

Spring 2010

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Online ISSN: 2643-7759

### Recommended Citation

Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411 (2010).

DOI: <https://dx.doi.org/10.25148/lawrev.5.2.10>

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# The Potential of Rulemaking by the NLRB

Jeffrey S. Lubbers\*

## I. INTRODUCTION

It is striking to note that there seems to be more Labor Law notice-and-comment rulemaking in the People's Republic of China than there is in the National Labor Relations Board (NLRB).

In May 2008, the Legislative Affairs Office of China's State Council released a draft of *Regulations on the Implementation of Labor Contract Law* and began seeking public comments.<sup>1</sup> The Regulations consist of forty-five articles, mainly including provisions on open-term labor contracts, economic compensation, outsourced labor, etc.<sup>2</sup> I later learned that 82,000 "opinions" from the public were received.<sup>3</sup>

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<sup>1</sup> See "Labor Contract Law Implementation Regulations Opened for Public Comment," XINHUA NEWS (May 9, 2008), available at <http://www.csrlaws.com/reports-71.html> (announcing that release). The Labor Law Contract itself was adopted at the 28th Session of the Standing Committee of the 10th National People's Congress of the People's Republic of China on June 29, 2007 and entered into force as of January 1, 2008. See Li & Fund Research Centre, *China's Newly Adopted Labor Contract Law*, China Distribution and Trading, at 3 (July 2007), available at <http://www.idsgroup.com/profile/pdf/distributing/issue42.pdf> (reporting that 190,000 responses were received in a month). I should hasten to add that, while China is making significant progress in obtaining public comment on proposals, it lacks an administrative procedure act that requires agencies to respond to such comments or allows adversely affected persons to seek judicial review of these sorts of "normative acts." See Peter Howard Come, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 387 (2002) (describing the consultation process but opining that "the key problem remains that the drafters, despite extensive solicitation for public comment and consultation, may decide not to take the comments on board"); John Ohnesorge, *Chinese Administrative Law in the Northeast Asian Mirror*, 16 TRANSNAT'L LAW & CONTEMP. PROBS. 103, 148 (2006) (describing the government's resistance to judicial review).

<sup>2</sup> See generally Gregory Sy, *Implementation Regulations For the Labor Contract Law of the People's Republic of China – A Summary*, <http://ezinearticles.com/?Implementation-Regulations-For-the-Labor-Contract-Law-of-the-Peoples-Republic-of-China-A-Summary&id=1545454> (summarizing the final regulations).

<sup>3</sup> See *Procedures Guidelines for Public Opinion Solicitation in Administrative Legislation through Mass Media like Internet and Newspapers*, at 3 (unsigned, undated briefing paper received from Chinese government for conference in Beijing, March 4-5, 2010, on file with author).

In contrast, although the NLRB has clear statutory authority to use rulemaking,<sup>4</sup> its last major successful substantive rulemaking was completed in 1989, when the Board issued a rule specifying the collective bargaining units in acute-care health care facilities<sup>5</sup> – a rule that was upheld by the Supreme Court in *NLRB v. American Hospital Ass'n*.<sup>6</sup> Since then the Board has proposed but withdrawn two other substantive rules. One, a rule to implement the Supreme Court's decision in *Communications Workers v. Beck*,<sup>7</sup> was proposed in September 1992<sup>8</sup> and withdrawn in 1996.<sup>9</sup> The other, concerning the appropriateness of single location bargaining units in certain industries, was floated in an advance notice of proposed rulemaking in 1994,<sup>10</sup> proposed in 1995,<sup>11</sup> and withdrawn in 1998.<sup>12</sup> Other than those two failed attempts, in the past 20 years, the Board has issued a smattering of procedural, privacy, and housekeeping rules – mostly as final rules – and has used the notice-and-comment process only 17 times.<sup>13</sup>

This seems curious since the Board clearly has broad discretion to make policy either by rulemaking or adjudication. Over the years, the Supreme Court and lower courts have basically upheld the legality of policymaking by adjudication (with some limits on application of newly

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<sup>4</sup> 29 U.S.C. § 156 (2006) (“The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.”).

<sup>5</sup> See Collective Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336 (Apr. 21, 1989) (to be codified at 29 C.F.R. pt. 103).

<sup>6</sup> *NLRB v. Am. Hosp. Ass'n*, 499 U.S. 606 (1991); see also Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991) (providing a comprehensive analysis of the rule making challenged in *NLRB v. Am. Hosp. Ass'n* and the ensuing litigation).

<sup>7</sup> *Comm'n Workers v. Beck*, 487 U.S. 735 (1988).

<sup>8</sup> See Union Dues Regulations 57 Fed. Reg. 43,635 (proposed Sept. 22, 1992) (to be codified at 29 C.F.R. pt. 103) (following 57 Fed. Reg. 7897 (proposed Mar. 5, 1992) (an earlier advance notice of proposed rulemaking)).

<sup>9</sup> See Rules and Procedures for the Implementation of *Comm'n Workers v. Beck*, 61 Fed. Reg. 11,167 (proposed Mar. 19, 1996) (to be codified at 29 C.F.R. pt. 102); see also, Scott A. Zebrak, Comment, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Health Care Bargaining Unit Rule and by the Proposed Beck Union Dues Regulation*, 8 ADMIN. L.J. AM. U. 125, 147-58 (1994) (analyzing the Board's rulemaking response to *Beck* prior to its subsequent withdrawal of the rule).

<sup>10</sup> See Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 59 Fed. Reg. 28,501 (proposed June 2, 1994) (to be codified at 29 C.F.R. pt. 103).

<sup>11</sup> See Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50,146 (proposed Sept. 28, 1995) (to be codified at 29 C.F.R. pt. 103).

<sup>12</sup> See Rules Regarding Standardized Remedial Provisions in Board Unfair Labor Practice Decisions and the Appropriateness of Single Location Bargaining Units in Representation Cases, 63 Fed. Reg. 8890 (proposed Feb. 23, 1998) (to be codified at 29 C.F.R. pt. 103).

<sup>13</sup> In the twenty years from 1990 to the present, a search of Westlaw by the author on May 10, 2010 [NLRB & “proposed rule” & da(aft 1989)] revealed that the Board has only issued about 30 rule-making documents, which were most of the procedural or housekeeping rules that were issued as final rules without notice and comment.

announced policies to parties before the Board who might have relied on the law as it was).<sup>14</sup> And its authority to issue rules was upheld by a unanimous Supreme Court (affirming the Seventh Circuit's decision authored by Judge Posner).<sup>15</sup>

One would think that the Board would have taken its hard-earned victory in the Supreme Court and built on it. Indeed, Professor Mark Grunewald, in his study prepared for the Administrative Conference of the United States in the aftermath of the Board's victory in the Supreme Court, wrote that "[t]he Board's institutional resolve against substantive rulemaking appeared to have collapsed, and it was possible to imagine wide-ranging and vigorous use of this previously dormant policymaking device in the labor relations area."<sup>16</sup>

However, this vision has not materialized. Instead the Board maintained its resistance to rulemaking, despite its apparent success in the health care bargaining unit rule. Other than that rule, codified at 29 C.F.R. § 103.30, the Board's CFR chapter only contains three other substantive rules (listed in Part 103 under the heading, "Other Rules"). These cover jurisdictional standards for colleges and universities,<sup>17</sup> and two relatively insignificant workplaces – symphony orchestras,<sup>18</sup> and horse/dog racing.<sup>19</sup>

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<sup>14</sup> See *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (holding that normally "the choice between rulemaking and adjudication lies in the first instance in the Board's discretion"); *NLRB v. St. Francis Hosp.*, 601 F.2d 404 (9th Cir. 1979) (holding that the Board could announce a prospective policy in an adjudication, but had to allow parties in subsequent enforcement actions to challenge application of the policy to them).

<sup>15</sup> *N.L.R.B. v. Am. Hosp. Ass'n.*, 499 U.S. 606 (1991), *aff'g* 899 F.2d 651 (7th Cir. 1990).

<sup>16</sup> Grunewald, *supra* note 6, at 276.

<sup>17</sup> *Colleges and Universities*, 29 C.F.R. § 103.1 (2009). According to the final rule preamble, the proposed rule received 33 comments. *Colleges and Universities*, 35 Fed. Reg. 18,370 (Dec. 19, 1970).

<sup>18</sup> *Symphony Orchestras*, 29 C.F.R. § 103.2 (2009). According to the final rule preamble, the proposed rule received 26 comments. *Jurisdictional Standards Applicable to Symphony Orchestras*, 38 Fed. Reg. 6176 (Mar. 7, 1973).

<sup>19</sup> *Horsereading and Dogracing Industries*, 29 C.F.R. § 103.3 (2009). This rule simply announced that the Board would not assert jurisdiction under in any proceeding under sections 8-10 of the NLRA involving these industries. The final rule preamble, did not disclose how many comments were received on the proposal. See *Horsereading and Dogracing Industries*, 38 Fed. Reg. 9507 (Apr. 17, 1973). Two other rules in the part are really procedural rules: one on posting of election notices (29 C.F.R. § 103.30), and another on notices concerning offers of reinstatement to military employees (29 C.F.R. § 103.100). There are three other parts in the NLRB's CFR chapter: "Administrative regulations," (29 C.F.R. pt. 100), "Statement of procedures" (pt. 101), and "Rules and regulations, Series 8" (pt. 103). All of these rules concern rules of practice before the Board and other procedural and housekeeping measures.

## II. THE BOARD'S CONSISTENT HISTORY OF SHRUGGING OFF CRITICISM BY COMMENTATORS

This is not a new issue for the Board. It has always made policy primarily through case-by-case adjudication. Professor Grunewald's article lists nine articles criticizing the Board for not making greater use of rule-making,<sup>20</sup> starting with Cornelius Peck's 1961 article, "The Atrophied Rulemaking Powers of the National Labor Relations Board"<sup>21</sup> and only one that defends the Board's practice.<sup>22</sup> Indeed, in the face of this criticism by commentators it has justified this posture in legal briefs.<sup>23</sup>

Nor is the NLRB alone in being criticized for over-reliance on policy-making through adjudication. As one commentator has concluded:

The use of administrative adjudication as a significant means of agency lawmaking has been the subject of sustained academic critique. In a series of articles spanning more than a half century, academic commentators have argued that agency lawmaking through adjudication suffers from a number of significant drawbacks – including decreased public participation, a lack of prospectivity, lesser transparency or predictability for regulated entities, and a tendency to arise in fact-bound circumstances – which make it inferior to legislative lawmaking by administrative agencies.<sup>24</sup>

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<sup>20</sup> Grunewald, *supra* note 6, at 274-75, n.3 (citing Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); Kenneth Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 UCLA L. REV. 63 (1973); Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9 (1987); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254 (1968); Cornelius J. Peck, *The Atrophied Rulemaking Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Carl S. Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction*, 25 LAB. L.J. 607 (1974); and Berton B. Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units*, 32 LAB. L.J. 105 (1981).

<sup>21</sup> Cornelius J. Peck, *The Atrophied Rulemaking Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961).

<sup>22</sup> Robert L. Willmore, Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982 (1980).

<sup>23</sup> See Zebrak, *supra* note 9, at 129 (describing the NLRB's brief in the Supreme Court case of *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969)).

<sup>24</sup> Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 649 (2008). She notes the very early article by Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 259-61 (1936) suggested that it would be preferable for the Federal Trade Commission to make law through legislative lawmaking rather than through adjudication. Also on this subject she cites William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Law-*

In 1986 then-ACUS General Counsel Richard K. Berg provided a classic listing of the respective advantages between adjudication and rulemaking for policy making purposes.<sup>25</sup> He began by saying that neither mode “is an inherently superior mode of decisionmaking for all occasions.”<sup>26</sup> With respect to adjudication, he said that it is the “better suited for intensive exploration of factual disputes and perhaps for resolving narrow policy issues involving limited numbers of contestants.”<sup>27</sup> He pointed out that, with respect to formal adjudication at least, “the party most immediately affected has substantially greater procedural rights than he would have in rulemaking.”<sup>28</sup> He also said that adjudication “lends itself to an incremental kind of policymaking, in which conclusions formed in one case are tested and applied or perhaps modified in another case.”<sup>29</sup>

Berg then went on to describe the advantages of rulemaking “where the agency is faced with an issue of potentially broad application or effect.” His catalogue of “frequently cited” reasons include:

1. “Rulemaking with its wider notice and broader opportunities for participation is fairer to the class of persons who would be affected by a new ‘rule’ than if the rule were formulated in an adjudication. Such broader participation also makes rulemaking more efficient as a way for the agency to gather information.”
2. Because rulemaking is normally prospective it is superior as a means of making new policy.
3. A generally applicable rule can provide “greater clarity to those affected as well as greater uniformity in enforcement.”

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*making*, 1980 DUKE L.J. 103, 103 (1980) as “noting that the ‘consensus’ is that agency lawmaking via legislation is superior to adjudication.” Other articles she cites (not cited by Professor Grunewald) criticizing agencies for not using more rulemaking include: Carl McFarland, *Landis’ Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 433-38 (1961) and Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308-09 (1988). Other articles with a more ambivalent or more balanced view identified by Ms. Eyer include: E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491-92 (1992), Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 550-53 (2005); and Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 514-28 (1970).

<sup>25</sup> Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163-64 (1986) (providing a list of advantages for agencies in using of rulemaking instead of adjudication).

<sup>26</sup> *Id.* at 162.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

4. Rulemaking's procedures (at least as provided for in Section 553 of the APA) provide more flexibility than the formal adjudication procedures mandated by Sections 554, 556, and 557. Specifically the agency has more control over presentation of information and may resort to its staff expertise without worrying about the separation of functions requirements in Section 554.

5. Agencies can better control the scope and pace of rulemaking and thereby maintain better control over its agenda.

6. A final rule issued after notice-and-comment rulemaking can "thereafter be applied without re-examination to eliminate case-by-case adjudications."

This last point is important in two ways. A rule properly issued in a rulemaking proceeding allows agencies to limit or eliminate issues that might otherwise require a hearing in an individual case.<sup>30</sup> And it also produces a binding precedent in future cases, unlike a rule announced in an adjudication which can be challenged in future enforcement actions by different parties.<sup>31</sup> On the other hand, the agency is also bound and cannot change a "rulemaking rule" in a future adjudication; it must change it in another rulemaking proceeding.<sup>32</sup> This aspect might have particular salience at the NLRB where shifting majorities often seek to change past adjudicative precedents.<sup>33</sup> It may appeal to a Board that wishes to enshrine its new policy in a way that is more difficult to change. On the other hand, the Board has defended its reluctance to use rulemaking because the "cumbersome process of amending formal rules would impede the law's ability to respond quickly and accurately to changing industrial practices."<sup>34</sup>

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<sup>30</sup> See, e.g., *Heckler v. Campbell*, 461 U.S. 458 (1983); *F.P.C. v. Texaco, Inc.*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Am. Airlines, Inc. v. C.A.B.*, 359 F.2d 624, 633 (1966) (en banc).

<sup>31</sup> Compare *N.L.R.B. v. St. Francis Hosp.*, 601 F.2d 409 (9th Cir. 1979) (rule announced in an adjudication is precedential but may be challenged in next case), with *Nat'l Petroleum Refiners Ass'n v. F.T.C.*, 482 F.2d 672, 690 (D.C. Cir. 1973) (noting that one benefit of making policy via rulemaking was that main issue in future enforcement actions would simply be whether defendant had violated the rule).

<sup>32</sup> See *Am. Fed'n of Gov't Employees Local 3090 v. Fed. Labor Relations Auth.*, 777 F.2d 751, 759 (D.C. Cir. 1985) (holding that an agency "seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal. . . . [U]ntil it amends or repeals a valid legislative rule or regulation, an agency is bound by such a rule or regulation.").

<sup>33</sup> See, e.g., *Int'l Union v N.L.R.B.*, 802 F.2d 969, 974 (7th Cir. 1986) (holding while Board is not bound by stare decisis, it may "jettison its precedents only if it has 'adequately explicated the basis of its new interpretation'" (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267, (1975)).

<sup>34</sup> See *Zebrak*, *supra* note 9 at 129.

Since Berg compiled his list, it is possible that the calculus has changed as rulemaking itself has become more “ossified.”<sup>35</sup> The multiplicity of statutorily and presidentially required analytical and procedural additions to rulemaking may have led agencies to move away from rulemaking to adjudication.<sup>36</sup> However, I know of no empirical or even anecdotal evidence to prove that this has happened. Moreover, policymaking by adjudication may also have become more problematic due to agency problems with the system of administrative law judges (ALJs) that must normally be used in formal adjudication. Agencies have “voted with their feet” by choosing to employ more informal adjudicative procedures including “non-ALJ adjudicators” through various means.<sup>37</sup> More likely, the locus of agency policymaking has shifted away from notice-and-comment rulemaking to informal “guidance,” that may fall within an exemption from the notice-and-comment procedures of the APA, but only if it is not binding or treated as binding on the public.<sup>38</sup>

It would be hard for this article to contribute anything new to the excellent scholarship concerning the Board’s past stance on the choice of rulemaking versus adjudication, or even on the general issues confronting agencies in this regard. Rather, as part of this symposium, I will assume that there is renewed interest in rulemaking at the Board and review the situation as it presents itself today.

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<sup>35</sup> See Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process – For Better or Worse*, 34 OHIO N.U. L. REV. 469 (2008) (describing the reduction in proposed and final rules since 1980 and attributing it to the many additional requirements applicable to rulemaking found in other statutes and executive orders). For the use of the term “ossify,” see, for example, Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

<sup>36</sup> One of the first to raise this possibility was then-Professor Antonin Scalia in 1981. See, Berg, *supra* note 25, at 149 (citing Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, REGULATION, July/Aug. 1981, at 25) (noting Scalia’s “prophe[cy]” that agencies might “turn to adjudication” to avoid the “increasing procedural burdens on rulemaking”).

<sup>37</sup> See Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65 (1996) (detailing the paucity of ALJs at many agencies).

<sup>38</sup> See *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (“Our cases . . . make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding.”). For more on legal limits on agency use of policy statements, see JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 94-105 (4th ed. 2006).



### III. NLRB'S MOST RECENT EXPERIENCES WITH RULEMAKING

#### A. Health Care Bargaining Unit Rulemaking Timeline

The Board's successful health care rule was proposed on July 2, 1987,<sup>39</sup> and public hearings were held in Washington, Chicago and San Francisco on August 17-18, August 31-September 1, and September 14-16, 1987. During the hearings 144 witnesses testified and the Board received 315 written comments.<sup>40</sup> It was re-proposed on September 1, 1988.<sup>41</sup> The final rule was issued on April 21, 1989.<sup>42</sup> The district court enjoined the rule on July 25, 1989,<sup>43</sup> the court of appeals reversed on April 11, 1990,<sup>44</sup> and the Supreme Court affirmed on April 23, 1991.<sup>45</sup> Thus, the rulemaking itself took 1¾ years and the litigation took another two years. But this timeline obviously should not be the norm. The Board's voluntary use of three sets of public hearings may have made sense due to the novelty and complexity of this rulemaking, but it clearly added a lot of time to the process and would normally not be necessary.

As Professor Grunewald noted:

[A] portion of the two years was consumed with a procedure not required for notice and comment rulemaking – multi-location hearings with an opportunity for a form of cross-examination. . . . Under the circumstances of this rulemaking, particularly its novelty for the Board, the hearings were probably a desirable choice. Certainly as a legal matter, however, and perhaps as a practical matter, the hearings were procedural overkill and the burdens created by the number and structure of the hearings would have to be considered as part of the overall cost-benefit evaluation of the rulemaking.<sup>46</sup>

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<sup>39</sup> Collective Bargaining Units in the Health Care Industry, 52 Fed. Reg. 25,142 (proposed July 2, 1987) (to be codified at 29 C.F.R. pt. 103).

<sup>40</sup> Grunewald, *supra* note 6, at 300-01.

<sup>41</sup> Collective Bargaining Units in the Health Care Industry, 53 Fed. Reg. 33,900 (proposed Sept. 1, 1988) (to be codified at 29 C.F.R. pt. 103).

<sup>42</sup> See Collective Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336 (Apr. 21, 1989) (to be codified at 29 C.F.R. pt. 103).

<sup>43</sup> Am. Hosp. Ass'n v. N.L.R.B., 131 L.R.R.M. (BNA) 2751 (N.D. Ill. May 22, 1989).

<sup>44</sup> Am. Hosp. Ass'n v. N.L.R.B., 899 F.2d 651 (7th Cir. 1990).

<sup>45</sup> Am. Hosp. Ass'n v. N.L.R.B., 499 U.S. 606 (1991).

<sup>46</sup> Grunewald, *supra* note 6, at 319-20. The Administrative Conference echoed this view:

The Board should publish rulemaking procedures that conform to the informal rulemaking procedures of the Administrative Procedure Act. These procedures should not require oral hearings or other procedures in addition to notice and the opportunity for comment, as a general matter, although such additional procedures may be useful for particular rulemakings.

Nor would a second round of notice and comments normally be required. And Supreme Court review obviously will be a rare occurrence. On the other hand, the number of written comments was quite low by today's standards, and, unless a judicial review provision is added to the NLRA as recommended below, two rounds of judicial review would likely be the norm in any controversial Board rulemaking.

### B. *Beck* Rulemaking Timeline

The *Beck* case was decided June 29, 1988. The Board issued an advance notice of proposed rulemaking on March 5, 1992, and a notice of proposed rulemaking in September 22, 1992. It was withdrawn on March 19, 1996.<sup>47</sup> In its explanation for the withdrawal, the Board said that it had addressed many of the issues raised by the notice of proposed rulemaking in several recent adjudications, and that other cases on its docket "will afford the Board the opportunity to address many, if not all, of the remaining issues that are addressed in the notice of proposed rulemaking. It is the Board's belief that those issues may now be more expeditiously resolved in those cases than in the rulemaking proceeding."<sup>48</sup>

### C. Single Location Bargaining Unit Rulemaking Timeline

The proposal concerning the appropriateness of single location bargaining units in certain industries was floated in an advance notice of proposed rulemaking on June 2, 1994, proposed on September 28, 1995, and withdrawn on February 23, 1998.<sup>49</sup> In its terse explanation the Board, with one member dissenting, stated that it took this action because "no action has

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Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure: Facilitating the Use of Rulemaking by the National Labor Relations Board (Recommendation 91-5), 56 Fed. Reg. 33,841, 33,852, ¶ 2(a) (July 24, 1991) (to be codified at 1 C.F.R. § 305.91-5), available at <http://www.law.fsu.edu/library/admin/acus/305915.html>.

<sup>47</sup> See *Comm'n Workers v. Beck*, 487 U.S. 735 (1988); *Union Dues Regulations*, 57 Fed. Reg. 43,635 (proposed Sept. 22, 1992) (to be codified at 29 C.F.R. pt. 103) (following 57 Fed. Reg. 7897 (proposed Mar. 5, 1992) (an earlier advance notice of proposed rulemaking)); *Rules and Procedures for the Implementation of Comm'n Workers v. Beck*, 61 Fed. Reg. 11,167 (proposed Mar. 19, 1996) (to be codified at 29 C.F.R. pt. 102); see also, Scott A. Zebrak, Comment, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Health Care Bargaining Unit Rule and by the Proposed Beck Union Dues Regulation*, 8 ADMIN. L.J. AM. U. 125, 147-58 (1994) (analyzing the Board's rulemaking response to *Beck* prior to its subsequent withdrawal of the rule).

<sup>48</sup> *Rules and Procedures for the Implementation of Comm'n Workers v. Beck*, 61 Fed. Reg. 11,167 (proposed Mar. 19, 1996) (to be codified at 29 C.F.R. pt. 102).

<sup>49</sup> See *Appropriateness of Requested Single Location Bargaining Units in Representation Cases*, 59 Fed. Reg. 28,501 (proposed June 2, 1994) (to be codified at 29 C.F.R. pt. 103); *Appropriateness of Requested Single Location Bargaining Units in Representation Cases*, 60 Fed. Reg. 50,146 (proposed Sept. 28, 1995) (to be codified at 29 C.F.R. pt. 103); 63 Fed. Reg. 8890 (proposed Feb. 23, 1998) (to be codified at 29 C.F.R. pt. 103).

been taken by the Board on [the] rulemaking proceeding for several years and [because of] the Board's determination to focus its time and resources on reducing the backlog of adjudicated cases pending before the Board."<sup>50</sup> It also dropped a footnote citing a congressional rider attached to each of the NLRB's 1996, 1997, and 1998 appropriations bills that prohibited the agency from expending any funds to promulgate a final rule in that rule-making proceeding.<sup>51</sup>

#### IV. POTENTIAL OBSTACLES TO BOARD RULEMAKING TODAY

##### A. "Ossification" Concerns Should be Somewhat Less for the Board

The ossification concerns mentioned above that currently affect all agency rulemaking may be less pronounced for an independent agency like the Board. Several important statutes and almost all of the analytical and procedural requirements found in Executive Orders and other presidential directives are inapplicable to Board rulemaking. The primary statutes that apply, other than the National Labor Relations Act (NLRA) and the Administrative Procedure Act, are the Paperwork Reduction Act (PRA), and the Regulatory Flexibility Act (RFA) (along with its follow-up legislation the Small Business Regulatory Enforcement Fairness Act). The National Environmental Policy Act (NEPA) also applies, but it is difficult to imagine how a Board rule would be a "major Federal action[] significantly affecting the quality of the human environment."<sup>52</sup>

##### 1. Paperwork Reduction Act

The NLRB rarely has a problem with the PRA. In its occasional procedural rulemakings it has disclaimed any impositions of reporting or recordkeeping requirements under the PRA. On occasion it has appropriately sought Office of Management and Budget (OMB) approval of a free-standing form or other information collection request.<sup>53</sup> While it is true that a substantive rulemaking may contain a reporting requirement or other information collection request, and that would bring the NLRB into the orbit of OMB review, the Board, like all independent regulatory agencies has the right under the Act to override a denial of approval by a majority

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<sup>50</sup> Withdrawal of Proposed Rulemakings, 63 Fed. Reg. 8890, 8891 (Feb. 23, 1998).

<sup>51</sup> *Id.* at n.2.

<sup>52</sup> 42 U.S.C. § 4332 (2006).

<sup>53</sup> See, e.g., Notice of Final Designation Procedures for Grantees, 68 Fed. Reg. 75,643, 75,652 (Dec. 31, 2003) (form for supplemental statement for application for professional position in the Office of the General Counsel).

vote of its members.<sup>54</sup> Thus, the PRA should not pose much of an obstacle to NLRB rulemaking.

## 2. Regulatory Flexibility Act

The Regulatory Flexibility Act requires agencies to consider the impact of proposed rules on “small entities” – including “small businesses,” “small (not-for-profit) organizations,” and “small governmental jurisdictions.”<sup>55</sup> The Act does not, however, mandate any particular outcome in rulemaking. It only requires consideration of alternatives that are less burdensome to small entities and an agency explanation of why alternatives were rejected.<sup>56</sup>

In practice, the way this would work is that unless the Board certifies to the Chief Counsel for Advocacy of the Small Business Administration, and publishes such certification in the Federal Register, that the rule will not have a “significant economic impact on a substantial number of small entities,”<sup>57</sup> the agency must prepare an “initial regulatory flexibility analysis” (IRFA). The IRFA, or a summary thereof, must be published in the Federal Register along with the proposed rule. The IRFA or the certification must be sent to the Chief Counsel for Advocacy. Courts now regularly review such certifications.<sup>58</sup>

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<sup>54</sup> 44 U.S.C. § 3507 (f) (2006).

<sup>55</sup> 5 U.S.C. § 601(3)-(5) (2006) (providing definitions of these terms, although they are opened in the sense that agencies can establish alternative definitions appropriate to their activities); *see also* Dep’t. of Commerce, GUIDELINES FOR PROPER CONSIDERATION OF SMALL ENTITIES IN AGENCY RULEMAKING, available at <http://www.ogc.doc.gov/ogc/legreg/zregs/guidelines.htm> (“A small business is any business that meets the size standards set forth in part 121 of Title 13, Code of Federal Regulations (CFR). Part 121 sets forth, by the North American Industry Classification System (NAICIS), the maximum number of employees or maximum average annual receipts a business may have to be considered a small entity. Provision is made for an agency to develop industry-specific definitions. The NAICIS is available at <http://www.sba.gov/size/sizetable2002.html>. A small organization is any not-for-profit enterprise that is independently owned and operated and not dominant in its field. A small government jurisdiction is any government or district with a population of less than 50,000.”).

<sup>56</sup> 5 U.S.C. § 603(a)(3)-(b)(3); *see also* 5 U.S.C. § 611(b) (noting that the agency’s explanation will be part of the “whole record of action” if judicial review of a final rule is sought).

<sup>57</sup> 5 U.S.C. § 605(b) (2006).

<sup>58</sup> For a case upholding the Agency’s certification, *see* *Cement Kiln Recycling Co. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (holding that under the RFA, an agency need not consider impacts on small business indirectly affected by the regulation of other entities, and upholding EPA certification by concluding that only six directly affected facilities met the definition of a “small business” and that only two of these would experience compliance costs in excess of one percent of annual sales); *but see* *N.C. Fisheries Ass’n, Inc. v. Daley*, 27 F. Supp. 2d 650, 659-60 (E.D. Va. 1998) (setting aside the annual fishing quota rule where the Secretary “did not consider a community any smaller than the entire state of North Carolina . . . ignored readily available data which would have shown the number of fishing vessels impacted by the agency’s regulations, . . . disregarded the simple distinction between a license holder and a fisherman who actually fishes for flounder . . . [and] improperly maintained that any present economic loss are alleviated by past revenues earned by overfishing”); *S. Offshore Fishing Ass’n v.*

When a rule will have a significant economic impact, the agency, in addition to publishing the proposed rule and IRFA, or summary, in the Federal Register, “shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques” such as advance notice of proposed rulemaking, publication of notice in specialized publications, direct notification of small entities, the holding of public conferences or hearings, or use of simplified or modified procedures that make it easier for small entities to participate.<sup>59</sup> After the comment period on the proposed rule is closed, the agency must either certify a lack of impact or prepare a “final regulatory flexibility analysis” (FRFA), which, among other things, responds to issues raised by public comments on the IRFA.<sup>60</sup> The agency is not required to send the FRFA to the Chief Counsel for Advocacy, but it must make it available to the public on request and publish the analysis or a summary of it in the Federal Register.<sup>61</sup>

It is unclear how big of a burden this would be for the Board. It is interesting to note that in the health care bargaining unit rule itself, the Board issued a second notice of proposed rulemaking, in part to add a Regulatory Flexibility Act certification.<sup>62</sup> It is certainly possible that a Board rule might have a “significant economic impact on a substantial number of small entities,” and if so the agency would need to do the requisite analysis. This determination is subject to judicial review.<sup>63</sup> However, the courts have held that only “small entities directly regulated by the proposed [regulation] – whose conduct is circumscribed or mandated – may bring a challenge to the RFA analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.”<sup>64</sup> This may mitigate the risk of a lawsuit against the Board under the RFA.

Daley, 995 F. Supp. 1411, 1434-37 (M.D. Fla. 1998) (rejecting the Commerce Department’s certification of no significant impact on shark fishermen of a fifty-percent quota cut, and granting summary judgment under RFA); *S. Offshore Fishing Ass’n v. Daley*, 55 F. Supp. 2d 1336 (M.D. Fla. 1999) (granting an injunction against the following year’s quota after remand).

<sup>59</sup> 5 U.S.C. § 609 (2006).

<sup>60</sup> 5 U.S.C. § 604(a); *see also* *Grand Canyon Air Tour Co. v. FAA*, 154 F.3d 455, 470-71 (D.C. Cir. 1998) (accepting FAA’s responses to comments on IRFA).

<sup>61</sup> 5 U.S.C. § 604(b).

<sup>62</sup> *See* *Collective-Bargaining Units in the Health Care Industry*, 53 Fed. Reg. 33,900, 33,934 (Sept. 1, 1988) (to be codified at 29 C.F.R. pt. 103); Grunewald, *supra* note 6, at 304 (suggesting that the “desire to correct [the omission of the certification] might, in part have motivated an additional comment period”). *See also* the recent “clarification” by the National Mediation Board to a proposed rule adding such a formal certification, 74 Fed. Reg. 64,695 (Dec. 4, 2009).

<sup>63</sup> 5 U.S.C. § 611 (2006).

<sup>64</sup> *White Eagle Co-op. Ass’n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009).

A quirk in the NLRA might also have an effect on the Board's performance of its duties under the RFA. Section 4 of the NLRA, 29 U.S.C. § 154, appears to bar the Board from hiring economists.<sup>65</sup> This provision was added in the Taft Hartley Act,<sup>66</sup> but the legislative history is sparse.<sup>67</sup> In the Senate's debate over whether to override President Roosevelt's veto, Senator Kilgore (D-WV) criticized the provision:

[S]uch experts are necessary to study industrial relations, to study company statistical records, to help compute back-pay obligations of companies, to provide the necessary advice for the Board to determine what is and what is not fail in the way of wages. But they are forbidden to hire such men. Whom are they going to get? Will the Board proceed along the line of intelligent guesses we hear so much about? How a Government agency concerned week in and week out with problems arising out of economic conditions can function without the help of economists is a question I cannot answer. I would as soon operate a mine without a mining-engineer as to try to establish a wage scale without an economic staff who can study the economics of the situation.<sup>68</sup>

Senator Ferguson (R-MI), in responding to Senator Kilgore, seemed to be concerned that without the provision, "this administrative board [could] go outside the record, build up its own record unbeknown to the union or the company, and make a decision based on what it may find from the opinion of its own economists outside the record."<sup>69</sup>

But regardless of the motives of the drafters, this provision hardly squares with recent congressional moves to increase the use of cost-benefit analysis in regulation, and I suspect that the Board would have very little difficulty in obtaining congressional acquiescence in removing this provision. If it is not removed, however, it would be hard to fault the Board for not performing adequate economic analysis under the RFA or any other statutory or executive mandate.

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<sup>65</sup> "Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis." 29 U.S.C. § 154 (2006).

<sup>66</sup> Taft Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947).

<sup>67</sup> The Senate Report on the Taft-Hartley Act indicates that the words "or for economic analysis" were substituted in section 4(a) for "(or for statistical work, where such service may be obtained from the Department of Labor)". The conference report on section 4, which added this language, did not even refer to it. See H.R. REP. NO. 510, at 37-38 (1947) (Conf. Rep.).

<sup>68</sup> 93 CONG. REC. 7418 (1947).

<sup>69</sup> 93 CONG. REC. 7419 (1947).

### 3. Congressional Review Act

The Small Business Regulatory Enforcement Fairness Act of 1996 added a new chapter to Title 5 of the United States Code, establishing a requirement for congressional review of agency rules.<sup>70</sup> This title became commonly known as the Congressional Review Act (CRA). Under this process, all federal agencies, including independent regulatory agencies, are required to submit each “rule” to both houses of Congress and to the Government Accountability Office (GAO) before it can take effect.

The definition of “rule” in the CRA is similar to the basic APA definition in 5 U.S.C. § 551(4) but with fewer exceptions.<sup>71</sup> For each such rule, agencies must submit to Congress: (1) a report containing “a concise general statement relating to the rule” and the rule’s proposed effective date; and (2) a copy of any special analysis or statement required by statute or relevant executive orders.<sup>72</sup> “Major” rules (i.e., rules with an impact exceeding \$100 million on the economy) are subject to a sixty-day delay in their effective date<sup>73</sup> while they are reviewed by Congress.<sup>74</sup> Non-major

<sup>70</sup> Small Business Regulatory Fairness Act of 1996, Pub. L. No. 104-121, tit. II, subtitle E, 110 Stat. 856 (codified at 5 U.S.C. §§ 801-808 (2006)). See Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997); see also CONGRESSIONAL RESEARCH SERVICE, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT (Oct. 10, 2001) (Richard S. Beth, primary author), available at <http://www.senate.gov/reference/resources/pdf/RL31160.pdf>.

<sup>71</sup> 5 U.S.C. § 804 (2006). The following types of rules are exempted from congressional review: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of nonagency parties. *Id.* § 804(3). Certain rules of the Federal Reserve Board are also exempted. *Id.* § 807.

<sup>72</sup> 5 U.S.C. § 801(a).

<sup>73</sup> A major rule takes effect, unless disapproved, on the *latest* of three possible dates: (1) sixty calendar days after Congress receives the report or the rule is published in the Federal Register; (2) where Congress has passed a joint resolution of disapproval of the rule, subsequently vetoed by the President, 30 session days after Congress receives the veto, or if earlier, the date on which either House of Congress votes and fails to override the veto; or (3) the date on which the rule would otherwise go into effect, if not for this review requirement. *Id.* § 801(a)(3). If either House votes to reject a joint resolution of disapproval, the rule goes into effect at that time. *Id.* § 801(a)(5).

Note that supporters of a popular rule can engineer such a vote early in the 60-day period to hasten the rule’s effective date. See, e.g., S.J. Res. 60, 104th Cong. (1996) (disapproving Medicare rule) (rejected).

<sup>74</sup> More specifically, the Court of Appeals for the Federal Circuit has held that the CRA does not alter major rules’ effective dates, but simply suspends their operation pending the outcome of Congressional review. There are also exceptions to the delayed effective date provision. Major rules relating to hunting, fishing, and camping can be made effective immediately. 5 U.S.C. § 808(1). There is also a “good cause” exception in § 808(2), similar to that in 5 U.S.C. § 553(b). Finally, the President may personally make a rule immediately effective by issuing an Executive Order that the rule is necessary due to an imminent threat to health, safety, or other emergency; necessary for the enforcement of criminal laws; necessary for national security; or issued pursuant to any statute implementing an international trade agreement. 5 U.S.C. § 801(c)(2).

rules can go into effect without delay, although Congress may, of course, still review them.

The CRA's main purpose is to provide Congress with an expedited method of disapproving agency rules. To be constitutional, however, it requires passage by both houses of a joint resolution of disapproval and presentation to the President for signature.<sup>75</sup>

While a large number of rules are sent to Congress each week,<sup>76</sup> the impact of the CRA on the rulemaking process has been slight. Obviously, it gives interested parties another "bite at the apple" after the agency's process is complete. It also gives Congress another weapon in its oversight arsenal. But so far, only one rule has been disapproved and few resolutions of disapproval have even been introduced.<sup>77</sup> The disapproval occurred in March 2001 when the Congressional leadership, supported by the Bush Administration, successfully used the Congressional Review Act to overturn the Clinton Administration's OSHA's controversial ergonomic regulations.<sup>78</sup>

Even though a similar scenario unfolded in 2009, the Congress and Obama Administration did not make use of the CRA to overturn Bush Administration rules. Thus the law appears to be more of an annoyance for the agencies than a useful tool for Congress. Nevertheless, it has created new responsibilities for agencies and Congress, new waiting periods, and new pressure points in the process. Moreover, it has created new tracking responsibilities for the agencies.<sup>79</sup>

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<sup>75</sup> See *INS v. Chadha*, 462 U.S. 919, 945-46 (1983) (setting forth the Constitution's Bicameral and Presentment Clauses, art. I, § 7, cls. 2-3).

<sup>76</sup> As of March 31, 2008, the Comptroller General had submitted reports on 731 major rules under § 801(a)(2)(A) and GAO had cataloged the submission of 47,540 non-major rules as required by § 801(a)(1)(A). CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT AFTER A DECADE, at 6 (May 8, 2008) (Morton Rosenberg, primary author), available at <http://www.fas.org/sgp/crs/misc/RL30116.pdf>.

<sup>77</sup> Rosenberg reports that forty-seven resolutions have been introduced through March 2008; only five received any sort of a floor vote. *Id.* at 7-14, tbl. 1.

<sup>78</sup> The ergonomics regulations issued after ten years of development by OSHA addressed the concerns that surround repetitive lifting and motions in the workplace. These regulations would have mandated standards for employers to promote ergonomics, buy specific equipment and reduce workplace injuries. See *Ergonomics Program*, 66 Fed. Reg. 20,403 (Apr. 23, 2001) (providing official notice of withdrawal of the regulation).

<sup>79</sup> See *Oversight Hearings on the Congressional Review Act Before the House Subcomm. on Commercial and Administrative Law of the Comm. on the Judiciary*, 104th Cong. 68-70 (1997) (statement of Jon Cannon, General Counsel, Environmental Protection Agency) (describing the centralization of the submittal and tracking function at EPA and the need for a daily messenger to deliver rules to three required offices); *id.* at 70-74 (statement of Nancy McFadden, General Counsel, Department of Transportation) (describing the computer tracking system and messenger system used by the Department).



#### 4. Executive Orders

There are numerous Executive Orders and other presidential or OMB documents that contain procedural or analytical requirements applicable to rulemaking by executive branch agencies.<sup>80</sup>

The key to such directive is Executive Order 12,866,<sup>81</sup> which mandates that executive agencies submit all of their “significant” proposed and final rules to the Office of Information and Regulatory (OIRA) for review and clearance. Another key feature is that “economically significant” rules with an impact of over \$100 million on the economy must be accompanied by a cost-benefit analysis. This Order was issued by President Clinton in 1993, survived the Bush Administration, and is still in effect at this writing, pending a well-publicized review by the Obama Administration.<sup>82</sup>

The good news for the NLRB is that few of these executive orders and White House directives have been made applicable to the independent regulatory agencies.<sup>83</sup> Although some scholars (including one who is now the present occupant of the key position of Administrator of OIRA), have advocated extending the White House rulemaking review executive order to independent agencies,<sup>84</sup> no President has attempted to do so – with the one limited attempt by President Clinton that is explained below. One reason may be that members of independent agencies do not serve at the pleasure of the President so White House leverage over an independent agency that failed to follow an executive order is more limited. Therefore, NLRB rules are not subject to OMB review – a process that typically adds about six months to the rulemaking process because, under the executive order, OIRA has 90 days to review the submission at both the proposed and final stages.

The two aspects of Executive Order 12,866 that President Clinton did direct to all agencies (including the independent agencies) were to: (1) participate in the Unified Agenda of Federal Regulatory and Deregulatory

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<sup>80</sup> See Lubbers, *supra* note 38, at 147-95; DEPARTMENT OF TRANSPORTATION, RULEMAKING REQUIREMENTS (2009) (prepared by Neil Eisner), available at <http://regs.dot.gov/rulemakingrequirements.htm>.

<sup>81</sup> Exec. Order No. 12,866 § 3(f), 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>82</sup> Obama request for comments. Obama did revoke two relatively minor Bush amendments to E.O. 12,866. Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

<sup>83</sup> The only statutory definition of “independent regulatory agencies” is found in the Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified at 44 U.S.C. §3501); see also Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000).

<sup>84</sup> See Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 203 (1986). Professor Sunstein is now the OIRA Administrator.

Actions<sup>85</sup> by publishing information on all regulations under development or review; and (2) develop an annual “Regulatory Plan” to be forwarded to OIRA by June of each year for review by the OMB Director and other “Advisors.”<sup>86</sup> The order also requires that the plan include the agency’s plans to review *existing* regulations.<sup>87</sup>

Many independent agencies do comply with this presidential directive/request, and the NLRB would have to decide whether to do so – though it is not a particularly burdensome task.

## B. Judicial Review Concerns

Unlike the NLRA, statutes containing judicial review provisions applicable to rulemaking generally call for direct, pre-enforcement review in the courts of appeals. Most of the major rulemaking programs are covered by such a provision, and statutes establishing the programs normally contain requirements as to venue, timing of review, and scope of review.

The Administrative Conference recommended placing direct review of rules in the courts of appeals in instances where: (1) the rule is so significant that a district court decision would likely be appealed; and (2) where other “orders” of agencies are already reviewed that way. The complete Conference statement on the subject is as follows:

The appropriate forum for the review of rules promulgated pursuant to the notice-and-comment procedures of 5 U.S.C. 553 should be determined in the light of the following considerations:

(a) Absence of a formal administrative record based on a trial-type hearing does not preclude direct review of rules by courts of appeals because: (i) Compliance with procedural requirements of 5 U.S.C. 553, including the requirement of a statement of reasons for the rule, will ordinarily produce a record adequate to the purpose of judicial review, and (ii) the administrative record can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court.

(b) Direct review by a court of appeals is appropriate whenever: (i) An initial district court decision respecting the validity of a rule will ordi-

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<sup>85</sup> The title was changed to add “Deregulatory” in 1996. For online versions of the Agenda from 1995 to the present, see Office of Information and Regulatory Affairs, <http://www.reginfo.gov/public/> (then follow “Unified Agenda” hyperlink(s)) (last visited July 19, 2010).

<sup>86</sup> Exec. Order No. 12,866 § 4(c), 58 Fed. Reg. 51,735 (Sept. 30, 1993). The “Advisors” are top regulatory policy officials of the Administration. *Id.* § 3(a). The plan is published each year in the October Unified Agenda.

<sup>87</sup> *Id.* § 5.

narily be appealed or (ii) the public interest requires prompt, authoritative determination of the validity of the rule.

(c) Rules issued by agencies that regularly engage in formal adjudication and whose “orders” are subject by statute to direct review by the courts of appeals will normally satisfy the criteria of (b) above and in any event should be reviewable directly by the court of appeals.

(d) Rules of other agencies that do not satisfy the criteria of (b) above should generally be reviewable in the first instance by the district courts.<sup>88</sup>

NLRB rulemaking surely meets the criteria set forth above for judicial review in the courts of appeals. Amending the NLRA in this regard is important in order to avoid district court forum shopping and two-level review in challenges to virtually all significant Board rules. Moreover, since Board adjudicative orders are already reviewable directly in the courts of appeals, those courts are familiar with the Board’s authority. Professor Grunewald recognized how important this point is for the future of NLRB rulemaking:

The most formal of these steps [to enhance the prospects for further rulemaking] would be to amend the NLRA to provide specifically for preenforcement judicial review of a final Board rule. This would confine review to a single proceeding, thus avoiding the confusion and inefficiency of serial challenges to a rule. The simplest and most traditional provision along this line would authorize an exclusive proceeding in any one of the courts of appeals. Consistent with well-recognized needs for prompt and comprehensive review when rules having broad national impact are challenged, the provision should also impose a time limit on seeking preenforcement review, and should preclude review in enforcement proceedings of questions of (1) whether the rule was within the authority of the Board, (2) whether procedural requirements for the rulemaking were satisfied, and (3) whether there was adequate support for the rule in the rulemaking record.<sup>89</sup>

The Administrative Conference agreed and so recommended:

Congress should amend the National Labor Relations Act to confine preenforcement review of final Board rules to a single proceeding. Review should be authorized in the appropriate court of appeals. This

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<sup>88</sup> ACUS Recommendation: The Choice of Forum for Judicial Review of Administrative Action (Recommendation 75-3), 40 Fed. Reg. 27,926 (July 2, 1975).

<sup>89</sup> Grunewald, *supra* note 6, at 321.

authorization should include a reasonable time limit on the seeking of preenforcement review and preclude judicial review of rules at the enforcement state concerning issues relating to whether (a) the procedures employed in the rulemaking were adequate, or (b) there was adequate support for the rule in the administrative record.<sup>90</sup>

### C. Need for the Board to Equip Itself to Undertake More Rulemakings

If the Board does decide to undertake more rulemaking, it needs to have the wherewithal to do so. As Grunewald, suggested:

[F]urther use of rulemaking would be a more realistic prospect for the Board, as an institutional matter, if there were a staff that could be called upon to provide support regardless of the particular subject of the rulemaking. Such a staff not only might provide support in ongoing proceedings, but also might be a source of substantive and procedural expertise in considering future rulemakings.<sup>91</sup>

The Board would also have to jump aboard the current transition into the world of “e-rulemaking,” by participating in the new government-wide rulemaking portal, *Regulations.gov*,<sup>92</sup> and in the unified docketing system, the Federal Docket Management System.<sup>93</sup>

Grunewald also recognized the need for a “regularized method for identifying manageable and timely subjects for possible rulemaking.”<sup>94</sup> This idea was fleshed out by the Administrative Conference as follows:

#### (b) Identification of Subjects for Rulemaking

To assist the Board in identifying manageable and timely subjects for which rulemaking might be appropriate, it should consider, among others, the following factors:

(i) The need for submissions and information, including empirical data, beyond that normally available through adjudication.

(ii) The value of participation by affected persons beyond the parties likely to participate in adjudication, with particular attention to possible reliance on prior policy and the breadth of impact of a new policy.

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<sup>90</sup> ACUS Recommendation: Facilitating the Use of Rulemaking by the National Labor Relations Board (Recommendation 91-5), 56 Fed. Reg. 33,852 ¶ 3 (July 24, 1991).

<sup>91</sup> Grunewald, *supra* note 6, at 322.

<sup>92</sup> Regulations.gov, <http://www.regulations.gov> (last visited July 19, 2010).

<sup>93</sup> Federal Docket Management System, <https://fdms.erulemaking.net/fdms-web-agency/component/submitterInfoCoverPage?Call>.

<sup>94</sup> Grunewald, *supra* note 6, at 322.

- (iii) The need to establish policy promptly in new areas of responsibility or for new enforcement initiatives.
- (iv) The opportunity for stabilizing policy in the particular subject area.
- (v) The likelihood that future litigation and enforcement costs may be lessened if a readily applicable rule is developed.
- (vi) The need to achieve control over the subject and timing of policy review and development.<sup>95</sup>

#### D. Integrating Rulemaking with Pending Adjudications

Because a Board rulemaking is likely to relate to issues involved in pending cases, it will need to consider how to handle this potential problem. The ACUS recommendation suggests:

The Board should develop a policy to govern situations in which the subject of a proposed rule has already been the focus of consideration in prior adjudicatory proceedings. The Board should seek to anticipate enforcement issues that may arise during the pendency of the rulemaking and possible judicial review. During the pendency of a rulemaking, the Board and its independent General Counsel ordinarily should continue to act under its body of precedent, but they should be prepared to depart from precedent in individual cases where the application of such precedent would be unfair or inefficient.<sup>96</sup>

Grunewald puts a finer point on this issue by raising the issue of what the Board should do, if, as happened in the health care bargaining unit rule, a court enjoins the rule pending judicial review. This issue would hopefully not arise if the NLRA were amended to place judicial review directly in the courts of appeals. And it may be that the Board will continue to eschew rulemaking absent such an amendment. But if not, Grunewald suggests that:

Given its broad enforcement responsibilities, the Board should ordinarily continue to apply existing law during the pendency of a rulemaking as it did with health care unit determinations. Yet once a rule is promulgated, even though it may become the subject of judicial review, the Board should ordinarily apply the law expressed in the rule

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<sup>95</sup> ACUS Recommendation, *supra* note 90.

<sup>96</sup> *Id.* ¶ 2(c).

as promulgated-unless a court order issued in the course of the review proceeding would preclude that action.<sup>97</sup>

#### V. THE EXAMPLE OF THE RECENT NATIONAL MEDIATION BOARD RULEMAKING

In what might be regarded as a “dress rehearsal” for future NLRB rulemaking, the Board’s sister agency, the National Mediation Board (NMB), has just completed its first significant rulemaking in many years. The NMB, which resolves representation disputes concerning employees covered by the Railway Labor Act (RLA), (concerning primarily rail and airline employees), proposed a change in its longstanding way of ascertaining how to determine support for a collective bargaining representative after an election.<sup>98</sup> Prior to this rulemaking, the NMB’s “policy require[d] that a majority of eligible voters in the craft or class must cast valid ballots in favor of representation.”<sup>99</sup> On November 3, 2009, the NMB proposed changing that policy to “allow the Board to certify as collective bargaining representative any organization which receives a majority of votes cast in an election.”<sup>100</sup> In part the NMB relied on the fact that the relevant provisions of the RLA and NLRA are similar and that the NLRB certifies collective bargaining representatives “on the basis of the majority of ballots cast.”<sup>101</sup>

This rulemaking proved to be controversial. Both the proposed rule and the final rule were issued over the published dissent of the NMB Chairman.<sup>102</sup> The NMB (like the NLRB in the health care bargaining unit

<sup>97</sup> Grunewald, *supra* note 6, at 323.

<sup>98</sup> Proposed Rules National Mediation Board: Representation Election Procedure, 74 Fed. Reg. 56,750 (Nov. 3, 2009) (to be codified at 29 CFR pts. 1202, 1206). The final rule was published (adopting the proposed rule) on May 11, 2010, 75 Fed. Reg. 26,062. The rule was subsequently upheld by the federal district court in *Air Transport Ass’n of America, Inc. v. National Mediation Bd.*, 719 F. Supp. 2d 26 (D.C. Cir. 2010). The author served as a consultant to provide training to the NMB members on rulemaking generally and to provide advice to the NMB General Counsel on this rulemaking, but all information provided here is from the public record.

<sup>99</sup> *Id.* at 56,751.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See dissent of NMB Chairman Elizabeth Dougherty, 74 Fed. Reg. at 56,752-54 (proposed rule), and 75 Fed. Reg. 26,083-88 (final rule). I would point out that the APA does not address the possibility of dissents in agency rulemakings, and agencies seem to have widely different practices in this regard. See, e.g., proposed rules by: Railroad Retirement Board, 60 Fed. Reg. 67,108, 67,109 (Dec. 28, 1995) (paraphrasing the dissenting views of the Labor Member of the Board); Nuclear Regulatory Commission, 49 Fed. Reg. 31,700 (Aug. 8, 1984) (to be codified at 10 C.F.R. pt. 55) (including separate Views of Commissioner); Federal Communications Commission, 75 F.C.C.2d 138, (1979) (including various Commissioners’ concurring and dissenting statements). See also final rules by: Federal Energy Regulatory Commission, 72 Fed. Reg. 39,904 (July 20, 2007) (to be codified at 18 C.F.R. pt. 35) (including

rule) decided it would be prudent to hold a public hearing on this proposal.<sup>103</sup> It heard thirty-one witnesses<sup>104</sup> and also received nearly 24,962 comments during its sixty-day comment period.<sup>105</sup>

The NMB issued its final rule, adopting the proposed rule without change, on May 11, 2010 – just over five months after publishing its proposal.<sup>106</sup> This was a rather remarkably expeditious rulemaking, considering that the Board and its small staff had little experience with rule-making, held a public hearing, received almost 25,000 comments, ruled on motions to disqualify the two members voting for the rule,<sup>107</sup> and published a twenty-page preamble in the Federal Register primarily responding to comments.

Despite the claims of lack of statutory support, inadequate factual support, procedural failings, and bias raised in comments by opponents of the rule and in the dissenting statement, a subsequent court challenge to the NMB rule failed in federal district court.<sup>108</sup> Of course there is still a possibility of an appeal to the D.C. Circuit, so the litigation may not be over, but

Commissioner's partial dissent as attachment); Consumer Product Safety Commission, 71 Fed. Reg. 42,028 (July 25, 2006) (to be codified at 16 C.F.R. pt. 1115) (explaining that the Commission voted 2-1 to issue the rule, with the dissenting Commissioner's statement and separate statements from the two Commissioners in the majority available from the Office of the Secretary or on the Commission's website); Railroad Retirement Board, 67 Fed. Reg. 5723 (Feb. 7, 2002) (to be codified at 20 C.F.R. pt. 200) (adopting a final rule "by the majority of the Board, Management Member dissenting"); Federal Communications Commission, 50 Fed. Reg. 11,188 (Mar. 20, 1985) (to be codified at 47 C.F.R. pt. 73) (correcting final rule and including a Commissioner's dissenting statement, inadvertently omitted in the original).

The NMB's proposed rule included disclaimers that the rule would not have any triggering impacts under the Paperwork Reduction Act, Regulatory Flexibility Act or National Environmental Policy Act. The agency later published a clarification containing a similar formal certification under the Regulatory Flexibility Act. Proposed Rules National Mediation Board: Representation Election Procedure, 74 Fed. Reg. at 56,754.

<sup>103</sup> Proposed Rules National Mediation Board: Representation Election Procedure, 74 Fed. Reg. 57,427 (Nov. 6, 2009) (to be codified at 29 C.F.R. pts. 1202, 1206). The one-day hearing was held on December 7, 2009 at a hearing room in the National Labor Relations Board, which also provided the security for the meeting.

<sup>104</sup> See Rules and Regulations National Mediation Board: Representation Election Procedure, 75 Fed. Reg. 26,062, 26,063 (May 11, 2010) (to be codified at 29 CFR pts. 1202, 1206). The list of witnesses is available on the NMB's website. NMB Open Meeting Speakers List, [http://www.nmb.gov/representation/proposed-rulemaking/speakers-list\\_12-07-09.html](http://www.nmb.gov/representation/proposed-rulemaking/speakers-list_12-07-09.html) (last visited July 19, 2010).

<sup>105</sup> See Rules and Regulations National Mediation Board: Representation Election Procedure, 75 Fed. Reg. at 26,063. Over 22,000 were form letters. See Proposed NMB Representation Rulemaking, <http://www.nmb.gov/representation/proposed-rep-rulemaking.html> (last visited July 19, 2010).

<sup>106</sup> Rules and Regulations National Mediation Board: Representation Election Procedure, 75 Fed. Reg. at 26,062.

<sup>107</sup> The denial of the motions was included in the preamble. *Id.* at 26,063-66.

<sup>108</sup> *Air Transport Ass'n. of America, Inc. v. National Mediation Bd.*, 719 F. Supp. 2d 26 (D.C. Cir. 2010).

the NMB has at least shown that labor-related rulemaking can be undertaken efficiently and expeditiously.

## VI. POSSIBLE EXAMPLES OF FUTURE BOARD RULEMAKINGS

It is undoubtedly presumptuous for me to suggest specific rulemaking projects for the NLRB; even raising them brings to mind the proverbial “briar patch.” However, I do have some very tentative ideas on the subject. For starters, it might be best to consider such initiatives in areas where the subject area of the potential rulemaking has been a subject of frequent recent litigation and requires some rationalization.

One such example is in the compliance area. After the Board has determined that an employer or union has committed an unfair labor practice, the next stage in the proceeding is compliance. Compliance involves the Board securing the steps required to remedy the unfair labor practices determined to have been committed. A common aspect of compliance is the duty of employers guilty of a discriminatory discharge to compensate employees with backpay subject to the concurrent duty of employees to mitigate wage loss by reasonably looking for interim work. An aspect of this that has seen a spate of litigation concerns who has the burden of proof as to whether there has been a reasonable search for interim employment,<sup>109</sup> and, relatedly, how soon the employee has to begin looking for it,<sup>110</sup> and whether strike benefits can be treated as interim earnings.<sup>111</sup> These issues would seem to lend themselves to the sort of collection of views and data that would be facilitated by a rulemaking proceeding.

A similar area of uncertainty is the complicated question of whether “employee involvement committees” are “labor organizations” under section 2(5) of the NLRA,<sup>112</sup> including the issues raised by the somewhat conflicting decisions of *Electromation, Inc.*<sup>113</sup> and *Crown Cork & Seal*.<sup>114</sup>

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<sup>109</sup> See *St. George Warehouse*, 351 N.L.R.B. 961 (2007) (Board reverses prior law by placing burden on the employee to show reasonable search, though employer keeps burden of showing there were substantially equivalent jobs in the geographic area).

<sup>110</sup> See *Grosvenor Resort*, 350 N.L.R.B. 1197 (2007) (delay of four to eight weeks too long; backpay denied).

<sup>111</sup> See *Domsey Trading Corp.*, 351 N.L.R.B. 824 (2007) (petition for enforcement denied in *N.L.R.B. v. Domsey Trading Corp.*, 383 Fed.Appx. 46, 188 L.R.R.M. (BNA) 3023 (2d Cir. Jun 30, 2010)).

<sup>112</sup> National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (2006) (stating that such labor organization may not be “dominated” by employers under the NLRA).

<sup>113</sup> *Electromation, Inc.*, 309 N.L.R.B. 990 (1992) *enforced*, *Electromation, Inc. v. N.L.R.B.*, 35 F.3d 1148 (7th Cir. 1994) (holding that employer “action committees” made up of management and employee representatives on various workplace issues were labor organizations, partly because they “dealt with” management; the court also held that the action committees were “dominated” by management).



A second consideration pointing to the use of rulemaking is the existence of outmoded standards developed in past adjudications, resulting, for example, from economic inflation or changes in technology.

Several examples of inflation-eroded standards are presented by the Board's discretionary monetary jurisdictional standards. For example, the jurisdictional standard for nonretail enterprises, set in a 1959 Board decision,<sup>115</sup> is \$50,000 in annual direct or indirect outflow or inflow. In 2009 dollars that amount would be nearly \$364,000.<sup>116</sup> The jurisdictional standard for retail concerns, based on a 1975 decision,<sup>117</sup> is \$500,000 in annual gross volume of business – nearly \$2,000,000 in 2009 dollars. I am not suggesting that these higher amounts are the right levels for Board jurisdiction – merely that a rulemaking might be a way to revisit and update the various aspects of the Board jurisdictional lines, most of which were decided long ago via case-by-case adjudication.<sup>118</sup>

New technology has provided opportunities for Board rulemaking in the election procedure area. In the 1966 *Excelsior Underwear* case<sup>119</sup> the Board established a requirement that in all election cases, the employer must turn over to the Board the names and addresses of all the eligible voters within seven days after the election has been agreed to or directed. The Board then turns this information to all parties in the case.<sup>120</sup> Another Board requirement is that the election cannot take place for ten days to give the union a chance to use this information.<sup>121</sup> The advent of electronic technology would allow some significant adjustment in these deadlines. First, it should be easier for the employer to compile, maintain and submit this information. Seven days may have been necessary in the age of paper

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<sup>114</sup> *Crown Cork & Seal Co. Inc.*, 334 N.L.R.B. 699 (2001) (holding that employee committees given delegated authority to operate the plant, subject to managerial oversight were not labor organizations because they did not “deal with management”).

<sup>115</sup> 48 Am. Jur. 2d *Labor and Labor Relations* § 624 (2010) (citing *Siemens Mailing Serv.*, 122 N.L.R.B. 81 (1958) *decision supplemented on other grounds*, 124 N.L.R.B. 594 (1959)).

<sup>116</sup> See *The Inflation Calculator*, <http://westegg.com/inflation> (last visited July 19, 2010).

<sup>117</sup> 48 Am. Jur. 2d *Labor and Labor Relations* § 625 (2010) (citing *Dilene Answering Serv. Inc.*, 216 N.L.R.B. 669 (1975)).

<sup>118</sup> See *Colleges and Universities*, 29 C.F.R. § 103.1 (2009) (According to the final rule preamble, the proposed rule received thirty-three comments); *Symphony Orchestras*, 29 C.F.R. § 103.2 (2009) (According to the final rule preamble, the proposed rule received twenty-six comments); *Horsereading and Dogracing Industries*, 29 C.F.R. § 103.3 (2009) (announcing that the Board would not assert jurisdiction in any proceeding under sections 8-10 of the NLRA involving these industries).

<sup>119</sup> *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

<sup>120</sup> *Id.* at 1239-40.

<sup>121</sup> See NLRB, CASEHANDLING MANUAL FOR REPRESENTATION PROCEEDINGS § 11302.1, available at <http://www.nlr.gov/nlr/legal/manuals/CHMII/Sections11300-11350.pdf>; see also § 11312.1 (providing that, with some exceptions, an election may not be held sooner than 10 days after the list of names and addresses of the eligible voters is due to be received by the Regional Director).

records and postal delivery, but two or three days should suffice now. Secondly, the disclosure requirement might be updated to include employees' email addresses and/or cell phone numbers. Moreover, the Board should now be able to transmit the information electronically to the union; that in itself might allow a shorter period before the election. Finally, since the waiting period is supposed to protect the union, perhaps the union should be allowed to waive it. All of these steps to shorten the election period could well be considered in a rulemaking.

Similarly, the exclusive union hiring hall, used frequently in the construction industry and at ports around the country, is a possible topic for rulemaking.<sup>122</sup> There are many rules governing illegal discrimination against non-union members or among union members in such halls which can amount to a breach of the duty of fair representation.<sup>123</sup> Moreover, it can be a violation of the NLRA if a hall is operated in an arbitrary and capricious way.<sup>124</sup> One example might be that the rules of the hiring hall may not be noticed or posted properly. A rulemaking proceeding could help rationalize the adjudicative decisions in this area and even perhaps take advantage of new technology in modernizing hiring hall requirements.

These examples are intended to be illustrative. To the extent they seem unrealistic to labor law practitioners, I apologize, and invite them to suggest their own nominations. But I cannot believe that in the large body of NLRB case law there are not numerous opportunities for policymaking by rulemaking.

## VII. CONCLUSION

The NLRB should reconsider its long-standing antipathy toward rulemaking. Its legal authority to make rules has been ratified by a unanimous Supreme Court decision. As an independent agency it has more freedom and should be able to move more expeditiously than other executive agencies. Its rules are not subject to OMB review (other than under the Paperwork Reduction Act) and several other statutory and presidential directives are not applicable to it.

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<sup>122</sup> See generally *Stagehands Referral Serv., LLC*, 347 N.L.R.B. 1167, 1170-71 (2006) (providing information on the operation of a hiring hall).

<sup>123</sup> See, e.g., *Plumbers and Pipe Fitters Local Union No. 32 v. N.L.R.B.*, 50 F.3d 29 (D.C. Cir. 1995).

<sup>124</sup> A union commits an unfair labor practice if it administers an exclusive hiring hall arbitrarily or without reference to objective criteria, even absent a showing of animus against nonmembers. *Boilermakers Local 374 v. N.L.R.B.*, 852 F.2d 1353, 1358 (D.C. Cir. 1988); *Stone & Webster Eng'g Corp.*, 319 N.L.R.B. 609 (1995); *but see Jacoby v N.L.R.B.*, 325 F.3d 301 (D.C. Cir. 2003); *Contra Coastal Elec., Inc.*, 329 N.L.R.B. 688 (1999) (holding mere negligence in the operation of an exclusive hiring hall does not constitute a violation of the Act).

However, its organic statute, the NLRA, needs several fixes for the Board to proceed confidently with rulemaking. A judicial review provision for direct judicial review of rules in the courts of appeals needs to be added, along with a time limit for bringing certain types of challenges. Additionally, the NLRA's apparent prohibition on the Board's employment of economists is anomalous and should be removed.

Once these actions are taken (which should not be controversial in and of themselves), the Board should, through training and strategic hiring, assemble a rulemaking staff, develop a rulemaking agenda (consistent, of course, with its continuing adjudicative responsibilities) and go forward into the world of notice-and-comment rulemaking. If China can do it, so can the NLRB!

[*Epilogue:* As this article was being prepared for publication, the NLRB released for public comment a set of proposed rules governing notification on employee rights under the NLRA. *See* 75 Fed. Reg. 80,410, (Dec. 22, 2010).]