (citing *Virginian*, 300 U.S. at 547 n.4, 547 n.5; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 n. 8 (1937); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 n.2 (1938)).

⁵² *Id.* at 633.

⁵³ *Id.* at 635-36 (citing Dep't of Econ. Research, NLRB, BULL. NO. 2 (1938)).

⁵⁴ *Heinz*, 311 U.S. at 517.

bulletin entitled *Written Trade Agreements in Collective Bargaining*, which itemized the growth and extent of signed trade agreements and inferred they serve “both as recognition of the union with which the agreement is reached and as a permanent memorial of its terms.”⁵⁵

In addition to citing DER studies, the early Board enriched its analysis by supporting substantive statements with non-DER sources. In *Crowe*, the opinion demonstrated the respondent’s effect on interstate commerce with figures that showed the quantity of business it conducted. To do so, it cited the parties’ agreed statement of facts, which described the transactions for one representative year. The statement’s statistics showed, e.g., that 98,583.32 tons of respondent’s coal (or 36.8 percent of total production) had entered or maintained the channels of interstate commerce that year alone.⁵⁶

Similarly, the *Heinz* opinion illustrated the importance of written agreements to peaceful workplaces with agency statistics and scholarly studies. Specifically, sources showed that (1) the number of signed trade contracts had grown over time,⁵⁷ (2) written contracts served as a recognition of the union and a record of the terms,⁵⁸ (3) employers often declined to sign written contracts in order to frustrate the process of bargaining,⁵⁹ and (4) unlike unilateral policies,

⁵⁵ *Id.* at 524 (citing Dep’t of Econ. Research, NLRB, BULL NO. 4 (1939)).

⁵⁶ *Crowe*, 104 F.2d at 635.

⁵⁷ *Heinz*, 311 U.S. at 524 (citing Bureau of Labor Statistics, DEP’T OF LABOR, FIVE YEARS OF COLLECTIVE BARGAINING 5-7; Saposs and Gamm, *Rapid Increase in Contracts*, 4 LAB. REL. REP. NO. 15, at 6).

⁵⁸ *Id.* (citing LEWIS L. LORWIN, THE AMERICAN FEDERATION OF LABOR 309; COMMONS & ASSOC., 2 HISTORY OF LABOR IN THE UNITED STATES 179-81, 423-24, 480; PERLMAN & TAFT, 4 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, at 9-10; PAUL MOONEY, COLLECTIVE BARGAINING 13-14; TWENTIETH CENTURY FUND, INC., LABOR AND THE GOVERNMENT 339).

⁵⁹ *Id.* at 523-24 (citing SUMNER H. SLICHTER, ANNALS OF THE AMERICAN ACADEMY 110-20 (1935); R. R. R. BROOKS, WHEN LABOR ORGANIZES 224).

signed labor contracts were considered “effective instrument[s] of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife.”⁶⁰

By incorporating the DER’s rigorous labor policy research, the early NLRB set the standard for enriching its understanding of complex labor questions with social science evidence. For example, in *Virginian Railway Co. v. System Federation*, the National Mediation Board (NMB) borrowed a DER bulletin entitled *Governmental Protection of Labor’s Right to Organize* to justify the Railway Labor Act.⁶¹ When other agencies adopted the DER’s economic data, they implicitly acknowledged its unique expertise on contentious labor questions and lent an air of legitimacy to other Board opinions. By contrast, when they stopped citing the NLRB’s specialized evidence, they signaled its irrelevance on cutting-edge issues.⁶²

Further, the early NLRB established a practice of considering non-DER perspectives with strong scientific support. For example, the Board used data to show that employer interference with employee unionization often induced labor unrest and impaired interstate commerce. In *Santa Cruz Fruit Packing Co. v. NLRB*, it cited an 18-month Department of Labor (DOL) study that blamed antiunion activities for 8/15 canning work stoppages affecting 7,484 employees.⁶³ In *Mooreville Cotton Mills v. NLRB*, it cited another 18-month DOL study that blamed

⁶⁰ *Id.* at 524 (citing CARROLL R. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 936-37 (Rev. ed. 1938); MITCHELL, ORGANIZED LABOR 347; GEORGE G. GROAT, AN INTRODUCTION TO THE STUDY OF ORGANIZED LABOR IN AMERICA 337-39, 341, 345, 346 (2d ed. 1926); 1935 NAT’L MEDIATION BOARD ANN. REP. 1-2).

⁶¹ *Virginian*, 300 U.S. at 547 (citing Dep’t of Econ. Research, NLRB, BULL. NO. 1 (1936)).

⁶² In addition to *Crowe*, *Heinz*, and *Virginian*, I was unable to locate any other court cases that cited the DER’s economic data. The DER was disbanded in 1940; the last case citing its data was published in 1941.

⁶³ *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 462-63 (1938) (citing DEP’T OF LABOR, STRIKES AND LOCKOUTS IN THE CANNING AND PRESERVING INDUSTRIES IN 1934, AND IN JANUARY TO JULY, INCLUSIVE, 1935, BY MAJOR ISSUES INVOLVED, BOARD EXHIBIT NO. 16 (1935)).

antiunion activities for 94 textile work stoppages affecting 290,154 employees and costing the industry 3,958,891 man-days of idleness.⁶⁴

Additionally, the early NLRB engaged the evidence by scrutinizing whether statistics actually supported the party briefs' points. Occasionally, the Board repurposed one party's studies to support another party's statements. For example, in *NLRB v. National Motor Bearing Co.*, the Board cited the defendant's data on plant productivity to disprove its claims of declines in production and suggest a proscribed motive for partially closing.⁶⁵ Similarly, in *Montgomery Ward & Co. v. NLRB*, the court cited a company's data on seasonal hiring to show its unjustified departure from standard practice and support the NLRB's inference of antiunion animus for failing to rehire.⁶⁶

In 1939, however, a congressional committee confiscated the DER's economic files and branded the Board's Chairman as subversive, the Chief Economist as Communist, and leftist groups generally as anti-democratic, pro-Soviet, and un-American.⁶⁷ In 1940, Congress "unceremoniously" banned the NLRB from employing any economists.⁶⁸ By attacking the DER's political ideology (not the unit's scientific methodology), Congress implied that some perspectives are simply forbidden, regardless of whether they receive scientific support. Although the specific political attack that motivated this ban was discredited and faded from America's political culture, the ban itself persists in affecting NLRB processes.

⁶⁴ *Mooresville Cotton Mills v. NLRB*, 94 F.2d 61, 63 (4th Cir. 1938) (citing DEP'T OF LABOR, STRIKES AND LOCKOUTS IN THE COTTON TEXTILE INDUSTRY IN 1934, AND IN JANUARY TO JULY, INCLUSIVE, 1935, BY MAJOR ISSUES INVOLVED, BOARD EXHIBIT No. 16 (1935)).

⁶⁵ *NLRB v. National Motor Bearing Co.*, 105 F.2d 652, 657-58 (9th Cir. 1939).

⁶⁶ *Montgomery Ward & Co. v. NLRB*, 107 F.2d 555, 561 (7th Cir. 1939).

⁶⁷ Stryker, *supra* note 2, at 350; 25.6 NLRB, RECORDS RELATING TO THE SMITH COMMITTEE INVESTIGATION OF THE NLRB (1934-41).

⁶⁸ Stryker, *supra* note 2, at 344; 29 U.S.C. § 154(a) (2010).

Finally, the early NLRB acknowledged the importance of studying social science when setting labor policy. Echoing the arguments that partisan appointees were probably partial to specific sides and possibly prompted by future reemployment with certain interests,⁶⁹ presidents appointed nonpartisan government workers and scholars “nearly exclusively.”⁷⁰ When presidents accepted that career academics were uniquely qualified and inherently impartial, they implied that social science expertise was integral to setting labor policy. However, when presidents abandoned this nomination tradition, they intimated that social science expertise was secondary to partisan industry experience—an important impediment to achieving legitimacy.

IV. DECISIONMAKING AFTER DER: AN NLRB CASE STUDY

A. Card Recognition Campaigns

The NLRB is currently confronting a great debate: whether the NLRA should protect a union organizing process that excludes an official Board election. Traditionally, a union would organize a workplace by collecting authorization cards. Once the NLRB had proof of cards from one-third of eligible employees, it would hold a secret-ballot election. If the union won by majority vote, the employer would have to recognize the union and engage in good-faith bargaining. Additionally, the union would enjoy an un rebuttable presumption of majority representation until the expiration of a reasonable waiting period.⁷¹

Today, a union that collects a majority of valid recognition cards typically demands representative status without holding an election. Studies show that more employees will sign a card than submit a secret-ballot vote in favor of unionization. Some unions state that cards best

⁶⁹ *Id.* at 1370-71.

⁷⁰ *Id.* at 1367.

⁷¹ Michael E. Aleo, Working Paper, *Card Check Recognition: The Ongoing Legal and Legislative Battle*, BEPRESS LEGAL SERIES 957, 958-59 (2006), <http://law.bepress.com/expreso/eps/957> (last visited Jan. 12, 2011).

reflect employee preference because employers will coerce their votes between the demand for recognition and the holding of the election. Conversely, some employers state that elections best reflect employee preference because unions will coerce their signatures during the campaign for organization.⁷²

Although the Board recognizes cards as bases for measuring employee support for unionization, it expresses a preference for secret ballot elections.⁷³ While some studies show that employers opposing unions legally enjoy considerably more opportunities for persuading their employees and commit poorly remedied unfair labor practices (UPLs) between demand and election,⁷⁴ other sources suggest that unions gathering cards take advantage of workers' wishes to "avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back."⁷⁵ Further, employees who sign cards might simply change their minds.⁷⁶

Thus, the current legal contest over whether or when a union should be able to receive recognition with a card majority instead of an official election hinges on several empirical questions, e.g., Are cards or elections more reliable indicators of employee preferences? How prevalent is union misinformation or coercion in gathering cards? and How prevalent is employer misinformation or coercion in persuading employees who signed cards to reject unions?

B. The Recognition-Bar Challenge

Under the recognition-bar doctrine, a union that secures good-faith employer support on basis of demonstrated majority status can receive a three-year reprieve from official Board

⁷² *Id.*

⁷³ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

⁷⁴ Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1784 (1983).

⁷⁵ *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).

⁷⁶ *Alliant Foodservice*, 335 N.L.R.B. 695, 695 (2001).

elections, regardless of challenges from employees and rival labor groups.⁷⁷ During the recognition-bar period, the *Dana I* plaintiffs claimed the acting union lacked the status of majority bargaining representative and could not enter an agreement on behalf of Dana Corp.'s employees. However, the ALJ simply applied the recognition-bar doctrine and upheld the agreement.⁷⁸

Generally, the ALJ is charged with enforcing agency policy, while the Board is capable of evaluating its desirability.⁷⁹ Accordingly, the *Dana I* ALJ dismissed the complaint in just ten pages on the grounds that the General Counsel had pled improper prerecognition without proving illegal recognition, a course of action not outlawed by the language of the NLRA.⁸⁰ Despite the quantity and complexity of issues that impact the recognition-bar discussion, the ALJ cited no social science statistics and made no mention of whether the recognition-bar doctrine represented sound policy.

On appeal, the reviewing Board reframed the issue from descriptive (whether the parties had obeyed the recognition-bar doctrine) to normative (whether the doctrine should exist at all). To answer the legal question of whether the recognition-bar doctrine is compatible with statute and commendable as policy, it addressed the factual question of whether card-check elections are somehow more susceptible to coercion and manipulation.⁸¹ As a result, the NLRB admitted four

⁷⁷ Aleo, *supra* note 71, at 958-59.

⁷⁸ Dana Corp., JD-24-05 (NLRB Div. of Judges Apr. 8, 2005) at 3 (“Dana I”).

⁷⁹ See NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 33, 35-36 (1997).

⁸⁰ Dana I, JD-24-05 at 3.

⁸¹ Dana II, 351 N.L.R.B. at 434.

party briefs, 24 amicus briefs, and four reply briefs, many of which emphasized the social science evidence and couched their challenges in data analysis terms.⁸²

Using this evidence, the Board reconsidered the balance between two competing interests: protecting employee preference and promoting stable bargaining. Next, it held the recognition bar doctrine had undervalued the employees' statutory right to choose their representation through official NLRB elections. Finally, it modified the restrictions on challenging the representativeness of voluntarily recognized unions.⁸³

Three years later, the Board solicited amicus briefs regarding "the actual experience of employees, unions, and employers under *Dana Corp.*"⁸⁴ After reading the briefs, the NLRB upheld the ALJ's dismissal in *Dana I*, thereby reinstating the original recognition bar.⁸⁵ Consequently, the Board members' evaluation of party/amici evidence may ultimately have influenced their approach to recognition-bar protection for union organizing efforts.

C. Dana II's Amicus Evidence

1. Citations to Social Science Statistics

To answer the legal/normative question of whether card recognition campaigns should receive NLRA protection, *Dana II* assessed the factual/empirical question of whether card recognition campaigns are inherently less reliable than official NLRB elections.⁸⁶ Despite

⁸² *Id.* at 434 n.2; NLRB, DANA/MELTADYNE BRIEFS, <http://www.nlr.gov/nlr/about/foia/danametaldyne/danametaldyneamicusbrieffs.html> (last visited Jan. 12, 2010).

⁸³ *Dana II*, 351 N.L.R.B. at 434.

⁸⁴ Rite Aid Store # 6473, 2010 N.L.R.B. LEXIS 337, at *1 (N.L.R.B. Aug. 27, 2010) ("Rite Aid").

⁸⁵ *Dana III*, 2010 N.L.R.B. LEXIS 489, at *1.

⁸⁶ *Dana II*, 351 N.L.R.B. at 439.

admitting 24 amicus briefs that represented a variety of interests,⁸⁷ the Board relied largely on three NLRB sources: a former chairman,⁸⁸ an operational summary,⁸⁹ and an annual report.⁹⁰

First, the Board cited a 1962 presentation by Frank McCulloch, who served as chairman from 1961 to 1970⁹¹—a source mentioned in “several” *Dana II* briefs⁹² and other court opinions.⁹³ While *Dana II* failed to specify McCulloch’s strategy for obtaining the statistics he cited, the speech’s transcript suggests that McCulloch had examined 202 elections: 58 with recognition rates of 30-50 percent, 87 with 50-70 percent, and 57 with over 70 percent.⁹⁴

The statistics showed a “significant disparity” between card recognition rates and official election results: Unions with 50-70-percent recognition only won 48 percent of elections, and unions with over-70-percent recognition only won 74 percent of elections.⁹⁵ (For 50-70-percent recognition, “[t]he study itself gives the figure 52 percent, but this is evidently an arithmetical error, since the study reports that the union won 42 out of 87 elections, which is 48 percent.”⁹⁶)

⁸⁷ *Dana II* lists the amici who oppose the recognition-bar doctrine at 435 n.8. They are (1) 21 Republican representatives; (2) federal and state chambers of commerce; (3) employer industry associations; (4) contract security companies; (5) antiunion advocacy organizations; and (6) labor/employment attorneys. Additionally, *Dana II* lists the amici who support the recognition-bar doctrine at 436 n.9. They are (1) 48 Democratic congressmen; (2) companies; (3) unions; (4) labor advocacy organizations; and (5) professors.

⁸⁸ *Id.* at 439.

⁸⁹ *Id.* at 439 n.25.

⁹⁰ *Id.* at 440 n.26.

⁹¹ NLRB, BOARD MEMBERS SINCE 1935, http://www.nlr.gov/about_us/overview/Board/Board_members_since_1935.aspx (last visited Jan. 12, 2011).

⁹² *Dana II*, 351 N.L.R.B. at 439.

⁹³ See, e.g., *NLRB v. Johnnie’s Poultry*, 344 F.2d 617, 620 (8th Cir. 1965); *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562, 565 (4th Cir. 1967); *Retail, Wholesale, & Dep’t Store Union v. NLRB*, 385 F.2d 301, 308 (D.C. Cir. 1967); *Village IX*, 723 F.2d at 1371; *County of Du Page v. Ill. Labor Rel. Bd.*, 231 Ill. 2d 593, 625 (Ill. 2008).

⁹⁴ Frank McCulloch, *A Tale of Two Cities: Or Law in Action*, PROCEEDINGS OF ABA SECTION OF LAB. REL. LAW 14, 17 (1962).

⁹⁵ *Dana II*, 351 N.L.R.B. at 439 (citing McCulloch, *supra* note 94, at 17).

⁹⁶ *Village IX*, 723 F.2d at 1371; accord *Du Page*, 231 Ill. 2d at 625.

Next, the Board cited two NLRB sources. In 2007, the General Counsel released an operational summary memorandum for Fiscal Year 2006, which revealed that once the NLRB received an election petition, the median delay was 39 days. In fact, 94.2 percent of elections occurred within 56 days.⁹⁷ The year before, the NLRB gave an annual report for Fiscal Year 2005, which only showed an objection rate of 5 percent.⁹⁸

Finally, the Board cited an article by James Brudney, which surveyed several dozen social science studies (and even a *Dana II* brief) on card recognition issues, many published within the last ten years.⁹⁹ However, it did not utilize Brudney's article to communicate a labor policy argument or convey an expert insight/evidence. Instead, it used Brudney simply to supply a list of voluntary recognition objectives "that will remain unaffected by our decision today."¹⁰⁰

2. Use of Social Science Statistics

Surprisingly, neither the majority nor the dissenting opinion discussed whether McCulloch's statistics constituted good science. That is, neither opinion checked the study for compliance with *Daubert*'s evidentiary benchmark for testing, peer review, error rate, operational standards, and general acceptance. Instead, they confined their inquiry to questioning its relevance to determining the significance of receiving card recognition.

Specifically, the majority argued that elections represent an instantaneous snapshot of employee preference.¹⁰¹ However, recognition cards are regularly collected over protracted

⁹⁷ *Dana II*, 351 N.L.R.B. at 439 n.25 (citing Office of the Gen. Counsel, NLRB, SUMMARY OF OPERATIONS (FISCAL YEAR 2006) (2007)).

⁹⁸ *Id.* at 440 n.26 (citing 2005 NLRB ANN. REP. 130).

⁹⁹ *Id.* at 442 n.34 (citing James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 832-41 (2005)). The brief in question is Brief of Amicus Curiae Kaiser Foundation Health Plan at 2, *Dana Corp.*, No. 8-RD-1976 (NLRB June 7, 2004) (supporting voluntary recognition). See Brudney at 886 n.54.

¹⁰⁰ *Id.* at 442.

¹⁰¹ *Id.* at 439.

periods (e.g., over a year in one union drive), during which time “employees can and do change their minds.”¹⁰² Because these cards merely provide a basis for conducting an election, the reasons for questioning their reliability “become moot once an election is held.”¹⁰³

By contrast, the dissent insisted the study had “prove[d] nothing” about whether cards or elections are more reliable. This is because the disparity could “just as easily” have resulted from employer coercion during election campaigns as union coercion during card collections. Depending on who coerced whom, the cards (not the votes) may “truly [have] reflected the employees’ free choice.”¹⁰⁴

Similarly, the opinions never questioned the admissibility or reliability of internal NLRB evidence and concentrated their arguments on examining its applications. Since 94.2 percent of elections occur within three months of the filing of the election petition, the majority argued that providing orderly processes for gauging electoral fairness may only cause a “substantial delay in a small minority” of union drives.¹⁰⁵ Since 95 percent of elections lack objections, the statistics belie suggestions that antiunion employers enjoy “a one-sided advantage” which allows them to exert pressure on employees throughout an election campaign.¹⁰⁶

Without disputing the 94.2 percent figure, the dissent declared the delay unacceptable because union status can remain unresolved for three months after voluntary recognition and because objections may cause the delay to snowball.¹⁰⁷ Likewise, without disputing the 5

¹⁰² *Id.* at 439 n.23 (citing *Alliant*, 335 N.L.R.B. at 695, where 16 employees who signed cards for one union later signed cards for another union).

¹⁰³ *Id.* at 439 n.24 (citing *Northeastern Univ.*, 218 N.L.R.B. 247, 248 (1975), which states that “it is the election, not the showing of interest, which decides” the issue of representation).

¹⁰⁴ *Id.* at 448 n.19 (Liebman, W. & Walsh, D., dissenting in part but concurring in result).

¹⁰⁵ *Id.* at 439 n.25 (citing Office of the Gen. Counsel, NLRB, SUMMARY OF OPERATIONS (FISCAL YEAR 2006) (2007)).

¹⁰⁶ *Id.* at 440 n.26 (citing 2005 NLRB ANN. REP. 130).

¹⁰⁷ *Id.* at 447 n.15 (Liebman & Walsh, dissenting in part but concurring in result).

percent figure, the dissent maintained that “[t]o the extent the majority is suggesting that employer coercion is rare in election campaigns, the majority’s statistics do not account for situations in which employer conduct was not known to the union or in which the union, for whatever reason, chose not to file objections.”¹⁰⁸

Finally, the opinions never probed the Brudney survey article for admissibility or relevance. Interestingly, Brudney argued that “an array of findings and studies indicate that the NLRB elections regime regularly tolerates, encourages, and effectively promotes coercive conditions that preclude the attainment of employee free choice,”¹⁰⁹ which directly challenges the majority preference for NLRB elections.¹¹⁰

Without scrutinizing these studies or engaging these arguments, the majority utilized Brudney merely to supply the various reasons for voluntary recognition “that will remain unaffected by our decision today.”¹¹¹ By contrast, the dissent used the article to support a substantive factual statement: that “employer antiunion conduct, and attendant delays, can undermine union support during lengthy election campaigns.”¹¹²

D. Rite Aid’s Amicus Evidence

1. Citations to Social Science Statistics

In granting the request to review *Dana II*’s modification of recognition-bar protection, *Rite Aid* refrained from reaching the merits or citing any statistics before “giving any interested party any opportunity to present any evidence” on whether *Dana II* is working.¹¹³ Instead, it

¹⁰⁸ *Id.* at 448 n.19 (Liebman & Walsh, dissenting in part but concurring in result).

¹⁰⁹ Brudney, *supra* note 99, at 819.

¹¹⁰ *See* *Dana II*, 351 N.L.R.B. at 434.

¹¹¹ *Id.* at 442 (citing Brudney, *supra* note 99, at 832-41).

¹¹² *Id.* at 448 n.19 (Liebman & Walsh, dissenting in part but concurring in result) (citing Brudney, *supra* note 99, at 824).

¹¹³ *Rite Aid*, 2010 N.L.R.B. LEXIS 337, at *2.

opted to solicit amicus briefs in order to “consider the actual experience of employees, unions, and employers under *Dana Corp.*, before arriving at any conclusions.”¹¹⁴

By contrast, the concurrence and dissent both cited the General Counsel’s statistics, which showed an official election rate of 5 percent and a union rejection rate of 1 percent. Specifically, the NLRB received some 1,111 notices of voluntary recognition and 54 petitions for traditional election. The voting employees refused the union 15 times, a number that included two elections that chose a petitioning union over the recognized union.¹¹⁵

2. Use of Social Science Evidence

Again, neither opinion disputed the General Counsel’s data as inadmissible or unreliable. Instead, they disagreed on whether it showed that *Dana II* was doing its job. The concurrence contended that since the rejection rate was just 1 percent, *Dana II* served no “clear purpose” in 99 percent of total cases.¹¹⁶ Further, the data had failed to capture the agreements never consummated as a result of the parties’ concerns about *Dana II*. Finally, it had failed to address *Dana II*’s impact on collective bargaining after voluntary recognition.¹¹⁷

The dissent responded that since the data reported at least 1,111 post-*Dana II* voluntary recognition agreements (not including the ones with no posted notices), “[t]here has been no apparent deterrent to voluntary recognition.”¹¹⁸ Accordingly, the Board had empirical evidence that *Dana II* protected the employees’ preferences without discouraging either voluntary

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *7 n.5 (Liebman, W., concurring); *Id.* at *20 (Schaumber, P. & Hayes, B., dissenting).

¹¹⁶ *Id.* at *7 n.5 (Liebman, concurring).

¹¹⁷ *Id.* at *7 (Liebman, concurring).

¹¹⁸ *Id.* at *20 (Schaumber & Hayes, dissenting).

recognition or collective bargaining. By contrast, it lacked “a scintilla of objective evidence to the contrary.”¹¹⁹

E. *Dana III’s Amicus Evidence*

In *Rite Aid*, the NLRB solicited briefs on *Dana II* issues from parties and amici. Despite admitting three party briefs, 14 amicus briefs, and two reply briefs that represented a variety of interests,¹²⁰ neither opinion cited any social science statistics. Instead, they concentrated on comparing and contrasting the *Dana II* issues to past precedent, particularly the prohibition on pre-hiring agreements outside construction workplaces under *Majestic Weaving Co., of New York*.¹²¹ In doing so, Board members reasoned “like lawyers balancing rights rather than policy analysts studying social and economic regulatory problems.”¹²²

F. *Critique of Card Recognition Cases*

1. Quality of Data

In the spirit of *Daubert*, agencies that evaluate specialized evidence should interrogate its testing, peer review, error rate, operational standards, and general acceptance.¹²³ Because labor conditions are “rapidly changing,”¹²⁴ several legal scholars have updated McCulloch’s study with more recent material (discussed in detail in section 2 *infra*). However, although his speech

¹¹⁹ *Id.* at *21 (Schaumber & Hayes, dissenting).

¹²⁰ NLRB, INVITATIONS TO FILE BRIEFS, http://www.nlr.gov/about_us/news_room/notice_for_briefs/index.aspx (last visited Jan. 12, 2010). The amici who oppose the recognition-bar doctrine are (1) chambers of commerce; (2) employer industry associations; and (3) antiunion advocacy organizations. The amici who support the recognition-bar doctrine are (1) congressmen; (2) companies; (3) unions; and (4) professors. While *Dana III* lists different amici at *1, these entities responded to an earlier request for party/amicus briefing, which occurred on March 30, 2006—a year before *Dana II*. Accordingly, I analyze these entities under *Dana II*.

¹²¹ 147 N.L.R.B. 859 (1964).

¹²² Fisk & Malamud, *supra* note 6, at 2019.

¹²³ Pierce, *supra* note 17, at 265.

¹²⁴ Christopher P. Yost & John H. Fanning, *The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?* 38 CATH. U. L. REV. 675, 677 (1989).

was 45 years old at the time of the *Dana II* decision, neither the majority nor the dissent ever raised issues regarding its reliability. Likewise, both opinions accepted the General Counsel’s statistics without addressing this issue.

Initially, the absence of *Daubert* analysis might not appear unduly alarming. As a former NLRB chairman, McCulloch lacked incentive to falsify his findings to favor either party. As a federal labor office, the General Counsel had expertise on labor issues in general and NLRB proceedings in particular. As “several” submitters cited the former chairman’s speech,¹²⁵ it probably enjoyed a general consensus of undisputed correctness. Consequently, analysts might assert that Board members refrained from questioning its reliability simply because reliability was not an issue.

However, critics should consider the studies’ two sources: the NLRB’s former chairman and the NLRB’s General Counsel. Lacking internal expertise in social science techniques,¹²⁶ the Board must rely on briefs from parties to supply specialized data¹²⁷—and likely also to evaluate this data. Notwithstanding the data’s true quality, the uniquely symbiotic relationship between the NLRB’s lawyer members as adjudicators, the NLRB’s General Counsel as researcher, and the NLRB’s General Counsel as prosecutor may encourage the members to weigh their opinions more heavily, letting older data from NLRB actors trump newer data from outside entities.¹²⁸

¹²⁵ Dana, 351 N.L.R.B. at 439.

¹²⁶ Gross, *supra* note 7, at 347.

¹²⁷ Fisk & Malamud, *supra* note 6, at 2065.

¹²⁸ Indeed, several scholarly studies have detected a nexus between the identities of the parties and the reception of their pleadings. See, e.g., S. Sidney Ulmer, *Selecting Cases for Supreme Court Review: An Underdog Model*, 72 AM. POL. SCI. REV. 902, 103 (1978) (arguing that courts will cite some parties (“upperdogs”) more frequently than others (“underdogs”) and that “upperdogs comprise governments (federal, state, and local and their agents) and businesses, while underdogs comprise labor unions, employees, minority group members, aliens, and criminals”); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on*

The Board is likeliest to encounter the issue of symbiosis when the beliefs of members and researchers are aligned. That is, the Board is unlikely to complete a rigorous *Daubert* analysis or conduct a resource-intensive review of specialized opposing arguments when the adjudicators agree with the ideological implications of the information's conclusions. However, the parties and public would prefer the Board to articulate its reasons for accepting or rejecting these arguments, especially when authors and adjudicators both serve a single agency and support the same outcome.

The existence (or appearance) of undesirable incentives implicates two issues: reliability and legitimacy. The assumption underlying the adversarial system is that clashes between counterparties will expose the truth¹²⁹—an assumption critical to adjudicators lacking the technical knowledge to evaluate the evidence without input from parties. If the Board develops patterns of weighing certain viewpoints more heavily, this may cause the quality of evidence to decline, while leaving the Board ill-equipped to detect the defects.

Commentators also claim that courts mainly derive their legitimacy and authority from persuading the public by justifying their decisions.¹³⁰ As agency adjudicators are expressly encouraged to admit most evidence,¹³¹ an observer's inquiry will likely shift from admissibility to reliability. In this context, the absence of analysis regarding the reliability of social science statistics may leave the Board's decisions unfounded, thus inviting an assumption of political/ideological motivations.

2. Quantity of Data

the Supreme Court, 148 U. PA. L. REV. 743, 749-50 (2000) (arguing that courts usually cite large institutional players).

¹²⁹ Kenneth B. Nunn, *The Trial as Text: Myth and Symbolism in the Adversarial Process*, 32 AM. CRIM. L. REV. 743, 748 (1995).

¹³⁰ Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990-91 (2008).

¹³¹ *Multi-Medical*, 550 F.2d at 978.

Although the Board members appeared to agree that McCulloch's election statistics were admissible and reliable, they disagreed on whether (and how) the statistics were relevant to showing employee coercion by unions (or employers). In order to illuminate these issues, they might have asked: (1) Fifty years later, does McCulloch's data still reflect labor realities? (2) How do employees receive information regarding unions? and (3) How do employees make decisions on whom to support? Ignoring this invitation to incorporate specialized evidence, the opinions cited almost no social science studies to prove substantive points.

To explain this omission, one may assert the existence of "gaping hole[s]" in empirical comparisons between the pressure on employees by unions and employers.¹³² Since scientific studies often require investments of time and money, the demand for data might exceed its supply from independent research communities. Considering the NLRB's express interest in ascertaining "the actual experience of employees, unions, and employers"¹³³ and analyzing "what members of the labor management community...have to say about this data and its lessons,"¹³⁴ critics might contend the Board is citing the best information available.

However, *Dana*'s admission/citation imbalance calls the information hole argument into question. In *Dana II*, the Board admitted four party briefs, 24 amicus briefs, and four reply briefs. The briefs cited 39 different sources of social science statistics that appeared in academic publications or agency reports in 2000-2010. These current citations featured in 3/4 (75 percent) of the party briefs, 11/24 (46 percent) of the amicus briefs, and 1/4 (25 percent) of the reply

¹³² Eaton & Kriesky, *supra* note 22, at 160.

¹³³ Rite Aid, 2010 N.L.R.B. LEXIS 337, at *1.

¹³⁴ *Id.* at *7 (Liebman, concurring).

briefs—a range of 0-12 and an average of 1.6 current citations per brief.¹³⁵ Nevertheless, *Dana II* utilized just three sources of social science statistics, all from within the NLRB.

Likewise, in *Dana III*, the Board admitted three party briefs, 14 amicus briefs, and two reply briefs. The briefs cited 29 different sources of social science statistics that appeared in academic publications or agency reports in 2000-2010. These figured in 1/3 (33 percent) of the party briefs, 8/14 (57 percent) of the amicus briefs, and 1/2 (50 percent) of the reply briefs—a range of 0-10 and an average of 1.8 current citations per brief.¹³⁶ However, despite the Board’s stated interest in “the actual experience of employees, unions, and employers,”¹³⁷ *Dana III* used no social science statistics at all.

To explain this absence, critics should consider the shortage of rebuttal for social science statistics from party/amicus briefs. In *Dana II*, just five¹³⁸ current sources appeared in multiple entities’ briefs, only three¹³⁹ of them in briefs that took opposite sides on recognition-bar issues. In *Dana III*, just seven¹⁴⁰ appeared in multiple briefs, only two¹⁴¹ of them opposing. Given the

¹³⁵ NLRB, DANA/MELTADYNE BRIEFS, <http://www.nlr.gov/nlr/about/foia/danametaldyne/danametaldyneamicusbrieffs.html> (last visited Jan. 12, 2010) (Excel data sets that describe the briefs on file with author).

¹³⁶ NLRB, INVITATIONS TO FILE BRIEFS, http://www.nlr.gov/about_us/news_room/notice_for_briefs/index.aspx (last visited Jan. 12, 2010) (Excel data sets that describe the briefs on file with author).

¹³⁷ Rite Aid, 2010 N.L.R.B. LEXIS 337, at *1.

¹³⁸ Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction its Own Obsolescence?*, THE LAB. LAWYER (2000); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42 (2001); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369 (2001); JAROL P. MANHEIM, THE DEATH OF A THOUSAND CUTS: CORPORATE CAMPAIGNS AND THE ATTACK ON THE CORPORATION (2001); Office of the Gen. Counsel, NLRB, SUMMARY OF OPERATIONS (FISCAL YEAR 2003) (2003)

¹³⁹ Eaton & Kriesky, *supra* note 138; Hartley, *supra* note 140; Office of the Gen. Counsel, NLRB, SUMMARY OF OPERATIONS (FISCAL YEAR 2003) (2003).

¹⁴⁰ Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer*

overlap between the sources cited in the *Dana II* briefs and the *Dana III* briefs, the combined *Dana* briefing only contributed four¹⁴² different current sources that even potentially received an opponent's rebuttal. This increased the difficulty of evaluating them critically.

By reducing its citations to social science statistics, the Board might hope to prevent lay members who lack a background in social science scholarship from inadvertently placing authority in pseudoscience. However, this practice also prevents the Board from accumulating experience/expertise in analyzing this type of information. Further, it permits a somewhat dated study to frame the discussion and dominate the debate, rather than sparking a dialogue that uses the knowledge of the past and the present. As a result, the Board runs the risk of rendering data irrelevant to reaching its decisions, thus raising an inference of arbitrariness or incompetence.

V. PROPOSAL

Since the amendment which prohibits the NLRB from employing any economists arguably permits the employment of general social scientists,¹⁴³ some scholars suggest the agency should hire a social science unit to evaluate party evidence and initiate independent investigations.¹⁴⁴ However, the NLRB is different from similar agencies that employ economists for scientific analysis. Accordingly, Congress should accommodate the NLRB's unique needs

Organizing, ECONOMIC POLICY INSTITUTE, EPI Briefing Paper No. 235 (2009); Cohen, *supra* note 141; Joel Dillard & Jennifer Dillard, *Fetishing The Electoral Process: The National Labor Relations Board's Problematic Embrace of Electoral Formalism*, 6 SEATTLE J. FOR SOC. JUST. 819 (2008); Eaton & Kriesky, *supra* note 138; Fisk & Malamud, *supra* note 6; Manheim, *supra* note 139; *New Survey Says Union Members Prefer Secret-Ballot Elections Over Card Check*, DAILY LAB. REP., July 22, 2004.

¹⁴¹ Eaton & Kriesky, *supra* note 138; Fisk & Malamud, *supra* note 6.

¹⁴² Eaton & Kriesky, *supra* note 138; Fisk & Malamud, *supra* note 6; Hartley, *supra* note 140; Office of the Gen. Counsel, NLRB, SUMMARY OF OPERATIONS (FISCAL YEAR 2003) (2003).

¹⁴³ 29 U.S.C. § 154(a) (2010) (stating that "Nothing in this subchapter shall be construed to authorize the Board to appoint individuals...for economic analysis.").

¹⁴⁴ Roomkin & Abrams, *supra* note 12, at 1459.

by authorizing an economic research unit to produce scientific evidence and appointing a cross-disciplinary group to evaluate this evidence.

First, Congress's standard criteria for qualified NLRB members have evolved to limit the ability of academics without industrial workplace experience to influence national policy. When Eisenhower expanded the NLRB's membership to include political appointees, supporters suggested that partisans possessed (1) an expertise in real-world labor relations, (2) the integrity to resist interest capture, and (3) the ability to follow federal judges in wearing "two hats."¹⁴⁵ They also alleged the impossibility of finding "anyone...entirely free" from allegedly prejudicial experiences.¹⁴⁶

However, when Nixon nominated a career management lawyer named Edward B. Miller, the congressional debates heralded an entirely new approach to measuring Board members' qualifications. Supporting his candidacy, some Congress members refined and amplified the Eisenhower-era arguments to turn the issue of background completely around. Since private-sector experience yields practical expertise, Miller's management background was not a minus, but a plus. Instead, Congress's true concern was NLRB's overwhelming inclusion of appointees from government and academia.¹⁴⁷

The Miller nomination marked a turning point in perceived acceptability of partisan appointments. By reacting to anti-partisan arguments with profound indifference (not one senator voted "no"), Congress exhibited "complete acquiescence to the appointment of management partisans to the Labor Board."¹⁴⁸ Accordingly, Congress also implicitly acknowledged the concerns over permitting government employees and academics who lacked

¹⁴⁵ Flynn, *supra* note 3, at 1372-74.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1379-81.

¹⁴⁸ *Id.* at 1382-83.

industry experience to influence labor policy. With the exception of Carter, the succeeding presidents continued this practice.¹⁴⁹

In sum, Congress is concerned that the Board “has had a deficiency by not having anyone on it who has had direct practical experience in the field.”¹⁵⁰ Such legislative rhetoric reflects several unflattering assumptions about staff member academics. Specifically, it suggests that professional researchers lack the industrial workplace expertise to understand their theories’ actual effects. By contrast, political appointees possess the practical life experience to temper academics’ impact on national labor policy. This establishes an inherently adversarial relationship between the contributions of the academics and the competency of the agency.

If Congress were to reauthorize the DER, the tension between the lawyers on the Board and the social scientists employed by it could undermine its ability to use this evidence effectively. Assuming Congress attempts to ensure the reconstituted DER’s independence by rendering it separate from the NLRB’s appellate Board (much like the NLRB’s General Counsel), it might hamper the economic unit’s integration into existing Board processes by making it all too easy for members to ignore its evidence and analyses.

By contrast, if Congress augments the Board’s membership with professional academics, they may develop a dialogue between lawyers and researchers and foster mutual assistance between law and science. At minimum, the Board members trained in social science would be able to write majority, concurring, or dissenting opinions assessing the Board’s evidentiary engagement, thereby forcing the Board members trained in law to address the specialized evidence submitted.

¹⁴⁹ *Id.* 1393-94.

¹⁵⁰ *Id.* at 1455 n.91.

Further, since current Board members serve a five-year term before rejoining the ranks of attorneys for corporations and unions, their labor industry roots could influence their ideologies (either because the interests of employability might affect their opinions or because their side-specific ties might indicate their preexisting labor philosophies). Accordingly, some argue that “because of their bias, neither the Board as an institution nor the public will really reap the benefit of the great practical expertise that union and management-side lawyers turned Board members bring to the job...[because] their partisan ties will trump their expertise every time.”¹⁵¹

Assuming this argument has merit, the members’ partisan ties could equally well trump the unit’s economic research. While Congress is unlikely to find a perfectly impartial nominee, it may locate a professional researcher lacking a connection to unions or corporations. Further, unlike an attorney Board member, a scholarly Board member who evaluates technical evidence must adhere to scientific community standards. Accordingly, his presence may counteract the politicization of controversial labor questions by encouraging the NLRB to engage the facts.

Through persuading his colleagues to engage party evidence, a scholarly Board member could promote the spirit of *Daubert* and push a thorough, rigorous approach to justifying technical decisions. Indeed, since the original DER existed a decade before Congress began appointing any partisan Board members, a proposal to evoke the Board’s early days should encompass both elements of early NLRB adjudications: nonpartisan researchers *and* nonpartisan decisionmakers.

Second, the NLRB’s research needs are narrow in scope. For example, since the Department of Labor (DOL) is charged with promulgating labor regulations, its Division of Economic and Labor Research (ELR) offers advice regarding the relevance, application, and

¹⁵¹ Joan Flynn, “*Expertness for What?*”: *The Gould Years at the NLRB and the Irrepressible Myth of the “Independent” Agency*, 52 ADMIN. L. REV. 465, 478 (2000).

interpretation of current economic research to international economic policy. Further, it fills DOL requests for research results and economic analyses to facilitate the formulation of international economic policies and programs.¹⁵² By contrast, the Board's adjudicatory body only requires economic research on specific issues relevant to unions and collective bargaining processes, not general labor policy.

Given the NLRB's narrow interests, opponents of employing interagency economists may argue that the DER's exploratory research is incompatible with the NLRB's adjudicatory function. Without a background in law, academics might expand their inquiries into questions not raised by real-world litigants, who may prefer to leave these issues to legislatures or resolve them independently. If NLRB adjudicators included a mix of lawyers and scholars, the agency could utilize the attorneys' unique expertise in limiting the deliberations to legally relevant issues.

To maximize these benefits of interdisciplinarity, the NLRB should change its composition to include three labor lawyers and two social scientists. (Ideally, the Board would implement this proposal upon reaching its quorum of five acting members.) In setting the number of scientists at 2/5, the NLRB could include sufficient experts to permit a debate, thus preventing one person from becoming the arbiter of real scientific truth. Simultaneously, it could maintain the Board's lawyer majority, thus reflecting its role of adjudicating legal disputes.

Third, the Board receives a substantial quantity of scientific evidence from amicus briefs. However, while staffed exclusively by lawyers, the Board is ill-prepared to evaluate its quality.¹⁵³ Consequently, "the only kind of expertise [the Board] possesses [is] the logical

¹⁵² Div. of Econ. & Lab. Research, Bureau of Int'l Labor Affairs, DEP'T OF LABOR, <http://www.dol.gov/ilab/programs/otla/economic.htm> (last visited Jan. 12, 2011).

¹⁵³ Gross, *supra* note 7, at 347.

coherence of doctrine and an intuitive sense about whether particular rules generate productive or unproductive litigation.”¹⁵⁴ This “type of expertise...is quite different from what generally counts as administrative agency expertise:” i.e., expertise in the subject of the adjudication.¹⁵⁵

Considering these characteristics of modern Board members, a social science staff could enhance the NLRB by filling the expert evaluator void. If Congress did nothing other than reauthorize the DER, it would create the problem of a single party serving as both a source and an evaluator and confer this party an advantage over external sources, only partially addressing the agency’s structural issues. By contrast, if Congress also expanded the Board to include social scientists, it would ensure that separate groups generate and evaluate specialized evidence.

On one hand, a dominant interagency DER might reap the benefits of economies of scale, allowing its economists to afford larger, more expensive research. On the other, it may reduce competition for Board citations, thus undermining accountability and encouraging complacency. By separating the generators and evaluators of information, the NLRB could establish an incentive for employees and amici to submit their very best research, thus increasing the agency’s scientific relevance and improving its impartiality and legitimacy.

VI. CONCLUSION

In defending agencies’ exemption from strict FRE standards for evaluating expert evidence, scholars suggest that agency ALJs have (1) extensive experience and specialized expertise in specific subjects, and (2) political accountability for policy choices regarding certain industries. Although the current NLRB lacks a staff of social science experts, the Board still requires specialized expertise to formulate labor policies that addresses real-world problems.¹⁵⁶

¹⁵⁴ Fisk & Malamud, *supra* note 6, at 2065-66.

¹⁵⁵ *Id.*

¹⁵⁶ Stryker, *supra* note 2, at 344.

To bridge this gap, the *Dana* Boards admitted numerous briefs with social science statistics, but cited very few of them. The pool of perspectives necessarily impacted the Board's data quality and quantity, and thus its deliberations and decisions.

Scholars have faulted the NLRB for its ignorance about the impact of its decisions, its isolation from the policymaking in other areas of the law of the workplace (including the policymaking of the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC)), and “the tendency of Board members, who recently have been drawn almost entirely from the ranks of labor and management attorneys, to reason like lawyers balancing rights rather than policy analysts studying social and economic regulatory problems.”¹⁵⁷ Although many agree the NLRB's recent approach to evaluating scientific evidence is less than perfect, they disagree on what the problems are—and how to fix them.

Accordingly, some state the NLRB should minimize its use of social science to honor Congress's intent in excluding economist employees while upholding superior interests, such as legal realism and *stare decisis*. Others suggest the NLRB should maximize its use of social science beyond simply employing social scientists. Finally, some argue the NLRB should expand its role to encompass both adjudication and rulemaking, thereby reducing its dependence on *amicus* briefs altogether.

To support the role of science, I argue that bringing experts aboard will enrich the analysis by offering an alternative to reasoning like lawyers. However, assuming the NLRB then becomes more qualified to analyze specialized evidence, it does not need to give this evidence dispositive weight. If the expert analysis clashes with popular labor policy or existing market

¹⁵⁷ Fisk & Malamud, *supra* note 6.

reality (for example, the interest in maintaining stable rules), the Board could exercise its discretion to minimize its impact.

To support the limits on economic experts, I argue the NLRB is entrusted with balancing competing interests. Accordingly, the Board should create a culture that incorporates specialized evidence without marginalizing alternative outlooks, such as law and politics. By developing a reputation for justifying its decisions in rational, empirical terms, the Board will increase its relevance and pave the way for expanding into new policymaking avenues—perhaps even rulemaking.

When proposing novel solutions to pervasive social problems, some scholars suggest that since the smaller government entities are more abundant, more adaptable, and less likely to radically affect a large constituency, such “laboratories of democracy”¹⁵⁸ serve as ideal test subjects. Thus, investigating a proposal for improving the NLRB’s evidentiary policy could inspire a more universal debate about whether amicus briefs are sufficient for courts to fill the social science gap without sacrificing relevance/reliability. Ultimately, exploring these issues could expand our ability to fashion a mutually beneficial relationship between law and science.

¹⁵⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (explaining the argument for states as laboratories of democracy).