IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.,* | ) | Case No. 1:11-cv-01629-ABJ |
| | ) | |
| | ) | Judge Amy Berman Jackson |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| NATIONAL LABOR RELATIONS BOARD, *et al.*, | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**MEMORANDUM OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND COALITION FOR A DEMOCRATIC WORKPLACE IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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***TABLE OF CONTENTS***

***TABLE OF AUTHORITIES***

**Cases**

**Statutes**

**Rules**



**Regulations**

## *INTRODUCTION*

Plaintiffs move this Court for an Order granting summary judgment in their favor on all claims stated. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Haynes v. Williams*, 392 F.3d 478, 481 (D.C. Cir. 2004) (quoting Fed. R. Civ. P. 56(c)). "A dispute about a material fact is not genuine unless the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id*. (internal quotation marks omitted). See also, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "In determining whether there are genuine factual issues in dispute, the court draws all reasonable inferences in favor of the non-moving party." *Wiely v. Glassman*, 511 F.3d 151, 155 (D.C. Cir. 2007) (per curiam).

In present case, the National Labor Relations Board ("NLRB" or "Board") has promulgated a rule requiring that all employers as defined in the National Labor Relations Act, 29 U.S.C. § 158(2) ("Act") post a notice entitled "Notification of Employee Rights Under the National Labor Relations Act" ("Rule"). In promulgating the Rule, the NLRB has far exceeded its statutory authority under the Act in several significant respects:

1. The Act clearly limits the Board's invocation of jurisdiction over employers to one of two occurrences – the filing of an unfair labor practice charge under Section 8 of the Act, 29 U.S.C. § 158, or the filing of a representation petition under Section 9 of the Act, 29 U.S.C. § 159. Nothing in the Act supports the NLRB's ability to assert plenary jurisdiction over the nation's six (6) million employers to require them to post a notice.

2. Nothing in the Act contemplates, let alone authorizes, the Board to create a new unfair labor practice for failing to post the Notice.

3. The Rule's alteration of the statute of limitations established by Congress in the Act unquestionably exceeds the Board's authority.

Accordingly, the Rule must be vacated and the Board permanently enjoined from implementing or enforcing it. In addition, the Rule compels employers to speak in a manner and with content they would not otherwise choose, thereby violating employers' rights under the First Amendment to the United States Constitution and Section 8(c) of the Act, 29 U.S.C. § 158(c). Thus, the Rule is in violation of Sections 6, 8(c) and 10(b) of the Act, 29 U.S.C. § 156, 158(c) and 160(b), and the Administrative Procedures Act ("APA"), 5 U.S.C. §§706(2)(A) and 706(2)(c) . For these reasons, Plaintiffs are entitled to summary judgment.

***STATEMENT OF UNDISPUTED FACTS***

This rulemaking proceeding began in 1993, when professor Charles Morris petitioned the Board to issue a broad rule requiring employers and unions to post notices advising employees of their rights and duties under the NLRA. *See* 75 Fed. Reg 80411. For seventeen years thereafter, the Board declined to act on the Morris petition, apparently because a majority of the Board believed that the Board lacked authority to impose such a requirement under the NLRA and/or that such a notice requirement was contrary to public policy.

Following appointment of new and controversial Board members in 2010,[1] the Board published a Notice of Proposed Rulemaking in the Federal Register on December 22, 2010, 75 Fed. Reg. 80410, seeking public comment for the first time on a rule requiring employers subject to the jurisdiction of the NLRA to post notices informing their employees of certain rights under

[1] One of the new Board members, Craig Becker, was denied Senate confirmation, reportedly due to his published views in favor of union organizing. He is serving under a recess appointment. *See* http://articles.cnn.com/2010-03-27 .

the NLRA. After considering public comments on the Proposed Rule, the Board published the Rule in the Federal Register on August 30, 2011, at 76 Fed. Reg. 54006 (2011). The effective date of the Rule is November 14, 2011. The Rule is entitled "Notification of Employee Rights under the National Labor Relations Act." Plaintiff National Association of Manufacturers ("NAM") filed a complaint with this Court on September 8, 2011, to declare the Rule unlawful and to enjoin its operation. Plaintiffs NAM and Coalition for a Democratic Workplace ("CDW") filed an amended complaint on September 23, 2011, seeking the same remedy.

Plaintiff NAM is the preeminent manufacturing association in the United States, as well as the nation's largest industrial trade association, representing 12,000 small and large manufacturers in every industrial sector in all 50 states. Plaintiff CDW represents millions of businesses of all sizes from every industry and every region of the country. CDW's membership includes hundreds of employer associations as well as individual employers and other organizations. Included within NAM's and CDW's membership and represented by these Plaintiffs are a significant number of the six million employers who will for the first time be required to post a notice to their employees compelled by the Board, absent judicial relief.[2]

***LAW AND ARGUMENT***

**I. There is no Genuine Issue as to Any Material Fact and Plaintiffs are Entitled to Judgment as a Matter of Law.**

The Board is wholly without statutory authority to promulgate the Rule. As an agency of limited jurisdiction under the NLRA, the Board is not permitted to coerce employers who are not engaged in representation elections or unfair labor practices into posting notices to their

[2] A second motion and brief in support thereof are being filed by the National Right to Work Legal Defense and Education Foundation and the National Federation of Independent Business. Plaintiffs NAM and CDW support each of the grounds and arguments being made by NRTW/NFIB.

employees, upon penalty of committing an unfair labor practice. Congress has deliberately withheld such authority for the past 75 years, and nothing in the Board's general rulemaking powers entitles the Board to expand its jurisdiction in the face of such clear Congressional intent. The Board's creation of a new unfair labor practice to enforce its new notice requirement further usurps the power of Congress. Moreover, the Board's alteration of the congressionally-established statute of limitations for filing an unfair labor practice charge exceeds the authority delegated by Congress and is contrary to Supreme Court and federal circuit court precedent. The Rule's posting requirement also constitutes compelled speech in violation of the First Amendment to the United States Constitution and Section 8(c) of the Act, 29 U.S.C. § 158 (c).

Accordingly, the Rule is in violation of Sections 6, 8(c), and 10(b) of the Act, 29 U.S.C. §§ 156, 158(c) and 29 U.S.C. § 160(b), the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 706(2)(A) and 706(2)(C), and the First Amendment. The manner in which the Board has expanded its jurisdiction to include compelled notices to employees, including the lack of independent research demonstrating an actual justification for the new Notice and the contents of the Notice itself, further compels a finding that the Rule is arbitrary and capricious and an abuse of agency discretion.

**II. The Rule is Subject to the Substantive Standards of Review Under Chevron.**

The Rule is subject to review under the standards set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). A *Chevron* analysis involves a two-step process. Under *Chevron* Step I, the Court asks "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *see also Public Citizen, Inc. v. HHS*, 332 F.3d 654, 659 (D.C. Cir. 2003). If Congress has spoken, then that is the end of the analysis, and the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843; *see also Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (*quoting Chevron*). No

deference is shown to the Defendants under this Step. *See Shays v. FEC*, 508 F. Supp.2d 10, 30 (D.D.C. 2007).

Under *Chevron* Step II, the Court may defer to the Defendants' application of the statute, but only if it is a permissible and reasonable construction of the statute. *Chevron,* 467 U.S. at 844; *Public Citizen*, 332 F.3d at 659; *Southern Cal. Edison Co. v. FERC*, 116 F.3d 507, 511 (D.C. Cir. 1997) (deference is owed to an agency only if its construction is "reasonable" in light of the statutory text, history, and purpose). A Court must set aside a rule if it is "arbitrary, capricious, …or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). See also, *United States v. Mead Corp*., 533 U.S. 218 (2001). An agency rule is arbitrary and capricious when "it is so implausible that it could not be ascribed to a difference in view or a product of agency expertise." *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

Plaintiffs submit that the Board's promulgation of the Rule fails under both steps of the *Chevron* standard.

## III. This Court also has General Federal Question Jurisdiction to Determine Whether the Rule Exceeds the Board's Statutory Authority.

In addition to being reviewable under the APA, this Court has general federal question subject matter jurisdiction over this matter. The Supreme Court has explicitly held that the federal district courts have jurisdiction to determine whether a rule or other action by the Board is in excess of its delegated authority under the NLRA. In *Leedom v. Kyne,* 358 U.S. 184 (1958) the Supreme Court held that such jurisdiction exists when the Board acts "in excess of its delegated powers and contrary to a specific prohibition of the Act." *Id.* at 188. Particularly applicable to this case, the Supreme Court further noted that the federal courts must intervene

when the Board has "attempted [the] exercise of power that had been specifically withheld." *Id.* at 189.

The review of agency action under *Leedom v. Kyne, supra,* involves no deference to the agency. Rather, it requires straightforward statutory interpretation to determine whether the agency action at issue is in excess of the power delegated by Congress. In *Railway Labor Executives' Ass'n v. National Mediation Board,* 29 F.3d 655 (D.C. Cir. 1994) (*en banc)* the D.C. Circuit addressed the parameters of such review, stating :

> Nor is this a case in which principles of deference to an agency's interpretation comes into play. Such deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.' *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* U.S. 837, 843-44 (1984).

*Id.* at 2908.

While different in jurisdictional basis, the substance of the analysis under *Leedom v. Kyne* is essentially the same as the *Chevron* Step I analysis. If it is determined that the agency has exceeded the grant of congressional authority, the agency action is void and the inquiry ends. Because of this similarity, the focus of the discussion below is whether the Rule exceeds the Board's statutory authority. If so, the Rule must be stricken under either the *Leedom v. Kyne* analysis or the *Chevron* Step I analysis. And, as will be amply demonstrated, the Rule clearly exceeds the bounds of the Board's statutory authority.

## IV. The Rule Has Been Promulgated In Excess of the Board's Statutory Authority Under The NLRA and the Board's Action is Not Entitled to Deference.

It is axiomatic that an agency's exercise of its jurisdiction is limited to that authorized by statute. As stated by the Supreme Court, "[a]n agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). Unlike the more general authority granted to most other federal agencies, Congress deliberately chose not to give the Board

plenary authority to assert active jurisdiction over all employers above some statutory threshold. Rather, the Board's authority to administer the provisions of the NLRA is triggered only when a representation petition is filed pursuant to Section 9(c)(1), 29 U.S.C. § 159(c)(1) or an unfair labor practice charge is filed pursuant to Section 8, 29 U.S.C. § 158 and processed by the Board under Section 10, 29 U.S.C. § 160.[3] Neither Section 6 nor any other section of the NLRA contains any provisions granting the Board the authority to assert active jurisdiction over an employer absent the filing of a petition or a charge. Thus, the Act specifically limits the parameters of the Board's power to (1) the investigation and processing of representation petitions and (2) the investigation and adjudication of unfair labor practice charges. 29 U.S.C. §§ 159, 160. In granting these powers, Congress defined precisely when and how the Board's power can be invoked. The language of the Act is unambiguous; with respect to representation petitions, § 9(c) of the Act states:

> (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 …; or
>
> (B) by an employer…
>
> the Board shall investigate such petition and if it has reasonable cause to believe a question of representation exists shall provide for an appropriate hearing upon due notice…. 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.
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> 29 U.S.C. § 159(c) (Emphasis added).

Clearly, Congress has authorized the Board to act in the representation arena *only* upon the filing of a petition. There is no authority granted to the Board to take any action in

[3] As the Board itself has acknowledged, the agency is not vested by the NLRA with "roving investigatory powers." 76 Fed. Reg. at 54010.

connection with representation issues in the absence of a petition being filed by employees, a union or an employer.

The same is true with respect to unfair labor practice charges; Congress carefully defined the parameters of the Board's power. Section 10 of the Act provides:

(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 158 of this title) affecting commerce …

(b) *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 the 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 …

29 U.S.C. § 160 (Emphasis added).

Section 10(c) even identifies when the Board's jurisdiction ceases. That Section provides that if the Board determines that no unfair labor practice has been committed, "then the Board shall state its findings of fact *and shall issue an order dismissing the said complaint*…" *Id.*

Given this very precise language, it is plain that Congress granted a limited scope of authority to the Board with respect to unfair labor practices. Only upon the filing of a charge is the Board's power invoked to determine the existence of an unfair labor practice. Thus, Congress empowered the Board to regulate the conduct of only those employers before it in representation or unfair labor practice proceedings.

If the limited grant of power were not clear enough from the provisions of the Act discussed above, yet additional statutory provisions confirm this conclusion. For example, Section 10(j), which permits the Board to seek preliminary injunctive relief in unfair labor practice cases, specifically states that "[t]he Board shall have the power, upon issuance of a complaint as provided in subsection (b)…to petition any United States district court [for

preliminary injunctive relief.]" 29 U.S.C. § 160 (j). The Board's power in this context begins only upon the issuance of a complaint, which can be issued only *after a charge is filed*. In the area of jurisdictional disputes, § 10(k) provides that the Board is "empowered" to resolve such disputes only *after an unfair labor practice charge is filed*. 29 U.S.C. § 160(k). The same is true with respect to secondary boycotts. Section 10(c) obligates the Board to seek preliminary injunctive relief in the case of secondary boycotts but only *after the filing of a charge*. 29 U.S.C. § 160(l).

Section 11 of the Act further illustrates the very defined limits of the Board's statutory authority:

> For purposes 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 sections 159 and 160 of this title* –

29 U.S.C. § 161. (Emphasis added). This preamble to the Board's authority to receive documentary evidence, issue subpoenas and serve process, again reinforces that the Board's powers are only those enumerated in Sections 9 and 10 of the Act. In this regard, it must be noted that Congress saw fit to explicitly limit the Board's subpoena power in § 11 by providing that "the Board *shall* revoke" any subpoena seeking evidence which "does not relate to any matter under investigation…" *Id.* (Emphasis added).

Consistent with the above statutory language, courts have repeatedly restricted the Board's jurisdiction to that imposed by the statute and have rejected previous efforts by the Board to expand its jurisdiction beyond the limits of the NLRA's authority. As the Supreme Court held in *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961), "where * * * Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme." *See also*

*Consolidated Edison* ("The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation…."; *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 900 (1984) ("Under ¶ 10(c), the Board's authority to remedy unfair labor practices is expressly limited . . ."*); Republic Steel Corp. v. NLRB,* 311 U.S. 7 (1940)) (holding that the Board may not justify an order solely on grounds that it will deter future violations of the Act; *NLRB v. Fant Milling Co.,* 360 U.S. 301, 306-309 (1959) (holding that the Board lacks independent power to find an unfair labor practice in the absence of a charge filed by a private party). *See also NLRB v. Financial Services Employees* at 2746 ("[d]eference to the Board 'cannot be allowed to slip into an inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'" (ellipsis in the original) *See also Civil Service Employees Assn., Local 1000, AFSCME v. NLRB,* 569 F.3d 88 2d (2nd Cir. 2009) (Deference is not accorded the NLRB where the NLRB moves into a new area of regulation which Congress has not committed to the NLRB).[4]

In light of these court decisions reaffirming the limited jurisdiction vested in the Board by Congress, the deliberate decision by Congress not to include a penal notice posting requirement anywhere in the NLRA must be interpreted as a *prohibition* on the Board's attempt to assert that power here. Certainly, had Congress intended to permit the Board to assert jurisdiction over employers absent the filing of a charge or petition, Congress easily could have done so. Since Congress limited the Board's jurisdiction from the outset of the NLRA, and then declined over a

[4] *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (*en banc*) is also directly on point. There, the National Mediation Board (the "NMB") promulgated a new procedural rule to address union representation issues in the context of railroad mergers and acquisitions. Specifically, the NMB provided that in the case of a consolidation of carriers, the NMB, a carrier or employees of a carrier could initiate representation proceedings. Previously, only employee groups could initiate such proceedings. The D.C. Circuit held that because the Railway Labor Act explicitly provided that the NMB's representation process is to be initiated "upon the request of either party to the dispute [*i.e.,* employee groups]," the NMB had exceeded its statutory power by allowing the process to be initiated by itself or a carrier.

75-year period to expand the agency's jurisdiction to include any notice-posting requirement outside the context of representation petitions and unfair labor practice complaints, it is clear that the Board's promulgation of the Rule violates the unambiguously expressed intent of Congress, contrary to Step 1 of the *Chevron* standard, and is an impermissible and unreasonable construction of the NLRA under Step 2 of the *Chevron* standard.

The absence of statutory authority for the Board to promulgate the Rule requiring the posting of the Notice stands in contrast to other major federal labor and employment laws that contain specific notice-posting requirements. The Railway Labor Act, 45 U.S.C. § 152, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-10, the Age Discrimination and Employment Act, 29 U.S.C. § 627, the Occupational Safety and Health Act, 29 U.S.C. § 657(c), the Americans With Disabilities Act, 42 U.S.C. § 12115, the Family and Medical Leave Act, 29 U.S.C. § 2619(a) and the Uniform Service Employment and Re-employment Rights Act, 38 U.S.C. § 4334(a), all contain express and specific provisions providing for notice-posting by employers subject to the jurisdiction of the relevant agency charged with enforcing the respective statutes. The posting requirements of Title VII are representative: "Every employer, employment agency, and labor organization, as the case may be, *shall* post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment and members are customarily posted, *a notice to be prepared or approved by the commission* setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a complaint." (Emphasis added). 42 U.S.C. § 2000e-10.

It is clear from the notice-posting provisions contained in the statutes noted above that when Congress intends to vest an enforcement agency with notice-posting rulemaking authority, such authority is set forth in the organic statute of the relevant agency. The fact that Congress

chose not to grant the Board authority to promulgate rules regarding the posting of a notice-of-rights demonstrates that the Board is without such authority.[5]

Further, with the exception of the Railway Labor Act, all of the statutes noted above were enacted subsequent to the NLRA. Had Congress wished to grant similar rulemaking authority to the Board, Congress could have easily amended the NLRA at some point in the last 75 years to include a provision similar to that contained in the other statutes. Congress, in fact, did precisely that by amending the Railway Labor Act to include an express notice-posting requirement. Notably, this was done just one year before enactment of the NLRA. 45 U.S.C. § 152 Eighth; Pub. L. No. 73-442, 48 Stat. 1185, 1188 (1934). Congress' pointed failure to amend the NLRA while amending the closely-related Railway Labor Act further emphasizes congressional intent not to grant notice-posting authority to the Board.

Moreover, Congress made extensive amendments to the NLRA in 1947, 1959 and 1974. Yet at no time did Congress even consider amending the NLRA—as it had the Railway Labor Act—to include a notice-posting rule.

Section 6 of the NLRA authorizes the Board to promulgate "such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. But neither Section 6 nor any other sections of the NLRA contain any provisions granting the Board the authority to promulgate a rule requiring employers to post a notification of employee rights under the NLRA. Since Congress did not include a notice-of-rights posting provision in the NLRA, it is obvious that no "rules and regulations [are] necessary to carry out" such provision.

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[5] In the only known instance in which a federal labor agency has previously promulgated a notice-posting requirement without an express statutory mandate, the U.S. Department of Labor in 1949 did so under authority granted by the Fair Labor Standards Act to require records and reports from employers. 29 U.S.C. 211(C). Perhaps more importantly, the DOL attached no *penalties* to employers' failure to post notices of employee rights. See 29 C.F.R. 516.4. Presumably for this reason, DOL's authority to impose its notice-posting requirement was never tested in a court challenge.

Nonetheless, Section 104.20(a) of the Rule requires "[a]ll employers subject to the NLRA [to] post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information containing basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this Part."

The Rule also provides for electronic posting of the Notice. Again, nothing in Section 6 nor any other provision of the NLRA authorizes the Board to require employers to electronically post a notice of employee rights under the NLRA. Even the statutes that require the posting of a notice-of-rights do not require electronic posting.

Thus, in the present case, the Board has no statutory authority to assert active jurisdiction over employers who are not already the subject of an unfair labor practice charge or a representation petition; and the Board therefore has no statutory authority to impose a notice posting requirement, particularly where the Board declares that the failure to adhere to such an unauthorized requirement will be penalized by finding innocent employers to have committed unfair labor practices. Indeed, as further discussed below, the Board has no statutory authority to create such an unfair labor practice; and no statutory authority to toll the statute of limitations set forth in Section 10(b), 29 U.S.C. § 160(b). The absence of statutory authorization to promulgate the Rule makes plain the unambiguously expressed intent of Congress that the Board, contrary to Step 1 of the *Chevron* standard, has no authority to issue the Rule. The Rule must therefore be held unlawful and set aside as in excess of the Board's authority pursuant to the APA, 5 U.S.C. § 706(2)(C).

## V. The Board's Claims Of Statutory Authority To Issue The Rule Are Without Merit.

In response to the apparent absence of statutory authority for the Rule, which was vigorously pointed out to the Board in thousands of comments during the rulemaking proceeding and in the dissent filed by Member Hayes, the Board majority has made a series of arguments in

defense of their claims of statutory authority. 76 Fed. Reg. 54010, et seq. Each of these arguments is baseless, as will be shown below.

First, although the Board has conceded that it does not have "roving investigatory powers," the Board nevertheless contends that it is entitled via rulemaking to "fill any gap left, implicitly or explicitly, by Congress." *Citing Morton v. Ruiz*, 415 U.S. 199, 231 (1974), and *Chevron U.S.A., Inc., supra*. 76 Fed. Reg. at 54010. But these cases did not deal with agencies whose mandates were so expressly limited by Congress, and in each case, the Court defined the "gap filling" question as primarily a matter of legislative intent. *See also Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 173 (2007) ("The ultimate question is whether Congress would have intended, and expected, courts to treat [the regulation] as within, or outside, its delegation to the agency of 'gap-filling' authority.") The Board's reliance on *Morton* and *Chevron* thus begs the question as to whether Congress left any "gap" to be filled here, or whether, by limiting the Board's authority to the handling of representation petitions and unfair labor practices, Congress intended to prohibit the Board from taking affirmative actions to coerce employers into posting notices outside those two limited areas of the Board's jurisdiction. *See also FDA v. Brown & Williamson Tobacco Corp*., 429 U.S. 120, 125 (2000) (holding that an agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."

In order to justify its affirmative actions here, the Board has further attempted to dispute the above described limits on its statutory jurisdiction, claiming that it actually is entitled to broadly promulgate rules on any subject pertaining to employee rights covered by the Act. 76 Fed. Reg. at 54011. Attempting to rewrite the history of judicial rejection of such assertions by the Board in the past, discussed above at p. 10, the Board majority has claimed that the courts

instead have allowed the Board "to take appropriate measures to prevent frustration of the purposes of the Act." *Id.* Neither the Supreme Court opinion which made that statement, however, nor any of the other decisions cited therein upheld anything other than Board actions taken in support of the Board's undisputed jurisdiction.[6]

For this reason as well, the Board is mistaken in its reliance on the Supreme Court's decision in *American Hospital Assn. v. NLRB*, 499 NLRB 606 (1991), affirming the Board's rulemaking regarding bargaining units in the health care industry. 76 Fed. Reg. at 54008. There, the Board engaged in the healthcare bargaining unit rulemaking expressly for the purpose of fulfilling its statutory responsibility to determine such units in representation proceedings. There was no dispute that the rulemaking activity was in support of the Board's existing jurisdiction and not an effort to *expand* that jurisdiction as is the case here.

The Board also contests here the meaning of the plain language of the Supreme Court's decision in *Teamsters Local 357*, discussed above, which declared unequivocally that "the Board cannot go farther and establish a broader, more pervasive regulatory scheme [than authorized by Congress]." 365 U.S. 667. The Board now contends that the *Teamsters 357* Court "simply meant to remind the Board that it may not administratively amend Section 8(a)(3) and 9b)(2) to prohibit nondiscriminatory activity that might be viewed as undesirable…." 76 Fed. Reg. at 54014. The Board is compelled to concede, however, that its new interpretation of the Supreme

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[6] In *NLRB v. Nash-Finch Co*., 404 U.S. 138, 142 (1971), the Supreme Court held that the Board could enjoin state court proceedings in derogation of the Board's jurisdiction over unfair labor practices. The Court likewise held in *In re National Labor Relations Board,* 304 U. S. 486, 496, the Board might petition for writ of prohibition against premature invocation of the review jurisdiction of the Court of Appeals, again in aid of the Board's own jurisdiction. In *Amalgamated Workers v. Edison Co*., 309 U. S. 261, the Court held that the Board had implied authority to institute contempt proceedings for violation of court decrees enforcing orders of the Board. Finally, in *Nathanson v. NLRB*, 344 U. S. 25, the Court allowed the Board to file claims in bankruptcy covering the sums included in its back-pay awards. Thus, in every one of these cases relied on by the Board, the authority upheld by the Court was the authority necessary for the Board to preserve its undisputed jurisdiction to enforce the Act. The present Rule does not claim to be needed to preserve the Board's jurisdiction but rather to *expand* it, in a way that is directly contrary to the limited grant of authority by Congress.

Court's holding in *Teamsters 357* is at odds with the view of the case that the Board itself has previously espoused for at least the past twenty years.[7]

The Board's present attempt to expand its authority ignores the Supreme Court's repeated holdings recognizing the statutory limits on the Board's jurisdiction, both in *Teamsters Local 357* and in the several cases cited above at p. 10. Therefore, contrary to the Board's new view of its jurisdiction, the agency remains prohibited by its governing statute from "going farther" by establishing a "broader, more pervasive regulatory scheme," which is exactly what the Board is attempting to do in the present Rule.

Finally, whereas the express Congressional authorization of every other federal labor agency's notice posting requirements should be viewed as a clear expression of an intent *not* to similarly authorize the Board's Rule, the Board has claimed that the notice posting rules of these other agencies somehow support the Board's action here. 76 Fed. Reg. at 54013. The Board cites in particular the Department of Labor's 1949 notice posting rule under the Fair Labor Standards Act (FLSA), discussed above at p. 12. The Board ignores the fact that the Labor Department's rule did not impose any penalties on employers who failed to comply with it, unlike the Board's current Rule. As a result, no one saw fit to challenge the Labor Department posting rule and so the courts never had the opportunity to consider the rule's legality. In any event, the FLSA did authorize the DOL to require employers to maintain reports and records,

[7] *See Statement of the Board in the Union Dues Regulation Proceeding*, 57 Fed. Reg. 43635, 43637-38 (Sept. 22, 1992) (declaring that the Supreme Court's holding prevented the Board from engaging in rulemaking that broadened the regulatory scheme of the NLRA). Though that rulemaking was withdrawn on other grounds, 61 Fed. Reg. 11167 (Mar. 19, 1996), the Board's view of *Teamsters 357* remained unchanged until the current proceeding, in which the Board has declared its earlier view to be "abandoned." 76 Fed. Reg. 54014.

which the DOL cited as authorization for the notice posting rule. Congress has given no such authority to the NLRB.[8]

In sum, contrary to the Board's claims, Congress has limited the scope of the Board's authority in ways that distinguish the agency from those other agencies which have been allowed to order employers to post notices of employee rights. Sections 9 and 10 explicitly describe the contours of the Board's power and make unquestionably clear that in the absence of such a charge or petition, and in the absence of express statutory authority, the Board has no jurisdiction to regulate employer conduct beyond those provisions.

Here, the Board purports to assert jurisdiction over six million employers nationwide and requires them to post a notice under threat of administrative prosecution, all in the absence of an unfair labor practice charge or representation petition. Nothing in the Act grants the Board such power. Accordingly, the Board has manifestly exceeded its statutory authority.

## VI. The Board's Promulgation Of The Rule Is Arbitrary And Capricious And Not A Reasonable Construction Of The Act.

Even assuming, *arguendo*, that notice-posting rulemaking authority can somehow be gleaned from the patent absence of such provision in the Act, the Rule must nonetheless be enjoined as being arbitrary, capricious and not a reasonable construction of the Act. *Chevron, supra; Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins., Co., supra.*

An agency rule is arbitrary and capricious when the agency's putative justification for the rule neglects or is contrary to the evidence before the agency during the rulemaking process. *See*, *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962); *cf American Hospital Association v. NLRB*, 499 U.S. 606 (1991). An agency rule is arbitrary and capricious when it is

[8] Nor has Congress given to the Board the type of authority given to the President under the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., which allowed the President to order the posting of employee rights by federal contractors in Executive Order 13496.

supported by insufficient or selective evidence. Scrutiny of the Board's justification for the Rule (attached hereto in the announcement of the Rule as Exhibit A) reveals no substantial, credible evidence supporting a need for the Rule. The alleged empirical evidence cited by the Board as the basis for generating the Rule consists solely of random anecdotes, a few selective studies cited in discrete articles, and partisan opinion. Substantive empirical evidence and analyses of rigorous scholarly merit are completely lacking. The Board, without a shred of credible evidence, contends that the Rule is necessary because employees are unaware of their NLRA rights. Rule at 21. The Board does not even attempt to explain why it is now imperative to address this problem 75 years after passage of the Act and in an environment of robust information and media proliferation. For reasons that are well stated in Member Hayes' dissenting opinion, the Board's specious rationalizations for promulgating the Rule are the very definition of arbitrary and capricious, and are unworthy of *Chevron* deference. See 76 Fed. Reg. at 54040-41 ("Neither the Notice of Proposed Rulemaking nor today's notice summarizing comments in response to that notice come anywhere close to providing a substantial factual basis supporting the belief that most employees are unaware of their NLRA rights.").

## VII. By Creating A New Unfair Labor Practice Under The Rule The Board Has Exceeded The Authority Granted To It By Congress.

Section 104.210 of the Rule states in pertinent part that: "[f]ailure by [employers] to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of their 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)." Section 104.210 of the Rule further provides that: "the Board will determine whether an employer is in compliance [with the Rule] when a person files an unfair labor practice charge alleging that the employer has failed to post the notice required [under Subpart B of the Rule]."

Section 104.210 of the Rule purports to create a new unfair labor practice where an employer covered under the NLRA fails to post a Notice. The Board's action plainly usurps congressional authority. Congress detailed the five unfair labor practices that may be committed by an employer in Section 8(a) of the NLRA, 29 U.S.C. § 158(a). The failure to post a notice of employee rights under the Act is not among them. Moreover, Section 10(a), 29 U.S.C. § 160(a), specifically empowers the Board to address *only* those unfair labor practices "listed in Section 158 of this title." Although the new unfair labor practice ostensibly derives from Section 8(a)(1), 29 U.S.C. § 158(a)(1), that Section makes it unlawful for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title." Section 157 has absolutely nothing to do with notice-posting.

The Board is not authorized to alter, augment or add to the enumerated unfair labor practices established by Congress. As noted above, the Supreme Court's opinion in *Local 357, Teamsters v. NLRB*, *supra* is controlling in this regard. There, the Board added two requirements to hiring hall arrangements (to prevent unlawful encouragement of union membership) not specifically provided by Congress. The Court held that the Board is confined to the hiring hall regime established by Congress and is without authority to establish a broader regulatory scheme.[9]

The Board cannot arrogate unto itself the legislative power to establish unfair labor practices that could subject employers to sanctions. Neither does the Board have the authority to amend the Act. Such power and authority is the province of Congress alone. Yet, in the present

[9] In defense of its Rule, the Board claims that it has previously "found numerous actions as to which Section 8 is silent . . . to violate Section 8(a)(1) . . ." But the failure to post a notice of employee rights is not an action; it is a form of *inactivity* which cannot be found to violate the Act except by creating a *new* unfair labor practice that Congress never countenanced. The Board's claimed analogies to other so-called "failures to act" are clearly erroneous. In each example offered by the Board, the failure to act was an unfair labor practice only when associated with affirmative actions by unions or employers that violated the Act. *See California Saw & Knife Works,* 320 NLRB 224, 233 (1995) (failure to give notice of so-called Beck rights not to pay dues is a violation only when the union takes action against non-payors).

case, the Board presumes to create a new notice-posting requirement *and* a new unfair labor practice for failure to post such Notice. The statutes cited in Section IV hereof that penalize failure to post mandated notices contain specific statutory authorization for such sanctions. *See*, Railway Labor Act, 45 U.S.C. § 152; Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-10; the Family and Medical Leave Act, 29 U.S. § 2619(a); and the Occupational Safety and Health Act, 29 U.S.C. § 657(c). On the other hand, the Americans With Disabilities Act, 42 U.S.C. § 12115; the Uniform Service Employment and Re-employment Rights Act, 38 U.S.C. § 4334(a); and the Age Discrimination in Employment Act, 29 U.S.C. § 627 do not contain specific statutory authorization for the relevant enforcement agencies to impose sanctions. Accordingly, they do not.

The Board stands alone in promulgating a notice-posting rule without statutory authority *and* in creating an unfair labor practice for failure to post the notice, again without statutory authority. Therefore, promulgation of the Rule violates the unambiguously expressed intent of Congress, contrary to Step 1 of the *Chevron* standard and is an impermissible and unreasonable construction of the NLRA under Step 2 of the *Chevron* standard. The Rule, therefore, is unlawful and should be set aside under the APA, 5 U.S.C. § 706(2)(C). Further, the Rule must be held unlawful and set aside as "arbitrary, capricious, . . . or otherwise not in accordance with the law" under 5 U.S.C. § 706(2)(A) of the APA.

## VIII. By Promulgating The Rule Purporting To Toll The Statute Of Limitations For Unfair Labor Practice Charges, The Board Has Again Exceeded The Authority Granted To It By Congress.

The Supreme Court and various circuit courts have made it abundantly clear that the Board has no authority to alter the statute of limitations for filing an unfair labor practice charge. As the Court stated in *Local Lodge No. 1424, etc., et al. v. National Labor Relations Board,* 362 U.S. 411 (1960):

> "As expositor of the national interest, Congress, in the judgment that a six month limitation period did not seem unreasonable, H.R. Rep. No. 245 80th Cong., 1st Sess., p. 40, barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights.
>
> It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy." (citing *Colgate-Palmolive Peet Co. v. National Labor Relations Board,* 338 U.S. 355, 363 (insert date).

Courts have repeatedly stressed that a statute of limitations established by Congress cannot be defeated by policy of the Board. *See Local Lodge 1424, supra*; *see also*, *Don Lee Distributor, Inc. v. National Labor Relations Board,* 145 F.3d 834 (6th Cir. 1998). Nonetheless, Section 102.214(a) of the Rule provides for the tolling of the statute of limitations for unfair labor practice charges. Section 102.214(a) provides in pertinent part that: "[w]hen 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 (6) 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." (Emphasis added). Thus, the Board purports to toll the statute of limitations for filing an unfair labor practice charge where an employer has failed to post a notice.

Section 10(b) of the NLRA, 29 U.S.C. § 160(b), however, provides in pertinent part that: "*[n]o complaint shall issue* based upon any unfair labor practice charge occurring *more than six (6) months prior to the filing of a charge* with the Board and service of a copy thereof upon a 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 (6) month period shall be computed from the day of his discharge." (Emphasis added). It is clear that the only exception to the six (6) month statute of limitations for filing an unfair labor

practice charge contemplated by Congress pertains to persons prevented from filing because of service in the military. Nothing in Section 10(b) evinces congressional intent to toll the statute of limitations where an employer has failed to post a notice not authorized by Congress.

Not only is the Rule's tolling of the Section 10(b) statute of limitations not authorized by Congress, its application to the unauthorized Notice is arbitrary and capricious. Statutes of limitation may not be altered at the whim of an agency:

> The statute of limitations is short . . . in most employment cases because the delay in bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements. We should not trivialize the statute of limitations by promiscuous applications of tolling doctrines.

*Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990). *See also*, *Kanakais Co., Inc.*, 293 NLRB 435 (1989).

As stated in *Local Lodge 1424, supra*, permitting the Board to alter the statute of limitations would "vitiate policies which underlie that provision of the Act (i.e., 10(b)) and which are to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere and recollections of events in question have become dim and confused, and to stabilize existing bargaining relationships." *Id.* at 419.

Section 102.214(a) therefore exceeds the unambiguously expressed intent of Congress contrary to Step 1 of the *Chevron* standard. Moreover, the tolling of the statute of limitations is "arbitrary, capricious, . . . or otherwise not in accordance with the law" and must be set aside under Step 2 of the *Chevron* standard.

## IX. The Rule Violates Section 8(c) Of The Act And The First Amendment By Compelling Employers To Engage In Speech They Would Not Otherwise Issue.

The First Amendment's protection of freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights,*

*Inc.*, 547 U.S. 47, 62 (2006). The Supreme Court has stated that where a statute "[m]andat[es] speech that a speaker would not otherwise make," the statute "necessarily alters the content of the speech." *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Corporate employers do not lose free speech protection because of the corporate status of the speaker. *See Pacific Gas and Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986).

Although the First Amendment's protection against compelled speech is not absolute, the exceptions typically arise in the commercial sphere. The state (*i.e.* governmental agency) may require speakers to express certain factual and uncontroversial messages without their consent. The most common examples are warning and nutritional labels, provided the speech requirements are reasonably related to the state's interest in preventing deception of consumers. *See Nat'l Elec. Mfrs. Ass'n. v. Sorrell*, 272 F.3d 104 (2nd Cir. 2001); *See also Zauderer v. Office of Disciplinary Council for Sup. Ct. of Ohio*, 471 U.S. 626 (1985). Where the speech compelled is subjective and controversial, a strict scrutiny analysis applies. The speech requirement must then serve a compelling state interest and be narrowly tailored to serve that interest. *FCC v. Pacifica*, 438 U.S. 726 (1978).

The Rule in the present case compels Plaintiffs, their members and all employers subject to the Act to post a Notice containing selective information regarding employee rights under the Act. The speech so compelled relates almost exclusively to rights favoring or promoting unionization. The Notice does not include significant employee rights related to, for example, the right to decertify a union or not pay dues in support of a union's political agenda. The biased nature of the Notice compels employers to engage in speech they would not otherwise make. Essential factual information regarding employee rights is omitted.

Section 8(c) of the Act, 29 U.S.C. § 158(c) permits employers to express their views, arguments and opinions as they deem fit on subjects covered by the Act. This section also grants employers the right to select the medium through which they will communicate their message. By compelling employers to communicate through specified media a selective and incomplete message, the Rule necessarily compels employers to communicate a subjective and controversial message — one that both violates employers' Section 8(c) rights and fails to meet the strict scrutiny standard. The dissemination of selective information regarding employer rights does not constitute a compelling governmental interest. Moreover, even if the notice-posting constituted a compelling state interest, the Rule's requirement that *all* employers post the Notice is not narrowly tailored to meet that interest. As noted by the Court in *Riley, supra,* "the State [could] itself publish" the information it requires employers to post. *Id.* at 800. The Board, by using all employers as a proxy for disseminating certain information regarding employee rights, has exceeded the narrow tailoring prong as well as the compelling state interest prong of the strict scrutiny standard. This is especially true given that employer speech is compelled by a newly-created penalty the Board has no authority to impose.

The Rule must therefore be held unlawful and set aside under the First Amendment, Section 8(c), 29 U.S.C. § 158(c) and the APA 5 U.S.C. § 706(2)(C).

## *CONCLUSION*

Plaintiffs respectfully submit that the Board is wholly without authority to enact the Rule and this Court should grant Plaintiffs' motion for summary judgment because there exists no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law.

Respectfully submitted,

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