



An “Independent” Agency Faces its Limits

The Constitutional Challenges to the NLRB

September 2026

U.S. Chamber of Commerce Employment Policy Division

Summary: The National Labor Relations Board (NLRB) was created through the 1935 passage of the National Labor Relations Act (NLRA). It was intended to reduce industrial strife by encouraging collective bargaining where needed. Although Congress later changed the agency’s structure, that core mission has remained the same. Its body of case law and the way it operates, however, have changed substantially. In recent years, the Board has too often undermined its stabilizing mission by expanding federal labor-law scrutiny into ordinary workplace management and repeatedly changing legal rules as its political composition shifts. Those tendencies became especially pronounced during the Biden administration and provide the institutional backdrop for recent constitutional challenges that may significantly alter the agency’s structure. A new Republican majority is also now in place, and it may reverse some Biden-era decisions. But another round of policy reversals would not by itself resolve the deeper problems of doctrinal instability, administrative overreach, and constitutional accountability.

Key Takeaways

The NLRB has expanded its reach. The Board has increasingly subjected employee handbooks, severance agreements, workplace discipline, and other routine employment practices to federal labor-law scrutiny.

Labor law has become less predictable. Major doctrines governing issues such as dues checkoff and workplace rules have repeatedly reversed as the Board’s political composition changes, creating uncertainty for employers, employees, and unions alike.

The Board’s approach can collide with employers’ other legal obligations. NLRB decisions involving civility rules, workplace misconduct, and abusive conduct illustrate the tension between expansive labor protections and employers’ responsibilities to maintain safe, professional, and nondiscriminatory workplaces.

Recent constitutional challenges could impose a new check on power. Cases involving SpaceX, Energy Transfer, and Findhelp challenge the removal protections afforded to NLRB officials, raising a fundamental Article II question about whether officials exercising significant executive authority are sufficiently accountable to the president.



Introduction

Most people have a pretty clear idea of what federal labor law is supposed to do. Employees should be free to talk with each other about pay. They should be able to organize, join a union, bargain collectively, and act together to improve wages, benefits, schedules, safety, and working conditions. Employers should not be allowed to fire people for doing those things. At the same time, the Act was not designed to give federal officials general supervisory authority over every workplace decision or to treat management itself as suspect.

That is the basic bargain Congress struck in 1935 with passage of the NLRA. The Act was meant primarily to reduce industrial strife by encouraging collective bargaining, where needed, over wages, hours, and other working conditions. It was not intended to create an administrative agency that would act as the dominant authority over the workplace.¹

The modern NLRB has moved far from that original bargain. It has treated ordinary employee handbooks as federal cases, considered commonplace severance agreements suspect, and given special protection to abusive workplace conduct if it occurs near union activity. Those are not isolated excesses. They reflect a self-aggrandizing bureaucracy with a sustained tendency toward broader jurisdiction: more documents to review, more workplace decisions to second-guess, more private arrangements to federalize, and more occasions to say that the NLRA overrides every other workplace concern and any other employment-related statute.

That is the through-line of this story. In its quest to become the first and foremost referee for the modern workplace, the Board has forgotten why the Act was passed in the first place. It has expanded and altered statutory definitions, flip-flopped decisions based on political control, and ignored practical workplace considerations. In doing so, it has produced the very instability Congress intended it to prevent. The result is an agency that increasingly appears less like a neutral referee and more like a regulator asserting authority beyond the Act's original design. Those concerns became especially pronounced during the Biden administration and provide the institutional backdrop for the constitutional challenges discussed below.

The Board's Structure Comes Under Constitutional Challenge

¹ 29 U.S.C. § 151.



SpaceX, Energy Transfer, and Findhelp brought those constitutional challenges while facing NLRB unfair-labor-practice proceedings. They were not asking courts to abolish labor law or block employees from organizing. They instead asked a basic constitutional question: can an agency that prosecutes, tries, decides, and reshapes national labor policy proceed through officials who are too insulated from presidential accountability? The court's answer was no. Article II makes the President responsible for faithfully executing the laws, and that responsibility means little if officials wielding executive power are protected from meaningful oversight. In that sense, the litigation is not a detour from labor policy; it is a necessary check on an agency that has used labor policy to expand its own power.

These lawsuits matter because they challenge the machinery behind the Board's expansion. The NLRB is not merely enforcing a narrow labor statute. It is increasingly using adjudication to pull handbooks, severance agreements, investigations, workplace discipline, and conflicts with other employment laws into its orbit. When an agency claims that kind of power while changing doctrine with political control, constitutional accountability is not a technicality. It is the check against the Board becoming the "überagency" one of its own members warned against – and against a regulator whose institutional incentives are not adequately constrained.²

The NLRB's job was stability. Increasingly, it produces the opposite: a body of law that expands with administrative ambition and then shifts with political control. That combination is especially dangerous. If an agency stays in its lane, a change in policy may be manageable. But when the agency keeps widening the lane—into handbooks, severance agreements, workplace investigations, discipline, speech, and other employment laws—every political reversal disrupts more of the workplace and makes regulated parties less able to rely on settled legal rules.

Agency Flip-flops

That is why the Board's flip-flopping is not a side issue. It is part of the expansion problem. The agency claims more territory, then redraws the map after the next election. Employers, employees, unions, and practitioners are left to plan around rules that may change materially with the next Board majority.

Ninth Circuit Court of Appeals Judge Diarmuid O'Scannlain captured the point in *Valley Hospital*, criticizing the Board for seesawing between interpretations depending on its

² *Plaza Auto Ctr., Inc.*, 360 NLRB 972, 986 (2014) (Johnson, Member, dissenting).



political composition. His description remains an important warning about the agency's instability: the NLRB "veers violently left and right, a windsock in political gusts."

Dues checkoff—the payroll deduction by which employers collect union dues from employees and remit them to the union—is a good example of this instability. For nearly five decades, employers could stop making those deductions after the collective bargaining agreement expired. In 2015, the Board said they could not. In 2019, the Board said they could. In 2022, the Board said they could not again. Same statute. Same agency. No, yes, no – in seven years.³

The point is not simply who had the better dues-checkoff rule. The same pattern appears in other recurring disputes, including who qualifies as an independent contractor and when separate businesses are treated as joint employers. The point is that basic rules governing bargaining leverage, contract administration, and union funding should not change every time the Board's political majority changes. An agency created to reduce industrial unrest should not make labor law feel provisional.

From there, the instability gets worse: the Board does not merely change rules; it sometimes moves statutory lines in whichever direction expands the Act's reach and, with it, the Board's own institutional power.

The Thumb on the Scale

Instability would be bad enough if the Board simply changed its mind and stopped there. Courts have accused it of something worse: moving statutory lines depending on which answer expands the Act's reach and increases the Board's control over the workplace. That is the thumb-on-the-scale problem in institutional form: interpretation that repeatedly enables the agency's own expansion.

The Board's thumb-on-the-scale problem is perhaps clearest in its treatment of supervisors. That may sound technical, but it is not. Supervisors are excluded from the Act's definition of "employee," so they generally do not vote in union elections or receive ordinary Section 7 protection. But the label also cuts the other way. If someone is a supervisor, the General Counsel can argue that the person spoke or acted for management, making the employer responsible for the conduct. That creates an obvious temptation. Define "supervisor"

³ See *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), remanded on other grounds sub nom. *Indus. Union of Marine & Shipbuilding Workers of Am. v. NLRB*, 320 F.2d 615 (3d Cir. 1963); *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1662-63 (2015); *Valley Hosp. Med. Ctr., Inc.*, 368 NLRB No. 139, slip op. at 8-9 (2019); *Valley Hosp. Med. Ctr., Inc.*, 371 NLRB No. 160, slip op. at 17 (2022).



broadly when the label helps prove an unfair labor practice. Define it narrowly when the label would remove someone from a bargaining unit, block reinstatement, or reduce the Act's coverage.

Courts have not missed the pattern. In *Res-Care*, Judge Posner said the Board had left itself open to charges that its supervisor decisions were “tinged with opportunism.”⁴ In *St. Mary's Home*, the Fourth Circuit confronted a striking example from a nursing facility. The Board treated one nurse as a supervisor when that helped attribute anti-union statements to the employer but then treated another nurse with materially similar duties as a non-supervisor when that allowed reinstatement and back pay. The court refused to let the Board have it both ways.⁵ In *Schnuck Markets*, the Eighth Circuit put the point even more bluntly, citing the charge that the Board applies the supervisor definition in whatever way “maximizes both the number of unfair labor practice findings it makes and the number of unions it certifies.”⁶ And in *Spentonbush/Red Star*, the Second Circuit reversed the Board after it refused to treat tug and barge captains as supervisors even though they commanded vessels carrying millions of gallons of gasoline and bore responsibility for crew safety, discipline, and disaster prevention. The court criticized the Board's “biased mishandling” and “manipulation” of supervisor cases and said its “pro-union bent” had produced an “unconscionable result.”⁷

The point is not that every supervisor case should come out for management. The point is that courts across circuits have accused the Board of moving the statutory line depending on which outcome expands its reach. This pattern raises serious concerns about outcome-driven interpretation.

When Workplace Management Becomes a Federal Case

The same expansionist instinct shows up in the Board's treatment of employee handbooks. Handbooks are a common feature of the workplace and set out employees' responsibilities and a range of standard policies. Under the Board's approach, routine workplace rules can be recast as unfair labor practices, allowing the agency to move from protecting collective

⁴ *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983).

⁵ *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067–68 (4th Cir. 1982); *Schnuck Mkts., Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992).

⁶ *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992) (quoting Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1721 (1981)).

⁷ *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 491–92, 494 (2d Cir. 1997).



action into supervising the daily language of workplace management. The agency no longer merely prevents retaliation against organizing; it increasingly reviews the ordinary rules employers use to maintain safe, respectful, and functional workplaces. In a sense, the NLRB is attempting to act as the nation's HR office.

The Board's approach is easiest to see in *T-Mobile*. There, the Board challenged handbook rules that told employees to maintain a positive work environment, avoid arguing and fighting, treat others with respect, demonstrate appropriate teamwork, and keep electronic information from unauthorized users. The Board said those ordinary workplace expectations could chill employees' rights under the NLRA. The Board reasoned that employees might read these ordinary conduct rules as discouraging candid or contentious discussions about unionization. But that theory effectively assumed that employees could not distinguish vigorous protected discussion from fighting or other unprofessional workplace conduct. That conclusion should trouble anyone who has ever managed a workplace. Rules requiring professionalism, cooperation, and basic respect are not exotic anti-union devices. They are the minimum conditions for people to work together.

The Fifth Circuit rejected much of the Board's analysis, explaining that a reasonable employee would understand these rules as requiring "professional manners," "cooperation," "common sense," and basic workplace conduct—not as gag orders on union talk. That should not have required an appeal. But it did. T-Mobile spent more than two years litigating over rules that most people would consider ordinary workplace expectations. At the NLRB, common sense too often arrives only after costly litigation and judicial correction; that sequence underscores why external checks on the agency matter.⁸

The Board went after similar rules in a hospital. In *William Beaumont Hospital*, it found unlawful rules prohibiting conduct that impeded harmonious relationships, comments that exceeded fair criticism, disparaging attacks on professional capability, and behavior inconsistent with a safe, healing, team-oriented environment.⁹

That setting matters. In a hospital, rules about professionalism, teamwork, safety, and a "healing" environment are not corporate fluff. They are part of patient care. The Board treated them as suspect because an employee might read them to discourage protected activity. That analysis gives too little weight to the employer's legitimate and legally significant interest in maintaining a professional patient-care environment. A labor statute

⁸ *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 267-73 (5th Cir. 2017); *T-Mobile USA, Inc.*, Case No. 10-CA-133833, NLRB Docket Activity (Complaint and Notice of Hearing issued/filed June 19, 2015); *T-Mobile USA, Inc.*, Case No. 01-CA-142030, NLRB Docket Activity (same).

⁹ *William Beaumont Hosp.*, 363 NLRB No. 162, slip op. at 2-3 (2016).



meant to protect collective action should not make it legally risky for a hospital to insist that people caring for patients behave professionally, and it should not let one agency subordinate every other legal and practical obligation to its own preferred theory of labor rights.

Then the Board flipped. In *Boeing*, a different Board majority restored some balance. It rejected the old overbroad approach, upheld Boeing’s no-camera rule, and expressly overruled prior cases that had treated basic civility rules as unlawful. That Board recognized that employers have legitimate reasons to maintain rules about cameras, confidentiality, safety, civility, and discipline, and that the NLRA was not enacted to make those ordinary rules presumptively suspect.¹⁰

That balance did not last. In *Stericycle*, the Board overruled *Boeing* and adopted a standard that again makes ordinary workplace rules vulnerable to attack. A neutral rule is now presumptively unlawful if an employee *could* reasonably read it to restrict Section 7 rights — even if the rule also has an obvious lawful meaning, even if the employer never applied it unlawfully, and even if the rule was written for a legitimate business reason. The Board also does not ask how an ordinary employee would read the rule in the everyday workplace. It asks how an employee who is “economically dependent” on the employer and thinking about protected activity might read it. That framing invites the Board to judge routine rules — civility, confidentiality, recording, investigations — from the standpoint of a hypothetical employee looking for reasons to be afraid.

The employer’s defense is largely theoretical. Once the presumption of unlawfulness attaches, the employer must prove not only that the rule serves a legitimate and substantial business interest, but also that *no narrower rule would work*. That is an almost insurmountable burden because the Board can evaluate the rule in hindsight and identify alternative wording the employer might have used. The Board can say the employer should have added a carveout, softened a verb, narrowed a definition, or limited the rule to a more specific circumstance. The result is that employers are not judged primarily by whether their rules served real workplace needs, but by whether the agency later concludes that a narrower formulation was possible.¹¹

The same kinds of rules can therefore be suspect, then sensible, then suspect again. And the instability is not merely prospective. When the Board announces a new rule through adjudication, it often applies that rule retroactively to pending cases. *Stericycle* did exactly

¹⁰ *The Boeing Co.*, 365 NLRB No. 154, slip op. at 3–4, 16–17 (2017).

¹¹ *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 2, 9–10, 15–16 (2023); id. at 17 (Kaplan, Member, dissenting).



that. After overruling *Boeing*, the Board applied its new workplace-rule standard retroactively, meaning employers that drafted policies under one legal regime could have those policies judged under another. Member Kaplan’s dissent put the unfairness plainly: retroactive application can make employers who were “law-abiding yesterday” into “lawbreakers today.” That is not industrial stability. It is compliance by hindsight. A workplace rule becomes lawful or unlawful not because of what the employer meant, how the rule was used, or how ordinary people would read it, but because of what a later Board says a hypothetical employee could have feared.¹²

The bigger point is not that one side of each handbook debate is always right. The NLRB keeps expanding the zone of ordinary workplace management subject to federal labor law scrutiny. Rules about civility, confidentiality, cameras, investigations, teamwork, and professionalism are no longer simply management tools. Under the Board’s more aggressive approach, they become potential unfair labor practices—another opportunity for the agency to enlarge its role and another sign that the original balance of the Act has been replaced by bureaucratic supervision.

And the Board’s reach does not stop with rules governing current employees.

Once the Board treats routine workplace language as a potential federal labor violation, its authority can readily extend beyond current employment. That is what happened with severance agreements.

The Board’s Reach Extends Beyond Active Employment

Severance agreements are another example of the same expansion. A severance agreement is not a union campaign. It is not a strike. It is not employees gathering on the shop floor to demand higher wages, safer conditions, or better schedules. It is an end-of-employment contract: money in exchange for a release, closure, confidentiality, and some assurance that the separation will not become a public brawl. Yet the Board has treated even that private exit arrangement as another subject for federal labor-law scrutiny.

The Board now treats those agreements as within its regulatory concern.

In *McLaren Macomb*, the Board held that an employer may violate the NLRA merely by offering a severance agreement with confidentiality or non-disparagement language the Board views as too broad. The employee does not have to sign it. The employer need not

¹² *Id.*, slip op. at 12 (2023) (stating that the Board’s usual practice is to apply new policies and standards retroactively to all pending cases absent manifest injustice and finding retroactive application appropriate); *id.* at 30 (Kaplan, Member, dissenting) (criticizing retroactive application because it “predictably make[s] employers in pending cases who were law-abiding yesterday into lawbreakers today”).



enforce it. There need not be any evidence that the clause actually chilled union activity. The offer itself can be an unfair labor practice. The decision reversed two narrower 2020 decisions and pulled ordinary separation language into the NLRB's expanding orbit – again turning a change in Board composition into a change in the legal meaning of common employment documents.¹³

That has become common fare for the modern NLRB—more documents under review, more workplace decisions federalized, more private employment arrangements recast as labor-law violations. The NLRA was written to protect employees acting together over working conditions and to channel labor conflict into stable bargaining rules. The modern Board, by contrast, is now policing how employers settle the end of an employment relationship.

No one argues that employers should be able to buy silence about unlawful conduct or block employees from filing charges. But *McLaren Macomb* goes much further. It treats standard severance language as federal labor coercion based on what the Board thinks the words might do in some later, hypothetical Section 7 scenario. That is not industrial peace. It is an incremental expansion of administrative power into common employment documents.

When Labor Law Shields Abuse

The Board's attempt to act as the workplace's überagency is even more troubling when misconduct is involved, because that is where its institutional ambition collides most directly with other federal and state anti-discrimination and anti-harassment laws.

In the 2020 *General Motors* decision, the Board tried to bring labor law back into alignment with ordinary workplace standards. It changed the test for cases involving abusive conduct during otherwise protected activity, including profane, racist, and sexually offensive remarks. That decision recognized the obvious tension between the Board's old doctrine and modern anti-discrimination law.¹⁴

Then the Board reversed again. In the 2023 *Lion Elastomers* ruling, it overruled *General Motors* and returned to older standards, giving employees more leeway when misconduct occurs in connection with protected activity.¹⁵ The reversal again illustrates how changes in

¹³ *McLaren Macomb*, 372 NLRB No. 58, slip op. at 1-2, 6-7 (2023), overruling *Baylor Univ. Med. Ctr.*, 369 NLRB No. 43 (2020), and *IGT d/b/a Int'l Game Tech.*, 370 NLRB No. 50 (2020).

¹⁴ *General Motors LLC*, 369 NLRB No. 127, slip op. at 1-2 (2020).

¹⁵ *Lion Elastomers LLC II*, 372 NLRB No. 83, slip op. at 1-2 (2023).



Board composition can produce significant doctrinal shifts in areas where employers must also comply with other workplace laws, and how the Biden-era Board seemed to care little about conflicts with other federal and state discrimination and harassment laws.

Some leeway may be appropriate in heated labor disputes. But the doctrine becomes much harder to defend when it limits an employer's ability to address abusive workplace conduct.

A recent Starbucks case from the Fifth Circuit shows the practical stakes. Starbucks fired a union organizer after a series of incidents, including obscene messages calling a female coworker with a documented medical condition a "dumb f***ing b**ch who can't even use cleaners" and "useless f***ing [person]." He also called his store manager a "chicken s**t," a "f***ing c**k[]sucker," a "f***ing stupid[]" 'lizard brain," and a "[f]***ing [p]***y" who "can suck my f***ing d**k." The administrative law judge sided with Starbucks on the termination. The Board disagreed. The Fifth Circuit vacated the Board's decision because the Board again placed its thumb on the judicial scale by ignoring contrary evidence. Judge Andrew Oldham's concurrence stated the obvious: "If a company in this country cannot choose to fire someone for this sort of unhinged abuse, then Heaven help us."¹⁶

That line is forceful because it captures the NLRB's narrow focus. The agency sees labor activity and too often treats every other workplace obligation as secondary. That approach is difficult to reconcile with an Act designed to balance rights rather than subordinate all other workplace obligations to the Board's preferred view of Section 7.

Employers must comply with more than one body of law. They must prevent harassment. They must protect employees from abuse. They must maintain safe workplaces. They must serve customers. They must run operations. Title VII and related laws do not disappear because an employee invokes union activity. The Supreme Court warned long ago that the Board was not commissioned to pursue the NLRA so single-mindedly that it ignores other important congressional objectives. That warning is exactly what an überagency ignores: legal limits, competing statutory duties, and the reality that the NLRA is one part of the law, not the whole of it.¹⁷

The Constitutional Check

The examples above are not a list of disconnected legal disputes. They point to one problem: the NLRB has turned a statute designed to stabilize labor relations into a vehicle for

¹⁶ *Starbucks Corp. v. NLRB*, No. 24-60649, slip op. at 2-5 (5th Cir. May 14, 2026) (Oldham, J., concurring in part).

¹⁷ *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).



expanding administrative control over the workplace. That is why recent court decisions putting the Board's structure on the table matter. The issue is not obscure constitutional housekeeping. It is accountability. Article II makes the President responsible for seeing that federal law is faithfully executed. That responsibility means little if officials exercising executive power can be insulated from presidential oversight by layers of statutory protection while using adjudication to expand their own authority.

That matters here because the NLRB is not acting like a modest administrator of a defined labor statute. It increasingly claims the power to police handbooks, severance agreements, workplace investigations, civility rules, discipline decisions, workplace speech, and conflicts with other employment laws. Board Member Harry I. Johnson III warned years ago that the NLRA does not make the Board an "überagency" authorized to brush past enforcement schemes Congress assigned to other laws and agencies.¹⁸ That warning has aged well. An agency trying to become the first referee for the modern workplace should not also be insulated from constitutional accountability; if anything, its expanding ambitions make accountability more urgent.

The Article II problem is straightforward. The NLRB does not merely offer advice. Through its enforcement system, it prosecutes unfair-labor-practice cases, conducts administrative trials, issues orders, and shapes national labor policy through adjudication. Its administrative law judges preside over those trials. Its Board members review those decisions and sit atop the agency's enforcement structure. Officials wielding that kind of federal power must remain meaningfully answerable to the President, and through the President, to voters. That accountability principle is not hostile to labor rights; it is a feature of constitutional government.

That is what the recent *SpaceX*, *Energy Transfer*, and *Findhelp* cases were about. Each employer was facing an NLRB unfair-labor-practice proceeding. Each went to federal court before being forced through the agency process and argued that NLRB administrative law judges and Board members are too insulated from presidential removal. The district courts entered preliminary injunctions. The Fifth Circuit affirmed, holding that the employers could bring these structural constitutional challenges before being forced through allegedly unconstitutional proceedings. It held that NLRB ALJs are unconstitutionally insulated by two layers of for-cause removal protection and that the employers were likely to succeed on their challenge to Board-member removal protections.¹⁹ More recently, the Northern

¹⁸ *Plaza Auto Ctr., Inc.*, 360 NLRB at 986 (Johnson, Member, dissenting).

¹⁹ *Space Exploration Technologies Corp. v. NLRB*, 151 F.4th 761, 764–65, 774–78 (5th Cir. 2025); *Aunt Bertha d/b/a Findhelp v. NLRB*, No. 4:24-cv-00798-P, slip op. at 1–3, 6–8 (N.D. Tex. May 15, 2026). The Fifth Circuit described the three employers' pending ULP proceedings, the pre-enforcement Article II challenges, and the district court injunctions;



District of Texas granted Findhelp final relief, declared the NLRB's ALJ and Board-member removal protections unconstitutional, and permanently enjoined the agency from continuing its administrative proceeding against Findhelp under the current structure.²⁰

The most telling part was the NLRB's own position. By the time the consolidated cases reached the Fifth Circuit, the agency was no longer defending the position that the removal protections for NLRB administrative law judges and Board members complied with Article II. But it still wanted the injunctions lifted so its proceedings could continue. That position placed agency continuity ahead of the threshold constitutional question. The NLRA is important, but it is not more important than the Constitution. A labor statute can be enforced only by a lawful agency, and an agency that seeks to proceed despite a serious structural defect demonstrates why structural limits matter.²¹

Amazon saw the same institutional instinct from inside the agency. When Amazon challenged the Board's structure, the Board brushed the motion aside, saying it was waived, foreclosed, insufficient, or harmless. In practical terms, the agency accused of wielding too much insulated power resolved the structural objection against the regulated party and allowed its own proceeding to continue.²²

Nor can the Board hide behind "expertise." Expertise does not explain repeated reversals on the same statutory questions. It does not explain treating ordinary workplace rules as federal labor violations one year and lawful management the next. The modern NLRB primarily makes law through adjudication, with successive Boards reversing prior interpretations and describing each new position as the Act's true meaning. That is why Article II accountability matters. An agency that keeps expanding its reach through case decisions should not also be insulated from the constitutional chain of command. The more the Board claims power to govern the workplace through adjudication, the stronger the case for presidential accountability becomes.²³

the Findhelp court later declared the challenged removal provisions unconstitutional and permanently enjoined the NLRB from resuming or continuing the administrative proceeding under the current structure.

²⁰ *Aunt Bertha d/b/a Findhelp v. NLRB*, No. 4:24-cv-00798-P, slip op. at 6, 8 (N.D. Tex. May 15, 2026) (declaring the statutory removal protections applicable to NLRB administrative law judges and Board members unconstitutional under Article II and enjoining the NLRB from "resuming or continuing the administrative proceedings against Findhelp under the current unconstitutional structure").

²¹ *Space Exploration Technologies Corp.*, 151 F.4th at 764 n.4, 765.

²² *Amazon.com Servs. LLC*, Case 29-CA-261755, slip op. at 1-2 & nn.2-3 (NLRB Oct. 8, 2024).

²³ 29 U.S.C. § 154(a); see also Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 Wis. L. Rev. 1115, 1120-22, 1132-35 (2017) (contrasting the Board's early economic-research role with modern NLRB decision making driven largely by adjudication rather than empirical labor-market analysis).



The injunctions should be understood in that light. They are a constitutional response to the problem described above: an agency that keeps expanding its own domain, destabilizing the law as it goes, and resisting the structural limits that keep federal power accountable. They serve the public interest because the public has an interest in labor law that is lawful, stable, and accountable—not merely aggressive.

The connection is direct. The NLRB was created to reduce industrial unrest by protecting collective bargaining and employee concerted activity over working conditions while preserving a workable balance for employers that must run safe, lawful workplaces. But the modern Board has pushed far beyond that center. It has treated ordinary workplace rules as federal labor problems. It has pulled severance agreements into its orbit. It has given special protection to misconduct that real employers must address under other laws. It has shifted statutory definitions in ways courts have described as manipulative. And it has reversed major doctrines as political control changes. The result is more Board authority, more uncertainty, and less of the stability the Act was supposed to promote.

That is the danger of an unchecked administrative agency. Once the Board views itself as the first referee for every workplace dispute—the “überagency” Board Member Johnson warned against—the question becomes what meaningful limits remain. If the agency can expand the Act through adjudication, flip the rules with each new majority, ignore real-world workplace obligations, and then proceed under a constitutionally defective structure because its docket must keep moving, constitutional limits are weakened in precisely the context where they are most needed. They are the means by which law restrains the bureaucratic self-aggrandizement on display here.

That is why the injunctions in *SpaceX*, *Energy Transfer*, and *Findhelp* advance the public interest. They do not excuse anyone from labor law. They require an agency that is itself lawful to enforce labor law. The Fifth Circuit recognized that employers should not have to choose “between compliance and constitutionality.” That matters because once an unconstitutional agency proceeding has run its course, the harm is not easily undone. The Constitution does not require regulated parties to endure an unlawful process first and ask questions later, especially when the process itself is the mechanism by which the agency expands its authority.

This is not an attack on collective bargaining. Employees should be free to organize, bargain, and act together over wages and working conditions. But a lawful statute still needs a lawful enforcer. The NLRA does not outrank Article II. It does not suspend



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separation of powers. And it does not permit the Board to treat its mission as too important for constitutional limits or too urgent for democratic accountability.

The NLRB was created to reduce industrial unrest. Increasingly, its shifting doctrine contributes to uncertainty. Employers are told to maintain lawful workplaces while ordinary workplace rules are scrutinized as potential labor violations. Employees and unions are told the rules of organizing, bargaining, dues checkoff, and unit scope, only to see those rules revised as Board majorities change. And when courts step in to stop unconstitutional proceedings before they begin, the agency protests that its work must go on. That response reflects the same institutional tendency that runs throughout the Board's recent history.

That response underscores the point. Stable labor relations require stable rules, predictable enforcement, and an agency that accepts constitutional limits rather than treating them as obstacles to its institutional agenda.

The modern NLRB has failed on all three counts. Article II challenges are therefore not a threat to the public interest; they are a necessary corrective to an agency that has too often blurred the line between enforcing the Act and expanding its own authority.

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