No. 12-1757

In The
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

National Labor Relations Board, et al

Defendants-Appellants

v.

Chamber of Commerce of the United States of America, et al

Plaintiffs-Appellees

On Appeal from Order of United States District Court,
District of South Carolina, Charleston Division
Case No. 2:11-cv-02516-DCN

Brief of Charles J. Morris, Amicus Curiae, in support of National Labor Relations Board Defendants-Appellants

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IDENTITY AND INTEREST OF AMICUS CURIAE AND AUTHORITY AND CONSENT TO FILE

Identity: Amicus Curiae Charles J. Morris is an emeritus professor, Dedman School of Law, Southern Methodist University. He is a recognized authority on the law of the National Labor Relations Act with more than 60 years of experience dealing with that law in various capacities. Among his extensive publications are the first two editions of the standard treatise on the NLRA, the *Developing Labor Law*, of which he was the founding author and editor-in-chief.

Interest: His interest in the subject matter of this case began in 1992 when he learned of the National Labor Relations Board's proposal to issue a substantive rule[1] requiring that unions—prior to any wrong-doing—notify all employees covered by union security contracts by notice-posting or mail of their rights regarding certain union unfair labor practices.[2] The Board based its authority to issue that rule on Section 6 of the Act and on its interpretation in *American Hospital Association v. NLRB*.[3] This proposed rule and its jurisdictional authority was endorsed and encouraged by several major employer organizations, including the United States Chamber of Commerce, the National Association of

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[1] *Union Dues Rights*, 57 Fed. Reg. 43,635-01 (29 C.F.R. Part 103), Sept. 22, 1992.

[2] Rights construed in *`Communication Workers v. Beck*, 487 U.S. 735 (1988).

[3] 499 U.S. 606 (1991).

Manufacturers, and the National Right to Work Foundation. That event prompted Amicus Morris to file an "interested person's" petition under the Administrative Procedure Act[4] with the Board, asserting that "the tail should not wag the dog and that the Federal Government should not promote a one-sided version of workplace rights;" he urged instead that the Board issue a broad rule that would advise employees of all their rights under the Act. That petition, which remained pending at the Board for a number of years, came to fruition with the notice-and-comment procedures that led to the issuance in 2011 of the Notice-Posting Rule involved herein.

The filing of the action in the district court below and the filing of two other related actions in the district court of the District of Columbia by essentially the same employer organizations that had sought the union notice-posting rule in the early '90s, all of whom were now asserting the opposite legal position—i.e., that the Board lacks comparable authority to issue a notice-posting rule prior to any wrongdoing—triggered the filing of amicus briefs by Amicus Morris in the aforesaid lower courts and later in the appellate courts, including the brief that here follows.

Authority to File: Charles J. Morris authorized the filing of this brief.

[4] 5 U.S.C. § 553(e).

Consent: All of the parties to this case have consented to the filing of this brief.

STATEMENT REGARDING AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting this brief; and no persons other than the amici curiae contributed money to fund this brief's preparation and submission.

ARGUMENT

I. NATURE OF THE CASE

A. The Basic *Chevron* Requirements

This is a garden-variety *Chevron*[5] step-two case. The question posed is the authority of the National Labor Relations Board (NLRB or Board) to issue a substantive notice-and-comment rule (Notice Rule or Rule) pursuant to Section 6 of the National Labor Relations Act (NLRA or Act) (29 U.S.C. § 156) and 5 U.S.C. § 553 of the Administrative Procedure Act (APA) that requires all employers under the Board's jurisdiction to post a Board-supplied notice in their workplaces that advises employees of their rights under the NLRA and how to enforce those rights. Although the district court failed to comply with *Chevron*,

[5] *Chevron U.S.A., Inc. v. NRDC, Inc*. 467 U.S. 837, 842-844 (1984).

Judge Norton acknowledged that "[t]he parties agree that the court must review the legal sufficiency of the Board's rule under the APA by applying the two-step analysis set forth in Chevron."[6]

Accordingly, the touchstone in this case is *Chevron*, the rules of which follow:

> First, always, is *the question at issue*. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [But] if the statute is silent or ambiguous with respect to the *specific issue*, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[7]

Employing "traditional tools of statutory construction,"[8] it is readily apparent that the NLRA is *silent* "on the precise question at issue"[9] since it is devoid of *specific* reference to a universal notice-posting requirement. *Chevron* tells us where to search for statutory authority and reiterates the limits on the judicial process:

> Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may

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[6] Order/Opinion of court below (hereinafter Opinion) 12 (citation omitted).

[7] *Id.*, at 843-843. Emphasis added.

[8] "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id*., at 843 n. 9.

[9] *Id*.

> not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[10]

Accordingly, when the agency makes rules "to fill any gap left, *implicitly* or *explicitly*, by Congress, [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." [11] The gap in this case was given to the Board to fill both *explicitly* and *implicitly*.

It was *explicitly* granted in *Section 6*, which provides the following plain language to be construed and applied:

> The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, *such rules and regulations as may be necessary to carry out the provisions of this Act*.[12]

That plain but broad language has already been interpreted by the Supreme Court in *American Hospital Association v. NLRB* (*AHA*),[13] which confirmed that the textual clarity of Section 6 alone suffices to validate the Notice Rule under *Chevron* step two.[14] This should have been recognized by Judge Norton when he

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[10] *Id*., at 844.

[11] *Id*. Emphasis added.

[12] Emphasis added.

[13] 499 U.S. 606 (1991).

[14] *See infra* at notes 19 and 51-52.

cited this Court's decision in *Soliman v. Gonzales*,[15] that: "Statutory construction begins with the language of the statute, as 'the plain language of the statute in question is deemed the most reliable indicator of congressional intent.'"[16] Validation of the Notice Rule under Section 6 thus fits easily into the axiom expressed in *Consumer Products Safety Commission v. GTE Sylvania*[17] that

> the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.[18]

Not only was there an absence of "clearly expressed legislative intention to the contrary" regarding the enactment of Section 6 in 1935, as the Supreme Court in AHA confirmed with its reference to the "sparse legislative history of the provision,"[19] there is now available definitive legislative history of the 1947 amendment to Section 6 that doubly confirms the Notice Rule's validity.[20]

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[15] 419 F3d 276 (4th Cir. 2005)

[16] *Id*., at 281-82. Opinion 14.

[17] 447 U.S. 102 (1980).

[18] *Id*., at 108.

[19] 499 U.S. at 613, and *see infra* at notes 51-52.

[20] *See* Part IIA *infra*.

The gap that Congress left for the Board to fill *implicitly* by issuance of this "legislative regulation" is contained in the following three provisions, for these are the "*provisions"* being "carried out" by this Section 6 Rule:

Section 1 (29 U.S.C. § 151):

> It is hereby declared to be *the policy of the United States* to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging* the practice and procedure of collective bargaining and by *protecting* the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[21]

Section 7 (29 U.S.C. § 157):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all of such activities….[22]

Section 8(a)(1) (29 U.S.C. § 158(a)(1):

> (a) It shall be an unfair labor practice for an employer—
>
> (1) *to interfere with*, restrain, or coerce employees in the exercise of the *rights guaranteed in section 7* of this Act.[23]

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[21] Emphasis added.

[22] Emphasis added.

[23] Emphasis added.

The language in these provisions, all of which is broad, plain, and unambiguous, should be construed in the manner emphasized by Chief Justice Roberts in two separate decisions when he was a judge on the D.C. Circuit Court of Appeals. He wisely reminded that "[t]he Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application."[24] Such application fully validates all features of the Rule herein.

That rule is thus entitled to garden-variety *Chevron* treatment because, as the Supreme Court recognized in the 17 cases noted below[25] and articulated in *Beth Israel Hospital v. NLRB,*[26] the rationale for judicial acceptance of the NLRB's

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[24] *In re England, Secretary of Navy*, 375 F.3d 1159, 1179 (D.C. Cir. 2004); *Consumers Electronics Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003).

[25] ***See the following eight pre-Chevron cases****: Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941); *NLRB v. Hearst Publs*., 322 U.S. 111, 131 (1944); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); *NLRB v. Weingarten, Inc*., 420 U.S. 251, 266 (1975); *NLRB v. A. J. Tower*, 329 U.S. 324 (1946), NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953), *NLRB v. Buffalo Linen*, 553 U.S. 87 (1957); *NLRB v. Iron Workers Local 103*, 434 U.S. 335, 350 (1978).

And see the following nine post-Chevron cases that relied on the Board's Chevron step-two interpretations: *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 42 (1987); *NLRB v. United Food and Commercial Workers*, 484 U.S. 113, 123 (1987); *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 787 (1990); *Holly Farms Corp. v. NLRB,* 517 U.S. 392, 403 (1996); *Ford Motor Co. v. NLRB,* 441 U.S. 488, 495, 497 (1979); *Beth Israel Hospital v. NLRB, see infra* at notes 26-27; *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982); *NLRB v. Transportation Mgt. Corp*., 462 U.S. 393 (1983); *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984).

[26] 437 U.S. 483 (1978).

reasonable interpretation of the Act where Congress has not supplied an unambiguously expressed intent on the precise question in issue is that:

> It is the Board on which Congress has conferred the authority to develop and apply fundamental national labor policy. [T]hat body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.[27]

B. The Rule's Appropriateness under Section 6 and Judge Norton's Factual Agreement

Although Judge Norton began his "Discussion" with an acknowledgement of the role of "the two-step analysis set forth in Chevron,"[28] he failed to follow the doctrine mandated by that case. But notwithstanding his tortuous explanation of his allegation that the Board lacked authority to promulgate the Notice Rule, he did recognize and concede the "factual" basis for that Rule. In fact, he stated that he "does not discredit the board's factual finding of a need for the notice-posting rule"[29] and that he "respects the Board's decision on that issue."[30] In fact, in the final footnote to his Opinion he acknowledged that if his decision "were to reach Chevron step two, it would...find that the Board 'articulate[d] a satisfactory

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[27] *Id*., at 500-501.

[28] Opinion 12.

[29] *Id*., at 22.

[30] *Id*.

explanation for its action including a rational connection between the facts found and the choice made.'"[31] In view of that concession, the purpose of the following samplings of the Board's findings is only to spell out some of the variety of reasons why employees have such a pressing need in their workplaces for the information contained on the Board-supplied notices required by the Rule.

After a lengthy review of the several thousand comments received following the rule-making notice, the Board concluded, based on "the comparatively small percentage of private sector employees who are represented by unions[,] the high percentage of immigrants in the labor force[,] and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights[, that] many employees are unaware of their NLRA rights[; accordingly,] a notice posting requirement is a reasonable means of promoting greater knowledge among employees."[32] The Board also observed that it "has been presented no evidence persuasively demonstrating that knowledge of NLRA rights is widespread among employees,"[33] and it noted that it had "received numerous comments opposing the rule precisely because the commenters believe that the notice will increase the level of knowledge about the NLRA on the part of

[31] *Id*., at 31.

[32] 76 Fed. Reg. 54,014-54,015.

[33] *Id*.

employees[, but] fear that employees may exercise their statutory rights is not a valid reason for not informing them of their rights."[34] The Board also noted that "remarks in multiple opposing comments strongly suggest that the commenters themselves do not understand the basic provision of the NLRA[—which] reinforce[s] the Board's belief that, in addition to informing employees of their NLRA rights so that they may better exercise those rights, posting the notice may have the beneficial side effect of informing *employers* concerning the NLRA's requirements.[35] The posted notice thus achieves a preventative effect that is also needed. Indeed, Judge Norton noted that "preventing" unfair labor practices (ULPs) was one of the Board's proper functions.[36]

The Board was thus faced with a pressing need to take reasonable and relatively unobtrusive steps to help correct a nation-wide condition that was undermining the responsible role that Congress had conferred upon that agency. Issuance of the Rule was thus the appropriate response, for it was in accord with the means which the Supreme Court—as indicated by the cases noted below—deems most appropriate for such circumstances, i.e., issuance of a substantive rule under Section 6 in accordance with APA procedures.

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[34] *Id*., at 54,016.

[35] *Id*., at 54,017 (Emphasis in original).

[36] Opinion 20.

Although most substantive NLRB rules have traditionally been issued through *adjudication*, the current Rule—like the rule in *AHA*—was issued under Section 6, which is not only more appropriate for its intended purpose, it also provides a broader scope of rulemaking authority than adjudication because it applies to "the *provisions* of the Act," hence *all* provisions, including Sections 1 and 7, whereas adjudicatory rules must be limited to defining or carrying out ULPs under Section 8 or representation issues under Section 9 (29 U.S.C. § 159). That difference bolsters the validity of the Rule without diminishing the deference owed the Board under *Chevron* standards.[37] In fact, this utilization of Section 6 complies remarkably with the Congressional intent defined by the Supreme Court's dispositive amalgam of opinions in *NLRB v. Wyman-Gordon*,[38] *NLRB v. Bell Aerospace Co.*,[39] the *AHA* case,[40] and—indirectly—*SEC v. Chenery Corp. (Chenery II)*.[41]

[37] *See supra* at notes 3-10.

[38] 394 U.S. 759 (1969).

[39] 416 U.S. 267 (1974).

[40] *Supra* at notes 11-13.

[41] 332 U.S. 194 (1947).

Wyman-Gordon involved a rule the Board had fashioned in *Excelsior Underwear, Inc.*,[42] that required the employer in a representation-election case to provide the NLRB regional director within 7 days after the consent-election agreement (or declaration of an election) with a list containing the names and addresses of all eligible voters, which would then be turned over to the union-party to the election. The Board's rationale for this rule was that the union's lack of home addresses represented an impediment to the employees' receiving information needed for a free and reasoned choice in voting for or against union representation.

Later, in *Wyman-Gordon*, the employer refused to provide the "Excelsior list" and refused to comply with a subpoena for such list. When the case reached the Supreme Court, the *Excelsior* rule was rendered valid by a combination of four justices under Justice Fortas' plurality opinion and three justices under Justice Black's concurring opinion. The Fortas opinion concluded that although *Excelsior* was a rule of general applicability, it had not been validly issued because the Board had not complied with Section 6 notice-and-comment procedures and other APA requirements; nevertheless, it deemed the rule enforceable as a valid product of an adjudicated case.

[42] 156 NLRB 1236 (1966).

Justice Black's opinion, quoting from *Chenery II*, simply held that the rule was valid as a legally-binding product of judicial adjudication, for

> the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.[43]

Justice Black noted that the Board, like most administrative agencies, had been granted both quasi-legislative power and quasi-judicial power, but the "line between these two functions is not always a clear one...."[44] He stressed with reference to Section 6, however, that:

> The Act does specify the procedure by which the rule-making power is to be exercised, requiring publication of notice for the benefit of interested parties and provision of an opportunity to be heard.... Congress had a laudable purpose in prescribing these requirements, and *it was evidently contemplated that administrative agencies like the Labor Board would follow them when setting out to announce a new rule of law to govern parties in the future.*[45]

That analysis by Justice Black of the relative qualities of Section 6 and adjudicatory rulemaking, with its reliance on *Chenery II*, was later adopted by the Court when it approved the Board's adjudicatory rule in the *Bell Aerospace* case.

Bell Aerospace involved the Board's ruling in an adjudicated case that narrowed the jurisdictional exclusion of "managerial employees." Repeating

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[43] 394 U.S. at 772, *citing Chenery II*, 332 U.S. at 203.

[44] 394 U.S. at 770.

[45] *Id*., at 771.

Justice Black's reliance on *Chenery II*[46] with reference to APA rulemaking, the Court declared that

> "[t]he function of filling in the interstices of the...Act should be performed as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise....Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseen situations."[47]

Accordingly, the Court concluded that

> the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. Although *there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act*, nothing in the present case could justify such a conclusion.[48]

The Supreme Court thus confirmed that Congress intended that Section 6 be the preferred medium for issuance of rules of general application, though it recognized that issuing rules by adjudication could also be acceptable in certain situations, such as where

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[46] 332 U.S. 194 (1947), *cited* in 416 U.S. at 292-294.

[47] 416 U.S. at 292-293. Emphasis added.

[48] *Id*., at 294. ("This is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements." *Id*., at 295.)

> problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule [or where] a hard and fast rule [is not appropriate.] *Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.*[49]

Thus, absent such special circumstances, the preference remains that the "function of filling in the interstices of [legislation] should be performed as much as possible, through [Section 6] quasi-legislative promulgation of rules to be applied in the future."[50]

It required several decades, however, to put that clarification fully into practice. It was not until the Court's unanimous approval of the Board's rule defining collective-bargaining units for acute hospital care employees in the *AHA* case that this concept was fully realized and reconfirmed. After referencing the "sparse legislative history of the provision,"[51] the Court emphasized the wide scope of Section 6 rulemaking with its conclusion that:

> As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6, we would have expected it to do so in language expressly describing an

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[49] *Id*., at 293. Emphasis in original.

[50] *Id*.

[51] *Id*., at 613.

> exception from that section or at least referring specifically to the section.[52]

It is thus now firmly established that the more appropriate means for the Board to exercise its quasi-legislative power of fashioning a rule of general application is through rulemaking under Section 6. Accordingly, the Notice Rule was appropriately issued under Section 6, because (1) it provides a suitable means of "*encouraging* the practice and procedure of collective bargaining" and organizational and concerted activity in accordance with "the policy of the United States" contained in Section 1 of the Act; (2) it provides employees with information they need in order to exercise their right to engage in Section 7 activities; and (3) it utilizes the Act's normal enforcement procedures to prevent and remedy interference with the exercise of those "rights guaranteed in Section 7" by declaring that failure to post this notice *interferes* with those rights and thus constitutes an unfair labor practice in violation of Section 8(a)(1).

It is elementary that when a covered employer commits an unfair labor practice—regardless of whether it is defined by simple statutory language in Section 8(a) or by a previously defined rule or policy based on that section but emanating from either an earlier adjudicated case or from Section 6 rulemaking—that employer becomes subject to the Act's enforcement process.

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[52] *Id.*

The Rule's application to all—or virtually all—employers generally, and with a requirement of an affirmative duty, is a relatively commonplace occurrence under the NLRA.

In fact, the Rule's requirement of notice-posting in the workplace is a natural companion to a no-solicitation rule the Board created for workplaces 69 years ago that the Supreme Court approved in *Republic Aviation Corp. v. NLRB.*[53] Both are general rules that require employers to perform a simple but legally necessary act in order to "*guarantee*"[54] employees the knowledge and opportunity to exercise their Section 7 rights in the workplace. The Court in *Republic Aviation*, adopting the Board's language, declared that a no-solicitation rule applicable during working time "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory."[55]

The *general* coverage of the Notice Rule, with its *prophylactic* effect, is in accord with the foregoing and many other general-applicability rules, including those contained in the following cases that approved general-coverage rules that impose affirmative duties in the absence of wrong-doing: *Jeannette Corp. v.*

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[53] 324 U.S. 793 (1945). The rule began in *Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943).

[54] This is the active verb Congress chose to define the Board's duty in § 8(a)(1).

[55] *Id.*, at 803, n. 10.

NLRB,[56] upholding a general rule against an employer "prohibiting employees from discussing wage rates among themselves [which] imposes an unlawful impediment on employees' right to engage in concerted activity for mutual aid and (sic) protection guaranteed by Section 7....";[57] *NLRB v. J. Weingarten, Inc.*,[58] upholding a general rule that employers in union-recognized workplaces must allow the presence of a union representative during an investigatory-disciplinary hearing when requested by the employee being interviewed;[59] *NLRB v. Washington Aluminum Co.*,[60] upholding rule that an employer *interferes* with nonunion employees' "mutual aid or protection"[61] rights when it discharges them for concertedly ceasing work; and *Eastex, Inc. v. NLRB*,[62] holding that distribution of

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[56] 532 F.2d 916 (3rd Cir. 1976), *enforcing* 217 NLRB 653 (1975).

[57] 217 NLRB at 658. For general treatment of NLRA coverage of nonunion employees, *see* Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673 (1989).

[58] 420 U.S. 251 (1975).

[59] This is a striking example of where an employer's failure to perform a specific act—i.e. failure to allow the presence of the union representative—regardless of motive, constitutes an interference with Section 7 rights.

[60] 370 U.S. 9 (1962).

[61] § 7.

[62] 437 U.S. 556 (1978).

a union news-letter discussing external employee-related political matters constitutes concerted activity protected by Section 8(a)(1).

Regarding such rules as those recognized in the foregoing cases, especially those involving concerted employee activity for "mutual aid or protection," the employer's motive is not relevant. Under the Notice Rule herein, regardless of *why* the employer might fail to post the notice, it is its *absence* that interferes with employees' right to engage in protected concerted activity, for without access to this notice, they are unlikely to be aware of those rights. It is the *failure* to post that interferes, not the employer's reason for not posting. The leading decision on this proposition is *NLRB v. Burnup & Sims.*[63] The Supreme Court there upheld a violation of Section 8(a)(1) where the employer's good faith but mistaken belief as to an employee's conduct was not a defense against the interference-effect of the employer's action. Unlike Section 8(a)(3), under which a finding of a discriminatory motive is essential for a discharge to be unlawful,[64] in cases involving independent Section 8(a)(1), motive is not a factor. It is sufficient that

[63] 379 U.S. 21 (1964).

[64] *See* DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT, 289-306, (John E. Higgins et al. eds, 5th ed. 2006).

the employer's conduct tends "to weaken or destroy"[65] employees' Section 7 rights, regardless of the absence of a discriminatory motive.[66]

Motive is thus irrelevant where the employer's failure to perform an affirmative duty that protects employees' right to engage in Section 7 concerted activity—such as the proactive requirement that the employer post the notice required by the Notice Rule—constitutes an *interference* with employee rights in violation of Section 8(a)(1). As the Board pointed out in *Technology Service Solutions*,[67] in accord with judicial precedent,

> [W]e find no basis for...holding that an overt act must occur for an employer to violate Section 8(a)(1). [There are] circumstances in which an *employer's failure to act* may interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; nothing in the statute precludes such failure to act from being found violations of Section 8(a)(1).[68]

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[65] *Burnup & Sims*, 379 U.S. at 23-24.

[66] For further authority regarding this basic Section 8(a)(1) concept, *see Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998); *NLRB v. Hudson Transit Lines, Inc.*, 429 F.2d 1223 (3d Cir. 1970); *American Freightways Co., 124 NLRB* 146 (1959).

[67] 324 NLRB 298 (1997).

[68] *Id*., at 301, *citing McDermott Marine Construction*, 305 NLRB 617 (1991), and *S&H Grossinger's, Inc.,* 156 NLRB 233, 251, 261 (1965), *enforced*, 327 F2d (2d Cir. 1967). Emphasis added. *See also NLRB v. J. W. Weingarten, Inc.*, at note 58 *supra*.

By the same token, for an example of the Board's similar rule-making authority relating to Section 9 requiring preliminary action by the employer, i.e., preparing and presenting for the union's later use a voter address and eligibility list, see the previously noted *Excelsior Underwear*[69] case.

II. LEGISLATIVE HISTORY

A. The Taft-Hartley Act's Amendment to Section 6.

The broad grant of rule-making authority in Section 6 is confirmed by compelling legislative history. As previously noted, the history of the 1935 Act supports that broad reading.[70] In addition, historical data concerning the 1947 amendment to Section 6 is particularly supportive of that reading. In 1947, the House of Representatives passed an amended, restrictive version of that section that would have denied the Board authority to engage in substantive rulemaking under Section 6, but it was ultimately rejected by Congress. Here is that history:

The original Section 6 in the 1935 Wagner Act read:

> The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.[71]

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[69] 156 NLRB 1236 (1966); *see supra* at notes 42-45.

[70] *Supra* at notes 19 and 51-52.

[71] 49 Stat. 449 (1935), § 6.

The Hartley Bill (H.R. 3020)[72] that passed the House substituted an amended version that inserted reference to the APA, deleted "rules," and limited the Board's authority to promulgation of only "such regulations as may be necessary to carry out the respective functions" of the agency. That amended Section 6 read:

> The Board and the Administrator,[73] respectively, shall have authority from time to time, in the manner prescribed by the Administrative Procedure Act, to make, amend, and rescind such *regulations* as may be necessary *to carry out their respective functions* under this Act.[74]

The undisputed[75] purpose of this change was explained in the minority report of the House committee that reported H.R. 3020:

> It seems clear that it is the intent of the authors to *eliminate the statutory authority of the Board to issue,* in addition to procedural regulations, *substantive changes* which under the Administrative Procedure Act might be construed as "*substantive rules*."[76]

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[72] LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1974) (hereinafter LEGIS. HIST. T-H ACT), at 49.

[73] H.R. 3020 would have created this new office, but it did not survive Conference-Committee consideration.

[74] Legis. Hist. T-H Act *supra* note 72, at 49. Emphasis added.

[75] The majority committee's report did not dispute the minority assertion that here follows. *Id.*, at 317.

[76] *Id*., at 366. Emphasis added. The minority report identified the majority's immediate objectives: preventing the Board from issuing *substantive rules* empowering it to conduct pre-hearing elections without the express consent of the parties and granting certifications based only on authorization cards rather than elections. *Id*., at 330, 336, & 1542.

The Senate rejected the entire House bill, including the amended Section 6, and drafted and passed its own bill (S. 1126[77]), for which Senator Robert Taft was the chief sponsor. It contained no change in the Wagner Act's Section 6 other than changing the final sentence to read: "Such rules and regulations shall be effective upon publication in the Federal Register."[78] The Senate committee report confirmed that the "only amendment to this section [was] in accordance with the requirements of the Administrative Procedure Act.[79]

The Senate passed the Taft bill with few amendments. Both bills were sent to Conference Committee where the House's deletions relating to substantive rulemaking and limiting incorporation of the APA in Section 6 were rejected. The original language of Section 6 was restored with full reference to "rules and regulations," and reference to the APA was inserted. The final text of Section 6 (with the insertion italicized)—hence the text in the Act today—reads as follows:

> The Board shall have authority from time to time to make, amend, and rescind, *in the manner prescribed by the Administrative Procedure Act*, such rules and regulations as may be necessary to carry out the provisions of this Act.

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[77] *Id*., at 99, 226.

[78] *Id*., at 109.

[79] *Id*., at 426.

With reference to this amended Section 6, the published Conference-Committee report explained that

> It is made to assure that the subsequent amendment of the National Labor Relations Act without changing this section will not supersede the general rules prescribed in the Administrative Procedure Act which are now applicable to the Board's powers to promulgate regulations.[80]

The Taft-Hartley Congress thus rejected the House's effort to eliminate the Board's substantive rulemaking authority and confirmed that the "subsequent amendment," i.e., the Taft-Hartley Act, "will not supersede the general rules prescribed in the Administrative Procedure Act which are now applicable to the Board's powers to promulgate regulations."

Had the House's amended language been enacted, Section 6 would have authorized only *procedural* "*regulations"* to "carry out" the agency's "*functions,*" and would not have provided authority for issuance of substantive rules—which would have achieved exactly what the court below now contends to be the proper result of its interpretation of Section 6. Congress's express rejection of an effort to change the statute's wording negates Judge Norton's assertion that Section 6

[80] House Conference Report, LEGIS. HIST. T-H ACT, *supra* note 72 at 542. *See* WILLIAM N. ESKRIDGE, JR., ET AL, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, *Appendix B: Cannons of Statutory Interpretation* 27 (4th ed. 2007) ("Committee reports (especially *conference committee reports* reflecting the understanding of both House and Senate) are the most authoritative legislative history" that can be produced. Emphasis added.)

does not confer full substantive rulemaking authority on the Board regarding *all* provisions of the Act.

The Supreme Court has addressed such rejected efforts to change a statute's wording. It declared in *Bradley v. Sch. Bd. of City of Richmond*,[81] that courts should generally be "reluctant … to read into [a] statute … limitation[s] that Congress eliminated." And the Court emphasized in *INS v. Cardoza-Fonseca* that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[82]

[81] 416 U.S. 696, 716, n. 23 (1974) (holding that Congress's explicit rejection of House amendment limiting ability to recover attorneys' fees was evidence that Congress did not intend such limitation).

[82] 480 U.S. 421, 442-43 (1987) (internal quotation marks omitted. *See also Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (holding that Congress's failure to pass bills overturning the IRS's interpretation of a statute demonstrated congressional acquiescence with the agency's interpretation); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (holding that Congress's rejection of legislation curbing an agency's jurisdiction was evidence that Congress did not intend to overrule the agency's interpretation); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975) (holding that Congress's rejection of a House amendment to Title VII (42 U.S.C. §§2,000e *ff*) that would have barred back pay to persons who had not filed EEOC charges showed Congress did not intend such a rule).

B. Legislative History Of Section 8(a)(1)

One of the three "provisions"[83] being "carried out" by the Notice Rule is Section 8(a)(1), about which there is relevant legislative history. During debate on his bill, Senator Wagner on two occasions advised his Senate colleagues of the specific meaning of Section 8(1),[84] stating first that it would have the "widest possible application"[85] and later characterizing the provision as having "the broadest reasonable interpretation of its omnibus guarantee of freedom."[86] The "widest possible application" of the phrase "to interfere with" was thus recognized and intended when the Act was passed in 1935.

That broad meaning was also recognized—and not changed—by the Taft-Hartley Congress when the phrase "*interfere with*" was being discussed and considered on the floor of the Senate in relation to Section 8(b)(1) (29 U.S.C. § 158(b)(1)), which was to be applicable to union ULPs. It was originally intended to be identical to its Section 8(a)(1) counterpart (applicable to employer ULPs). However, because "*interfere with*" was known to have an extremely broad

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[83] *See supra* at notes 21-23.

[84] The pre-Taft-Hartley designation of § 8(a)(1).

[85] LEGIS. HIST. T-H ACT, *supra* note 72 at 2333.

[86] *Id.*, at 2487.

meaning, Senator Irving Ives moved to amend Section 8(b)(1) by deleting those words. After he pointed out in floor debate that because of its broad meaning, retention of this phrase "may later, by interpretation and effect, defeat legitimate attempts at labor organization,"[87] his amendment was adopted without objection.[88] The intended *broad* meaning of "*interfere with"* in Section 8(a)(1) was therefore fully recognized in both 1935 and 1947 legislative history.

III. THE DISTRICT COURT'S OTHER REVERSIBLE ERRORS

Ignoring Section 6 and the Board's long history of substantive rulemaking by adjudication,[89] Judge Norton's Opinion recognized only the *quasi-judicial* functions in Sections 8, 9, and 10 as the means by which the Board carries out its statutory functions, thereby acknowledging only its *reactive* role, not its *proactive* policy-defining quasi-legislative role. He asserted that because "[t]he notice-posting rule *proactively* dictates employer conduct *prior* to the filing of any petition or charge, ... such a rule is inconsistent with the Board's *reactive* role under the Act."[90] His Opinion thus wholly ignored the Act's important *proactive*

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[87] *Id*., at 1025.

[88] *Id*., at 1139. Accordingly, § 8(b)(1) applies only "to restrain or coerce," not to "interfere with."

[89] *See supra* at notes 53-62.

[90] *Id*. Emphasis added. Defining that *reactive* role and ignoring the Act's legislative features, the Opinion insisted that "[i]t is clear from the structure of the

quasi-legislative functions that Section 6 emphasizes, that legislative history confirms, and which the adjudicative function has abundantly incorporated—such as in the prophylactic and general-rule cases previously examined.[91]

Accordingly, although the Opinion contended that "[t]he *plain language* and structure of the Act compel a finding that the Board lacks authority under Section 6 to promulgate the rule,"[92] it never identified the "plain language" to which it referred—such language being non-existent—and, regarding the "structure" to which it referred, it disregarded entirely the quasi-legislative aspects of that structure. Furthermore, in reading the text of Section 6, it departed from the common judicial meaning of "necessary,"[93] which is indeed strange, for (as previously noted) Judge Norton accepted the Board's factual findings of the necessity for this Rule.[94] He indicated, however, that those facts were not

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Act that Congress intended the Board's authority over employers be triggered by an outside party's filing of a representation petition or ULP charge." *Id*. For the longstanding contrary recognition of advance *proactive* requirements, *see* notes 53-62 & 67-69.

[91] *See supra* at notes 53-62.

[92] Opinion 17. Emphasis added.

[93] *See Mourning v. Family Publ'ns Serv., Inc*., 411 U.S. 356, 369 (1973) ("Where the empowering provision of a statute states simply that the agency may 'make...such rules and regulations as may be necessary to carry out [its] provisions...the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'").

[94] *Supra* at notes 29-31.

sufficient because the Board has "not shown that the rule is 'necessary' to carry out any other provision of the Act,"[95] for which he provided the non-sequitur observation that "the Act places no affirmative obligation on employers to post notices of employee rights or inform employees of those rights, so the rule cannot be 'necessary' to carry out a nonexistent provision."[96] Of course, the *provisions to be carried out* are not "nonexistent," for they are clearly contained in Sections 1, 7, and 8(a)(1).[97] Section 6, by its clear text, applies to *all* provisions of the Act, even including one of the provisions that Judge Norton's Opinion did recognize, Section 8, which "guarantees" in Section 8(a)(1) that employers may not "interfere with" employees' Section 7 rights.[98]

The final essence of Judge Norton's approach is the novel rule that he posits to determine the validity of the Notice Rule:

> Because the statute is "silent" as to the notice posting, the court must look beyond the plain language of the statute to determine whether Congress intended to delegate authority to the Board to fill this legislative silence.[99]

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[95] *Id*., at 17

[96] *Id*., at 18.

[97] *See* notes 21-23 *supra* and accompanying text.

[98] *See supra* at notes 83-88.

[99] Opinion 23.

This stands *Chevron* on its head, for on finding such silence—the existence of which Judge Norton thus concedes—*Chevron* insists that the only "question for the court is whether the agency's answer is based on a permissible construction of the statute,"[100] which must be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." Instead, his rule, which Appellee Chambers of Commerce apparently ask this Court to adopt, holds that Congressional silence means just the opposite, that the agency is not authorized to fill the gap even when Congress has provided specific authority for it to do so, as it did in Section 6.

Although Judge Norton in a final footnote asserted that he had decided this case "on Chevron step one grounds,"[101] that does not appear to have been accurate, for he never successfully addressed or questioned the broad coverage contained in the plain language and legislative history of Section 6, and because, in the words of *Chevron*, "the statute [in this case] is silent...with respect to the specific issue,"[102] the Board's response—which is wholly consistent with the policy of the Act—is

[100] 467 U.S. at 843.

[101] Opinion 31, n. 20.

[102] *Chevron*, 467 U.S. at 843.

clearly "a permissible construction of the statute."[103] The Board's Rule is an unqualified application and requirement of *Chevron* step two.

Judge Norton, however, is to be commended for his decision's *qualified* support for the Rule's validity in that final footnote, noted earlier, where he acknowledged that "if it were to reach Chevron step two, it would...find that the Board 'articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'"[104] Clearly, *Chevron*—in both steps one and two—requires reversal of Judge Norton's actual ruling and confirmation of his qualified ruling.

IV. CONCLUSION

For the above reasons, this Court is respectfully requested to hold that the Board had authority to issue the Notice Rule, that the order of the district court be reversed, and that summary judgment in favor of the NLRB Appellants be granted.

[103] *Id*.

[104] Opinion 31, n. 20.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned hereby certifies this 2nd day of October, 2012, to the following:

A. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,989 words, based on the word count of the word-processing system used to prepare this brief (Microsoft Word 2010), which is within the 7,000 word limitation applicable to amicus curiae briefs, not including the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 2, 2012, this Amicus Curiae Brief of Charles J. Morris was sent by UPS to the the Clerk of Court for the United States Court of Appeals for the Fourth Circuit for filing not later than Oct. 5 in accordance with the telephone instructions of that Clerk's office, and that a true and correct electronic copy of this brief was sent via e-mail to the following counsel of NLRB Appellants and Chamber-of-Commerce Appellees in accordance with their previously indicated consent to such delivery:

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