No. 12-1757

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD; MARK GASTON PEARCE, in his official capacity as Chairman of the National Labor Relations Board; BRIAN E. HAYES, in his official capacity as Member of the National Labor Relations Board; RICHARD F. GRIFFIN, JR., in his official capacity as Member of the National Labor Relations Board; SHARON BLOCK, in her official capacity as Member of the National Labor Relations Board; and LAFE E. SOLOMON, in his official capacity as Acting General Counsel of the National Labor Relations Board,

Defendants-Appellants

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and the SOUTH CAROLINA CHAMBER OF COMMERCE,

Plaintiffs-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON
Case No. 2:11-cv-02516-DCN

BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

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[1] This provisions contained in 29 C.F.R. Part 104 are enjoined pending appeal pursuant to the D.C. Circuit's order in the parallel proceeding, *Nat'l Ass'n of Mfrs. v. NLRB*, on April 17, 2012 (Case Nos. 12-5068 and 12-5138).

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JURISDICTION

The Chamber of Commerce of the United States and the South Carolina Chamber of Commerce (the Chamber) filed this action challenging the issuance by the National Labor Relations Board (the NLRB or the Board)[1] of a rule (the Rule) establishing a duty for employers within the Board's jurisdiction to post an official Board notice informing employees of their rights under the National Labor Relations Act (NLRA or the Act), 29 U.S.C. §§ 151-169. The Chamber alleged that the Rule violated the NLRA; the Administrative Procedure Act, 5 U.S.C. § 706; the Regulatory Flexibility Act, 5 U.S.C. § 611; and the First Amendment.[2] The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

On April 13, 2012, the district court issued an order granting the Chamber summary judgment, and on April 17, 2012, the district court issued final judgment. On June 15, 2012, the Board filed a timely notice of appeal. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

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[1] Terence F. Flynn has resigned his membership from the Board. *See* Fed. R. App. P. 43(c)(2).

[2] The district court did not reach the Regulatory Flexibility Act and First Amendment claims. J.A. 276 n.20.

ISSUE PRESENTED

Whether the National Labor Relations Act authorizes the NLRB to issue a rule that requires employers within the Board's jurisdiction to post an official Board notice informing employees of their rights under the Act.

STATEMENT OF FACTS

The Rule challenged by the Chamber is entitled "Notification of Employee Rights Under the National Labor Relations Act," 76 Fed. Reg. at 54,006 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104); J.A. 152. The Rule establishes a duty for employers within the Board's jurisdiction to post an official Board notice informing employees of their rights under the Act.

This Rule corrects a long-standing anomaly. Until now, the Board has been almost alone among agencies and departments administering major federal labor and employment laws in not requiring covered employers to routinely post workplace notices informing employees of their statutory rights and the means by which to remedy violations of those rights. The prevailing practice reflects a common understanding that such notices are a minimal necessity to ensure that employees are informed of their workplace rights. 76 Fed. Reg. at 54,006-07; J.A. 152-53.

STATEMENT OF THE CASE

The Chamber brought its rulemaking challenge in the District of South Carolina. After cross-motions for summary judgment, the district court issued an order rejecting the Board's authority to promulgate a rule implementing an employers' duty to post the notice. J.A. 276.[3] The district court disagreed with the Board's arguments that the Act's Section 6 provides statutory authority for the Rule and that the Rule is consistent with the Act. *Id.* at 262-75.[4] The Board has appealed.

STANDARD OF REVIEW

Summary judgment in rulemaking cases is reviewed de novo. *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 189 (4th Cir. 2009).

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[3] Record references in this final brief are to the joint appendix (J.A.).

[4] Earlier, in a parallel challenge to the Rule, the District Court for the District of Columbia upheld the Board's statutory authority to issue the Rule, but determined that two of the Rule's three remedial provisions were inconsistent with the Act. Nonetheless, the district court permitted the Board to employ both of these remedies on a case-by-case basis. *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34, 43-53, 54-55, 58 & n.21, 63 (D.D.C. 2012).

The challengers and the Board both appealed. On April 17, 2012, in light of the conflicting decisions in the two district courts, the D.C. Circuit granted the motion of the plaintiffs/appellants in that case for an injunction pending appeal and ordered expedited briefing. The case was heard on September 11, 2012, and is pending decision.

SUMMARY OF ARGUMENT

Section 6 of the Act authorizes the Board to issue rules "necessary to carry out" the Act's other provisions. The Supreme Court's seminal decision in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), teaches that rules issued pursuant to broad rulemaking grants such as Section 6 must be upheld if they are "reasonably related to the purposes of the enabling legislation." In addition, this Court's decision in *Harman Mining Co. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*, 826 F.2d 1388 (4th Cir. 1987) (*Harman Mining*), warns parties who challenge a rule issued pursuant to broad rulemaking grants like Section 6 that they must carry a "heavy burden" to demonstrate the rule's invalidity.

The Rule fully meets the *Mourning* standard, and the challengers have failed to carry their heavy burden under *Harman Mining*. Following in the long tradition established by other federal agencies and departments which require employers to post informational notices for the benefit of employees, the Rule requires covered employers to post an official Board notice explaining rights protected and practices prohibited by the Act. Particularly in light of evidence in the administrative record showing declining levels of public awareness of the Act's protections and procedures, this Rule is

"necessary to carry out" not only Section 7, which sets forth the core rights of employees under the NLRA, and Section 1, which sets forth the Act's policies, but also Sections 8, 9, and 10, which empower the Board to protect those rights through cases brought before it by outside parties.

The district court, contrary to *Mourning* and *Harman Mining*, improperly adopted a restrictive construction of the word "necessary," as used in Section 6's broad grant of rulemaking authority to the Board. The district court was not at liberty to substitute its own construction for the one conclusively established by *Mourning* and reinforced by a long line of precedent.

The district court also erred by relying on procedural limits on the Board's adjudicatory authority to support its conclusion. Although the Board cannot adjudicate cases under Sections 9 or 10 unless an outside party files a petition or charge, these provisions have no bearing on the Board's regulatory authority under Section 6 to create affirmative duties that the Board has determined are necessary to effectuate core statutory provisions. In addition, courts have long recognized the Board's authority to use the process of case-by-case adjudication to devise legal rules that place prospective obligations upon employers. The Board's authority to implement the NLRA's provisions is, at the very least, no less when it

proceeds by rulemaking. The district court's contrary conclusion is inconsistent with the purpose behind Congress's grant of legislative rulemaking authority. It also conflicts with *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), where the Supreme Court instructed that the Board's rulemaking power is not limited by other provisions of the Act unless those other provisions so state.

The district court further erred to the extent that it discerned congressional intent to prohibit a notice-posting requirement from the fact that Congress included the requirement in certain other statutes. Particularly in the administrative setting of this case, the district court's drawing of a negative inference to interpret legislative silence was not appropriate under this Circuit's precedents. Nor does the case law support the district court's conclusion that the Board's notice-posting Rule usurps a major policy question that Congress has reserved to itself. The Board reasonably relied on the example of the Department of Labor, which in 1949 issued a rule requiring employers to post a notice under the Fair Labor Standard Act. That requirement stands to this day.

Alternatively, as the Board found, the Rule is a valid exercise of the Board's power to interpret its enabling act under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *NLRB v.*

J. Weingarten, Inc., 420 U.S. 251 (1975). Under these cases, the Board may "adapt the Act to changing patterns" in the workplace by exercising its "special function of applying the general provisions of the Act to the complexities of industrial life." And here, the Rule is based on a reasonable interpretation of Section 8(a)(1), the broad language of which courts have long understood as authority for the Board to direct the performance of affirmative employer duties. Thus, because the Board was interpreting general and purposely ambiguous language, and did so in a way that the district court conceded was reasonable, the district court's failure to uphold the Rule as an exercise of the Board's *Chevron* authority is also reversible error.

ARGUMENT

The Board's Rule Requiring Employers to Post a Notice of Employee Rights Is a Lawful and Reasonable Exercise of the Board's Statutory Authority.

The National Labor Relations Act authorizes the NLRB to require employers within the Board's jurisdiction to post an official Board notice informing employees of their rights under the NLRA. The Rule is a legitimate exercise of the Board's substantive rulemaking authority under Section 6. Alternatively, the Rule is a valid exercise of the Board's authority to fill a statutory gap under *Chevron, U.S.A., Inc. v. Natural Resources*

Defense Council, Inc., 467 U.S. 837 (1984). Because the district court ruled to the contrary, its decision should be reversed and the case remanded for the court to pass on the remaining challenges to the Rule.

A. The Rule Is Within the Board's Broad Legislative Rulemaking Authority Under Section 6, Because It Reasonably Relates to the Purposes of the Act Under the Supreme Court's Decision in *Mourning*.

Section 6 grants the Board "broad rulemaking authority," *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991) (*AHA*), to issue "such rules and regulations as may be necessary to carry out the provisions of this [Act]," 29 U.S.C. § 156.

The proper framework for analyzing a rule promulgated under such a statutory grant is well established: "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 the provisions of this Act,' . . . the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (first omission in original; footnote omitted) (quoting *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 280-81 (1969)); *see also United Hosp. Ctr., Inc. v. Richardson*, 757 F.2d 1445, 1451 (4th Cir. 1985). "Moreover, in determining whether the regulations are within the purpose of the enabling

legislation, the courts 'give great deference to the interpretation given the statute by the officers or agency charged with its administration.'" *United Hosp. Ctr.*, 757 F.2d at 1451 (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002) (noting that an agency's judgment that a particular regulation "is necessary to carry out" its enabling statute "must be given considerable weight" (quotation omitted)). Accordingly, this Court has noted "the heavy burden on the [rule challenger] to demonstrate the invalidity of a regulation promulgated under a statute providing a broad grant of rulemaking authority." *Harman Mining Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 826 F.2d 1388, 1390 (4th Cir. 1987).

Because the notice-posting Rule is reasonably related to the Act's purposes, the Chamber has failed to meet its "heavy burden." As the following discussion demonstrates, the Rule is necessary to carry out a number of provisions of the NLRA.

1. The Rule Is Necessary to Carry Out Multiple Provisions of the NLRA.

The NLRA reflects Congress's determination that certain employer and labor union practices and the inherent "inequality of bargaining power between employees . . . and employers," substantially burden commerce. 29 U.S.C. § 151. To address these problems, Congress decided to

"encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing." *Id.* To those ends, Section 7—the Act's "centerpiece," *Office & Prof'l Emps. Int'l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir. 1992)—grants most private-sector employees the right "to self-organization;" "to form, join, or assist labor organizations;" "to bargain collectively;" and "to engage in other concerted activities," as well as the right "to refrain from any or all such activities." 29 U.S.C. § 157. "The rights guaranteed to employees by [Section 7 of] the Act include full freedom to receive aid, advice, and information from others, concerning those [Section 7] rights and their enjoyment." *Harlan Fuel Co.*, 8 NLRB 25, 32 (1938). Section 8, in turn, prohibits employers and unions from engaging in "unfair labor practices" that infringe on covered employees' Section 7 rights. 29 U.S.C. § 158. To administer the statute, Section 3 establishes a National Labor Relations Board and a General Counsel of the Board. *Id.* § 153. Section 10 authorizes the Board to adjudicate unfair labor practice cases litigated by the General Counsel, subject to a six-month statute of limitations. *Id.* § 160. Finally, Section 9 authorizes the Board to conduct representation elections and issue certifications. *Id.* § 159.

The Board relied on ample administrative record evidence to support its reasonable conclusion that the full and free exercise of employees' Section 7 rights depends on employees knowing that those rights exist and that the Board protects those rights. This conclusion accords with the long-standing tradition of other federal agencies and departments to require employers to post various notices of employee rights in the workplace. *See* 76 Fed. Reg. at 54,006-07; J.A. 152-53 (listing examples). The Department of Labor, for example, decided in a rulemaking over sixty years ago to require employers to post notices informing employees of their workplace rights under the analogous Fair Labor Standards Act. *See* 14 Fed. Reg. 7516, 7516 (Dec. 16, 1949) (finding that "effective enforcement of the act depends to a great extent upon knowledge on the part of covered employees of the provisions of the act and the applicability of such provisions to them"). For similar reasons, as the District Court for the District of Columbia correctly found, the Rule, by requiring employers to post in the workplace an official Board notice reciting employee rights under Section 7 and examples of employer and labor union misconduct prohibited by Section 8, is "necessary to carry out" the core rights set forth by Section 7. *Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 46, 49. Until the present Rule, the Board stood almost alone in not having a similar requirement.

In addition, the Rule is necessary to carry out Sections 8, 9, and 10. The Board's processes are not self-initiating. Under Section 10, the Board may not adjudicate an unfair labor practice case involving a violation of Section 8 unless a charge has been filed within the Act's six-month statute of limitations that results in the issuance of a complaint by the General Counsel. *See* 29 U.S.C. §§ 153(d), 160(b); *see also* 2 The Developing Labor Law 2854 (John E. Higgins, Jr. ed., 6th ed. 2012) (citing 29 C.F.R. § 102.9). Likewise, under Section 9, union election "procedures are set in motion with the filing of a representation petition." 2 The Developing Labor Law 2831. In both instances, a private party must file the initiating document. *Id.* at 2854 (citing 29 C.F.R. § 102.9); *id.* at 2831 (citing 29 U.S.C. § 159(c)(1)(A), (B), and (e)(1)). The Act therefore presupposes employee awareness of and participation in the Board's processes. Accordingly, employee knowledge of NLRA rights and how to enforce them within statutory timeframes is crucial to effectuate Congress's national labor policy through the processes established by Sections 8, 9, and 10. *See* 76 Fed. Reg. at 54,010-11; J.A. 156-57. To help address these concerns, the notice tells employees how to contact the Board for additional information and how to report a violation of the Act before the statute of limitations expires. 76 Fed. Reg. at 54,048-49; J.A. 194-95.

Consistent with the view of scholars who first urged the Board to adopt a notice-posting requirement, the Board found that there is now a significant lack of public awareness of the NLRA's protections and procedures. *See id.* at 54,014-17. The Board explained that knowledge of the NLRA's rights and processes was more widespread in prior years when union density was greater,[5] and thus, the severe decline in that density, in combination with factors such as the rise in immigrants in the workforce who are unlikely to be familiar with their workplace rights, has left employees less likely to be informed of their rights under the NLRA. *See id.* at 54,006, 54,014-17. This informational deficit precludes the full exercise of Section 7 rights and the Board's ability to remedy violations of those rights under Sections 8, 9, and 10. Therefore, given the critical link between employees' timely awareness of their NLRA rights and the fulfillment of the Act's objectives, the Board was correct to conclude that the Rule's notice-posting obligation is "necessary to carry out" all of the aforementioned provisions of the Act.

[5] The Board explained that unions have been a traditional source of information about the NLRA's provisions, and moreover, that employees are now less likely to have personal experience with collective bargaining or co-workers who have had that experience. 76 Fed. Reg. at 54,011; J.A. 157.

2. The District Court Erred In Disregarding *Mourning* Based on a Misunderstanding of the Plain Meaning and Structure of the NLRA.

The district court said that it "respect[ed] the Board's decision" with regard to the "need for the notice-posting rule." J.A. 267. And it acknowledged the Supreme Court's command to sustain the Rule "as long as it is reasonably related to the purposes" of the Act. *Id.* at 263 (quoting *Mourning*, 411 U.S. at 359). But it declined to follow this mandate, dismissing *Mourning* and its progeny as a "pre-*Chevron* line of cases," *id.*, and finding that the "plain meaning of the word 'necessary' and the statutory framework" of the Act precluded approval of the Rule, *id.* at 264. Each of the justifications given for that conclusion is flawed. *Id.* at 262-70.

a. *Mourning* provides a valid basis for upholding the Rule.

This Court has applied *Mourning* to uphold agency rules issued pursuant to rulemaking grants like the one in Section 6, and it has done so post-*Chevron*. In *Harman Mining*, for example, this Court upheld a rule that only concurrent state awards could offset a federal award of black lung benefits. 826 F.2d at 1390-91. The rule was not expressly authorized by statute.[6] Rather, the Secretary of Labor relied upon authority under the

[6] Indeed, Harman argued that the rule conflicted with another statutory provision, 30 U.S.C. § 932(g).

Federal Coal Mine Health and Safety Act to issue rules as the Secretary "deems appropriate to carry out the provisions" of that Act and "necessary to provide for the payment of benefits . . . to persons entitled thereto." 30 U.S.C. §§ 932(a), 936(a).

As noted above, in *Harman Mining* this Circuit recognized "the heavy burden on the [rule challenger]. . . to demonstrate the invalidity of a regulation promulgated under a statute providing a broad grant of rulemaking authority." 826 F.2d at 1390. *Harman Mining* also observed that "[s]uch regulations are presumptively valid and will be sustained 'so long as they are reasonably related to the purposes of the enabling legislation.'" *Id.* (quoting *Mourning*, 411 U.S. at 369) (internal quotation marks and brackets omitted). Finding that the regulation at issue satisfied the *Mourning* standard, this Court upheld the challenged rule as "reasonably related to the purposes of the Act." *Id.* at 1391.

Other circuits have similarly applied *Mourning* or its test. For example, in *Janik Paving & Construction, Inc. v. Brock*, the Second Circuit reviewed a regulation providing for debarment as a sanction for non-compliance with certain federal contracting requirements. 828 F.2d 84, 86-87 (2d Cir. 1987). The *Janik* court rejected many of the same arguments relied upon by the district court here. In *Janik*, both the relevant statute and

its legislative history were silent about debarment. *Id.* at 89. And other subsequently enacted statutes had specifically endorsed debarment, while the one at issue did not. *Id.* at 92. The challenger pointed to these later enactments as evidence that Congress did not mean to permit debarment under the statute at issue. But the court upheld the regulation, relying on, *inter alia*, *Mourning*. *Id.* *Janik* and numerous other cases[7] confirm both the application of *Mourning* here and the validity of the rule under review.

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[7] *See, e.g.*, *Checkosky v. SEC*, 23 F.3d 452, 468 (D.C. Cir. 1994) (per curiam) (upholding under *Mourning* the SEC's authority to promulgate a rule governing discipline of accountants "appearing or practicing" before the Commission, under the SEC's general rulemaking grant); *Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 384-85, 387 (D.C. Cir. 1989) (relying on *Mourning* to reject a challenge to the Capitol Police Board's statutory authority to issue regulations requiring permits for demonstrations on the Capitol Grounds, when rulemaking grant permitted "all necessary regulations" for controlling Capitol Grounds traffic); *Graham Engineering Corp. v. United States*, 510 F.3d 1385, 1389 (Fed. Cir. 2007); *Jackson v. Richards Medical Co.*, 961 F.2d 575, 585 (6th Cir. 1992); *National Medical Enterprises, Inc. v. Sullivan*, 957 F.2d 664, 665-66, 667 (9th Cir. 1992); *Gallegos v. Lyng*, 891 F.2d 788, 792 (10th Cir. 1989); *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 868 n.4, 869 (3d Cir. 1986).

Furthermore, district courts across the Fourth Circuit have recognized the continuing vitality of *Mourning* and *Harman Mining*. *See, e.g.*, *Baltimore-Washington Tel. Co. v. Hot Leads Co.*, 584 F. Supp. 2d 736, 743 (D. Md. 2008) ("When a statute provides 'a broad grant of rulemaking authority,' the Fourth Circuit has held that 'such regulations are presumptively valid and will be sustained so long as [they are] reasonably related to the purpose of the enabling legislation.'" (quoting *Harman Mining*, 826 F.2d at 1390)); *Nowlin v. E. Assoc'd Coal Corp.*, 331 F. Supp. 2d 465, 474 (N.D.W.Va. 2004) ("The law imposes a heavy burden on

b. The district court's narrow reading of the term "necessary" in Section 6 is wholly unprecedented.

The district court recognized that broad rulemaking provisions like Section 6 are extraordinarily common. J.A. 259-60 n.6. And, as shown above, *Mourning*, *Thorpe*, and *Harman Mining* have construed the word "necessary" in such provisions to authorize rules that are "reasonably related" to the purposes and policies of the statute.[8] Notwithstanding that clear authority, the district court concluded that, as a matter of plain language, Section 6's use of the word "necessary" requires something more than a rule that is "simply useful" in serving the purposes of the Act. *Id.* at 262. In doing so, the district court erred in purporting to change the definition of a term that has already been authoritatively interpreted by the courts.

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employers challenging the validity of a regulation promulgated under a statute such as the Black Lung Benefits Act that provides a broad grant of rulemaking authority."); *Credit Union Nat. Ass'n v. National Credit Union Admin.*, 57 F. Supp. 2d 294, 299 (E.D. Va. 1995) ("The Supreme Court [in *Mourning*] has squarely addressed the question of an agency's authority to issue regulations under a statute providing a broad grant of regulatory authority.").

[8] This broad reading of the term "necessary" in the rulemaking context is consistent with the Supreme Court's generous construction of the Constitution's "necessary and proper" clause. *See United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) ("[W]e look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.").

Initially, in finding that the word "necessary" has a plain meaning, the district court overlooked cases holding otherwise. *See AFL-CIO v. Chao*, 409 F.3d 377, 387 (D.C. Cir. 2005) ("[A]mbiguity [is] inherent in the word 'necessary' . . . ."); *Krause v. Titleserve, Inc.*, 402 F.3d 119, 126 (2d Cir. 2005) ("Particularly as used in the law, the word 'necessary' is ambiguous.").

More fundamentally, the district court's plain language approach disregards well-established law recognizing that whether a regulation is "necessary" is a matter primarily entrusted to the agency charged with the administration of the relevant statute. "An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing." *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 845 (1986).[9]

[9] Such deference is no less appropriate in this case merely because the Board's authority to promulgate the Rule is at issue. The district court failed to apply Fourth Circuit law in using "more intense scrutiny" of the Board's analysis of Section 6 because it involves "the agency interpret[ing] its own authority." J.A. 256-57 (quoting *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981)). This Circuit has specifically rejected this aspect of *Hi-Craft*, and defers to an agency when it interprets statutory provisions delimiting its own jurisdiction. *EEOC v. Seafarers Int'l Union*, 394 F.3d 197, 201-02 (4th Cir. 2005).

For that reason, a broad construction of general rulemaking grants is now an accepted part of our jurisprudence. *See Alcoa S.S. Co. v. Fed. Mar. Comm'n*, 348 F.2d 756, 761 (D.C. Cir. 1965) (stating that newly enacted general rulemaking grant gave the agency the authority to "adopt rules necessary to substantive regulation"); *Nat'l Ass'n of Pharm. Mfrs. v. FDA*, 637 F.2d 877, 880 (2d Cir. 1981) (Friendly, J.) (noting that the "generous construction of agency rulemaking authority has become firmly entrenched"); *see also Thorpe*, 393 U.S. at 278, 280-81 (upholding rule requiring federally assisted housing projects to "comply with a very simple notification procedure before evicting [their] tenants"); *Lincoln Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 856 F.2d 1558, 1561-63 (D.C. Cir. 1988) (upholding rule requiring financial institutions "to obtain approval" before exceeding certain investing thresholds). That is why *Mourning*, *Thorpe*, and *Harman Mining*—and countless other cases dealing with rulemaking provisions like Section 6—have consistently upheld rules that serve the purposes of the other provisions of the statute. The district court should have done the same.

Section 6, of course, does not grant the Board "'limitless power to write new law.'" J.A. at 263 (quoting *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 143-44 (D.D.C. 2005).

Plainly, for example, an agency cannot rely on its general rulemaking authority to contradict what Congress has said elsewhere in the enabling act. *See, e.g.*, *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139-40 (D.C. Cir. 2006) (finding that agency lacked authority to issue a rule that was at odds with Congress's choice to leave such regulation to states and Indian tribes). There is, however, no basis for the district court's conclusion that the Board's authority in this case was limited by the supposed "plain meaning" of Section 6 or the structure of the Act, as explained further below. The Rule is both "reasonably related to the purposes of the enabling legislation," *Mourning*, 411 U.S. at 369 (quotation omitted), and fully within the structure and plain language of the NLRA.

Because the district court's unprecedentedly narrow construction of "necessary" in Section 6 conflicts with binding interpretations from the Supreme Court and this Court, it must be rejected.

3. The Structure of the Act Does Not Preclude the Board from Placing Obligations upon Employers Against Whom No Charge or Petition Has Been Filed.

The district court also held that, under the structure of the Act, the Board is not authorized to prospectively impose obligations on employers. The district court relied principally upon "the statutory framework that channels the Board's powers away from proactive regulation of employers

to a mechanism whereby the Board's functions are triggered by an outside party." J.A. 264. In drawing this inference, the district court pointed to Sections 9 and 10 of the Act, which respectively empower the Board to conduct representation elections and issue complaints in response to petitions and unfair labor practice charges initiated by private parties. *Id.* at 265. The district court held the private initiation requirement to mean that the Board cannot "promulgat[e] a rule that proactively imposes an obligation on employers prior to the filing of a ULP charge." *Id.* at 269. This was error for a number of reasons.

First, the district court fundamentally misunderstood the structure of the NLRA when it held that the Board could not "proactively dictate[] employer conduct prior to the filing of any petition or charge." *Id.* at 265. For the Act's entire history, the Board has used adjudication to create new substantive rules that apply to employers even prior to an unfair labor practice charge being filed against them. For example, in *NLRB v. Washington Aluminum Co*., the Supreme Court held that a nonunion employer's established rule forbidding employees to leave work without permission did not provide a lawful cause for discharge when applied to the unorganized employees' concerted activity in spontaneously walking out to

protest lack of heat in the workplace. 370 U.S. 9, 16-17 (1962). The holding in that case defines a standard of conduct for employers generally.[10]

Similarly, in *Republic Aviation Corp. v. NLRB*, the Supreme Court approved the Board's rule, fashioned through adjudication, that an employer's barring its employees from soliciting for a union on the employer's property while on break was presumptively unlawful. 324 U.S. 793, 804 (1945). In this manner, the Board enunciated the law that employers are expected to follow. *See* Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 891 (1962) ("Time and again the Board has announced that certain conduct would, or presumptively would, violate one of the broad prohibitions of the Labor Relations Act, whereas other conduct would not, or presumptively would not.").

Nor does it matter that this Rule applies to all employers within the NLRA's jurisdiction. It is black-letter law that Congress intended the Act's jurisdictional breadth to encompass the full extent of Congress's power to

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[10] *See* Nancy J. King, *Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces*, 40 Am. Bus. L.J. 827, 855, 856 (2003) (cautioning nonunion employers that their workplace policies are subject to the NLRA and that "[e]mployers who have workplace rules that prohibit employees from discussing the terms and conditions of employment with other employees or that require management's approval before employees may engage in protected concerted activity will violate Section 7").

regulate commerce. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). The obligations set forth in the NLRA's text apply to all employers within the Board's statutory jurisdiction. The obligations that the Board has developed through adjudication or rulemaking have the same scope and are enforced in the same way—through unfair labor practice proceedings initiated by a private party. The rule at issue is no exception. *See* 76 Fed. Reg. at 54,049; J.A. 195 (detailing the Rule's enforcement procedures in Subpart B). The import of Section 10 is simply that employer breaches of obligations created by Board may go unremedied if unfair labor practice charges are not timely filed. But that issue of the Rule's enforcement is distinct from the question of the Board's authority to place obligations on employers in the first place. *See NLRB v. Pease Oil Co.*, 279 F.2d 135, 137 (2d Cir. 1960) ("An Act of Congress imposes a duty of obedience unrelated to the threat of punishment for disobedience.").

Furthermore, contrary to the district court's view, the Board's statutory rulemaking authority need not "be triggered by an outside party's filing of a representation petition or ULP charge." J.A. 265. Congress attached no such restriction to its grant of rulemaking authority in Section 6 of the NLRA, and absent language "expressly describing an exception from that section or at least referring specifically to that section," the Board's

exercise of its broad rulemaking authority is presumed to be authorized. *AHA*, 499 U.S. at 613. As the Board explained, Sections 9 and 10 obviously preclude the Board from "issu[ing] certifications or unfair labor practice orders via rulemaking proceedings." 76 Fed. Reg. at 54,011; J.A. 157. However, nothing in those sections otherwise limits the Board's broad legislative rulemaking authority under Section 6 to specify affirmative requirements that further the objectives of the NLRA and that are not contrary to any statutory provision. 76 Fed. Reg. at 54,011; J.A. 157; *see also Trans-Pac. Freight Conference of Japan/Korea v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1245 (D.C. Cir. 1980) (holding that when an agency proceeds by rulemaking, it should not be "constricted by the formalities of the adjudicatory process in the absence of a clear congressional intent to the contrary"). Here, the district court failed to show any "clear congressional intent," *Trans-Pac. Freight*, 650 F.2d at 1245, to restrict the Board's rulemaking powers.

Nor is the district court's citation of legislative history regarding "Congress's intent to place the Board in a primarily adjudicative role in relation to employers," to the contrary. *See* J.A. 269-70. This legislative history, by its own terms, refers not to rulemaking, but to the "quasi-judicial power of the Board [which] is restricted to [the enumerated] unfair labor

practices." *Id.* at 269 (quoting S. Rep. No. 73-1184 (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 1100 (1959) (Leg. Hist.). As explained above, the Board has long made rules establishing standards of conduct through adjudication. But as Judge Posner has noted, "[the Board's] rulemaking power is not less when it proceeds, under the explicit authority of section 6, in accordance with the procedures that the Administrative Procedure Act prescribes for rulemaking." *Am. Hosp. Ass'n v. NLRB*, 899 F.2d 651, 655 (7th Cir. 1990), *aff'd*, 499 U.S. 606 (1991); *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion."). Indeed, in *NLRB v. Wyman-Gordon Co.*, many on the Court strongly encouraged the Board to use rulemaking—instead of adjudication—whenever it was defining or creating obligations for employers, employees, and unions. 394 U.S. 759 (1969).[11] Before the district court's decision here, no court has ever questioned the Board's authority under Section 6 to make rules of "*general*

[11] *Id.* at 764 (plurality opinion of Fortas, J.), 777, 779 (Douglas, J.), 783 n. 2 (Harlan, J.).

or particular applicability and future effect." *Id.* at 763-64 (quoting the APA, 5 U.S.C. § 551(4)) (emphasis added).[12]

4. Section 6 Authorizes the Board's Making Legislative Rules Placing Affirmative Duties on Employers.

By their very nature, legislative rules of the sort referred to in *AHA*, *Wyman-Gordon*, *Schor*, and *Mourning*, are supposed to "grant rights, impose obligations, or produce other significant effects on private interests." *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A properly adopted substantive rule establishes a standard of conduct which has the force of law."); *see also Beltone Elecs. Corp. v. FTC*, 402 F. Supp. 590, 598 (N.D. Ill. 1975) (discussing FTC's creation of affirmative duties

[12] In this context, the district court was particularly mistaken to implicitly criticize the Board for going "seventy-five years without promulgating a notice-posting rule," but now choosing to "flex its newly discovered rulemaking muscles." J.A. 272-73. As the Supreme Court recently reiterated, "neither antiquity nor contemporaneity with a statute is a condition of a regulation's validity." *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 712 (2011) (internal quotations and brackets omitted); *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996) (deferring to regulation "issued more than 100 years after the enactment" of the statutory provision the regulation construed); *see also NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (noting that the Board has a "responsibility to adapt the Act to changing patterns of industrial life"). As the Board properly found, it would be an "abdication of that responsibility for the Board to decline to adopt this rule simply because of its recent vintage." 76 Fed. Reg. at 54,013; J.A. 159. If anything, "the exercise of the Board's dormant substantive rulemaking power is long overdue." *Am. Hosp. Ass'n*, 899 F.2d at 655.

applicable to all manufacturers and sellers of products through its Trade Regulation Rule); Oren Bar-Gill & Rebecca Stone, *Mobile Misperceptions*, 23 Harv. J. L. & Tech. 49, 110 (2009) (explaining that the FCC regulates cellular providers through both affirmative and negative disclosure provisions).[13] And two of the *Wyman-Gordon* opinions confirm that the

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[13] Because of the existence of the Board's broad Section 6 rulemaking power, the district court's extensive reliance on *Railway Labor Executives Association v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (en banc), is misplaced. *See* J.A. 264, 266, 274. There, the court struck down an election rule of the NMB, an agency that, unlike the Board, *lacks* general rulemaking authority. NMB had also suggested that "deference is required any time a statute does not expressly *negate* the existence of a claimed administrative power." *Ry. Labor Execs. Ass'n*, 29 F.3d at 671. The D.C. Circuit rejected that argument as "both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Id.* Here, the NLRB is not claiming that the Act's failure to prohibit notice posting is the source of its power to create such an obligation. Rather, the Rule is an exercise of the Board's general rulemaking authority, which NMB lacked, and reflects the Board's judgment that the Rule is necessary in order to carry out specific statutory provisions that would otherwise not be effectuated.

Moreover, in *Railway Labor Executives*, there was persuasive evidence in the RLA's language, structure, and legislative history that Congress had considered and rejected the NMB's regulatory choice. *Id.* at 665-69. By contrast, there is no such evidence here.

Another D.C. Circuit case relied upon below, *Public Service Commission of the State of New York v. FERC*, is also inapposite because in that case, the court found the agency's action to upset the structural balance created by the statute by forcing regulated entities to carry the burden of proof. 866 F.2d 487, 490-92 (D.C. Cir. 1989); *see* J.A. 264 (citing *Pub. Serv. Comm'n*). No such structural imbalance is created by the Board's using the legislative rulemaking authority it was granted in Section 6 to carry out Sections 8, 9, and 10 of the NLRA.

very point of rulemaking power is to impose general obligations: "The rule-making provisions of [the APA] . . . were designed to assure fairness and mature consideration of *rules of general application*." 394 U.S. at 764 (plurality op. of Fortas, J.) (emphasis added). And as Justice Douglas observed, "[t]he rulemaking procedure . . . gives notice *to an entire segment of society* of those controls or regimentation that is forthcoming." *Id.* at 777 (Douglas, J., dissenting) (emphasis added).

Authorizing such legislative rules is the central purpose of Section 6. That section is not, as the district court thought, "terra incognita." J.A. 260. On the contrary, more than twenty years ago, the Supreme Court carefully considered that provision and affirmed that the Board has "broad rulemaking authority." *AHA*, 499 U.S. at 613. The Court examined "the structure and the policy of the NLRA" to reach the following conclusion:

> 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 exception from that section* or at least referring specifically to the section.

Id. (emphasis added). The Court could not have been clearer that unless the Board has been "expressly" limited in some manner, Section 6 empowers the Board to regulate, at least within the parameters set by *Mourning* and its

progeny. No such limitation was found in *AHA*, and no such limitation exists here.

The district court attempted to distinguish *AHA* by stating that in context the Board there was carrying out duties imposed by Section 9 of the Act while the Board is performing no comparable function here. J.A. 265-66. The district court's reasoning fails on its own terms. As explained above, the Board reasonably concluded that this Rule is necessary to carry out Sections 1, 7, 8, 9, and 10 of the Act, because the effectiveness of all these provisions depends on employees knowing their rights and how to enforce them. *See* 76 Fed. Reg. at 54,010-11; J.A. 156-57. The Supreme Court has recognized that the NLRA implicitly authorizes the Board to take a variety of appropriate measures "to prevent frustration of the purposes of the Act." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 142 (1971). The Board reasonably inferred here that if the Board can use implied powers to "prevent frustration of the purposes of the Act," *id.* at 142, it can surely use its express rulemaking power to do so. 76 Fed. Reg. at 54,011-12; J.A. 157-58.

In any event, had Congress intended to limit the Board's rulemaking power in the way the district court found, it would have used words of limitation—like those that appear in the Act's provision detailing the

Board's subpoena power. Section 11 explicitly limits the Board's subpoena power to "hearings and investigations . . . necessary and proper for the exercise of the powers vested in [the Board] by sections [9] and [10]." 29 U.S.C. § 161. This provision demonstrates *AHA*'s point that when Congress wants to limit the Board's power by reference to Sections 9 and 10, it does so explicitly. *See Nat'l Ass'n of Mfrs.*, 846 F. Supp. 2d at 47 (finding it "significant that Congress did not similarly limit the scope of the Board's rulemaking power under section [6]").[14] Thus, in "look[ing] to the statutory language as a whole," *Soliman v. Gonzales*, 419 F.3d 276, 282 (4th Cir. 2005), the enlightening contrast of Section 11 demonstrates the infirmity of the district court's restricted reading of Section 6.[15]

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[14] *See also, e.g., United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (quotation omitted); *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 471-72 (4th Cir. 2011) ("[A]ll language in the statute should be given full effect.").

[15] Similarly, a comparison of Sections 5 and 6 underscores the district court's error. The district court interpreted Section 6 as authorizing rules and regulations necessary to carry out the Board's "essential functions." J.A. 269. The actual text of that section, however, provides for the Board to make rules to carry out the *NLRA's provisions*. 29 U.S.C. § 156. Section 5, by contrast, *does* refer specifically to the Board's power to "prosecute any inquiry necessary *to its functions*." 29 U.S.C. § 155 (emphasis added). The limiting language the district court read into Section 6 simply does not exist there.

5. The *Silence* of the NLRA Does Not Prohibit this Notice-Posting Rule.

In addition to its criticism of the Board's general authority to regulate employers, the district court held that, in particular, the Board's notice-posting rule conflicted with the NLRA. J.A. 270-73. In support, the district court relied primarily upon the fact that the NLRA is *silent* on the matter while other labor law statutes require notice posting. This reasoning was in error.

a. Silence is not evidence that Congress considered the matter.

As this Court explained in *U.S. Immigration and Naturalization Service v. Federal Labor Relations Authority*, the problem with divining clear intent from congressional silence is "that it assumes that Congress both considered every conceivable situation and intended to address them all by addressing a few." 4 F.3d 268, 272 (4th Cir. 1993). Experience, however, has demonstrated that there are several other plausible explanations for legislative silence. Congress may not have focused on the point in the context at issue. Or, where an agency is empowered to administer the statute, Congress may have deliberately left the choice up to the agency. *See Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990); *see also Cheney R.R. Co. v. ICC*,

902 F.2d 66, 104 (D.C. Cir. 1990) (noting that "the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion") (quotation omitted). And even if Congress did consider the issue, it is possible that "Congress was unable to forge a coalition on either side of the question." *Chevron*, 467 U.S. at 865. Simply put, "[n]ot every silence is pregnant." *State of Ill., Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983).

In addition, where, as here, a regulatory statute has been construed to grant an administrative agency flexibility and discretion in carrying out its congressionally granted mission, *see NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975), this Court has cautioned that "*expressio unius* is not a particularly helpful tool."[16] *U.S. INS*, 4 F.3d at 272; *see also Dir., Office of Workers' Comp. Programs, U. S. Dep't of Labor v. Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982) (refusing to adopt rule challenger's

[16] Indeed, the district court seemed to acknowledge as much. Although it applied the maxim at some length, J.A. 270-73, the court recognized that the usefulness of its *expressio unius* analysis had been "call[ed] . . . into doubt," *id.* at 272 n.16 (citing *Cheney*, 902 F.2d at 69; *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998)); *see Cheney*, 902 F.2d at 69 ("Whatever its general force, we think [*expressio unius*] an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.").

interpretation, in part because the canon is "applied with great caution and is recognized as unreliable"). It is for this reason that this Court recently held in *National Electrical Manufacturers Association v. U.S. Department of Energy* that "even where we are dealing with statutory language and not mere snippets of legislative history, we will draw such a negative inference only where it appears that Congress meant to exclude the unmentioned item." 654 F.3d 496, 511 (4th Cir. 2011). No such conclusion can be drawn here.

The district court's analysis of the legislative silence issue failed to give proper effect to this Court's teaching. There is nothing whatsoever in the NLRA itself or its legislative history on the specific subject of this Rule. As the district court correctly noted, the only NLRA legislative history regarding notices cited by congressional amici below was "not particularly relevant to the notice-posting rule at issue in this case." J.A. 271 n.15. This is in clear contrast to, for example, *Local 357, International Brotherhood of Teamsters v. NLRB*, where the Supreme Court discussed at length legislative history in which Congress expressly chose *not* to regulate hiring halls in the manner adopted by the Board, not to mention contrary statutory language. 365 U.S. 667, 673-76 (1961); *see* J.A. 264 (discussing *Local 357*).

In the absence of evidence that Congress actually considered whether employers subject to the NLRA should post a notice of rights under that Act, the district court should not have inferred from legislative silence that Congress intended to withhold authority from the Board to require notices of employee rights to be posted in the workplace. Such an inference is only reasonable if it is clear that Congress considered and rejected the very position argued before the court. *See Blau v. Lehman*, 368 U.S. 403, 411-12 (1962). Otherwise, "[t]o explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities." *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940); *see also, e.g., Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) ("[S]everal equally tenable inferences may be drawn from [congressional] inaction . . . .").[17]

[17] The district court also erred in its reliance on the fact that the NLRA has been amended a number of times since 1935, without adding a notice obligation. J.A. 272. A number of cases discount whether mere reenactment suffices to show congressional intent. *See, e.g., Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible . . . . Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."). To give weight to inaction on this issue during the NLRA's amendments would be particularly inappropriate inasmuch as legislative consideration at those times was entirely addressed to other matters. *See Aaron v. SEC*, 446 U.S. 680, 695 n.11 (1980).

b. The notice-posting provisions of other statutes do not demonstrate that Congress considered and rejected notice posting under the NLRA.

In an effort to make silence speak against the Rule, the district court observed that many other labor and employment laws require notice posting. The district court found that these other statutes demonstrate that Congress *must* have considered and rejected notice posting in the NLRA context—even though it never said anything about it. J.A. 270-72.

This further attempt to draw an inference from legislative silence again disregards the lessons of *U.S. INS*, 4 F.3d at 272, and the other cases discussed immediately above, about the unreliability of this mode of discerning congressional intent. The district court appeared to assume that the inclusion or omission of a notice-posting requirement was necessarily a focus of Congress's consideration. But that inference is not supported by the history of notice-posting legislation. In the primary example relied upon by the district court —the RLA—the generalized notice-posting provision, Section 2, Eighth, 45 U.S.C. § 152, Eighth, was considered so uncontroversial that it was not worthy of even a brief mention in the legislative history.[18] The RLA provision was considered

[18] Joseph B. Eastman, the "principal draftsman and proponent of the 1934 amendments," *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 152 n.19 (1969)), did not mention the new notice-

contemporaneously with the NLRA, but there is no explanation as to why Congress included the provision in one statute but not in the other. The district court cited no evidence that the other statutory notice-posting requirements it mentioned were any more controversial. J.A. 254 (listing notice-posting statutes).

6. The Rule Does Not Usurp Congressional Authority.

For similar reasons, the district court also erred in inferring that "[s]ince Congress has required notice posting in at least nine other federal statutes, notice posting is clearly a major question, not an interstitial matter." J.A. 275. As the cases relied on by the district court illustrate, agency rules have been struck down on the grounds of agency usurpation of major policy questions reserved to Congress where, for example, the rules represent extremely aggressive expansions of administrative authority—"extraordinary cases" of "economic and political magnitude"—typically involving agency efforts to regulate whole new industries. *See FDA v.*

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posting requirement, nor apparently did anyone else. *See, e.g., Hearings on H.R. 7650 Before the House Comm. on Interstate & Foreign Commerce*, 73d Cong. 28 (1934) (statement of Joseph Eastman, Federal Transportation Coordinator) *reprinted in* 3 The Railway Labor Act of 1926: A Legislative History 28 (1988) (hereinafter "RLA Leg. Hist."); *Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce*, 73d Cong. 9-26, 156-57 (1934) (statement of Eastman), *reprinted in* 3 RLA Leg. Hist. 9-26, 156-67; H.R. Rep. No. 73-1944, at 2, 14 (1934), *reprinted in* 1 RLA Leg. Hist. 919, 931; S. Rep. No. 73-1065 (1934), *reprinted in* 1 RLA Leg. Hist. 820 (all making no mention of notice provision).

Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 159 (2000); *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 465 (D.C. Cir. 2005).

The Rule at issue is not of that sort. Rather, the Rule is more fairly compared to a similar notice-posting requirement issued by the Department of Labor (DOL). DOL promulgated a notice-posting rule despite Congress's silence on notice posting in the Fair Labor Standards Act (FLSA). The Board partially relied on this regulation to support its conclusion that it possessed the requisite authority to mandate the same kind of notice commonly required under other workplace statutes. 76 Fed. Reg. at 54,010, 54,013-14; J.A. 156, 159-60. Like the NLRA, the FLSA does not contain a provision expressly requiring employers to post a notice of pertinent employee rights. Yet, DOL, pursuant to the FLSA's recordkeeping requirements and its authority to promulgate regulations to enforce those requirements, 29 U.S.C. § 211(c), adopted a notice requirement in 1949 that employers to this day must follow. *See* 29 C.F.R. § 516.4 (2010). The Board is unaware of any challenge to DOL's authority to promulgate or enforce the FLSA notice requirement, which has been in effect for over 60 years. *See* 14 Fed. Reg. at 7516 (Dec. 16, 1949) (subsequently codified at 29 C.F.R. § 516.4).

For these reasons, the Board's rule is within its Section 6 authority and consistent with the NLRA.

B. Alternatively, the Board's Rule is Based on a Valid Interpretation of the Act as Permitted Under *Chevron* and *Weingarten*.

1. *Weingarten* Permits the Board to Interpret the Act in Light of "Changing Patterns of Industrial Life."

The Rule should also be upheld as a valid exercise of the Board's power to interpret its enabling act under *Chevron* and *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (*Weingarten*). As explained below, the Board properly exercised its gap-filling authority under *Chevron* and *Weingarten* in promulgating its notice-posting requirement. *See* 76 Fed. Reg. at 54,010-11; J.A. 156-57 (discussing *Chevron* and *Weingarten*).

To determine whether this rule is based on a valid interpretation of the Act under *Chevron*, the Court must first ask whether Congress "has directly spoken to the precise question at issue." 467 U.S. at 842. As explained *supra*, Part A. 4, neither the structure and legislative history of the Act nor Congress's insertion of notice-posting provisions in certain other statutes suggest that Congress meant to prohibit notice posting under the NLRA by failing to mention it. Where, as in this case, the statute is "silent or ambiguous with respect to the specific issue," *Chevron* instructs that the

court must then ask whether the agency rule is "based on a permissible construction of the statute." *Id.* at 843. As this Court recently stated:

> [T]he Supreme Court has instructed that few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context. We have proceeded to *Chevron*'s second step where the statutory language neither plainly compelled nor clearly precluded an interpretation, because in such circumstances the precise import of the language is ambiguous and certainly not free from doubt. Similarly, we have reached *Chevron*'s second step after describing statutory language as susceptible to more precise definition and open to varying constructions.

Nat'l Elec. Mfrs. Ass'n, 654 F.3d at 505 (quotations and alterations omitted); *Fernandez v. Keisler*, 502 F.3d 337, 339 (4th Cir. 2007) ("[Where] Congress has not merely failed to address a precise question but has also made an explicit delegation of rulemaking authority to the agency, the agency's regulation is given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." (quotation omitted)).

The relevant sections of the Act are certainly "susceptible to more precise definition." The purpose of the Act in Section 1, the rights of employees in Section 7, and the obligations of employers in Section 8 are all written broadly, and specifically designed to permit the Board to spell out their application, and to adapt to changing times. As the Supreme Court has explained:

> The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. . . . It is the province of the Board, not the courts, to determine whether or not the "need" [for a Board rule] exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor management relations. For the Board has the special function of applying the general provisions of the Act to the complexities of industrial life, and its special competence in this field is the justification for the deference accorded its determination.

Weingarten, 420 U.S. at 266 (citations and quotations omitted). As *Chevron* itself noted, "it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." 467 U.S. at 865-66; *see also Nat'l Elec. Mfrs. Ass'n*, 654 F.3d at 510 (noting "*Chevron*'s mandate to accord government agencies the flexibility to respond to changing conditions"). "[If the Board] is to accomplish the task which Congress set for it[, the Board] necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978).

The ignorance of most employees about their statutory rights is a relatively new development, as discussed above. *See also* 76 Fed. Reg. at 54,014-17; J.A. 160-63. Under these changed circumstances, the notice

"fill[s] the interstices" in the Act by ensuring both access to Board processes under Sections 9 and 10, and freedom to exercise Section 7 rights free from employer interference under Section 8. *Beth Israel Hosp.*, 437 U.S. at 501. "Consistent with this understanding of the Board's role, the notice-posting regulations represent an attempt to 'adapt the Act' in light of recent realities and 'the Board's cumulative experience.'" 76 Fed. Reg. at 54,011; J.A. 157.

2. The District Court's Conclusion that the Rule Does Not Interpret Any Statutory Language Is Erroneous.

The district court did not dispute the Board's reliance upon changed factual circumstances in the workplace, J.A. 267, and further would have found (if it had reached the point) that the Board "'articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made,'" *id.* at 276 n.20 (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

However, just as it did in rejecting the Board's exercise of its legislative rulemaking authority under *Mourning*, *id.* at 266, the district court rejected the Board's exercise of its gap-filling authority under *Chevron*, concluding that the NLRA's text did not authorize the Board to issue the Rule, *id*. at 275. The court held "there is not a single trace of statutory text that indicates Congress intended for the Board to proactively regulate

employers in this manner." *Id*. In earlier rejecting the Board's *Mourning* authority, the district court similarly stated that the Rule did not carry out any of the Board's "existing duties under the Act." *Id*. at 266.

In so reasoning, the district court failed to heed *Weingarten*, where, as just explained above, the Supreme Court recognized that the Board has a duty to adapt the general provisions of the Act to the changing circumstances of industrial life. In *Weingarten*, the Board was carrying out its duty to give effect to Section 8(a)(1), which declares it to be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section [7] of this [Act]." 29 U.S.C. § 158(a)(1). Contrary to the district court's conclusion, that statutory text fully supports the Board's *Weingarten*-based conclusion that the Rule is based on a reasonable interpretation of the statute. 76 Fed. Reg. at 54,011; J.A. 157 (citing Sections 1, 7, 8, 9, and 10 and *Weingarten*).

To be sure, as the district court observed, J.A. 274, Section 8(a)(1) does not explicitly mention notice posting. Neither, however, did it expressly protect an employee's right "to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." *Weingarten*, 420 U.S. at 256. To the contrary, the Board delineated that right using its congressionally delegated power to interpret

the NLRA. Here too, as in *Weingarten*, the Board is performing the gap-filling role that Congress delegated to it when it enacted the broad language of Section 8(a)(1). As the Supreme Court has explained, Congress

> left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus . . . administrative flexibility within appropriate statutory limitations [is] obtained to accomplish the dominant purpose of the legislation.

Republic Aviation Corp., 324 U.S. at 798; *see also Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 90 (D.C. Cir. 1995) ("[T]here can be no doubt that Congress delegated authority to the Board to construe provisions of the NLRA, especially those implicating alleged unfair labor practices.").

Courts have long held, contrary to the district court's opinion, that Section 8(a)(1)'s prohibition of employer interference with Section 7 rights is fairly construed to authorize the Board to direct the performance of *affirmative employer duties*. An early decision that held otherwise was quickly reversed on the ground that the "interference" prohibited by Section 8(a)(1) was specifically intended by Congress to include the affirmative duty to bargain. *See Art Metals Constr. Co. v. NLRB*, 110 F.2d 148, 150-51 (2d Cir. 1940) (Hand, J.) (reversing his own opinion in *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 869 (2d Cir. 1938), which had held that the

affirmative duty to bargain was not encompassed by Section 8(a)(1)); *see also Standard Oil Co. v. NLRB*, 399 F.2d 639, 642 (9th Cir. 1968) (violating the duty to bargain also violated Section 8(a)(1)); *Truitt Mfg. Co.*, 110 NLRB 856, 857, 870 (1954), *enforcement denied*, 224 F.2d 869 (4th Cir. 1955), *rev'd*, 351 U.S. 149 (1956).

And the affirmative duties in Section 8(a)(1) are not limited to the duty to bargain alone. To the contrary, as both the House and Senate reports accompanying the Wagner Act stated, violating the duty to bargain is only one "type[] of interference and restraint . . . [and is] not intended to limit in any way the interpretation of the general provisions of subsection [8(a)](1)." H.R. Rep. No. 74-1147, at 17 (1935), reprinted in 2 Leg. Hist. 3066; *see* S. Rep. No. 74-573, at 9 (1935), reprinted in 2 Leg. Hist. 2309. The prohibitions specified in the succeeding sections merely "spell out with particularity some of the practices that have been most prevalent and most troublesome," S. Rep. No. 74-573, at 9, reprinted in 2 Leg. Hist. 2309, and that "experience has proved require such amplification and specification," H.R. Rep. No. 74-1147, at 17, reprinted in 2 Leg. Hist. 3066; *see also NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262, 265, 267 (3d Cir. 1941) (noting that the unfair labor practices described in Sections 8(a)(2) through

8(a)(5) "are but particular species of the generic unfair practice . . . mentioned in [Section 8(a)(1)]").

Consistent with Congress' intent, the Board has recognized other affirmative employer duties under Section 8(a)(1) as well, such as the duty to grant unions access to employer property under certain circumstances, or the duty to prevent employees from coercing their coworkers at the worksite. *See Tech. Serv. Solutions*, 324 NLRB 298, 301 (1997); *St. Francis Med. Ctr.*, 347 NLRB 368, 369 (2006); *Champagne Color, Inc.*, 234 NLRB 82, 82 (1978).

In sum, Section 8(a)(1) authorizes the Board to prescribe affirmative employer duties which the Board finds serve "the dominant purpose of the legislation . . . [to protect] the right of employees to organize for mutual aid without employer interference." *Republic Aviation*, 324 U.S. at 798. The notice-posting rule serves that purpose, and is based on a permissible interpretation of the Act under *Chevron*.[19]

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[19] This analysis demonstrates that the Board could also have developed its notice-posting rule through case-by-case adjudication. Over the years, the Board has frequently been presented with cases where employer directives and rules interfere with the free exercise of the employees' NLRA rights. *E.g., Washington Aluminum Co.*, 370 U.S. at 16-17; *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 377 (D.C. Cir. 2007); *McClain & Co. Inc.*, 358 NLRB No. 118 (Aug. 31, 2012). Generalizing from such experiences, employees could fairly conclude that the failure of their employers to post notices of NLRA rights comparable to the notices that are posted with

CONCLUSION

For the foregoing reasons, the Board's understanding of its statutory authority is consistent with the statutory text, as well as binding case law interpreting the NLRA and similar language in other statutes. Thus, because the Board's notice-posting Rule is "reasonably related to the purposes of [the Act]," it should be upheld as an exercise of the Board's legislative rulemaking authority under *Mourning*. And alternatively, because the Board was interpreting ambiguous language, and did so in what the district court found to be a reasonable manner, the Rule is also a proper use of the Board's

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respect to other labor and employment statutes inhibits the free exercise of their NLRA rights. *Cf. Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) ("[O]rganization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."). If unfair labor practice charges were filed on this theory and made the basis of an unfair labor practice complaint, the Board could find in an adjudicated case, as it found in the Rule, that an employer's failure to provide its employees with notice of NLRA rights reasonably tends to interfere with Section 7 rights and thereby violates Section 8(a)(1). 76 Fed. Reg. at 54,032; J.A. 178.

Chevron authority. The district court's decision should be reversed and remanded for the court to pass on the remaining challenges to the Rule.

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National Labor Relations Board
September 2012

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1757 **Caption:** Chamber of Commerce, et al. v. NLRB, et al.

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(s) Abby Propis Simms

Attorney for National Labor Relations Board

Dated: Sept. 28, 2012

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ADDENDUM OF STATUTES AND REGULATIONS

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ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 551(4) Definitions.

"[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

FAIR LABOR STANDARDS ACT

29 U.S.C. § 211(c). Collection of data; Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

FAMILY AND MEDICAL LEAVE ACT

29 U.S.C. § 2615. Prohibited Acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

29 U.S.C. § 2617. Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected—

(A) for damages equal to—

(i)the amount of--

(I)any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively ; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action

An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations

The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate—

(A) on the filing of a complaint by the Secretary in an action under subsection (d) of this section in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) of this section in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1), unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

FEDERAL COAL MINE HEALTH AND SAFETY ACT

30 U.S.C. § 932

§ 932. Failure to meet workmen's compensation requirements

<For constitutionality of provisions of Pub.L. 111-148, see National Federation of Independent Business v. Sebelius, Secretary of Health and Human Services, 2012 WL 2427810.>

(a) Benefits; applicability of Longshore and Harbor Workers' Compensation Act; promulgation of regulations

Subject to section 28(h)(1) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, during any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) as amended [33 U.S.C.A. § 901 et seq.], as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4,, [FN1] 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) [33 U.S.C.A. §§ 901, 902, 903, 904, 908, 909, 910, 912, 913, 929, 930, 931, 932, 933, 937, 938, 941, 943, 944, 945, 946, 947, 948, 948a, 949, 950], shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of Title 26), be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, or with respect to entitlements established in paragraph (5) of section 921(c) of this title. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

(b) Liability of operators

During any such period each such operator shall be liable for and shall secure the payment of benefits, as provided in this section and section 933 of this title. An employer, other than an operator of a coal mine, shall not be required to secure the payment of such benefits with respect to any employee of such employer to the extent such employee is engaged in the transportation of coal or in coal mine construction. Upon determination by the Secretary of the eligibility of the employee, the Secretary may require such employer to secure a bond or otherwise guarantee the payment of such benefits to the employee.

(c) Persons entitled to benefits

Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section: Provided, That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis (1) which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969, when it was operated by such operator; or (2) which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 945 of this title.

(d) Monthly payments; amounts; accrual of interest

Benefits payable under this section shall be paid on a monthly basis and, except as otherwise provided in this section, such payments shall be equal to the amounts specified in section 922(a) of this title. If payment is not made within the time required, interest shall accrue to such amounts at the rates set forth in section 934(b)(5) of this title for interest owed to the fund. With respect to payments withheld pending final adjudication of liability, in the case of claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, such interest shall commence to accumulate 30 days after the date of the determination that such an award should be made.

(e) Conditions upon payment

No payment of benefits shall be required under this section:

(1) except pursuant to a claim filed therefor in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe; or

(2) for any period prior to January 1, 1974.

(f) Limitation on filing of claims

Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later--

(1) a medical determination of total disability due to pneumoconiosis; or

(2) March 1, 1978.

(g) Reduction of monthly benefits

The amount of benefits payable under this section shall be reduced, on a monthly or other appropriate basis, by the amount of any compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis. In addition, the amount of benefits payable under this section with respect to any claim filed on or after the effective date of the Black Lung Benefits Amendments of 1981 shall be reduced, on a monthly or other appropriate basis, by the amount by which such benefits would be reduced on account of excess earnings of such miner under section 403(b) through (l) of Title 42 if the amount paid were a benefit payable under section 402 of Title 42.

(h) Promulgation of regulations

The Secretary of Labor shall by regulation establish standards, which may include appropriate presumptions, for determining whether pneumoconiosis arose out of employment in a particular coal mine or mines. The Secretary may also, by regulation, establish standards for apportioning liability for benefits under this

subsection among more than one operator, where such apportionment is appropriate.

(i) Subsequent operators' liability for benefit payments

(1) During any period in which this section is applicable to the operator of a coal mine who on or after January 1, 1970, acquired such mine or substantially all the assets thereof, from a person (hereinafter in this subsection referred to as a "prior operator") who was an operator of such mine, or owner of such assets on or after January 1, 1970, such operator shall be liable for and shall, in accordance with section 933 of this title, secure the payment of all benefits which would have been payable by the prior operator under this section with respect to miners previously employed by such prior operator as if the acquisition had not occurred and the prior operator had continued to be an operator of a coal mine.

(2) Nothing in this subsection shall relieve any prior operator of any liability under this section.

(3)(A) For purposes of paragraph (1) of this subsection, the provisions of this paragraph shall apply to corporate reorganizations, liquidations, and such other transactions as are specified in this paragraph.

(B) If an operator ceases to exist by reason of a reorganization or other transaction or series of transactions which involves a change in identity, form, or place of business or organization, however effected, the successor operator or other corporate or business entity resulting from such reorganization or other change shall be treated as the operator to whom this section applies.

(C) If an operator ceases to exist by reason of a liquidation into a parent or successor corporation, the parent or successor corporation shall be treated as the operator to whom this section applies.

(D) If an operator ceases to exist by reason of a sale of substantially all his or her assets, or as the result of a merger, consolidation, or division, the successor operator, corporation, or other business entity shall be treated as the operator to whom this section applies.

(4) In any case in which there is a determination under section 9501(d) of Title 26 that no operator is liable for the payment of benefits to a claimant, nothing in this subsection may be construed to require the payment of benefits to a claimant by or on behalf of any operator.

(j) Failure of operators to secure benefits

Notwithstanding the provisions of this section, section 9501 of Title 26 shall govern the payment of benefits in cases--

(1) described in section 9501(d)(1) of Title 26;

(2) in which the miner's last coal mine employment was before January 1, 1970; or

(3) in which there was a claim denied before March 1, 1978, and such claim is or has been approved in accordance with the provisions of section 945 of this title.

(k) Secretary as party in claim proceedings

The Secretary shall be a party in any proceeding relative to a claim for benefits under this part.

(l) Filing of new claims or refiling or revalidation of claims of miners already determined eligible at time of death

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981.

30 U.S.C. § 936

§ 936. Regulations and reports

(a) Promulgation; applicability of section 553 of Title 5

The Secretary of Labor and the Secretary of Health and Human Services are authorized to issue such regulations as each deems appropriate to carry out the provisions of this subchapter. Such regulations shall be issued in conformity with section 553 of Title 5, notwithstanding subsection (a) thereof.

(b) Annual reports to Congress

At the end of fiscal year 2003 and each succeeding fiscal year, the Secretary of Labor shall submit to the Congress an annual report on the subject matter of parts B and C of this subchapter. Each such report shall be prepared and submitted to Congress in accordance with the requirement with respect to submission under section 942 of Title 33.

(c) Compliance with State workmen's compensation laws; conflicts between State and Federal provisions

Nothing in this subchapter shall relieve any operator of the duty to comply with any State workmen's compensation law, except insofar as such State law is in conflict with the provisions of this subchapter and the Secretary by regulation, so prescribes. The provisions of any State workmen's compensation law which provide greater benefits than the benefits payable under this subchapter shall not thereby be construed or held to be in conflict with the provisions of this subchapter.

NATIONAL LABOR RELATIONS ACT

29 U.S.C. §§ 151-169

[Title 29, Chapter 7, Subchapter II, United States Code]

FINDINGS AND POLICIES

Section 1.[§151.] The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such

commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is 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.

DEFINITIONS

Sec. 2. [§152.] When used in this Act [subchapter]—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code [under title 11], or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

[Pub. L. 93-360, § 1(a), July 26, 1974, 88 Stat. 395, deleted the phrase "or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual" from the definition of "employer."]

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an

agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8 [section 158 of this title].

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act [section 153 of this title].

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means--

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person. [Pub. L. 93-360, § 1(b), July 26, 1974, 88 Stat. 395, added par. (14).]

NATIONAL LABOR RELATIONS BOARD

Sec. 3. [§ 153.] (a) [Creation, composition, appointment, and tenure; Chairman; removal of members] The National Labor Relations Board (hereinafter called the "Board") created by this Act [subchapter] prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) [Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal] The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 [section 159 of this title] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 [section 159 of this title] and certify the results thereof, except that upon the filling of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) [Annual reports to Congress and the President] The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) [General Counsel; appointment and tenure; powers and duties; vacancy] There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

Sec. 4. [§ 154. Eligibility for reappointment; officers and employees; payment of expenses] (a) Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No administrative law judge's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no administrative law judge shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in

any case in court. Nothing in this Act [subchapter] shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefore approved by the Board or by any individual it designates for that purpose.

Sec. 5. [§ 155. Principal office, conducting inquiries throughout country; participation in decisions or inquiries conducted by member] The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Sec. 6. [§ 156. Rules and regulations] The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [by subchapter II of chapter 5 of title 5], such rules and regulations as may be necessary to carry out the provisions of this Act [subchapter].

RIGHTS OF EMPLOYEES

Sec. 7. [§ 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 such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] 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 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the

periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) [section 159(a) of this title];

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is- -

(A) forcing or requiring any employer or self-employed person to join

any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsection (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title];

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) [this subsection] shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act [subchapter]: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport

any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) [of this section] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act [subchapter] any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act [section 159(c) of this title],

(B) where within the preceding twelve months a valid election under section 9(c) of this Act [section 159(c) of this title] has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [section 159(c)(1) of this title] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be

appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

(c) [Expression of views without threat of reprisal or force or promiseof benefit]

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 [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

(d) [Obligation to bargain collectively]
For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

(A) The notice of section 8(d)(1) [paragraph (1) of this subsection] shall be ninety days; the notice of section 8(d)(3) [paragraph (3) of this subsection] shall be sixty days; and the contract period of section 8(d)(4) [paragraph (4) of this subsection] shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification

or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3) [in paragraph (3) of this subsection].

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

[Pub. L. 93-360, July 26, 1974, 88 Stat. 395, amended the last sentence of Sec. 8(d) by striking the words "the sixty-day" and inserting the words "any notice" and by inserting before the words "shall lose" the phrase ", or who engages in any strike within the appropriate period specified in subsection (g) of this section." It also amended the end of paragraph Sec. 8(d) by adding a new sentence "Whenever the collective bargaining . . . aiding in a settlement of the dispute."]

(e) [Enforceability of contract or agreement to boycott any other employer; exception]

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:

Provided, That nothing in this subsection (e) [this subsection] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) [this subsection and subsection (b)(4)(B) of this section] the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer,""any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or

performing parts of an integrated process of production in the apparel and clothing industry:

Provided further, That nothing in this Act [subchapter] shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) [Agreements covering employees in the building and construction industry]

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area:

Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]:

Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

(g) [Notification of intention to strike or picket at any health care institution]

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to

such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act [subsection (d) of this section]. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[Pub. L. 93-360, July 26, 1974, 88 Stat. 396, added subsec. (g).]

REPRESENTATIVES AND ELECTIONS

Sec. 9 [§ 159.] (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) [Determination of bargaining unit by Board] The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the

representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) [Hearings on questions affecting commerce; rules and regulations]

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purpose specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) [Secret ballot; limitation of elections]

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3) [section 158(a)(3) of this title], of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any

such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

(d) [Modification of findings or orders prior to filing record in court] Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to

the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) [Institution of court proceedings as stay of Board's order] The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) [Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title] When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of title 29, United States Code [chapter 6 of this title] [known as the "Norris-LaGuardia Act"].

(i) Repealed.

(j) [Injunctions] The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to

have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) [Hearings on jurisdictional strikes] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) [section 158(b) of this title], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) [Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) [section 158(b) of this title], or section 8(e) [section 158(e) of this title] or section 8(b)(7) [section 158(b)(7) of this title], the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) [section 158(b)(7) of this title] if a charge against the employer under section 8(a)(2) [section 158(a)(2) of this title] has been filed and after the preliminary investigation, he has reasonable cause to

believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D) [section 158(b)(4)(D) of this title].

(m) [Priority of cases] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8 [section 158 of this title], such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1) [of this section].

INVESTIGATORY POWERS

Sec. 11. [§ 161.] For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 [sections 159 and 160 of this title]--

(1) [Documentary evidence; summoning witnesses and taking testimony] The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence

whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) [Court aid in compelling production of evidence and attendance of witnesses] In case of contumacy or refusal to obey a subpoena issued to any person, any United States district court or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Repealed.

[Immunity of witnesses. See 18 U.S.C. § 6001 et seq.]

(4) [Process, service and return; fees of witnesses] Complaints, orders and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefore when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) [Process, where served] All process of any court to which application may be made under this Act [subchapter] may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) [Information and assistance from departments] The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

RAILWAY LABOR ACT

45 U.S.C. §152 Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section.

The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

REGULATORY FLEXIBILITY ACT

5 U.S.C. § 611

§ 611. Judicial review

(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a)shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3)(A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be

commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than--

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to--

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

NATIONAL LABOR RELATIONS ACT REGULATIONS

29 CFR § 102.9

§ 102.9 Who may file; withdrawal and dismissal.

A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. Any such charge may be withdrawn, prior to the hearing, only with the consent of the regional director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to § 102.45, upon motion, with the consent of the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to § 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the administrative law judge designated to conduct the hearing, or the Board.

29 CFR § 104.201

§ 104.201 What definitions apply to this part?

Employee includes any employee, and is not limited to the employees of a particular employer, unless the NLRA explicitly states otherwise. The term includes anyone whose work has ceased because of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. However, it does not include agricultural laborers, supervisors, or independent contractors, or anyone employed in the domestic service of any family or person at his home, or by his parent or spouse, or by an employer subject to the Railway Labor Act (45 U.S.C. 151 et seq.), or by any other person who is not an employer as defined in the NLRA. 29 U.S.C. 152(3).

Employee notice means the notice set forth in the Appendix to Subpart A of this part that employers subject to the NLRA must post pursuant to this part.

Employer includes any person acting as an agent of an employer, directly or indirectly. The term does not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. 152(2). Further, the term "employer" does not include entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

Labor organization means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. 152(5).

National Labor Relations Board (Board) means the National Labor Relations Board provided for in section 3 of the National Labor Relations Act, 29 U.S.C. 153. 29 U.S.C. 152(10).

Person includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers. 29 U.S.C. 152(1).

Rules, regulations, and orders, as used in § 104.202, means rules, regulations, and relevant orders issued by the Board pursuant to this part.

Supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. 152(11).

Unfair labor practice means any unfair labor practice listed in section 8 of the National Labor Relations Act, 29 U.S.C. 158. 29 U.S.C. 152(8).

Union means a labor organization as defined above.

29 CFR § 104.202

§ 104.202 What employee notice must employers subject to the NLRA post in the workplace?

(a) Posting of employee notice. All employers subject to the NLRA must post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this part.

(b) Size and form requirements. The notice to employees shall be at least 11 inches by 17 inches in size, and in such format, type size, and style as the Board shall prescribe. If an employer chooses to print the notice after downloading it from the Board's Web site, the printed notice shall be at least 11 inches by 17 inches in size.

(c) Adaptation of language. The National Labor Relations Board may find that an Act of Congress, clarification of existing law by the courts or the Board, or other circumstances make modification of the employee notice necessary to achieve the purposes of this part. In such circumstances, the Board will promptly issue rules, regulations, or orders as are needed to ensure that all future employee notices contain appropriate language to achieve the purposes of this part.

(d) Physical posting of employee notice. The employee notice must be posted in conspicuous places where they are readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted. Where 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must post the notice in the language employees speak. If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must either physically post the notice in each of those languages or, at the employer's option, post the notice in the language spoken by the largest group of employees and provide each employee in each of the other language groups a copy of the notice in the appropriate language. If an employer requests from the Board a notice in a language in which it is not available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language. An employer must take reasonable steps to ensure that the notice is not altered, defaced, covered by any other material, or otherwise rendered unreadable.

(e) Obtaining a poster with the employee notice. A poster with the required employee notice, including a poster with the employee notice translated into languages other than English, will be printed by the Board, and may be obtained from the Board's office, 1099 14th Street, NW., Washington, DC 20570, or from any of the Board's regional, subregional, or resident offices. Addresses and telephone numbers of those offices may be found on the Board's Web site at http://www.nlrb.gov. A copy of the poster in English and in languages other than English may also be downloaded from the Board's Web site at http://www.nlrb.gov. Employers also may reproduce and use copies of the Board's official poster, provided that the copies duplicate the official poster in size, content, format, and size and style of type. In addition, employers may use commercial services to provide the employee notice poster consolidated onto one poster with other Federally mandated labor and employment notices, so long as the consolidation does not alter the size, content, format, or size and style of type of the poster provided by the Board.

(f) Electronic posting of employee notice.

(1) In addition to posting the required notice physically, an employer must also post the required notice on an intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means. An employer that customarily posts notices to employees about personnel rules or policies on an intranet or internet site will satisfy the electronic posting requirement by displaying prominently—i.e., no less prominently than other notices to employees—on such a site either an exact copy of the poster, downloaded from the Board's Web site, or a link to the Board's Web site that contains the poster. The link to the Board's Web site must read, “Employee Rights under the National Labor Relations Act.”

(2) Where 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must provide notice as required in paragraph (f)(1) of this section in the language the employees speak. If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must provide the notice in each such language. The Board will provide translations of the link to the Board's Web site for any employer that must or wishes to display the link on its Web site. If an employer requests from the Board a notice in a language in which it is not

available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language.

29 CFR § 104.203

§ 104.203 Are Federal contractors covered under this part?

Yes, Federal contractors are covered. However, contractors may comply with the provisions of this part by posting the notices to employees required under the Department of Labor's notice-posting rule, 29 CFR part 471.

29 CFR § 104.204

§ 104.204 What entities are not subject to this part?

(a) The following entities are excluded from the definition of "employer" under the National Labor Relations Act and are not subject to the requirements of this part:

(1) The United States or any wholly owned Government corporation;

(2) Any Federal Reserve Bank;

(3) Any State or political subdivision thereof;

(4) Any person subject to the Railway Labor Act;

(5) Any labor organization (other than when acting as an employer); or

(6) Anyone acting in the capacity of officer or agent of such labor organization.

(b) In addition, employers employing exclusively workers who are excluded from the definition of "employee" under § 104.201 are not covered by the requirements of this part.

(c) This part does not apply to entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

(d)

(1) This part does not apply to entities whose impact on interstate commerce, although more than de minimis, is so slight that they do not meet the Board's discretionary jurisdiction standards. The most commonly applicable standards are:

(i) The retail standard, which applies to employers in retail businesses, including home construction. The Board will take jurisdiction over any such employer that has a gross annual volume of business of $500,000 or more.

(ii) The nonretail standard, which applies to most other employers. It is based either on the amount of goods sold or services provided by the employer out of state (called “outflow”) or goods or services purchased by the employer from out of state (called “inflow”). The Board will take jurisdiction over any employer with an annual inflow or outflow of at least $50,000. Outflow can be either direct—to out-of-state purchasers—or indirect—to purchasers that meet other jurisdictional standards. Inflow can also be direct—purchased directly from out of state—or indirect—purchased from sellers within the state that purchased them from out-of-state sellers.

(2)There are other standards for miscellaneous categories of employers. These standards are based on the employer's gross annual volume of business unless stated otherwise. These standards are listed in the Table to this section.

29 CFR § 104.204, TBL.

Table to § 104.204

Employer category	Jurisdictional standard
Part II	
Amusement industry	$500,000.
Apartment houses, condominiums, cooperatives	$500,000.
Architects	Nonretail standard.
Art museums, cultural centers, libraries	$1 million.

Bandleaders	Retail/nonretail (depends on customer).
Cemeteries	$500,000.
Colleges, universities, other private schools	$1 million.
Communications (radio, TV, cable, telephone, telegraph)	$100,000.
Credit unions	Either retail or nonretail standard.
Day care centers	$250,000.
Gaming industry	$500,000.
Health care institutions:	
Nursing homes, visiting nurses associations	$100,000.
Hospitals, blood banks, other health care facilities (including doctors' and dentists' offices)	$250,000.
Hotels and motels	$500,000.
Instrumentalities of interstate commerce	$50,000.
Labor organizations (as employers)	Nonretail standard.
Law firms; legal service organizations	$250,000.
Newspapers (with interstate contacts)	$200,000.
Nonprofit charitable institutions	Depends on the entity's substantive purpose.
Office buildings; shopping centers	$100,000.
Private clubs	$500,000.
Public utilities	$250,000 or nonretail standard.
Restaurants	$500,000.
Social services organizations	$250,000.
Symphony orchestras	$1 million.
Taxicabs	$500,000.
Transit systems	$250,000.

(3) If an employer can be classified under more than one category, the Board will assert jurisdiction if the employer meets the jurisdictional standard of any of those categories.

(4) There are a few employer categories without specific jurisdictional standards:

(i) Enterprises whose operations have a substantial effect on national defense or that receive large amounts of Federal funds

(ii) Enterprises in the District of Columbia

(iii) Financial information organizations and accounting firms

(iv) Professional sports

(v) Stock brokerage firms

(vi) U. S. Postal Service

(5) A more complete discussion of the Board's jurisdictional standards may be found in An Outline of Law and Procedure in Representation Cases, Chapter 1, found on the Board's Web site, http://www.nlrb.gov.

(e) This part does not apply to the United States Postal Service.

29 CFR PT. 104, SUBPT. A, APP.

Appendix to Subpart A—Text of Employee Notice

"EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

"Under the NLRA, you have the right to:

• Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

• Form, join or assist a union.

• Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.

• Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.

• Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.

• Strike and picket, depending on the purpose or means of the strike or the picketing.

• Choose not to do any of these activities, including joining or remaining a member of a union.

"Under the NLRA, it is illegal for your employer to:

• Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

• Question you about your union support or activities in a manner that discourages you from engaging in that activity.

• Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

• Threaten to close your workplace if workers choose a union to represent them.

• Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

• Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.

• Spy on or videotape peaceful union activities and gatherings or pretend to do so.

"Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

• Threaten or coerce you in order to gain your support for the union.

• Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.

• Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.

• Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

• Take adverse action against you because you have not joined or do not support the union.

"If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union ***54049** are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

"Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: http://www.nlrb.gov.

You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

"*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

"This is an official Government Notice and must not be defaced by anyone."

Subpart B—General Enforcement and Complaint Procedures

29 CFR § 104.210

§ 104.210 How will the Board determine whether an employer is in compliance with this part?

The Board has determined that employees must be aware of their NLRA rights in order to exercise those rights effectively. Employers subject to this rule are required to post the employee notice to inform employees of their rights. Failure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1).

Normally, the Board will determine whether an employer is in compliance when a person files an unfair labor practice charge alleging that the employer has failed to post the employee notice required under this part. Filing a charge sets in motion the Board's procedures for investigating and adjudicating alleged unfair labor practices, and for remedying conduct that the Board finds to be unlawful. See NLRA Sections 10-11, 29 U.S.C. 160-61, and 29 CFR part 102, subpart B.

29 CFR § 104.211

§ 104.211 What are the procedures for filing a charge?

(a) Filing charges. Any person (other than Board personnel) may file a charge with the Board alleging that an employer has failed to post the employee notice as required by this part. A charge should be filed with the Regional Director of the Region in which the alleged failure to post the required notice is occurring.

(b) Contents of charges. The charge must be in writing and signed, and must be sworn to before a Board agent, notary public, or other person authorized to administer oaths or take acknowledgements, or contain a declaration by the person signing it, under penalty of perjury, that its contents are true and correct. The charge must include:

(1) The charging party's full name and address;

(2) If the charge is filed by a union, the full name and address of any national or international union of which it is an affiliate or constituent unit;

(3) The full name and address of the employer alleged to have violated this part; and

(4) A clear and concise statement of the facts constituting the alleged unfair labor practice.

29 CFR § 104.212

§ 104.212 What are the procedures to be followed when a charge is filed alleging that an employer has failed to post the required employee notice?

(a) When a charge is filed with the Board under this section, the Regional Director will investigate the allegations of the charge. If it appears that the allegations are true, the Regional Director will make reasonable efforts to persuade the respondent employer to post the required employee notice expeditiously. If the employer does so, the Board expects that there will rarely be a need for further administrative proceedings.

(b) If an alleged violation cannot be resolved informally, the Regional Director may issue a formal complaint against the respondent employer, alleging a violation of the notice-posting requirement and scheduling a hearing before an administrative law judge. After a complaint issues, the matter will be adjudicated in keeping with the Board's customary procedures. See NLRA Sections 10 and 11, 29 U.S.C. 160, 161; 29 CFR part 102, subpart B.

29 CFR § 104.213

§ 104.213 What remedies are available to cure a failure to post the employee notice?

(a) If the Board finds that the respondent employer has failed to post the required employee notices as alleged, the respondent will be ordered to cease and desist from the unlawful conduct and post the required employee notice, as well as a remedial notice. In some instances additional remedies may be appropriately invoked in keeping with the Board's remedial authority.

(b) Any employer that threatens or retaliates against an employee for filing charges or testifying at a hearing concerning alleged violations of the notice-posting requirement may be found to have committed an unfair labor practice. See NLRA Section 8(a)(1) and 8(a)(4), 29 U.S.C. 158(a)(1), (4).

29 CFR § 104.214

§ 104.214 How might other Board proceedings be affected by failure to post the employee notice?

(a) Tolling of statute of limitations. When an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful. See NLRA Section 10(b), 29 U.S.C. 160(b).

(b) Noncompliance as evidence of unlawful motive. The Board may consider a knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue.

Subpart C—Ancillary Matters

29 CFR § 104.220

§ 104.220 What other provisions apply to this part?

(a) The regulations in this part do not modify or affect the interpretation of any other NLRB regulations or policy.

(b)

(1) This subpart does not impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart must be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This part creates no right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its ***54050*** officers, employees, or agents, or any other person.

FAIR LABOR STANDARDS ACT REGULATION

29 C.F.R. § 516.4

§ 516.4 Posting of notices.

Every employer employing any employees subject to the Act's minimum wage provisions shall post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy. Any employer of employees to whom section 7 of the Act does not apply because of an exemption of broad application to an establishment may alter or modify the poster with a legible notation to show that the overtime provisions do not apply. For

example: Overtime Provisions Not Applicable to Taxicab Drivers (section 13(b)(17)).

14 Fed Reg. 7516 (1949)

Title 29 - Labor, Chapter V – Wage and Hour Division, Part 516 – Records to be Kept By Employers: Posting of Notices

In the administration of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U. S. C. 201, Public Law 393, 81st Cong., 1st Sess.), it has been found that effective enforcement of the act depends to a great extent upon knowledge on the part of covered employees of the provisions of the act and the applicability of such provisions to them, and a greater degree of compliance with the act has been effected in situations where employees are aware of their rights under the law. For this reason Industry Wage Orders Issued pursuant to the act have included a requirement that employers post appropriate notices in conspicuous places where covered employees are working.

On the basis of the accumulated experience of the Division over a period of more than 11 years of administration of the act, I hereby find and determine that the posting of notices of the applicability of the act in establishments where covered employees are employed is a necessary adjunct to proper enforcement of the statutory provisions, and is an essential aid to the Division in preventing evasion or circumvention of the statutory provisions, and that a general requirement for posting of such notices in all covered establishments should be adopted. On the basis of these facts and the fact that the administrative experience of the Division has provided complete and conclusive information and data necessary to a determination of the matter here involved, I find that notice and public procedure provided for in section 4 of the Administrative Procedure Act is unnecessary. Now, therefore, pursuant to authority vested In me by the Fair Labor Standards Act, as amended, this part is amended by adding a new section, designated as §516.18, to read as follows:

> §516.18 *Posting of notices.* Every employer employing any employees engaged in commerce or in the production of goods for commerce shall post and keep posted such notices pertaining to the applicability of the Fair Labor Standards Act as shall be prescribed by the Division, in conspicuous places in every establishment where such employees are employed so as to permit them to readily observe a copy on the way to or from their place of employment.

Present §§ 516.18 and 516.19 are renumbered as §§ 516.19 and 516.20, respectively. The above amendments are to become effective on January 25, 1950. (See. 11, 52 Stat. 1066, as amended; 20 U. S. C. and Sup., 211)

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *et al.*, Defendants-Appellants, v.	)	
	)	Case No. 12-1757
CHAMBER OF COMMERCE, *et al.*, Plaintiffs-Appellees.	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2012, the National Labor Relations Board's Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system.

I certify that the foregoing document was served electronically on the following counsel for Appellees, who have consented to electronic service:

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Dated: September 28, 2012
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