



Rule will have on its members. MEMA members employ thousands of workers, some of whom are represented by unions, and many others who are not. These employees and the companies they work for have operated under principles established by the NLRB their entire careers. Over the years, the balanced industrial policy struck by Congress in the National Labor Relations Act and implemented by the NLRB has enabled the men and women who comprise the workforce of MEMA members to function effectively and in essential harmony. There has been no evidence in recent years of any groundswell of discontent in the motor vehicle parts labor force, nor any indication of simmering dissatisfaction among personnel regarding the balance between their rights and the way the companies they work for are managed. Despite the challenging economic conditions of recent years, labor and management in the motor vehicle parts industry have worked together to maintain the viability of the industry.

Although the human resources environment in American industry has produced an era of diminishing labor friction and rising productivity, the NLRB has announced a Rule designed to agitate the existing workplace equilibrium. MEMA's members are very concerned about the appalling timing of the NLRB's unwarranted decision to meddle in their effectively functioning workplaces. Not only is MEMA convinced that the NLRB's proposed rule is unwise, but it is also contrary to the NLRA and the Constitution.

## **ARGUMENT**

### **The Notice Posting Rule Legislates Changes in the Requirements and Enforcement of the NLRA and Infringes Upon the Free Speech Rights of Employers.**

The NLRB's Notice Posting Rule would require all employers within its jurisdiction, though they are not accused of an unfair labor practice, nor involved in a representation election, to post a notice that would inform employees of only certain, selected rights under the National Labor Relations Act ("NLRA" or "Act"). Along with the obligation to post a notice, the Notice

Posting Rule creates a new unfair labor practice to punish employers who fail to abide with the posting mandate, and declares a novel basis for tolling the statute of limitations for filing an unfair labor practice charge. The Board has offered strained arguments to support its determination that it possesses authority to substantially modify the legislatively crafted elements of the Act, but mostly the Board depends on its plea for the Court to withhold scrutiny of the Board's action, and merely defer to the NLRB's administrative decision.

The Court should not accept the Board's unreasonably overbroad interpretation of its authority to legislate substantive changes in the requirements and enforcement of the NLRA, especially where the Board's actions seriously infringe upon the fundamental Free Speech rights of employers under the NLRA and the Constitution. In support of the complaint filed by the Chamber of Commerce, MEMA submits that implementation of the NLRB's Notice Posting Rule would be destructive of the statutory and constitutional rights of American employers, and it would be wrong for this Court to defer to the NLRB's determinations.

***The Legislative History of the Act***

The NLRA, as amended, is a product of legislative compromises following decades of discussion and debate over one of the most controversial issues in American life: the respective roles of Government and unions in the workplace. The NLRA represents the bargain reached by Congress in the Wagner Act of 1935, the Taft-Hartley Act of 1947 (over the veto of President Truman), and the Landrum-Griffin Act of 1959. Over the decades, the Congress and President negotiated to reach the result that establishes the substantive rights and procedural mechanisms governing the relationship between labor and management in the United States. Notably, for 50 years there have been calls by labor leaders and academics for further legislative reform, and

countless bills have been introduced in Congress to enact changes to the NLRA, but to no avail. The basic structure of the law has remained unchanged since 1959.

During the Act's long legislative history, Congress debated what conduct by employers the Act should define as unfair labor practices; how much time should be allowed for a person to file an unfair labor practice; what circumstances should be recognized as tolling the statute of limitations; and whether an employer's exercise of Free Speech rights should be insulated from unfair labor practice charges. The bargains struck in the legislative process are represented in the law enacted by Congress.<sup>1</sup>

***Employer Free Speech Protections under Section 8(c)***

Free Speech principles have special significance in the context of labor relations because of the unique statutory protections guaranteed by Section 8(c) of the Act, which was enacted in 1947 as one of the core elements of the Taft-Hartley Act. Section 8(c) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this (Act) if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c).

The architects of Section 8(c), led by Senator Robert Taft of Ohio, made it clear that Section 8(c) was designed to prevent the Board from "attempt[ing] to circumscribe the right of

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<sup>1</sup> For 75 years the Board never discovered a gap in the Act relating to notifying the public of rights under the NLRA. Yet now three Board members say they have discovered a gap, and the NLRB has invented for itself legislative authority to impose a notice posting obligation, to enact a new ULP, to revise the statute of limitations, and to impose liability on employers who exercise their Freedom of Speech. It is disingenuous for these three Democratic members of the NLRB, each of whom had a career representing labor unions before their appointment (one of whom has never been confirmed by the Senate), to contend that the Rule merely fills in gaps left by Congress. If these partisan Board members can spawn such novel rulemaking powers to adopt obligations not arising from the Act, and to overturn protections expressly provided in the Act, then it is to be expected that a future majority of Board members is certain to find other gaps in the obligations imposed on unions, and on the penalties available against unions, and on the procedures that govern union organizing efforts. In this highly politicized and contentious area, endowing the NLRB with a previously unknown prerogative to pioneer rights and remedies never enacted by Congress will surely produce a torrent of labor relations clashes as the newly empowered NLRB goes about a novel "gap-filling" mission.

free speech (even) where there were also findings of unfair labor practices.” 93 CONG. REC. 6601 (1947). Soon after passage of Taft-Hartley, in its Annual Report for 1948, the NLRB recognized that Section 8(c) grants immunity beyond that contemplated by the Free Speech guarantees of the Constitution. 13 N.L.R.B. ANN. REP. 49 (1948). In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969), the Supreme Court explained the fundamental role of Section 8(c) in the NLRA’s statutory scheme, stating that it “implements the First Amendment” in the labor relations area and protects the First Amendment right of employers to express their views about unionism. Section 8(c) is an important affirmation that in the absence of any threat of reprisal or force, or promise of benefit, Congress did not intend to endow the NLRB with power to abridge in the slightest the Free Speech rights of employers.

**The Notice Posting Rule Compels Employers to Promote the NLRB’s Agenda.**

The NLRB’s Notice Posting Rule compels employers to post a statement of certain rights selected by the NLRB to be included in the Notice. On the basis of the thousands of comments submitted during the rulemaking process, as well as the multiple actions filed by employer organizations to preclude its implementation, it is indisputable that the Notice Posting Rule compels employers to endorse a message that many do not support. The Notice Posting Rule not only asserts dominion over physical and electronic employer bulletin boards, but it does so in a manner that even the NLRB does not profess is subject matter neutral, but which is purposely intended to reach only employees who are not union members – the obvious purpose being to facilitate efforts to bolster interest in the mechanisms and protections for gaining union representation, while screening employees from information regarding their rights to end union representation, to de-authorize their union from compelling union dues payments, to reduce their dues payments to unions, or to assert their rights to govern their unions. While the NLRB has

presented unconvincing rationales for its shrewd decision to favor notification of certain rights over others, presuming that any rational basis is sufficient to justify such discriminatory treatment of the subject matter, in the context of Government compelled speech, the NLRB's meager justifications cannot pass muster.

Finally, the Board's explanation of its decision to adopt the Notice Posting Rule includes no credible evidence that its decision is based on an objectively observed and verified problem of employees who are unaware of their rights under the NLRA, or who have suffered some injury that will be rectified by the posting of a notice. The only evidence cited are out of date academic articles that make no claim of scientific objectivity or credibility. Moreover, even if there were plausible evidence that American workers were unaware of the NLRA and prejudiced by their ignorance, the NLRB has utterly failed to explain why alternative measures that do not intrude on statutory and constitutional Free Speech rights would not suffice to correct the perceived problem. The NLRB's analysis of the process of informing employees of their rights under the law ignores the ability of the NLRB to communicate its message through the countless and inexpensive channels of modern media. Furthermore, the entire rulemaking process has disregarded the underlying assumption of the structure of the NLRA, namely that Congress intended UNIONS – not employers – to provide information to workers about their rights under the NLRA, as well as opportunities for employees to exercise those rights. Congress never saddled employers with the notice obligation that the Notice Posting Rule imposes on employers.

**Freedom of Speech Includes Protection from Compulsion to Deliver the Government Message.**

By compelling employers to post a notice that employers view as advocating the Government's objectionable pro-union message, the Notice Posting Rule plainly infringes on fundamental Free Speech rights. In a case addressing the Free Speech rights of workers

compelled by law to provide financial support to unions, the Supreme Court declared that “[a]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.” *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). The Court has also stated that “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994).<sup>2</sup>

The U.S. District Court for the District of Columbia recently recognized that a fundamental tenet of constitutional jurisprudence is that the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.” *R.J. Reynolds Tobacco Co. v. FDA*, Civ. No. 11–1482(RJL), 2011 WL 5307391 at \*5 (Nov. 7, 2011), quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). See *Riley v. Nat’l Fed’n of the Blind, Inc.*, 487 U.S. 781, 797 (1988) (there is a “constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression ....”). In its analysis of the limits imposed by the First Amendment on federal power to mandate a specific message in a commercial context, the *R.J.*

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<sup>2</sup> The origin of the principle that the First Amendment protects the right to refrain from speaking is generally recognized as *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), as elaborated by *Wooley v. Maynard*, 430 U.S. 705 (1977). These cases involved attempts to compel public expressions of fidelity to ideas with which those compelled disagreed. In *Barnette*, the compulsion was a flag salute imposed on a child. In *Wooley* it was a state license plate forcing a driver to carry the state motto “Live Free or Die.” The Court said in *Wooley*, the right not to speak derives from “the right of freedom of thought protected by the First Amendment.” 430 U.S. at 714. “The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Id.* The evil in compelling a person to espouse the Government’s message is that it “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Id.* at 715. There is no federal power to “use ... private property as a ‘mobile billboard’ for the State’s ideological message or suffer a penalty.” *Id.*

*Reynolds Tobacco* court observed that a speaker typically “has the autonomy to choose the content of his own message,” *R.J. Reynolds Tobacco Co.*, *supra* at \*5, quoting *Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 573 (1995), and “the choice to speak includes within it the choice of what not to say.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion). It follows, therefore, that when government authority “ ‘mandates speech that a speaker would not otherwise make,’ that statute ‘necessarily alters the content of the speech.’ ” *R.J. Reynolds Tobacco Co.*, *supra* at \*5, quoting *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir.2006) and *Riley*, 487 U.S. at 795. Such speech compelled by the Government is “presumptively unconstitutional.” *R.J. Reynolds Tobacco Co.*, *supra* at \*5, citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). As this Court held in *R.J. Reynolds Tobacco Co.*, serious harm is suffered when a person is compelled to publish a message in which he or she does not believe, precisely because First Amendment rights have been abridged. *Id.* at \*9 citing *Coal. For Common Sense in Gov’t Procurement v. United States*, 576 F.Supp.2d 162, 168 (D.D.C. 2008). The *R.J. Reynolds Tobacco* court concluded that such harm should not be derided as merely the ordinary cost of complying with regulations, because it is the residual effect of unconstitutionally compelled commercial speech designed, at a company’s expense, to advocate a competing policy agenda. *R.J. Reynolds Tobacco Co.*, *supra* at \*9.

Government regulations of speech must not only be viewpoint and speaker neutral, but must also be subject neutral. *See, e.g., Carey v. Brown*, 447 U.S. 455, 462 (1980) (ban on all picketing in residential neighborhoods except labor picketing related to a place of employment unconstitutional because ban not subject neutral). When the subject matter of governmental regulation of speech is not neutral, there is an “inherent risk that the Government seeks not to



advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion.” *Turner Broad. Sys.*, 512 U.S. at 641; *see also Consol. Edison Co. of N.Y. Inc. v. Public Serv. Comm’n*, 447 U.S. 530, 538 (1980) (holding that lack of subject neutrality creates the risk of government manipulating the “search for truth”).

In accordance with these principles, courts have recognized that compelling a person to post a message dictated by a governmental authority implicates these First Amendment rights, and requires the Government to demonstrate a compelling need for such intrusion. *See Smith v. Commission of Fair Employment and Housing*, 30 Cal.Rptr.2d 395 (Cal.App. 1994) (“We have no doubt the coerced posting of these notices implicates plaintiff’s First Amendment right to freedom of speech. (U.S. Const., Amend. I.)”), *Judgment Affirmed in Part, Reversed in Part on other grounds* 12 Cal.4th 1143, 913 P.2d 909 (1996) (on review, California Supreme Court did not dispute that order requiring posting of notices implicated free speech right – 12 Cal.4<sup>th</sup> at 1195 ), *cert. denied* 521 U.S. 1129 (1997). Justice Jackson explained the burden on the Government to demonstrate a compelling need for government action infringing upon free speech in *West Virginia State Bd. of Edu. v. Barnette*, 319 U.S. at 639:

The right of a State to regulate, for example, a public utility may well include ... power to impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

As the court held in *R.J. Reynolds Tobacco Co.*, *supra* at \*6, to pass constitutional muster in compelling commercial speech, the Government must carry the double burden of demonstrating that there is a compelling interest that demands infringement on the Freedom of

Speech, and that the form and substance of the compelled speech is narrowly tailored to achieve the Government's essential objective.

These Free Speech principles have special significance in the context of labor relations because of the unique statutory protections guaranteed by Section 8(c) of the NLRA, which "implements the First Amendment" in the labor relations area and protects the First Amendment right of employers to express their views about unionism. The Free Speech principles established by the First Amendment and Section 8(c) should govern this Court's decision whether to defer to the NLRB's Notice Posting Rule, which openly dictates that employers surrender their freedom of conscience and their right to choose which ideas and beliefs deserve expression, consideration, and adherence. In *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1987), the Supreme Court ruled that while the Board's statutory interpretation might normally be entitled to deference, courts cannot defer to administrative decision making where an agency's "construction of a statute would raise serious constitutional problems." *DeBartolo*, 485 U.S. at 575 (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979)). Defining the area within which the NLRB is entitled to deference, *DeBartolo* shows that even if the Board could reasonably construe the NLRA to confer power on the NLRB to impose posting duties on employers, to create new unfair labor practices, and to revise the statute of limitations, this Court could not accord deference to the Board's construction of the Act because its construction raises constitutional questions. The reasoning of *DeBartolo* illustrates that the Board's power to govern national policy in the field of labor relations does not confer authority to ignore the ancient admonition that an act by the Government "contrary to the constitution is not law." *Marbury v. Madison*, 5 U.S. 137, 176 (1 Cranch 137, 177) (1803). Accordingly, *DeBartolo* establishes that when the

NLRB's interpretation of the Act erodes constitutional rights, courts should not defer to the NLRB but must "independently inquire whether there is another interpretation" that avoids the constitutional problem. *Id.* at 576-77.

The legislative history of the Act is barren of any indication that Congress intended to impose notice posting on employers, or otherwise compel employers to promote the Government's message concerning employee rights under the NLRA. Section 8(c) certainly belies any contention that any employers exercise of Freedom of Speech rights would be the basis for a finding of an unfair labor practice.

The NLRB has not demonstrated that there is a compelling reason for implementing the Notice Posting Rule 75 years after enactment of the NLRA. The Board has offered no explanation of why it has not pursued other avenues to publicize the contents of the mandated Notice that do not infringe on Free Speech rights. The Board cannot justify its failure to make the mandated Notice subject matter neutral. For all of these reasons, the strict scrutiny under which the Notice Posting Rule must be analyzed demands that the Court should not defer to the Board's adoption of the Rule and should grant the Plaintiff's motion for summary judgment.

**The NLRB Lacks Authority to Impose a Notice Posting Requirement.**

The NLRA is different from the various other statutes that require employers to post notices, because unlike those other federal laws, there is no statutory command in the NLRA requiring employers to post a notice of rights. Consequently, while American workplaces have posted notices concerning Title VII, OSHA, ERISA, ADEA, ADA, etc. since their enactment, the NLRA has operated under a different mandate, and the NLRB has enforced an alternative compliance protocol during its 75 years.

Instead of notices in every workplace, the NLRA has consistently imposed notice posting requirements *only upon those employers and unions that have violated the Act*. Even though Congress has amended the NLRA three times since its original enactment (1947, 1959, 1974), a notice posting requirement has never been added. The use of notice posting as a remedial tool is deeply embedded in the NLRB's enforcement of the Act and in the American culture of labor relations. Compelling notice posting as a remedy for violations of the NLRA represents a rational choice made by generations of Board members and NLRB General Counsels to utilize the "Notice to Employees" as the "Scarlet Letter" of labor relations to expose violators of the NLRA to their employees and others in their workplaces. The NLRB's use of notice posting as a remedy, rather than as a public proclamation of the provisions of the NLRA, is an established element of the law, effectively acknowledging the limits on the jurisdiction of the Board. The NLRB is assigned narrow regulatory authority to redress interference with the rights of employees that are guaranteed by the Act. The Senate Report on the Wagner Act explained:

The quasi-judicial power of the Board is restricted to four unfair labor practices and to cases in which the choice of representatives is doubtful.

SENATE REPORT NO. 1184 ON S. 2926, at p. 1, *reprinted in* 1 Legislative History of the National Labor Relations Act of 1935 (1935), at p. 1100.

The Board is not a roving commission with power to uncover, define, and punish employment practices the Board finds undesirable, or with authority to impose duties the NLRB would find expedient. *See* S. REP. 74- 573, 2 *Leg. Hist.* 2308 (1935) ("Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair"). Thus, for 75 years the NLRB has properly restricted the obligation imposed on employers to post a notice transmitting the NLRB's message to situations in which the NLRB is conducting an election because a question of

representation exists, and as a remedial function when there is a finding of an unfair labor practice.

Since Congress has not authorized the NLRB to promulgate a Notice Posting Rule, and has explicitly limited the Board's authority to act when there is no question concerning representation nor unfair labor practice charged, the Notice Posting Rule is inconsistent with the NLRA. A regulation cannot stand if it is contrary to the statute. *United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). The NLRA, perhaps more than any other piece of legislation, was the result of hard won congressional compromises by legislators with divergent views and objectives. The legislative determination not to include a posting requirement by employers that have not violated the Act cannot be reversed by administrative fiat. "Agencies must respect and give effect to these sorts of compromises." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002), citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-819 (1980).

**The NLRB Lacks Authority to Impose Sanctions for Non-Posting.**

The Notice Posting Rule imposes a range of sanctions on employers that fail to post the required notice. The Rule would penalize noncompliant employers by tolling the statute of limitations on unfair labor practice charges filed against them, imposing unfair labor practice liability on them, and presuming the existence of unlawful animus in litigation of unfair labor practice charges.<sup>3</sup> The NLRB has invented these penalties in the Notice Posting Rule, because nowhere in the NLRA are such measures contemplated. These unauthorized sanctions are beyond the NLRB's authority.

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<sup>3</sup> As explained *supra*, the NLRB contravenes Section 8(c) and the First Amendment by penalizing an employer for exercising the Free Speech right not to support the NLRB's message.

The unfair labor practices defined in the NLRA and the statute of limitations established in the Act represent congressional determinations on these matters, which are not subject to revision by the NLRB. The Senate Report on the Wagner Act was explicit that Congress intended the violations set forth in the Act to represent the sum total of all employer conduct that would contravene the Act; the unfair labor practices listed were not merely examples of the types of conduct from which the NLRB could build. Thus, the Report states:

the unfair labor practices under the purview of this bill are strictly limited to those enumerated in section 8. This is made clear by paragraph 8 of section 2, which provides that “The term ‘unfair labor practice’ means any unfair labor practice listed in Section 8,” and by Section 10 (a) empowering the Board to prevent any unfair labor practice “listed in Section 8.” Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade practices, this bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair.

SENATE REPORT NO. 573 ON S. 1958, p. 9, *reprinted in 2 Legislative History of the National Labor Relations Act of 1935 (1935)*, at p. 2308.

The sanctions imposed by the Notice Posting Rule would work an end run around important elements of the NLRA’s remedial scheme, and therefore are not permitted. *Compare Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. at 91. In analogous circumstances in *Ragsdale*, the Supreme Court addressed agency action to expand sanctions and impose procedural requirements that went beyond the Family and Medical Leave Act (FMLA) and changed the remedial scheme of the law. The Court explained that any key term in an important piece of legislation is the result of compromise between groups with marked, but divergent interests in the contested provision. The result decided by the legislative process must stand – it is not subject to revision by agency rulemaking. In the present context, during the debates leading to passage of the NLRA and its amendments, employers sought more freedom to manage

their businesses; unions wanted more leverage to demand concessions. Congress resolved the conflicts by choosing the middle ground reflected in the statute. In doing so, the Senate Report purposely recorded in the legislative history that the NLRB would lack authority to prohibit whatever labor practices that in its judgment might be deemed unfair.

Similarly, with respect to the NLRA's six month statute of limitations, the Board has arrogated to itself power to revise a core element of that statute that was the product of significant debate before the compromise was ultimately reached. Thus, the House Report on the House bill explained that:

A more important change is one that requires charging parties to file their charges within 6 months after the unfair practice is alleged to have occurred.... It has not been unusual for the Board, in the past, to issue its complaints years after an unfair practice was alleged to have occurred, and after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused. Allowing 6 months for filing a charge ... does not seem unreasonable.

HOUSE REPORT NO. 245 ON H. R. 3020, at p. 40, *reprinted in* Legislative History of the Labor Management Relations Act (1947), at p. 331. In the Senate, the Minority Report also highlighted the seriousness of the legislation in limiting employer exposure to stale charges of unfair labor practices, stating:

[The bill] requires that charges of unfair labor practices be filed within 6 months after their commission—the shortest statute of limitations known to the law ....

SENATE MINORITY REPORT NO. 105, PT. 2, ON S. 1126, at p. 5, *reprinted in* Legislative History of the Labor Management Relations Act (1947), at p. 467.

The NLRB must respect and give effect to these compromises. It cannot use a rulemaking process to establish new unfair practices and to change procedural deadlines that have been decided by Congress. Where a statute establishes a penalty scheme, it is beyond the agency's authority to impose an unauthorized sanction for failure to comply with a notice posting

obligation. The proposed penalties for non-posting would improperly impose punishments not authorized by the NLRA, alter the balance struck by Congress, and should be held invalid.

### CONCLUSION

For all of the foregoing reasons, amicus Motor & Equipment Manufacturers Association requests that the Court grant Plaintiff's Motion for Summary Judgment and enjoin the implementation of the NLRB's Notice Posting Rule.

Respectfully submitted,

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