

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF)
MANUFACTURERS, *et al.*,)
)
Plaintiffs,)
)
v.)
)
NATIONAL LABOR RELATIONS)
BOARD, *et al.*,)
)
Defendants.)
)

Case No. 1:11-cv-01629-ABJ

Judge Amy Berman Jackson

**REPLY MEMORANDUM OF THE NATIONAL ASSOCIATION OF
MANUFACTURERS AND COALITION FOR A DEMOCRATIC WORKPLACE**

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I. THE BOARD HAS FAILED TO CARRY ITS BURDEN OF SHOWING THAT THE NEW RULE IS AUTHORIZED BY THE NATIONAL LABOR RELATIONS ACT.

A. The Board's Brief Ignores Or Understates The Congressional Limits On The Board's Authority.

The Board's contention that the Rule requiring employers to post a notice of employee rights is a reasonable exercise of the Board's rulemaking authority is wholly unsupported by the National Labor Relations Act ("NLRA"), the legislative history of the NLRA and Supreme Court and lower court cases, including those cited in the Board's brief in support of summary judgment ("Brief").

Although the Board concedes that the agency's jurisdiction over a given (party) employer is not invoked until either a representation petition or an unfair labor practice charge is filed (Brief at 8), it nonetheless contends that the Board is empowered to require *all* employers to post a notice. In doing so, the Board makes no attempt to explain how it may assert jurisdiction over all employers in the absence of a charge or petition. Unlike the general authority granted to other federal agencies, Congress deliberately withheld from the Board plenary authority to assert active jurisdiction over all employers. 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 as filed pursuant to Section 8, 29 U.S.C. § 158 and processed by the Board under Section 10, 29 U.S.C. § 160. Despite the absence of any statutory authority to assert jurisdiction over employers not the subject of an unfair labor practice charge or representation petition, the Board simply asserts that the Rule is reasonably related to the purposes of the Act because it addresses the "anomaly" of "the Board [standing] almost alone in not having [a notice-posting] requirement." (Brief at 1, 9).

The Board, however, conveniently fails to address the reason for this anomaly: in contrast to its failure to delegate notice-posting authority to the Board, Congress made a considered decision to grant the agencies that administer the other major federal labor and employment laws statutory authority to require notice-posting by all covered employers. *See e.g. American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Fin. Inst. Employees*, 475 U.S. 192 (1986); *Republic Steel Corp. v. NLB*, 311 U.S.7 (1940), Railway Labor Act, 45 U.S.C. § 152, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000(e)-10, The Age Discrimination in Employment Act, 29 U.S.C § 627, Occupational Safety and Health Act, 29 U.S.C. § 657(c), Americans With Disabilities Act, 42 U.S.C. § 12115, Family and Medical Leave Act, 29 U.S.C. § 2619(a), Uniform Service Employment and Re-Employment Rights Act, 38 U.S.C. § 4334(a);¹ *see also Alcoa Steamship Co. v. Fed. Maritime Comm'n.*, 348 F.2d 756, 758 (D.C. Cir. 1965) (“Where Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power.”).

The Board’s Brief fails to address the jurisdictional restraints on the Board’s authority. Nor does the Brief distinguish the numerous cases emphasizing or defining the Board’s limited jurisdiction. *See e.g. NLRB v. Fin. Inst. Employees, supra; Civil Service Employees Ass’n., Local 1000, AFSCME v. NLRB*, 569 F.3d 88 (2nd Cir. 2009); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940); *Railway Labor Executives Ass’n. v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (en banc); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). The Brief merely recites that the Rule is “reasonably related to the purposes of the enabling legislation,” without acknowledging that such enabling legislation does

¹ Only one federal labor agency has promulgated a notice-posting requirement without express statutory authority. The U.S. Department of Labor requires such posting purportedly under authority granted by the Fair Labor Standards Act requiring records and reports from employers. 29 U.S. 211(C). The DOL requirement attaches no penalties to an employer’s failure to post such notices. The DOL’s alleged authority has never been tested in court.

not permit the Board to make a prodigious jurisdictional leap by asserting authority over all six million employers covered by the NLRA. Absent such authority, the Rule has necessarily been promulgated in excess of the authority granted by Congress under the NLRA.

B. The Board’s New Rule Does Not Fill Any “Gap” Left By Congress, But Instead Expands The Board’s Jurisdiction Beyond The Plain Intent Of Congress.

Next, the Board’s Brief incorrectly asserts that the Rule “reasonably fills a statutory gap left by Congress in the NLRA.” The Board fails, however, to address precisely what gap Congress purportedly left or why Congress chose not to grant the Board statutory authority to require a notice of rights posting when it granted such authority to other agencies. Quite simply, Congress left no gap to be filled.

The Board inaptly cites *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356 (1973) and *Morton v. Ruiz*, 415 U.S. 199 (1974) in support of its argument that the Rule reasonably fills a gap left by Congress. In those cases, however, specific statutory authority or legislative history permitted gap-filling. For example, in *Mourning*, the Supreme Court found that the legislative history of the Truth In Lending Act comports with the Federal Reserve Board’s authority to promulgate a rule compelling sellers to comply with the disclaimer requirements of the Act. Congress had given the Federal Reserve Board the power to prevent concealment of frivolous transaction charges. Thus, Congress had provided a clear statutory predicate for the Federal Reserve Board’s gap-filling authority.

Similarly, in *Morton v. Ruiz*, the Supreme Court made it abundantly clear that the power of an agency (in that case, the Bureau of Indian Affairs) to administer a congressionally-created program “necessarily requires the formulation of policy in the making of rules to fill any gap left by Congress.” That in turn, necessarily requires a review of the legislative history to determine

if Congress had, in fact, left a gap. As more fully set forth below, the problem with the Board's position is that the legislative history of the NLRA clearly shows that, in the present case, Congress left no gap.

In addition, the Board's attempt to draft *American Hospital Association v. NLRB*, 499 U.S. 609 (1991) in support of its argument that the rule is a permissible exercise of gap-filling authority is grievously flawed. The Board maintains *American Hospital Association* (Brief at 17-19) confirms that the "broad rule making authority" set forth in Section 6 of the NLRA empowers the Board to make "such rules and regulations as may be necessary to carry out the provisions of [the Act]," including the Rule. 29 U.S.C. § 156. The Board argues that under *Chevron* it should be allowed reasonable latitude to fill gaps arising from congressional silence or ambiguity. *American Hospital Association*, however, highlights the insolvency of the Board's argument. In that case the Court affirmed a rule that carried out a *specific existing* provision of the NLRA (*viz.*, Section 9(c)). The Rule in the present case carries out no existing provision of the NLRA, for Congress chose not to insert any provision related to notice posting. To accept the Board's argument in the present case is to necessarily accept the proposition that the Board may assert authority over virtually *any* subject upon which Congress has remained silent. As stated by Member Hayes:

[T]he majority construes *American Hospital Association* as an endorsement of deference to the exercise of Section 6 rulemaking authority whenever Congress did not expressly limit this authority. This is patently incorrect. "To suggest, as the [majority] effectively does, that *Chevron* deference is required any time a statute does not expressly negate the existence of a claimed administrative power * * *, is both flatly unfaithful to the principles of administrative law * * * and refuted by precedent." *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (citation omitted). *Were courts "to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."* *Id.*

In sum, the majority's notice rule does not address a gap that Congress delegated authority to the Board to fill, whether by rulemaking or adjudication. The Supreme Court has made clear that "[w]here Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 419, 432-433 (1960). (emphasis added.)

The NLRA contains no provision requiring employers to provide a notice of rights to employees. This was not an accidental or intentional gap left by Congress for the Board to fill. Rather, the absence of a notice of rights provision in the NLRA reflects the considered specific intent of Congress that the Board not be empowered to compel employers to post such a notice. Not only may such specific intent be gleaned from a comparison of the NLRA with the labor and employment statutes noted above that grant the relevant enforcement agencies notice-posting authority, but it is evident from the NLRA's legislative history itself.

As explained in greater detail in the Congressional amicus brief filed in this proceeding, when the Wagner Act was originally introduced in 1934, the bill contained express provisions requiring employers to provide notice to employees that any term of a labor agreement that conflicted with the (Wagner) Act was invalid. Since most contracts at that time contained such conflicting provisions, most employers would have been required to provide the required notice. In addition, the bill provided that an employer's failure to provide the notice to employees constituted an unfair labor practice. S. 2926 § 304(b), 1 Leg. Hist. 14 and H.R. 8434 § 304(b), 1 Leg. Hist. 1140; S. 2926 § 5(5), 1 Leg. Hist. 3 and H.R. 8434 § 5(5), 1 Leg. Hist. 1130 (1934).

The foregoing provision was excised from the Wagner Act after Congress debated and adduced testimony on the provisions. S. 1958 74th Cong., 2 Leg. Hist. 3032 (1935). Therefore, the final version of the Wagner Act contained no notice provision. Further, despite significant amendments to the NLRA in 1947, 1959, and 1974, no general notice provisions were included. Moreover, when Congress amended the Railway Labor Act to include a general notice

requirement in 1934, Congress specifically removed the notice provision from the Wagner Act. Accordingly, the absence of a notice-posting provision in the NLRA, along with ordinary rules of statutory construction evince the plain intent of Congress not to grant the Board the authority to compel employers to post a notice of rights. *See Alcoa Steamship Co. v. Fed. Maritime Comm'n.*, 438 F.2d 756 (D.C. Cir. 1965). Consequently, contrary to the Board's assertion that "the notice posting requirement also properly fills a *Chevron*-type gap in the NLRA's statutory scheme," (Brief at 11) no such gap exists. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). *See also, Northpoint Tech, Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005); *Shays v. Fec.*, 508 F. Supp.2d 10 (D.D.C. 2007); *FDA v. Brown and Williamson Tobacco Corp.*, 429 U.S. 120 (2000).

Finally, the Board's Brief ignores the Supreme Court's recent holding in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), in which the Court applied principles previously set forth in *Machinists v. Wisconsin Employment Commission*, 427 U.S. 132 (1976), forbidding "both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended 'be unregulated because left to be controlled by the free play of economic forces.'" The Court went on to hold in *Chamber of Commerce v. Brown* that employer communications about unionization is a particular zone that Congress intended to be left unregulated.² Plainly, the Board's new Rule has entered the forbidden zone of regulation and must be set aside. Thus, contrary to the Board's Brief, the Rule fills no gaps left by Congress. Rather, the Rule exceeds the authority granted to the Board by Congress and must be held unlawful. *See Lyng v. Payne*, 476 U.S. 926, 937 (1986).

² "[C]ongressional intent to shield a zone of activity from regulation is usually found only "implicit[ly] in the structure of the Act," drawing on the notion that "[w]hat Congress left unregulated is as important as the regulations that it imposed." In the case of noncoercive speech, however, the protection is both implicit and explicit, [Citations omitted] "[C]ongressional intent to shield a zone of activity from regulation is usually found only important as the regulations that it imposed." [citations omitted]. * * * In the case of noncoercive speech, however, the protection is both implicit and explicit . . . " 554 U.S. at 68.

II. THE BOARD HAS FAILED TO JUSTIFY ITS UNAUTHORIZED CREATION OF A NEW UNFAIR LABOR PRACTICE AS A PENALTY FOR VIOLATION OF THE NEW RULE.

In response to Plaintiffs' assertion that the Board has unlawfully created a new unfair labor practice with which to enforce the new Rule, the Board's Brief first argues that the new Rule does not actually create a new unfair labor practice but merely enforces the existing Section 8(a)(1). (Brief at 33). This argument ignores the 75-year history of the Act, during which the Board has never previously found Section 8(a)(1) to impose on employers any affirmative obligation to notify employees of rights under the Act, in the absence of other conduct imposing such an obligation.

None of the cases cited by the Board are at all similar to the Board's new Rule, which for the first time imposes a penalty on employers who have not engaged in any misconduct and have in fact taken no action whatsoever. None of the Board's cited cases purports to punish *inactivity* under the NLRA. Thus, in *Republic Aviation v. NLRB*, 324 U.S. 793, 798 (1945), cited in the Board Brief at 33, the Supreme Court merely upheld the right of the Board to prohibit employer conduct which plainly "interfered" with employees' exercise of their organizational rights, as proscribed by Section 8(a)(1).³ Likewise, in the additional cases cited on page 33 of the Board's Brief, the courts in each case simply upheld the Board's application of the "interference" language of Section 8(a)(1) to specific employer conduct that violated employee rights.⁴ None of these cases found Section 8(a)(1) to apply where employers had done *nothing at all*, as is the case with the NLRB's new Rule.

³ The employer in *Republic Aviation* had prohibited the wearing of union insignia and the solicitation of co-workers on non-working time, actions that were "clearly violative of the Act."

⁴ See *Allegheny Ludlum v. NLRB*, 301 F.3d 167 (3rd Cir. 2002) (systematic polling of employees), *Strucksnes Constr. Co.*, 165 NLRB 1062 (1967) (same), and *NLRB v J. Weingarten, Inc.*, 420 U.S. 251 (1975) (denying employee access to union representative).

According to the Board’s Brief, there have been “numerous instances where the violation of an obligation may interfere with employee rights just as affirmative misconduct does.” NLRB Brief at 34. But again none of the cases cited by the Board stand for its stated proposition. Instead, each time where the Board has found a violation of Section 8(a)(1) over the past 75 years, there has been some *affirmative action* by a party, which has created the obligation to explain or undo the action in order to avoid interference with employee rights. Thus, in *Truitt Mfg. Co.*, 110 NLRB 856 (1954), *enfd.*, 351 U.S. 149 (1956), the employer made affirmative claims in bargaining as to which the employer was compelled by the Board to provide supporting documentation in order to prevent Section 8(a)(1) interference. It was the employer’s action of refusing to bargain in good faith, expressly prohibited under Section 8(a)(5), that properly invoked the additional prohibition against Section 8(a)(1) interference. To the same effect is *Standard Oil Co. of Ca., Western Operation, Inc. v. NLRB*, 39 F. 2d 639, 642 (9th Cir. 1967), cited in the Board’s Brief at 35.

Contrary to the Board’s Brief at 34, it is hardly a “small step” for the Board to declare that six million employers may be found in violation of the Act for doing nothing other than failing to post a notice of employee rights, which they have been under no obligation to post for the past 75 years. The Board’s Brief instead confirms that such a declaration is unprecedented under Section 8(a)(1) of the Act and in fact creates a new unfair labor practice that has never been authorized by Congress.⁵

Finally, the Board’s Brief is unsuccessful in its efforts to distinguish or limit to its facts the Supreme Court’s seminal holding in *Local 357, Teamsters v. NLRB*, 365 U.S. 667 (1961), in

⁵ The absence of such statutory authorization distinguishes every other labor law notice requirement that other federal agencies currently enforce by penalizing employers. Notwithstanding the contention in the Board’s Brief at 35, the Board’s new Rule finds no support in such penalties as are found in other statutes, because there is no statutory authorization for such a penalty in the NLRA.

which the Court expressly prohibited the Board from “establishing a broader, more pervasive regulatory scheme” than Congress has authorized. *Id.* at 675. Both in that case and in this one, the Board has attempted to penalize the failure to engage in conduct, posting a notice, which Congress has chosen NOT to penalize. Just as the Supreme Court held that the Board could not require unions to post a notice without a finding that they had in fact “discriminated” against employees within the meaning of Section 8(a)(3), the Board cannot now be allowed to require six million employers to post a notice without a finding that such employers have in fact “interfered with, coerced, or restrained” employees within the meaning of Section 8(a)(1). Under the Supreme Court’s holding in the *Local 357* case, the Board’s attempt to create a new violation of Section 8(a)(1) plainly constitutes a prohibited effort by the agency to establish a broader, more pervasive scheme than is permitted by the Act.

III. THE BOARD HAS FAILED TO JUSTIFY THE NEW RULE’S UNAUTHORIZED VIOLATION OF SECTION 10(b) OF THE ACT.

The Board’s Brief does not cite any authority under the NLRA to refute Plaintiffs’ clear showing that the Board lacks authority to alter the statute of limitations for filing an unfair labor practice charge. *See Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960) and other cases cited at Plaintiff’s Brief at 20-21. Instead, the Board’s Brief relies almost entirely on cases decided under different statutory schemes, specifically where such statutes mandate posting of employee rights. The Board ignores numerous court decisions holding that Title VII and other employment law statutes should NOT be relied on as precedent for NLRB decision making, particularly as to procedural remedies under the NLRA. *See Tipler v. E.I. DuPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971) (“Title VII and the NLRA are statutes with separate and independent remedies. . .Although these two acts are not totally dissimilar, their differences significantly overshadow their similarities”) (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir.

1969)). As other courts have held, “administrative agencies . . . are creatures of statute, bound to the confines of the statute that created them, and lack the inherent equitable powers that courts possess.” *U.S. Fidelity and Guar. Co. v. Lee Invs. LLC*, 641 F.3d 1126, 1135 (9th Cir. 2011) (citing *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 502 F.2d 349, 354 n.* (D.C. Cir. 1974)).

Although the Supreme Court did analogize Title VII and the NLRA with regard to the general concept of equitable tolling in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the Board Brief improperly extrapolates from that decision to justify the Board’s unprecedented new policy of tolling Section 10(b)’s limitation for an employer’s failure to post the newly required notice. Certainly, no such issue was presented to the Court in *Zipes*. Moreover, unlike the notice-posting statutes cited in the Board’s Brief at 41, Section 10(b) has been long interpreted to allow equitable tolling only in the event of “affirmative misconduct” by the employer. *See, e.g., Washington v. Washington Metropolitan Area Transit Authority*, 160 F.3d 750 (D.C. Cir. 1998) (rejecting claim of equitable tolling under Section 10(b) in the absence of “affirmative misconduct” by the defendant employer to lull the employee into inaction); *accord, Dove v. Washington Metropolitan Area Transit Authority*, 402 F. Supp. 2d 91 (D.D.C. 2005); *see also Conley v. Int’l Brotherhood of Electrical Workers, Local 639*, 810 F.2d 913, 915-916 (9th Cir. 1987) (refusing to toll 10(b) limitations period).

It is therefore telling that the Board's Brief relies exclusively on cases decided outside the confines of the NLRA to justify the Board's new tolling provision.⁶ In any event, the new Board Rule contradicts longstanding interpretations of Section 10(b), specifically that the statute of limitations begins to run upon a charging party's notice of an act constituting an unfair labor practice, absent "fraudulent concealment." *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 429 (1960). *See also Leach Corp.*, 312 NLRB 990 (1993), *enf'd* 54 F.3d 802 (D.C. Cir. 1995). The Board's new Rule completely reverses decades of understanding as to the proof required to toll the running of the statute of limitations, and must be set aside on this ground.

IV. THE BOARD HAS FAILED TO JUSTIFY THE NEW RULE'S IMPAIRMENT OF EMPLOYER SPEECH RIGHTS.

The Board's assertion that the Rule does not impair employer rights under the First Amendment and/or Section 8(c) of the NLRA suffers from two significant infirmities.

First, contrary to the Board's Brief, the Rule mandates speech that employers might not otherwise make and dictates the content of that speech. This unequivocally constitutes compelled speech. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Riley v. National Fed'm of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). Where compelled speech 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). *See also Stuart v. Huff*, --- F.Supp.2d ---, 1:11-cv-804 (M.D.N.C. Oct. 25, 2011) ("The First Amendment generally includes the right to refuse

⁶ Even the inapposite statutory notice cases cited in the Board's Brief are inconsistent with the new Rule. For example, in *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F. 3d 41, 48-50 (1st Cir. 2005), the leading case cited in the Board's Brief at 41, the court declared that an employer's failure to post a required notice of employee rights would not result in equitable tolling of Title VII's statute of limitations unless the plaintiffs proved that they did not have actual or constructive knowledge of their statutory rights. By contrast, the Board's new Rule *presumes* that all employees will lack actual or constructive knowledge of their statutory rights under the NLRA, absent proof otherwise by a non-posting employer.

to engage in speech compelled by the government.”); *R.J. Reynolds Tobacco Co v. U.S. Food and Drug Admin.*, --- F.Supp.2d ----, No. 11-cv-1482 (D.D.C. Nov. 6, 2011).

The Rule in the present case requires *all* employers covered by the Act to post a notice containing selective information regarding employee rights. Even if compelling employers to provide biased information to employees constitutes a compelling state interest, requiring all employers—not just party employers subject to the Board’s jurisdiction—to do so cannot be deemed narrowly tailored. Accordingly, the Rule does not survive strict scrutiny.

Second, the Board’s reliance on *Lake Butler Apparel Co. v. Sec’y of Labor*, 519 F.2d 984 (5th Cir. 1975) as being “virtually indistinguishable” from the present case actually underscores the Rule’s infringement on Plaintiffs’ First Amendment rights. The Board correctly notes that in *Lake Butler*, the Fifth Circuit rejected “an employers First Amendment challenge to the Occupational Safety and Health Act requirement that it post an [information sign] similar to the one at issue here.” 76 Fed. Reg. 54006, 54012 (Aug. 30, 2011). But the Board fails to note the obvious difference between *Lake Butler* and the present case. Congress expressly granted the Occupational Safety and Health Administration statutory authority to require employers post such information sign, whereas Congress withheld such authority from the Board. As the court stated in *Lake Butler*, “if the government has a right to promulgate these regulations, it seems obvious that they have a right to *statutorily require* that there be posted in a place that would be obvious to the intended beneficiaries to the statute—Lake Butler’s employees.” (Emphasis added.) The court further noted that “the First Amendment which gives [the employer] the full right to contest the validity to the bitter end cannot justify his refusal to post a notice *Congress thought to be essential.*” *Id.* at 89 (emphasis added). As set forth in Section I(B) above, not only did Congress not include a notice of rights in the NLRA, it removed notice provisions from an

earlier draft. It is evident, therefore, that Congress did not think a Board-compelled notice of rights to be essential. It must also be noted that the *Lake Butler* decision, decided under a statute different from the NLRA, addressed only the rights of employers under the First Amendment, not the separate statutory provision protecting employer speech (or lack thereof) from being found to violate the NLRA under Section 8(c) of the Act. Section 8(c) protects employer speech rights in ways that are separate and independent of the First Amendment. *See Chamber of Commerce v. Brown, supra*, 554 U.S. 60.⁷

V. THE BOARD HAS FAILED TO REBUT PLAINTIFFS' CONTENTION THAT THE NEW RULE IS ARBITRARY AND CAPRICIOUS.

A. Contrary To The Board's Brief, There Is No Empirical Evidence That Employees Lack Access To Information About Their Rights Under The NLRA.

As previously stated in Plaintiffs' Brief, at 17-18, the Board's new Rule must also be set aside because it is arbitrary and capricious, specifically because its putative justifications are not supported by substantial, or in this case any, empirical evidence. *See also* 76 Fed. Reg. at 54040-41 (Member Hayes, dissenting). Contrary to the Board's Brief, the Rulemaking proceeding contains no relevant data supporting the Board's claimed justification for the Rule, *i.e.*, the supposed lack of employees' awareness of their rights. The D.C. Circuit has previously held that "it is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data." *Portland Cement Ass'n v. Ruckelshaus*, 486 F. 2d 375 (D.C. Cir. 1973).

The Board's Brief identifies no additional data in support of the Board's stated justification, confirming that none exists. The Board relies solely on anecdotal statements in the rulemaking record and the unsupported claim that recent declines in the rates of unionization have left workers without sufficient means of learning about their collective bargaining rights.

⁷ The addition of § 8(c) expressly precludes regulation of speech about unionization.

Board Brief at 29-30. In response to the obvious answer that employees have more information at their disposal than ever before through the internet and related means, the Board Brief simply opines that employees are “less likely to seek out such information” in the absence of the newly required Notice poster. *Id.* at 32.

What is particularly striking about the Board’s argument is that no consideration is given to reasonable alternatives to the new Rule’s imposition of the posting requirement on employers. As noted by many commenters in the rulemaking record, the Board already provides substantially greater information about Section 7 rights to the public on its website than has ever before been available. The Board could easily engage in additional public outreach on its own to address the perceived need of employees to receive more information about unionization. The unions themselves also have more power than ever to communicate with workers and are regularly doing so through both electronic and personal means.

In short, nothing has changed in the last 75 years to justify the new notice posting requirement, except that there is *less* need for such a requirement than ever before. The Board’s promulgation of the new Rule without any objective data to support it, and in the face of the record evidence that the information in the compelled notice is already widely available outside the workplace, is arbitrary and capricious.

B. Contrary To The Board’s Brief, The Notice Language Compelled By The New Rule Is Not At All Neutral.

The Board’s Brief asserts that the new Rule should overcome the arbitrary and capricious standard because the language of the compelled Notice is “neutral.” Brief at 24-25. Yet the Board’s Brief ignores the statutorily mandated “right to work” laws of 22 states and the failure of the Board’s compelled Notice to give any notice to employees of their right not to pay union dues in those states. *See* 29 U.S.C. 164(b). The right to decertify a union or to object to union

dues requirements even in non-right to work states is also unmentioned in the Board's Notice. Finally, the lack of balance in the listing of employee rights in the Board's Notice cannot be denied, when the required poster lists six pro-collective action rights before mentioning a single "right to refrain" from any of the above.

VI. THE BOARD'S PARTIAL MOTION TO DISMISS SHOULD BE DENIED.

Finally, the Board asserts that the APA's availability for review of the Rule precludes this Court from exercising jurisdiction over Count Five of the Amended Complaint. Thus, the Board seeks dismissal of Count Five pursuant to Rule 12(b)(1), Fed.R.Civ.P. Contrary to the Board's assertion, this Court does have jurisdiction to review the Rule under *Leedom v. Kyne*, 358 U.S. 184 (1958), and the existence of the APA as an additional, alternative remedy does not in any way alter such jurisdiction. As a result, the Board's Rule 12(b)(1) motion must be denied.

In *Leedom v. Kyne*, the Supreme Court determined that the federal district courts have general federal question jurisdiction to review actions by the Board which are "in excess of its delegated powers or contrary to a specific prohibition in the Act." *Id.* at 188. In so holding, the Court did note as a factor in recognizing this cause of action the lack of a meaningful remedy available to the employees injured by the Board's underlying ruling. The availability or viability of the review analyzed, however, was limited to that under the statute at issue, the NLRA.

In *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32 (1991), a case relied on by the Board, the Court ruled that *Leedom v. Kyne* jurisdiction did not exist to review an agency rule implemented pursuant to the Financial Institutions Supervisory Act, 12 U.S.C. § 1818 *et seq.* ("FISA"), in part because FISA provided an adequate remedial scheme in the context of that case.⁸ In considering the adequacy of review procedures in the

⁸ The Court's decision finding no jurisdiction pursuant to *Leedom v. Kyne* was principally based on the fact that in addition to the review procedures existing, FISA also contained a provision explicitly precluding any other avenue

course of determining whether jurisdiction under *Leedom v. Kyne* exists or not, the Supreme Court has always examined the review available under the substantive statute at issue. In *Kyne*, it was the review available under the NLRA; in *MCorp Financial* it was review under FISA. The Court, to Plaintiffs' knowledge, has not looked at the availability of alternative claims for relief outside the statute at issue in analyzing jurisdiction under the *Kyne* principle. Indeed, the Board has cited no such case.

Most important, the D.C. Circuit has clearly and explicitly stated that review pursuant to *Kyne* exists even where the APA is available to obtain review of agency action. In *Railway Labor Executives Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (*en banc*), the Court, sitting *en banc*, held that a National Mediation Board promulgated rule for processing certain representation issues was subject to review under *Kyne*. In its opinion the Court specifically stated:

The separate concurring opinion by Judge Randolph holds that judicial review also is available to the appellants under section 704 of the Administrative Procedure Act, see 5 USC Section 704 (1988), and that the Merger Procedures can not withstand review for lack of authority in the Board to promulgate them. We agree with this alternative basis for decision.

Id. at 659, fn.1 (emphasis added).

As detailed in Plaintiffs' Memorandum In Support of Their Motion for Summary Judgment, *Railway Labor Executives Ass'n* is directly on point regarding the merits of this matter. Likewise, it is directly on point with respect to the availability of review of the Rule at issue under both *Leedom v. Kyne* and the APA. Accordingly, the Board's Motion To Dismiss Count Five of the Amended Complaint must be denied.

of judicial relief. Specifically, 12 USC § 1818(i)(1) provides, in pertinent part, "no court shall have jurisdiction to affect by injunction or otherwise . . . any notice or order under this section . . ." In this regard *MCorp Financial* is unquestionably distinguished from *Kyne* as the NLRA has no similar limitation.

With respect to the merits of Count Five, as demonstrated above, the Board has far exceeded its statutory authority in promulgating the Rule. That being the case, *Leedom v. Kyne* compels that this Court “strike down” the Rule in its entirety. *Kyne*, 358 U.S. at 184.

VII. 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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CERTIFICATE OF SERVICE

The undersigned counsel certifies that, on this 22nd day of November 2011, he electronically filed a true and correct copy of the foregoing Reply Memorandum of the National Association of Manufacturers and Coalition for a Democratic Workplace with the Clerk of the Court using the CM/ECF system, and thereby served a copy on the following counsel:

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