

**Political bias in labor adjudication:
Comparing the German Federal Labor Court and the
U.S. National Labor Relations Board**

Matthew M. Bodah
Professor of Industrial Relations
University of Rhode Island, Schmidt Labor Research Center
Kingston, RI
USA

&

Martin R. Schneider
Professor of Personnel Economics
University of Paderborn, Faculty of Business Administration
Paderborn, NRW
Germany

mbodah@uri.edu
martin.schneider@notes.upd.de

© 2012 Matthew M. Bodah & Martin R. Schneider
No written or electronic reproduction without permission

Political bias in labor adjudication: Comparing the German Federal Labor Court and the U.S. National Labor Relations Board

Matthew M. Bodah & Martin R. Schneider

I. Introduction

In all industrialized nations, the legal regulation of the workplace involves some combination of statutes, administrative rules, and case law (e.g. Blanpain, 2010). Various types of tribunals, in turn, are responsible for animating regulation through the adjudication of disputes between labor market actors. There are many federal, state, and even local agencies that have some role in the process in the U.S., although by far the most important body concerning private sector labor relations is the National Labor Relations Board (hereinafter, the NLRB or the Board).¹ In Germany, only the federal government is involved in workplace regulation, the adjudication of which is handled by a system of labor courts (Weiss & Schmidt, 2000).

The NLRB consists of 32 regional offices, a corps of forty administrative law judges (ALJs) in four regional divisions, and a five-member Board, which sits in Washington, D.C. For the most part, the NLRB has two duties: supervising elections for union representation and deciding whether so-called unfair labor practices (ULPs) have been committed by either employers or unions. An independent General Counsel acts as the prosecutor of ULPs. Board members have five-year terms, while the General Counsel is appointed for four years. Much of the Board's actual work involves handling appeals of decisions by the ALJs. The German Labor Court comprises 123 courts of the first instance in municipalities around the country, 19 state-level bodies², and a single Federal Labor Court (*Bundesarbeitsgericht*) (hereinafter, the BAG or the Court), located in Erfurt. The BAG has 35 professional judges who have lifetime appointments. Cases at the Court, however, are handled by five-member Panels composed of three professional and two lay judges. The lay judges represent employers and employees and are given five-year appointments. The duties of the D.C. Board and the BAG Senates are somewhat similar, although the BAG has a broader mandate and issues decisions on matters beyond private sector labor relations.³

The common mission of the NLRB and BAG in adjudicating labor law gives them some functional equivalency. What we are most interested in, however, is the extent to which political bias—arising from internal ideology and external pressure—affects both Board and BAG decisions. Ideally, decisions free of rent-seeking behavior should depend only on the letter of the law, the intent of the framers of the law, or objective and abstract measures of equity. But prior studies, as well as the original research undertaken here, tell us otherwise. From a law-and-economics perspective, for example, the nature of the nomination process, career incentives, and

¹ The NLRB has authority over nearly all private sector labor relations, except for airlines, railroads, and firms that do not meet its very board jurisdictional requirements (e.g. very small firms). The Board does not have jurisdiction over public sector labor relations.

² Each German state (*Land*) has one court, except for Bavaria and North Rhein-Westphalia, which, because of their size, have two and three, respectively.

³ General information on the NLRB and BAG can be found at their websites: www.nlr.gov and www.bundesarbeitsgericht.de.

political meddling, among other things, affect decision-making (Schneider, 2005; Schneider, 2004; Cooter, 1983).

In this paper, we consider political bias at both the NLRB and BAG. Empirical, quantitative work on the NLRB is nothing new. But our research reviews and updates prior analyses and it adds new data and new interesting variables. We, therefore, confirm what has been known since at least the early 1980s (Delorme, Hill & Wood, 1981) and show, in addition, that political bias in Board decisions is two-fold—it stems from the selection of Board members and from direct influences by the administration and the Congress in power. As a second contribution, we show that in Germany judges are better protected from the political meddling of present governments and parliament, though a systematic bias due to the selection of judges is visible in the German BAG as well. Hence, the comparison helps to identify what is peculiar about the U.S.: the strong influence of the contemporaneous political environment. As a final contribution, we extend the tools used in studying NLRB decisions to BAG decisions. While scholars there have been considering issues of BAG bias for some time (e.g. Däubler, 1975), their research has been qualitative and has lacked the rigor of quantitative modeling and statistical analysis.

II. Previous research

A. Research on the NLRB and BAG

Qualitative analyses largely agree that decision-making at the NLRB has displayed political bias. Harper (2009) and Gould (2007) have shown how the Board during the administration of George W. Bush reversed a number of precedents to find in favor of employers. Earlier work demonstrated either pro-employer or pro-labor tendencies by previous Boards (Bodah, 2001; Gross, 1995; Estreicher 1985). These qualitative studies have been complemented by a number of quantitative analyses (Bodah & Schneider, 2006; Leroy 2001, Snyder & Weingast, 2000; Cooke, Mishara & Spreitzer, 1995; Moe, 1985; Cooke & Gautschi, 1982; and Delorme, Hill & Wood 1981).

Delorme, Hill and Wood (1981), in an analysis of 1,250 ULP cases from 1955-1975, found that the politics of an appointing president and a Board member's own political affiliation were significant factors in whether a member voted for or against the union's position in a case. Cooke, Mishara, and Spreitzer (1995), working with a sample of 530 cases from 1957-1986, found that the politics of Congress also influenced Board decisions. Complementing that finding, Bodah and Schneider (2006), in looking at 1,022 cases from 1954-2004, found that party of the president in power, which reflects majority control of the Board, is significant in determining a cases outcome. This latter result is consistent with Moe's (1985) finding that Board decisions oscillate by presidential administration.

The research on the BAG has been somewhat different than that on the NLRB. The studies of the NLRB are, in essence, attempts to discover rent-seeking behavior and have found fairly short cycles between pro-employer and pro-labor leanings. Research on the BAG has argued—almost to the contrary—that the Court is *too* independent because it has undertaken rulemaking that should be left to the legislative branch (Rüthers, 1994: 54ff) and, further, that changes in ideology at the BAG occur of very long periods of time—what Hanau (1998: 69) referred to as a “slow-

moving stream.” Prior to 1980, the Court was accused of being employer-friendly (Däubler, 1975), while the opposite has been true of the period since (Rüthers, 1996, 1994).

B. Economic analysis of judicial organization

More broadly, bias in judicial decision-making has been examined through various lenses, covering such areas as judicial motivation and career incentives (Cohen, 1992; Cooter, 1983) and judicial independence and ideology (Rubin, 2000; Ashenfelter, Eisenberg, & Schwab, 1995). Recently, institutional characteristics have been studied in work on appeals and supreme courts (Amaral-Garcia, Garoupa & Grembi, 2009; Fiorino, Padovano & Sgarra, 2007; Kornhauser, 2000; Ramseyer & Rasmusen, 1997) and in international comparison of judicial independence (Hadfield, 2008; Feld & Voigt, 2003).

Much traditional legal theory is dominated by “mechanical legal formalism” (Stephenson, 2009). According to this view, judges make decisions based on certain accepted methods of legal interpretation, which are tightly circumscribed by law (Friedman, 2005; Caporale & Winter, 2002: 693). Many statutes, however—and particularly the labor laws important here—are necessarily vague. A legislative body cannot possibly conceive of every issue that might be in dispute between labor market actors. Since statutes are nebulous—and even rule-making cannot account for every eventuality—much room is left for interpretation by adjudicators. This belief is consistent with ideas of “legal realism” (Stephenson, 2009) and with law-and-economics approaches that find that judges have utility functions that influence decision-making (Posner, 1993; Cooter, 1983).

C. Empirical methodology

The methodology used here is similar to the work previously done on the NLRB by Bodah and Schneider (2006); Leroy (2001); Snyder and Weingast (2000); Cooke, Mishara and Spreitzer (1995); Moe (1985); Cooke and Gautschi (1982); and Delorme, Hill, and Wood (1981). It is also similar to the work on the U.S. courts by Ashenfelter, Eisenberg, and Schwab (1995). In these studies the case outcome (for or against the employer, for or against the defendant, etc.) is typically the dependent variable with independent variables representing certain characteristics of adjudicators either individually or as a group: their political affiliations, those of their appointers, etc. Variables that represent the political and economic context are frequently added to the models. As mentioned, a preponderance of this research, and specifically that on the Board, supports the argument that political bias is present in decision-making.

III. Theory and Hypotheses

A. Judicial organization of the NLRB and the BAG

The way we examine how politics may bias labor law adjudication owes much to the evolving economic analysis of judicial organization (Rubin, 2000; Cooter, 1983), which has more recently been extended to cross-country comparisons (Hadfield, 2008; Feld & Voigt, 2003). The main

ideas of our comparative analysis have been developed more fully in a previous paper (Schneider & Bodah, 2011).

In essence we argue that the institutional details that govern the five-member NLRB Board and three professional judges on a Panel of the BAG will crucially influence the employer-friendliness of decision-making.

The Board consists of five members. They are nominated by the President, and confirmed by the Senate.⁴ The nomination procedure has been subject to political wrangling and has become extremely contentious, particularly since the late 1970s. Since then, various administrations have tried to appoint Board members with relatively apparent pro-labor or pro-employer attitudes. As a result of political standoffs, the Board often has had fewer than the five members for long periods of time (Bodah, 2007; Bodah, 2001). A Panel of the BAG—the court consists of ten Panels each responsible for a certain subject matter—is composed of three professional and two lay judges. The professional judges are selected jointly by the Federal Minister of Labor and the electoral committee for judges (*Richterwahlausschuss*). That committee is composed of all state ministers in charge of the labor judiciary and an equal number of members elected by Parliament (*Bundestag*). A council of experienced judges (*Präsidentialrat*) and the President of the BAG also make suggestions concerning the qualification of candidates based on performance appraisals (Rehder, 2006; Blankenburg, 1996, pp. 265f). This nomination procedure has been criticized by legal scholars because it is caught between two opposing principles: the democratic election of judges and the selection of the most qualified candidate for a public position (Grigoleit & Siehr, 2002). Various governments have been said to push for candidates that were not considered the most able for the position, but were sympathetic to the political power at the federal level (Gilles, 1983).

The comparison between the Board and the Court shows an interesting combination of similarities and differences (see Table 1). Independence of Board members and of judges of the Court is secured by a number of regulations. Both BAG judges and NLRB members are granted certain protections from gross infringements in their decision-making. They cannot be removed during their term of office—barring malfeasance—and their individual pay is set by civil service procedures not at the discretion of the legislature or the executive. Furthermore, both bodies, the executive dominates the nomination procedure and may work towards the appointment of adjudicators with strong preferences for either unions or employers. The NLRB and the BAG, however, crucially differ in their career system. Board members are appointed for five year terms only, while BAG judges are given lifetime appointments. Since the Board is also subject to congressional oversight, it is more exposed to influence activities by the executive and legislative branches.

⁴ Under the U.S. Constitution, the president may make so-called “recess appointments” when Congress is not in session. Such appointees are not entitled to full five-year terms, however, but may serve only until the next congressional recess. Such appointments have become more frequent in recent years.

Table 1. Three main aspects of the adjudicatory organization compared.		
	BAG	NLRB
Selection and nomination	Election by committee (<i>Richterwahlausschuss</i>) Suggestions made by experienced judges (<i>Präsidentialrat</i>)	Nomination by the President and confirmation by the Senate. No formal role for sitting Board members.
Career system	Lifetime appointments Exempt from removal without cause Pay attached to position Internally oriented careers	Five year terms, subject to reappointment Exempt from removal without cause during term Pay attached to position Externally oriented careers
Accountability	To the law	To the law To Congress
Source: Schneider & Bodah (2011)		

B. Two effects

The partly similar and partly differing institutional features, we argue, give rise to two effects—a selection effect and a career effect (Schneider & Bodah 2011). A *selection effect* will be visible in both the NLRB’s and the BAG’s decision making such that the political leanings of those parties that most influence the appointment of judges will influence the employer-friendliness of decisions. In the US, the political opinions of Board members will be influenced by the political party of the President who nominated the Board member and by the degree to which the Senate was influenced by the Democratic or Republican Party. A Board dominated by members brought to office by the Democratic Party will tend to decide in a more labor-friendly way, whereas a Board dominated by members brought to office by the Republican party will tend to decide in a more employer-friendly way. In Germany, similarly, the opinions of judges will be influenced by the political party that supported the federal government when the judge was appointed. A deciding Panel of the Court that consists in the majority of judges appointed when a federal government led by the Social Democratic Party (SPD) was in power will decide in a more labor-friendly way, whereas a deciding Panel of the Court that consists in the majority of judges appointed when a federal government led by the Christian Democratic Party (CDU) was in power will decide in a more employer-friendly way.

The *career effect* will only be visible in the Board’s decision-making. Present political environment will influence the decision-making of the Board (but not that of the BAG) because—in essence—the Board members care for the future career inside or outside the Board. NLRB members are appointed for a staggered five-year terms. As reappointment is not the rule, Board members are often oriented towards external career opportunities. The evidence shows that Board members seek to find other positions in Washington, D.C. after their term of office on the Board (Gould, 2000, p. 293). In Germany, by contrast, judges are given life terms and an appointment at the BAG can be considered the successful peak of a judicial career. As a result,

Board members more than BAG judges may be inclined to please the government or other future employers—pro-employer or pro-labor law-firms—in their decision-making.

This difference in incentives is compounded by the nature of accountability. The NLRB as an independent agency is accountable to Congress. Congress is entitled to oversight and investigations, and provides the Board with its fiscal appropriation. It may ask for information from the NLRB and may raise questions about the Board's behavior and decision making. Congress has used these prerogatives intensively. For example, the control of Congress over the Board's budget has led to serious cuts in funding to punish the Board, and to Congress placing stipulations, known as "riders", on how the Board may spend its budget.⁵ Furthermore, members of Congress have tried to exert a more informal influence on the Board, for example by addressing letters to Board members (Bodah, 2001, pp. 706-709). The BAG—as a Court—is not exposed to similar degrees of oversight. Though the executive has the right of supervising judges (*richterliche Dienstaufsicht* Papier, 1990) and that has been criticized as a lever for ministries to influence the courts (Lück, 1987), the influence that the Court experienced has been less severe than that of the NLRB. But the grosser forms of rent-seeking documented for the NLRB are unheard of in Germany, and Parliament does not have rights of oversight and investigation as does the U.S. Congress.

IV. Empirical analysis

A. The NLRB

For this analysis, we selected 1,060 Board ULP decisions from 1955 through 2011. The beginning date was chosen to correspond with the first full year of BAG operations. Not all ULP decisions were included in our sampling frame, however. Rather, to increase the comparability of cases, only decisions concerning employer ULPs were selected—i.e. Section 8(a) decisions. These are cases in which it is alleged that an employer somehow interfered with its employees' rights to organize, bargain collectively, and/or engage in concerted activity. Further, to assure that each decision had a value for each variable under consideration, only decisions that offered a full review of the ALJ's decision are included, which excludes motions for summary judgment and supplemental decisions. As mentioned above, most cases are assigned by the Board to a three member panel. And since restricting our analysis to such cases further comparability, we consider only cases decided by three member panels.

Every fiftieth decision listed in the *Decisions and Orders of the National Labor Relations Board* was selected. In the event that the fiftieth decision did not meet our selection criteria, the next decision to do so was selected. As mentioned, this resulted in the selection of 1,060 decisions from a 56 year period. The exclusion mentioned above, however, led to the elimination of approximately 75 cases. Therefore, most of our analyses below involve approximately 985 cases. We estimate that our sample includes approximately 20% of employer unfair labor practice decisions from the relevant time period that provide a full review of an ALJ's decision.

⁵ For example, a current rider prohibits the Board from using resources on electronic balloting, a practice opposed by employers

1. Descriptive statistics

Over the period, the employer was ultimately found guilty by the Board of committing one or more unfair labor practices in 81.4% of the decisions. While that may seem high, one must recall the track that an unfair labor practice charge follows: there is a full vetting to assure that a charge is meritorious, the employer is given a chance to settle the complaint, and the Board gives great deference to the decision of the ALJ. Therefore, weak cases against an employer are likely to be culled well before they reach the Board level. Only about 16.2% of cases were decided definitively for employers. These were decisions wherein the Board, either in agreement with or in overturning the ALJ, dismissed the entire complaint against the employer. In 2.4% of the cases in our sample, the decision was impossible to classify as either for or against the employer. These are cases that resulted in some charges being dismissed, but at least an equal number being sustained.

In 47.8% of the decisions examined, the Board fully affirmed the ALJ's decision. In approximately 39.4% of decisions, the Board affirmed the ALJ with modifications, but the basic result (i.e. for or against the employer) did not change. The modification could be that the remedy was modified in some way (e.g. the date of reinstatement changed), or the remedy kept, but with amendments to the decisional logic. In a few cases, the Board merely corrected errors of the ALJ, such as misspelled names, wrong dates, wrong locations, etc. In only about 12.8% of the decisions did the Board overturn an ALJ, either in whole or in large part. Where the Board modified the ALJ's decision, it decreased the penalty against the employer about one-quarter of the time and increased it about one-third of the time.

The following table displays the number and percent of decisions in the sample by presidential administration.

President (Party)	Years	# decisions	%
Eisenhower (R)	1955-1960	53	5.39
Kennedy (D)	1961-1963	49	10.37
Johnson (D)	1964-1968	125	12.70
Nixon (R)	1969-1973	191	19.41
Ford (R)	1974-1976	79	8.03
Carter (D)	1977-1980	159	16.16
Reagan (R)	1981-1988	120	12.20
Bush, G.H.W (R)	1989-1992	58	5.89
Clinton (D)	1993-2000	89	9.04
Bush, G.W. (R)	2001-2008	50	5.08
Obama (D)	2009-2011	11	1.12

Fifty-three percent of the decisions were made during Republican administrations and 47% under Democratic administrations. During the period of observation, 27 Board members have been Democrats, 36 have been Republicans, and one was an independent.

2. The hypotheses

To test Hypothesis 1, the effect of politics on the appointment process, scale of 0 to 10 was created for each Board member. Each Republican member began with a score of 3 and each Democratic member a score of 7 (the one independent was scored 5). Appointment by a Republican president was scored -2 and confirmation by a Republican senate -1. Appointment by a Democratic president was scored 2 and confirmation by a Democratic senate 1. Therefore, a Republican (3) appointed by a Republican president (-2) and confirmed by a Republican senate (-1) received a score of 0. A Democratic member (7) appointed by a Democratic president (2) and confirmed by a Democratic senate (1) received a 10. The minimum score that a Democratic member could receive is 4 (i.e. if he/she were appointed and confirmed by Republicans); the maximum score a Republican could receive is 6 (i.e. if he/she were appointed and confirmed by Democrats).

We then summed across a three member panel, creating a range of scores from 0 to 30. However, since two is either added to or subtracted from an odd number, and one then added or subtracted, there are no odd-numbered values. For readability, Table 3 collapses the scale into three categories: 0-10, 12-20, and 22-30.

	0-10	12-20	22-30
Number of decisions	231	470	283
For	21.7%	15.1%	13.4%
Neither	4.3	2.3	1.06
Against	74.0	82.6	85.5

We see that on the Republican end of the scale, decisions are made in favor of employers about 22% of the time and against employers about 74% of the time, but on the Democratic end of the scale, decisions are made in favor of employers only about 13% of the time, and go against employers nearly 86% of the time.

The statistical significance of the political scale is confirmed in Table 4, which displays analysis of variance results. Here we see that there is a statistically significant difference across groups, with “Republican” panels more likely to favor employers and “Democratic” panels less likely to favor employers.

	SS	Df	MS	F	Prob.>F
Between groups	18.06	14	1.29	2.39	.003
Within groups	523.07	969	.53		
Total	541.13	983	.55		

Hypothesis 2 asserts that the political context at the time of decision, independent of the politics of the selection process, biases decisions. In the U.S. we can look at both the politics of president and the political makeup of Congress to get at this point. The problem with the former, however, is that it is not independent of the political orientation of the Board, since the party of the president holds a majority on the Board.

Keeping in mind the limitation stated above, Table 6 displays decisions by result and presidential administration. This data provide support for Hypothesis 2 in that Boards during Democratic administrations find for the employer an (unweighted) average of only 12.7% of the time, while deciding against the employer in 86.6% of cases; Boards during Republican administrations side with employers 18.7% of the time and against employers in 78% if cases.

Table 5. Decision for or against employer by presidential administration.			
President (Party)	For	Neither	Against
Eisenhower (R)	16.98	1.89	81.13
Kennedy (D)	16.33	0.00	83.67
Johnson (D)	12.00	0.00	88.00
Nixon (R)	18.85	2.09	79.06
Ford (R)	12.66	2.53	84.81
Carter (D)	11.32	2.52	86.16
Reagan (R)	22.50	7.50	70.00
Bush, G.H.W (R)	17.24	1.72	81.03
Clinton (D)	14.61	1.12	84.27
Bush, G.W. (R)	24.00	4.00	72.00
Obama (D)	9.09	0.00	90.91

Table 6 shows results of a one-way analysis of variance on the data in Table 5 when the cases are sorted into two categories: Democratic or Republican President.

Table 6. One-way analysis of variance, decision for or against employer, by Democrat versus Republican President.					
	SS	Df	MS	F	Prob.>F
Between groups	2.14	1	2.14	3.90	.048
Within groups	531.99	982	.55		
Total	541.13	983	.55		

Table 7 displays the results of cases by the political composition of Congress at the time of the decision. Since the Democrats have had an advantage in Congress during the most of the years we are studying (e.g. they controlled the House of Representatives from the beginning of the period until 1994), we used the percentage of Democrats in Congress as our variable of interest. During the period, the range of the percentage of Democrats in Congress has been from 46% to

68%. In Table 7, we divide this into three categories and see that size of the Democrat caucus correlates with decisions for or against employers.

Percent of Democrats in Congress	For	Neither	Against
46 to 49%	19.27%	2.75%	77.98%
50 to 59%	18.72	3.09	78.19
60 to 68%	12.08	1.54	86.40

Table 8 displays results for a one way analysis of variance for the variables in Table 7. We can see that the significant result provides further support for Hypothesis 2.

	SS	Df	MS	F	Prob>F
Between groups	5.27	2	2.63	4.83	.008
Within groups	535.86	981	.55		
Total	541.13	983	.55		

Finally, in Table 9 we combine variables into several models using logistic regression⁶ (N=957), with the dependent variable coded “1” if the decision favors the employer (Freq.=158) and “0” if it does not (Freq.=799). Decisions that could not be classified as definitively for or against the employer were excluded—hence the drop in sample size to 957.

Model 1 includes three independent variables: whether the ALJ decided for the employer, a trend variable, and dummy variables representing the decades during the relevant time period. The former variable is used to create a baseline. The Board hears appeals of ALJ decisions and its policy is to defer to the ALJ’s judgment in ordinary circumstances. Therefore, we expect that the ALJ’s decision to be highly predictive of the Board’s decision. The trend and time variables control for changes that are a function of time and all other contemporaneous effects.

Model 2 adds the political scale discussed above. Recall individual Board members can be scored from 0 to 10 depending on their own political affiliations as well as those of appointing president and confirming Senate. For a three member panel, the closer to zero the more Republican the panel and the closer to 30 the more Democratic. This variable surfaces the selection effect and is used to test Hypothesis 1. We expect a negative relationship between this variable and a decision in favor of an employer.

Model 3 adds two variables representing the political environment at the time of the decision. One variable is coded “1” if a Democratic president is sitting at the time of decision and “0” if a Republican is in the White House. The other variable is the percentage of Democrats in Congress. In both cases we expect a negative relationship with decisions for an employer.

⁶ The “logistics” command in STATA statistical program was used.

Table 9. Logistic regression, dependent variable decision in favor of employer=1, odds ratios reported.			
Independent variables	(1)	(2)	(3)
Year 1960-1969	.87 (.60)	1.42 (1.00)	3.06 (2.30)
Year 1970-1979	.99 (.86)	1.22 (1.08)	2.11 (1.96)
Year 1980-1989	2.71 (3.11)	2.64 (3.10)	2.95 (3.60)
Year 1990-1999	2.14 (3.22)	2.71 (4.12)	1.75 (2.82)
Year 2000-present	3.86 (7.14)	4.50 (8.46)	1.29 (2.57)
Time trend	.99 (.00)	.99 (.00)	.99 (.00)
ALJ decision for employer	27.29*** (6.06)	29.23*** (6.67)	33.26*** (7.98)
Political scale (0-30), Republican low/Democrat high		.94*** (.02)	.94** (.03)
Democratic President (1=yes)			.71 (.29)
Percentage of Democrats in Congress			.88*** (.03)
Observations	957	957	957
LR chi-squared	272.58***	281.92***	300.91***
Log-likelihood	-294.09	-289.42	-279.93
Pseudo R-squared	0.32	0.33	0.35
Std. Err. in parentheses, *** p<0.01, ** p<0.05, * p<0.1			

The results in Table 9 show general support for Hypotheses 1 and 2. In Model 2, the coefficient for political scale, which captures the politics of the Board members, their appointing Presidents, and confirming Senates is highly significant. The z-statistic (not displayed) displays the expected sign. Hence, the more Democratic the Board, the less likely the decision will favor the employer. This coefficient maintains its level of significance in Model 3, when the political affiliation of the President and the percent of Democrats in Congress is added. Taken together, these results indicate a strong support for Hypothesis 1.

The percentage of Democrats in Congress is also highly significant in Model 3. This provides support for Hypothesis 2. The coefficient for the variable concerning the party of the President is not significant, even though it showed significance in the one-way analysis of variance above. This is likely the result of collinearity with the political scale variable. Since the Board's chair serves at the pleasure of the President, the majority on the Board will always reflect the President's politics.

Neither the trend variable nor the time period dummy variables are significant in any of the models.

B. The BAG

Compared to the NLRB, The BAG has a much broader mandate, comprising both labor law and employment law. In fact, the bulk of Court cases deal with alleged unfair dismissals that are unrelated to industrial relations. To exclude such more individual conflicts and concentrate on a subject matter similar to the NLRB unfair labor practices cases, we focus in our analysis on industrial dispute cases. These concern conflicts on strikes, lockouts, and their legal consequences. The BAG decisions on industrial disputes were retrieved from the most comprehensive legal database in Germany, *Juris*. Between 1955 and 2009, *Juris* recorded 159 BAG decisions in category “AR-07-02 Arbeitskampfrecht”. Among these, 97 decisions were suitable for our analysis. Overall, 39 professional judges were involved in the decisions, and 21 different judges presided over the hearings including all Court presidents from Hans Carl Nipperdey to the current BAG president Ingrid Schmidt. Of the 97 decisions, 77 are in cases that were filed by labor, that is, workers or trade unions, whereas 20 decisions are in cases that were filed by employers or employer associations. If a BAG case is filed by labor, this implies that labor has been the losing party in the previous trial in the Labor Court of Appeal.

Though the number of 97 decisions seems small, we cover all the decisions that have been published in the time period and hence all important BAG decisions on the subject matter. The number of decisions is so much smaller because in the three-stage system of the German labor court system, many decisions are culled from the legal process during the first two stages of the labor court system, the municipal labor courts and regional Labor Courts of Appeal. Hence, the cases underlying our decisions are the pinnacle of a large body of legal conflicts. Furthermore, each of the decisions has exerted a considerable influence on employment relations in Germany. As the pertinent statute, the *Tarifvertragsrecht*, has not regulated strikes and lockouts to any sufficient degree, the BAG has had a particularly strong discretion in deciding on industrial dispute issues. Therefore, the rules that have evolved to govern industrial disputes are largely the result of Court decisions rather than statute law. It is no coincidence that industrial dispute cases have usually been assigned to the group of judges—Senate 1—of the BAG that is headed by the President of the BAG. Among the 97 decisions we analyzed, 82 were published by Senate 1, one decision by the Grand Senate, and another 17 decisions by the Senates 2, 4, 5, 6, and 9.

1. Descriptive statistics

Most of the decisions were published in the period 1974 to 2005 (see Table 10). Historically, the German federal government was led by chancellors (*Bundeskanzler*) or heads government supported by either of the two competing large political parties, the Christian Democratic Party (CDU) and the Social Democratic Party (SPD). Among the 97 decisions, 72 were promulgated when a CDU-led government was in power, and 26 cases when an SPD-led government was in power.

Table 10. Number and percent of BAG decisions in sample by Federal Chancellor.			
Chancellor (Party)	Years	# decisions	%
Adenauer (CDU)	1955-1963	3	3.09
Erhard (CDU)	1963-1966	0	0.00
Kiesinger (CDU)	1966-1969	0	0.00
Brandt (SPD)	1969-1974	1	1.03
Schmidt (SPD)	1974-1982	17	17.53
Kohl (CDU)	1982-1998	65	67.02
Schröder (SPD)	1998-2005	8	8.25
Merkel (CDU)	2005-	3	3.09

Among the 42 nomination of judges, 26 were under a CDU-led government, and 14 under a SPD-led government. Two judges were nominated to different posts within the Court by opposing governments, and for two judges we were unable to reconstruct the year they came to office.

2. The hypotheses

Owing in part to the different political system in Germany, and in part to the smaller sample, the political variables differ somewhat to the analysis on the NLRB decisions. The influence of the current government was captured by a binary variable measuring whether a CDU-led or an SPD-led government was in power. We did not create more elaborate measures based on majorities in Parliament because the chancellor needs a majority in the *Bundestag*, the first house of Parliament in Germany. Therefore, a CDU-led government at the same time implies a majority of CDU members of parliament who tend to be more employer-friendly in their political opinions.

According to Hypothesis 1, BAG decision making should not be influenced by the political leaning of the present federal government or the labor-friendliness of parliament. Though the absence of an empirical link cannot be tested in the actual sense of the word, our analysis shows that the data are consistent with the hypothesis. In Table 11, the 77 decisions in cases filed by labor are broken down by the winning party and the government in power. The null hypothesis that there is no association between the two variables cannot be rejected according to Fisher's exact test. Equivalent evidence for the 20 decisions in cases filed by employers is reported in Table 12. Hence, in contrast to NLRB decisions, Court decisions do not seem to be influenced in any measurable way by the present government or parliament.

Table 11. Decision for or against employer by government in power (CDU-led or SPD-led): cases filed by labor			
	CDU-led	SPD-led	Total
For	15	25	40
Against	9	28	37
Total	24	53	77
p-value for one-sided Fisher's exact test: 0.158			

Table 12. Decision for or against employer by government in power (CDU-led or SPD-led): cases filed by employers			
	CDU-led	SPD-led	Total
For	1	17	18
Against	1	1	2
Total	2	18	20
p-value for one-sided Fisher's exact test: 0.195			

According to Hypothesis 2, the outcome of BAG decisions should reflect the political leanings of the governments that were in power when the deciding judges were installed. To test Hypothesis 2, a binary variable was created to measure the political leanings of the deciding Panel of judges. A Panel consists of three professional judges and two lay judges. The possible influences of the two lay judges neutralize each other because one judge has been delegated by trade unions and the other by employer associations. For the three professional judges, we identified the type of government under which the majority of the professional judges on the panel was appointed. Hence, an SPD-led appointing government implies that two or three of the professional judges (including the presiding judge) were appointed when an SPD-led federal government was in power. Likewise, a CDU-led appointing government implies that two or three of the professional judges (including the presiding judge) were appointed when a CDU-led federal government was in power. A Senate with a majority of judges installed when a CDU-led government was in power is more likely to decide in favor of employers according to Hypothesis 2.

There is a clear association between the political leanings of the Panel—based on their time of appointment—and the employer-friendliness of decisions. In Table 13, the decisions in cases filed by labor are broken down by the winning party and the majority of the Panel. With a majority of judges appointed under a CDU-led government, employers won 33 out of 55 cases (or 60 % of the time). Under a SPD-led government, employers only won 7 out of 22 cases (or 32 % of the time). In other words, a majority of judges under a CDU-led government increases the times that employers win by 28 percentage points. That is a sizable effect, and it is statistically significant ($p=0.023$) in a one-sided Fisher's exact test.

Table 13. Decision for or against employer by government appointing the majority of judges on the panel (CDU-led or SPD-led): cases filed by labor			
	CDU-led	SPD-led	Total
For	33	7	40
Against	22	15	37
Total	55	22	77
p-value for one-sided Fisher's exact test: 0.023			

Table 14. Decision for or against employer by government appointing the majority of judges on the panel (CDU-led or SPD-led): cases filed by employers			
	CDU-led	SPD-led	Total
For	18	0	18
Against	0	2	2
Total	18	2	20
p-value for one-sided Fisher's exact test: 0.005			

Equivalent evidence for decisions in cases filed by employers is reported in Table 14. With a majority of judges appointed under a CDU-led government, employers won each and every of the 18 cases. The sample of 20 cases is of course extremely small, but it is perhaps even more surprising to see such a strong effect. Despite the small sample the effect is highly statistically significant ($p=0.005$) in a one-sided Fisher's exact test.

Finally, in Table 15 we combine variables into several logistic regressions ($N=97$) with the dependent variable coded "1" if the decision favors the employer ($Freq.=58$) and "0" if it does not ($Freq.=39$).

Model 1 includes five independent variables: three binary variables capturing the time period, a time trend, and whether labor filed the case. Hence, our baseline model controls for time-specific effects and distinguishes decisions by the party who filed the cases. The findings show that the time trend has an estimated odds ratio above one and is weakly significant. Though that implies that for each year the odds of employers to win increases, the effect disappears in the models (2) and (3). More importantly, the estimated odds ratio for the binary variable whether labor filed the cases has a value 6.61 and significant at the 5 % level. As this implies, employers have a much higher odds of winning when labor filed the case. That is consistent with overly optimistic workers or trade unions filing a complaint in cases in which they had lost in the previous stage, the Labor Court of Appeal trial.

Model 2 adds the binary variable measuring whether the present government is SPD-led. Confirming the findings from the contingency tables, there is no statistically significant influence of the political leanings of the federal government in power, and hence the majority in parliament, on BAG decisions.

Model 3 adds the binary variable measuring whether the majority of judges on the Panel had been appointed by an SPD-led government. The estimated odds ratio of 0.20 is statistically significant at the 1 % level. It indicates that with a majority of judges appointed by an SPD-led government the odds of winning is five times lower than the odds of winning with a majority of judges appointed by a CDU-led government. That is consistent with Hypothesis 2 though perhaps the considerable size of the effect is surprising.

Table 15. Logistic regression, dependent variable decision in favor of employer=1, odds ratios reported.			
Independent variables	(1)	(2)	(3)
Years 1976-1985	0.15 (.265)	0.14 (.273)	0.06 (.218)
Year 1986-1995	0.05 (.171)	0.08 (.285)	0.05 (.286)
Year 1996-2009	0.01 (.107)	0.01 (.125)	0.01 (.223)
Trend	1.12* (.099)	1.11 (.125)	1.10 (.229)
Labor filed case=1	6.61** (.021)	9.86** (.011)	8.22** (.020)
Present SPD-led government=1		0.44 (.242)	0.49 (.351)
Majority of judges appointed under SPD-led gov. =1			0.20*** (.009)
Constant	0.38 (.419)	0.63 (.728)	2.18 (.605)
Wald chi-squared	14.66**	16.08**	23.76***
log-likelihood	-58.03	-57.32	-53.48
Pseudo R-squared	0.112	0.123	0.182
Std. Err. in parentheses, *** p<0.01, ** p<0.05, * p<0.1			

V. Conclusions, limitations, and directions for future research

In this paper it was shown more directly than in previous studies that decisions by the NLRB are strongly influenced by the political composition of the U.S. Congress. We argue that this could be attributed to Board members who care for their reappointment or future careers outside the Board (career effect). The methodology applied—the analysis of the likelihood of winning—has been extended for the first time to adjudication in labor law of the German BAG. Unlike the NLRB, the BAG is better protected from influence by present governments, so the career effect is not visible in the German data. But BAG decisions—as NLRB decisions—are systematically influenced by a selection effect: the political leanings of those who once appointed the deciding NLRB Board members and the BAG judges clearly influence the outcome of decisions.

Appointments strongly influenced by the Democrats in the U.S., or by the Social Democrats in Germany, will enhance the chances of winning for labor. Conversely, appointment influenced by the Republicans in the U.S., or by members of the Christian Democratic Union in Germany, will enhance the chances of winning for employers.

The findings have important implications for the evolution of labor law and industrial relations in general in the two countries. The opportunity of politicians of appointing Board members and judges clearly affects the outcomes of cases in both countries. But Board members are appointed for five years, and each year one new member should be nominated.⁷ Therefore, governments can regularly change the composition—and thus the political attitudes—of the Board. BAG judges, by contrast, are tenured, so the possible impact of an opinionated selection extends over a longer period. Hence, the selection effect influences legal outcomes more quickly in the U.S. than in Germany. Furthermore, a direct career effect was assumed for the Board members but not for the BAG judges. As a result, there will be swings from labor-friendly to employer-friendly decisions, and back, over short cycles in the U.S., but over long cycles in Germany. The outcome of labor law adjudication is more volatile in the U.S. than in Germany. This finding is an important lesson to be drawn from the cross-country comparison we have conducted.

The chief limitation of ours and similar studies is a systematic selection of legal cases in the two samples (Ashenfelter, Eisenberg, & Schwab, 1995). In both the NLRB and the BAG, most legal conflicts are resolved short of a trial. The attrition of cases through the process may differ in the two jurisdictions and may bias the sample in particular ways. However, a link between the party allegiance of judges and their ideologies in decision-making has been found to be a robust finding across a whole range of studies on American courts (Pinello, 1999). Our findings are in line with those studies.

An obvious route of future research would be the remedy of sample selection bias by examining directly how conflicts are culled from the legal process. Such a study would, however, be difficult to conduct with the available data. A second interesting route would be to extend the analysis to other countries. Variations in judicial organization are likely to lead to other legal outcomes. Our comparative analysis of the organization of labor judiciaries is in its infancy. If a clear comparative theory has evolved, it may be instructive to collect a number of empirical indicators of institutions and legal outcomes for a whole range of labor judiciaries across the globe, much in the way of the evolving cross-country analysis of whole legal systems (Feld & Voigt 2003).

References

- Amaral-Garcia, Sofia; Garoupa, Nuno; and Grembi, Veronica. 2009. Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal. *Journal of Empirical Legal Studies*, 6: 381-404.
- Ashenfelter, Orley; Eisenberg, Theodore; and Schwab, Steward J. 1995. Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes. *Journal of Legal Studies*, 24: 257-281.

⁷ Although the statute provides for the annual replacement (or reappointment) of a single member, due to the level of political conflict during the past several decades, this practice has largely been abandoned. It is now more common that the Board will have a long period of one or more vacant seats, followed by the “batch appointment” of several individuals in order to satisfy both political parties (Bodah, 2007).

- Behrens, Peter. 1989. Die Bedeutung der ökonomischen Analyse des Rechts für das Arbeitsrecht. *Zeitschrift für Arbeitsrecht*, 20: 209-238.
- Blankenburg, Erhard. 1996. Changes in Political Regimes and Continuity of the Rule of Law in Germany. Herbert Jacob et al.: *Courts, Law, and Politics in Comparative Perspective*. London: New Haven, pp. 249-314.
- Blanpain, Roger (ed.).2010. Comparative Labour Law and Industrial Relations in Industrialized Markets. Aalphen aan den Rijn: Kluwer Law International.
- Bodah, Matthew M. 2001. Congress and the National Labor Relations Board: A Review of the Recent Past. *Journal of Labor Research*, 22: 699-722.
- Bodah, Matthew M. and Schneider, Martin. 2006. Discretion and Performance: A Cross-national Comparison of Public Governance. A Preliminary Look at the National Labor Relations Board and German Federal Labor Court. Unpublished paper presented at the Labor and Employment Relations Association (LERA) 58th Annual Meeting, Boston.
- Bodah, Matthew M. 2007. Congress and the NLRB: An analysis of Congressional pressure on Board decision-making—How appointments affect Board outcomes. Unpublished paper presented at the Labor and Employment Relations Association (LERA) 59th Annual Meeting, Chicago.
- Caporale, Tony and Winter, Harold. 2002. A Positive Model of Supreme Court Economic Decisions. *Southern Economic Journal*, 68: 693-702.
- Cooke, William N; Mishara, Aneil K; and Spreitzer, Gretchen M. 1995. The Determinants of NLRB Decision-Making Revisited. *Industrial and Labor Relations Review*, 48: 237-257.
- Cooke, William N; and Gautschi, Frederick H. 1982. Political Bias in NLRB Unfair Labor Practice Decisions. *Industrial and Labor Relations Review*, 36: 539-549.
- Cooter, Robert D. 1983. The Objectives of Private and Public Judges. *Public Choice*, 41: 107-132.
- Däubler, Wolfgang. 1975. *Das soziale Ideal des Bundesarbeitsgerichts*. Frankfurt, Köln.
- Däubler, Wolfgang. 1999.: Arbeitsrecht und Politik. *Recht der Arbeit*, 52: 18-24.
- Delorme, Charles D; Hill, R. Carter; and Wood, Norman J. 1981. The Determinants of Voting by the National Labor Relations Board on Unfair Labor Practice Cases, 1955-75. *Public Choice*, 37: 207-218.
- Estreicher, Samuel. 1985. Policy Oscillations at the Board: A Plea for Rulemaking. *Administrative Law Review*, 36: 163-175.
- Feld, Lars P; and Voigt, Stefan. 2003. Economic Growth and Judicial Independence: Cross-country Evidence Using a New Set of Indicators. *European Journal of Political Economy*, 19: 497-527.
- Fiorino, Nadia; Padovano, Fabio; and Sgarra, Grazia. 2007). The Determinants of Judiciary Independence: Evidence from the Italian Constitutional Court (1956-2002). *Journal of Institutional and Theoretical Economics*, 163: 683-705.
- Franz, Wolfgang; and Rütters, Bernd. 1999. Arbeitsrecht und Ökonomie. Mehr Beschäftigung durch eine Flexibilisierung des Arbeitsrechts. *Recht der Arbeit*, 52: 32-38.
- Friedman, Barry. 2005. The Politics of Judicial Review. *Texas Law Review*, 84: 257-337.
- Gilles, Peter .1983. Richterliche Unabhängigkeit und parteipolitische Bindung von Richtern. *Deutsche Richterzeitung*, 61: 41-48.
- Gould, William B. 2000. *Labored Relations: Law, Politics, and the NLRB. A Memoir*. Cambridge: MIT Press.

- Gould, William B. 2007. Independent Adjudication, Political Process, and the State of Labor-management Relations: The role of the National Labor Relations Board. *Indiana Law Journal*, 82: 461-497.
- Grigoleit, Klaus Joachim; and Siehr, Angelika. 2002. Die Berufung der Bundesrichter: Quadratur des Kreises? *Öffentliche Verwaltung*, 55: 455-462.
- Gross, James A. 1995. *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994*. Philadelphia: Temple University Press.
- Gross, James A. 1985. Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making. *Industrial and Labor Relations Review*, 39: 7-18.
- Gross, James A. 1974. *The Making of the National Labor Relations Board*. Albany: SUNY Press.
- Hadfield, Gillian K. 2008: The Levers of Legal Design: Institutional Determinants of the Quality of Law. *Journal of Comparative Economics*, 36: 43-73.
- Halbach, Günter; Paland, Norbet; Schwedes, Rolf; and Wlotzke, Otfried. 1994. *Labour Law in Germany: An Overview*. 5. Aufl. Bonn.
- Hanau, Peter. 1992. Formelle und informelle Einflüsse der Verbände auf die Arbeitsgerichtsbarkeit. *Deutsche Richterzeitung*, 70: 422-426.
- Hanau, Peter. 1998. Entwicklungslinien im Arbeitsrecht. *Der Betrieb* 1/2: 69-79.
- Harper, Michael C. 2009. Judicial Control of the National Labor Relations Board in the Age of Chevron and Brand X. *Boston Law Review*, 89: 189-250.
- Kornhauser, Lewis A. 2000. Appeal and Supreme Courts. In B. Bouckaert, Bardewijn and G. de Geest (eds.): *Encyclopedia of Law and Economics, Vol 5. The Economics of Crime and Litigation*. Cheltenham: Elgar, pp. 45-62.
- LeRoy, Michael H. 2001. The Formation and Administration of Labor Policy by the NLRB: Evidence from Economic and ULP Strike Rulings. *Journal of Labor Research*, 22: 736-737.
- Lück, Horst. 1987. Richterliche Unabhängigkeit—wie leicht sie beeinträchtigt und wie schwer sie verteidigt werden kann. *Deutsche Richterzeitung*, 54: 391-393.
- Moe, Terry M. 1985. Control and Feedback in Economic Regulation. The Case of the NLRB. In: *American Political Science Review*, 79: 1094-1116.
- Padovano, Fabio; Sgarry, Grazia; and Fiorino, Nadia. 2003. Judicial Branch, Checks and Balances and Political Accountability. *Constitutional Political Economy*, 14: 47– 70.
- Papier, Hans-Jürgen. 1990. Richterliche Unabhängigkeit und Dienstaufsicht. *Neue Juristische Wochenschrift*, 43: 8-14.
- Pinello, Daniel R. 1999. Linking Party to Judicial Ideology in American Courts A Meta-Analysis. *The Justice System Journal*, 20: 219-54
- Posner, Richard A. 1993. What do Judges Maximize? (The Same Thing Everybody Else Does). *Supreme Court Economic Review*, 3: 1-41.
- Ramseyer, J. Mark and Rasmusen, Eric B. 1997. Judicial Independence in a Civil Law Regime: The Evidence from Japan. *Journal of Law, Economics, and Organization*, 13: 259-286.
- Rehder, Britta. 2006. Recht und Politik beim Wandel des deutschen Flächentarifs. Juristen als politische Akteure im System der Arbeitsbeziehungen. *Politische Vierteljahresschrift*, 47: 169-192.
- Rubin, Paul H. 2000. Judge-Made Law. B. Bouckaert and G. de Geest, Gerrit (eds): *Encyclopedia of Law and Economics, Vol 5. The Economics of Crime and Litigation*. Cheltenham: Elgar, pp. 543-558.

- Rüthers, Bernd. 1994. Arbeitsrecht und Ideologie. *Deutscher Arbeitsgerichtsverband (ed.): Die Arbeitsgerichtsbarkeit: Festschrift zum 100jährigen Bestehen des Deutschen Arbeitsgerichtsverbandes*. Berlin, 39-57.
- Rüthers, Bernd. 1996. *Beschäftigungskrise und Arbeitsrecht. Zur Arbeitsmarktpolitik der Arbeitsgerichtsbarkeit*. Bad Homburg.
- Schneider, Martin R. 2004: Careers in a Judicial Hierarchy. *International Journal of Manpower*, 24: 431-446.
- Schneider, Martin R. 2005. Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal. *European Journal of Law and Economics*, 20: 127-144.
- Snyder, Susan K; and Weingast, Barry R. 2000: The American system of shared powers: The President, congress, and the NLRB. *Journal of Law, Economics, and Organization*, 16: 269-305.
- Stephenson, Matthew C. 2009. Legal Realism for Economists. *Journal of Economic Perspectives*, 23: 191-211.
- Weiss, Manfred; Simitis, Spiro; and Rydzy, Wilhelm. 1989. The Settlement of Labour Disputes in the Federal Republic of Germany. In T. Hanami and R Blanpain (eds). *Industrial Conflict Resolution in Markets Economies. 2nd ed*. Boston, pp. 81-106.
- Weth, Stephan. 1998. Besonderheiten der Arbeitsgerichtsbarkeit. *Neue Zeitschrift für Arbeitsrecht*, 15: 680-688.