

# COMMENT

## SETTING LABOR POLICY PROSPECTIVELY: RULEMAKING, ADJUDICATING, AND WHAT THE NLRB CAN LEARN FROM THE NMB'S REPRESENTATION ELECTION PROCEDURE RULE

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## INTRODUCTION

For years, scholars have criticized the National Labor Relations Board's (NLRB's or Board's) reliance on adjudication rather than rulemaking.<sup>1</sup> The use of adjudication rather than rulemaking is problematic for the NLRB because of continued “policy oscillation”—frequent changes in agency policy between presidential appointments—in Board adjudications, which “sows disrespect for the agency.”<sup>2</sup> Additionally, the NLRB's sole use of adjudication precludes public participation, encourages fact-specific policymaking, and fosters the problem of agency nonacquiescence.<sup>3</sup>

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1. See generally Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); Joan Flynn, *The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387 (1995); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Scott A. Zebrak, Comment, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Heath Care Bargaining Unit Rule and by the Proposed Beck Union Dues Regulation*, 8 ADMIN. L.J. AM. U. 125 (1994).

2. See Estreicher, *supra* note 1, at 171 (noting that the Seventh Circuit denied enforcement in *Mosey Manufacturing Co. v. NLRB*, 701 F.2d 610 (7th Cir. 1983), because the policy at issue had oscillated seven times and the only changed circumstance was “in the Board's membership”).

3. See *id.* at 175 (expressing that agency nonacquiescence occurs when an agency pursues an issue rejected in one circuit in another to obtain a favorable result). For example, *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 470 (D.C. Cir. 2009), held that the National Labor Relations Board (NLRB or Board) could not decide unfair labor practice cases with only two members, but the Seventh Circuit held the opposite in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845–47 (7th Cir. 2009). Despite the unfavorable

Scholars argue that by rulemaking, the NLRB could ameliorate the appearance of political bias, articulate clear precedents, and encourage public participation in policymaking.<sup>4</sup>

Despite the promise of clearer precedents and a more politically neutral appearance, the NLRB has largely refrained from notice-and-comment rulemaking.<sup>5</sup> The NLRB claims that rulemaking procedures are too rigid for union policymaking, which must be quick to respond to specific fact patterns.<sup>6</sup> This raises ossification of rulemaking issues, including problems posed by the Regulatory Flexibility Act (RFA)<sup>7</sup> and the Congressional Review Acts (CRA),<sup>8</sup> and the threat of judicial review. The threat of congressional intervention also influences the NLRB's decision to refrain from rulemaking.<sup>9</sup>

There has been renewed scholarship criticizing the NLRB's avoidance of rulemaking and suggesting that the current Board is in a good position to begin rulemaking.<sup>10</sup> Heeding scholars' pleas, on December 22, 2010, the

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decision in the Court of Appeals for the District of Columbia Circuit, the NLRB continued to issue decisions with two Members until the Supreme Court resolved the circuit split against the NLRB. *See* *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010) (invalidating the NLRB's power to issue decisions before the President appointed new members because of a three-person quorum requirement).

4. *See, e.g.*, Estreicher, *supra* note 1, at 176 (arguing that rulemaking "should not[] prevent policy reversal," but should allow for more legitimate and certain laws); William B. Gould, IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 43 (2009) (noting rulemaking has a "stare decisis gravitas" as it invites public input).

5. *See, e.g.*, Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FLA. INT'L UNIV. L. REV. 411, 412–13 (2010) (noting three recent attempts—only one of which was successful—at NLRB rulemaking).

6. *See* Brief for NLRB at 15, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (No. 463) (explaining the NLRB's view that the "cumbersome process of amending formal rules would impede 'the law's ability to respond . . . to changing industrial practices'" (citation omitted)).

7. 5 U.S.C. §§ 601–612 (2006).

8. 5 U.S.C. §§ 801–808 (2006).

9. *See, e.g.*, Lubbers, *supra* note 5, at 420 (concluding that although the NLRB must address the Regulatory Flexibility Act (RFA) and Congressional Review Act (CRA) by performing additional analyses when rulemaking, ossification concerns should be minor); Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 995 (1980) [hereinafter *NLRB Rulemaking*] (arguing that the NLRB's use of adjudication lessens congressional and judicial oversight as rulemaking is more conspicuous than adjudicatory policymaking).

10. *See, e.g.*, Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 13–14 (2009) (arguing that the Obama Board should engage in rulemaking to stabilize fluctuating policies); Gould, *supra* note 4, at 44 (suggesting that the Obama Board should resume the rulemaking process that

NLRB issued its first notice of proposed rulemaking since its only recent successful rule in 1989 defining bargaining units in healthcare facilities.<sup>11</sup>

In light of this renewed discussion about the benefits of rulemaking in the inherently political unionization context, this Comment will examine the recent and controversial representation election procedure rulemaking by the National Mediation Board (NMB)—the federal agency charged with overseeing labor relations in the railway and airline industries—as a point of comparison for the NLRB.<sup>12</sup> Both agencies are bipartisan, independent, and facing the challenge of regulating in a highly political industry.<sup>13</sup> In November 2009, the NMB proposed a change in the way it counts union election ballots.<sup>14</sup> For seventy-five years, the NMB’s election procedure required that a majority of all eligible voters in the voting class cast valid ballots in favor of representation to certify the union.<sup>15</sup> Under the new rule, the NMB counts a majority of the valid ballots actually cast to determine if the class has elected a representative, a process which conforms to NLRB voting procedures.<sup>16</sup> The NMB engaged in notice-and-comment rulemaking under the Administrative Procedure Act (APA), invited written

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the Clinton Board was unable to complete “because of political pressure from a hostile Republican Congress”).

11. Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104). *See generally* Grunewald, *supra* note 1 (suggesting that the NLRB model many of its future rulemaking procedures off of the procedures it used during the successful healthcare bargaining unit rulemaking).

12. *See* Gould, *supra* note 4, at 42 n.116 (recognizing the National Mediation Board (NMB) as an “analogue to the NLRB . . . in the railway and airline industries”); *see also* Lubbers, *supra* note 5, at 431 (noting that the NMB’s rulemaking is a “‘dress rehearsal’ for future NLRB rulemaking”).

13. The Railway Labor Relations Act (RLRA) establishes the NMB as a bipartisan “independent agency” composed of three members appointed by the President. 45 U.S.C. § 154, First (2006). Likewise, the National Labor Relations Act (NLRA) creates a bipartisan NLRB with five members “appointed by the President by and with the advice and consent of the Senate.” 29 U.S.C. § 153(a) (2006).

14. *See* Representation Election Procedure (NPRM), 74 Fed. Reg. 56,750, 56,750 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2010)) (proposing a change in the NMB’s tallying procedures to “provide a more reliable measure/indicator of employee sentiment”).

15. *See id.* at 56,751–52 (describing that since 1935, abstentions from voting counted as a “no” vote).

16. *See id.* at 56,751 (relying in part on the similar language in the agencies’ statutes to justify the change).

submissions, and even held a public hearing on the issue<sup>17</sup> before adopting the final rule on May 11, 2010.<sup>18</sup>

Controversy surrounded the rule change—the agency received almost 25,000 comments during its sixty-day comment period and heard thirty-one witnesses at the open hearing.<sup>19</sup> Those who opposed the rule argued that the NMB rushed through the notice-and-comment process just before Delta, whose employees were traditionally anti-union, merged with Northwest, a traditionally pro-union organization.<sup>20</sup> Additionally, NMB Chairman Elizabeth Dougherty dissented from both the proposed and final rules, complaining that as the minority Republican member of the NMB she was given insufficient time to review the rule before its publication.<sup>21</sup> Ultimately, the NMB successfully defended itself in the U.S. District Court for the District of Columbia against arguments that it lacked statutory support to alter election procedures, that the majority prejudged the issues involved, and that it lacked factual support to justify the policy change.<sup>22</sup> Although the Air Transport Association (ATA) has appealed the decision,<sup>23</sup> the rule has also withstood a Senate joint resolution vote to return to the old election procedures.<sup>24</sup>

Given the similarities between the NMB and the NLRB, the NMB's successful rulemaking attempt demonstrates that the NLRB has the wherewithal to engage in notice-and-comment rulemaking, and it should look to the NMB's procedures as a guideline for conducting rulemaking in the future. This Comment analyzes the predictive and instructive value of the NMB's representation election procedure rulemaking for the NLRB. Part I will explore why the NLRB has refrained from setting its agenda through notice-and-comment rulemaking in the past, including its political

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17. See Meeting Notice, 74 Fed. Reg. 57,427 (Nov. 6, 2009) (inviting interested parties to share their views on the proposed changes in writing or orally during an open hearing).

18. Representation Election Procedure (Final Rule), 75 Fed. Reg. 26,062 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206).

19. *Id.* at 26,063.

20. See generally *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, No. 10-0804, (D.D.C. June 4, 2010) (order denying motion for expedited discovery) (rejecting the plaintiff's argument that the timing of the proposal proved that the NMB conspired to certify unions running for election at Delta).

21. Representative Election Procedures (Final Rule), 75 Fed. Reg. at 26,083 (Dougherty, Chairman, dissenting) (worrying that the public would perceive the rule as political because the majority excluded her from the rulemaking).

22. See generally *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010) (denying the plaintiff's preliminary injunction and affirming the final rule).

23. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010), *appeal docketed*, No.10-5254, (D.C. Cir. Jul. 29, 2010).

24. S.J. Res. 30, 111th Cong. (2010). The Senate rejected it by a vote of 43 to 56. *Id.*

considerations, problems with judicial review, and complications caused by the RFA and the CRA. Part II will survey scholarship calling for increased rulemaking at the NLRB. Part III will conduct a case study of the NMB representation election procedure rulemaking—analyzing the rulemaking from its inception through the court decision—and will address how the process overcame the NLRB’s concerns about notice-and-comment rulemaking. Part IV will discuss the NLRB’s recent notice of proposed rulemaking, showing how it has mirrored the NMB rulemaking procedure, and make recommendations for the rule going forward. Finally, this Comment concludes that both the NMB and NLRB’s recent rulemaking activities demonstrate that the agencies can successfully set labor policy prospectively by using APA rulemaking correctly and carefully.

#### I. THE NLRB AND RULEMAKING: A HISTORY OF APPREHENSION AND AVOIDANCE

Since its inception, the NLRB has set its substantive policies by adjudicating rather than engaging in APA notice-and-comment rulemaking.<sup>25</sup> Although agencies can generally choose between rulemaking and adjudication to set policy, scholars as far back as the 1960s have criticized how the NLRB avoids notice-and-comment rulemaking.<sup>26</sup> This Part identifies the reasons the NLRB has been reluctant to engage in rulemaking.

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25. See, e.g., Zembrak, *supra* note 1, at 126 n.4 (explaining that the NLRB has chosen to enforce almost all of its substantive policies exclusively through adjudications, with a few minor exceptions concerning rules about the jurisdictional standards for symphony orchestras, private colleges and universities, and horse racing); see also Lubbers, *supra* note 5, at 412 (noting that the NLRB completed its last successful rulemaking in 1989, when it issued a rule specifying collective bargaining units in healthcare facilities; since then the NLRB has proposed and withdrawn two substantive rules).

26. See *supra* note 1. Since *SEC v. Chenery Corp.*, the Supreme Court has recognized agencies’ ability to set policy by adjudication or rulemaking. 332 U.S. 194, 202 (1947) (holding that the Securities and Exchange Commission (SEC) had the discretion to promulgate a policy during “*ad hoc* adjudication” concerning the Federal Water Service Corporations’ reorganization plan); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (affirming that the NLRB may choose how to form policy). *But see* *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (listing cases of first impression and abrupt departures from well-established practices as factors militating toward a finding of agency abuse of discretion).

A. *NLRB's Ability and Reluctance to Engage in Rulemaking*

Congress granted the NLRB statutory authority to engage in rulemaking in accordance with the APA.<sup>27</sup> Yet, the NLRB is unique among major federal agencies in making its policy almost exclusively through adjudication rather than rulemaking.<sup>28</sup> The history of substantive NLRB rulemaking is sparse; since 1970, the NLRB has promulgated very few substantive rules following the procedures set forth in § 553 of the APA.<sup>29</sup> The NLRB has chosen to pursue adjudication over rulemaking for several reasons. First, agencies may avoid rulemaking because it imposes a burden on staff trying to simultaneously adjudicate cases.<sup>30</sup> Second, agencies use adjudication rather than rulemaking to avoid setting clear policies susceptible to judicial intervention and overruling and to avoid the more binding effect that policies set in rulemaking have over precedential rules announced in adjudicatory opinions.<sup>31</sup>

The NLRB in particular has expressed reluctance to engage in notice-and-comment rulemaking, claiming that the rulemaking process is too rigid and inflexible for the labor industry and that adjudication “permits ‘gradual development of the law through specific fact patterns . . . .’”<sup>32</sup> The complex areas the NLRB regulates—such as “secondary boycotts, picketing, [and] the duty to bargain in good faith”—supposedly evolve too quickly and unpredictably to accommodate rulemaking.<sup>33</sup> When adjudicating, on the other hand, the agency is free to amend its policies with less delay from public input and political pressure.<sup>34</sup>

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27. See 29 U.S.C. § 156 (2006) (“The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary . . .”).

28. Flynn, *supra* note 1, at 388 (noting that although the NLRB is unlike any other major federal agency in not utilizing its rulemaking power, it is entitled to set policy through adjudication unless it disguises policymaking as fact-finding (citing *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 819 (1990) (Scalia, J., dissenting))).

29. See *supra* note 25 and accompanying text.

30. See Zebrak, *supra* note 1, at 128 (explaining that it may be more plausible for agencies to adjudicate because rulemaking requires a greater devotion of resources than adjudication, and doing both can be a financial burden).

31. See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 103 (3d ed. 1998) (noting that agencies must engage in subsequent rulemaking proceedings to change policies adopted in rules); Zebrak, *supra* note 1, at 128 n.16 (describing how courts require administrative agencies to provide reasons for departing from a policy set in a rulemaking).

32. Brief for NLRB at 15, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (No. 463).

33. See *id.* (arguing that case-by-case adjudication creates labor policies that respond to “actual industrial experience” and better cater to the regulated).

34. See *NLRB Rulemaking*, *supra* note 9, at 999 (arguing that Congress is more likely to take notice of rulemaking proceedings because they are more public than adjudications).

This proffered reason disguises three of the agency's underlying concerns. First, rulemaking may attract congressional attention, making the agency's policies more susceptible to congressional intervention. Second, just as Congress is more likely to challenge a policy clearly stated in a rule, the Judiciary can more easily overturn agency policy developed during rulemaking than it can adjudicatory policies.<sup>35</sup> Third, rulemaking has become ossified in recent years, as Congress has enacted regulatory statutes that impose on agencies additional analytical requirements.<sup>36</sup> These concerns are each discussed below.

1. *Political Concerns with Increased Rulemaking*

"Labor relations is one of the most polarized and controversial subjects of national political debate,"<sup>37</sup> so it is unsurprising that the NLRB works to limit congressional intervention when setting national labor policy. Adjudications minimize the contact an agency has with Congress, as they set policy incrementally and disguise policies behind the factual circumstances of discrete cases.<sup>38</sup> If the NLRB engages in rulemaking, congressional intervention into policymaking might increase, and the agency fears this will undercut the flexibility it needs to adapt its policies to rapidly changing political and industrial conditions.<sup>39</sup>

Even when adjudicating, the NLRB cannot avoid congressional contact altogether because it is an executive agency and derives its power from the National Labor Relations Act (NLRA).<sup>40</sup> The NLRB's contact with Congress, however, is mostly informal.<sup>41</sup> The agency formally interacts with the Legislature when Congress confirms new members, issues

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35. *See id.* (noting that increased congressional oversight and judicial review of policies set forth in rulemaking cause delay and impede the NLRB's function); *see also* Flynn, *supra* note 1, at 433-34 (suggesting that courts often overturn the NLRB's policy decisions without remanding).

36. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1391 (1992) (noting that the purpose of most statutes is to "accomplish progressive public policy goals," but ossification of the informal rulemaking process delays agencies from accomplishing their goals).

37. *NLRB Rulemaking*, *supra* note 9, at 988.

38. *See id.* at 995 (observing how the NLRB uses adjudication to adopt policies over time without articulating their implications, giving Congress no clear policy to attack).

39. *See id.* at 999 (finding that adjudication affords the NLRB independence to respond to changes in politics, which it does as new presidents appoint members from the dominant political party).

40. 29 U.S.C. §§ 151-169 (2006).

41. *See NLRB Rulemaking*, *supra* note 9, at 993 (noting that Congress mostly communicates with the NLRB privately, irregularly, and without exposing the agency to public scrutiny).

appropriations, and reviews the NLRB's annual report to Congress—but these contacts are routine and rarely controversial.<sup>42</sup> Problems arise for the NLRB when congressional committees substantively review agency policies during oversight hearings, as Congress has used hearings to harass the Board in the past.<sup>43</sup> By “hid[ing] the ball” behind adjudicatory facts, adjudication may disguise policy choices, avoid attacks on the agency's use of empirical data during the rulemaking process, and avoid attracting congressional attention for a longer period of time.<sup>44</sup> Additionally, Congress can impose riders on the NLRB's appropriations to prevent it from using funds to enact policies, and rulemaking could expose the agency to such intervention.<sup>45</sup> The NLRB has refrained from rulemaking in part to avoid the “delay, administrative inconvenience, and harassment” that may come from clearly articulating labor policy.<sup>46</sup>

However, a clear articulation of a policy decision will lead to a more legitimate final rule.<sup>47</sup> For example, the NLRB recently changed its

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42. *See id.* (observing how Congress has confirmed every presidential nominee to the Board, has approved appropriations routinely, and has largely ignored the NLRB's annual report). Recently, Obama appointees have faced controversy from the Senate. Craig Becker, an Obama appointee to the NLRB, faced opposition from the Senate before Obama appointed him to the NLRB as a recess appointee. *See* Mark Hemingway, *Controversial National Labor Relations Board Nominee Craig Becker Shot Down in Senate*, WASHINGTONEXAMINER.COM (Feb. 9, 2010, 5:00 AM), <http://washingtonexaminer.com/blogs/beltway-confidential/controversial-national-labor-relations-board-nominee-craig-becker-shot-dow> (describing how the Senate prevented Obama's pick, Craig Becker, from being nominated to the NLRB because of his pro-union background); *see also* Hunton & Williams LLP, *President Makes Controversial Recess Appointments to NLRB and EEOC*, HUNTON EMP'T & LABOR PERSPECTIVES (Mar. 29, 2010), <http://www.huntonlaborblog.com/2010/03/articles/nlr-1/president-makes-controversial-recess-appointments-to-nlr-and-eoc/> (noting Obama's controversial recess appointment Craig Becker).

43. *See* Joan Flynn, “Expertness for What?": *The Gould Years at the NLRB and the Irrepressible Myth of the “Independent” Agency*, 52 ADMIN. L. REV. 465, 468 n.15 (2000) (identifying two oversight hearings in 1996 in which congressional Republicans criticized the Clinton Board's “apparent loss of respect for the rule of law” when they disapproved of Chairman Gould's leadership).

44. *See NLRB Rulemaking*, *supra* note 9, at 995 (contending that adjudicatory lawmaking results in the rule developing gradually over several years without giving Congress a clear policy).

45. Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeal* 26 n.84 (Univ. of Tenn. Knoxville, Ctr. of Law, Legal Studies Research Paper No. 113, 2010) (forthcoming in FLA. INT'L U. L. REV. 2011), *available at* <http://ssrn.com/abstract=1660215> (recounting how Congress quashed the NLRB's proposed rule establishing single-location units by attaching riders to its budget).

46. *NLRB Rulemaking*, *supra* note 9, at 999.

47. *See* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2057–58

long-standing policy known as the “recognition bar,” whereby the NLRB will wait a reasonable amount of time before entertaining a petition to decertify a newly recognized union.<sup>48</sup> In *Dana Corp.*, the NLRB changed this policy to allow for decertification at any point after recognition by signed authorization card.<sup>49</sup> Neither the majority nor the dissent relied on factual evidence to support their conclusions and left their policy choices unexplained, which led to a confusing and unjustified policy change.<sup>50</sup> A notice-and-comment proceeding would have provided the agency “access to social science data or other factual research” to create a well-reasoned and explained policy choice.<sup>51</sup>

## 2. *Judicial Review Concerns with Increased Rulemaking*

Just as hiding the ball behind adjudicative facts shields the NLRB from congressional review, the NLRB fears that a shift to rulemaking would increase judicial oversight.<sup>52</sup> The Judiciary reviews NLRB adjudications—but adjudicative legislation forces the reviewing courts to scrutinize the application of the policy to the discrete facts of the case, which insulates the policy from outright judicial rejection.<sup>53</sup> Judges review policies made during rulemaking in isolation, only examining the empirical data, legislative facts, and agency procedure found in the rulemaking record.<sup>54</sup>

The NLRB fears that promulgating clearer policies through rulemaking will facilitate judicial imposition of individual judges’ own policy decisions,

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(2009) (stating that the Bush II Board’s “methods and choices are [not] perceived as legitimate” because of its failure to articulate its policy decisions).

48. See *Keller Plastics E. Inc.*, 157 N.L.R.B. 583, 586 (1966) (“[C]ertification must be honored for a reasonable period, ordinarily 1 year in the absence of unusual circumstances . . .”).

49. See *Dana Corp.*, 351 N.L.R.B. 434, 441 (2007) (allowing immediate decertification where the employer chooses to recognize a union elected via informal signed authorization cards).

50. See *Fisk & Malamud*, *supra* note 47, at 2062 (articulating the undefended policy premises behind the *Dana* opinion, including a preference for allowing challenges to the validity of union recognitions).

51. *Id.* at 2065; see *Estreicher*, *supra* note 1, at 176 (noting that rulemaking allows agencies to analyze a broader range of empirical data than what parties to an adjudication present in their briefs).

52. *Flynn*, *supra* note 1, at 422 (noticing how the NLRB diverts the Judiciary’s attention from the policy to the facts in adjudication while rulemaking provides a clear policy target).

53. See *id.* at 413 (describing a “de jure/de facto” gap in adjudications—a difference between a policy and its application—which forces the courts to focus only on the policy’s application).

54. See *id.* at 417 (noting that courts can assess the agency’s accuracy when reviewing a rule, but have a harder time justifying reversing policies the NLRB promulgated to fit a set of facts).

especially where labor relations are concerned.<sup>55</sup> This assertion seems counter to the deferential role of the Judiciary after the creation of *Chevron* doctrine.<sup>56</sup> Yet scholars argue that while the Judiciary has always afforded the NLRB a deferential standard of review,<sup>57</sup> this has never deterred judicial hostility toward unions.<sup>58</sup> Judicial hostility toward collective bargaining increases the risk of judicial intervention, which leads to administrative “delay and uncertainty.”<sup>59</sup> Additionally, the NLRA contains no provision prescribing pre-enforcement judicial review in the courts of appeals, so challenges to rulemaking must first go through the federal district court and are subject to appeal.<sup>60</sup>

### 3. *Ossification Concerns with Increased Rulemaking*

Some scholars have suggested that rulemaking has become “ossified” in recent years, which dissuades agency rulemaking.<sup>61</sup> The concept of agency ossification denotes the idea that over the last few decades, Congress, the Judiciary, and the Executive Branch have imposed additional procedures for notice-and-comment rulemaking with the result “that the process has

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55. See *id.* at 444–45 (arguing that the Judiciary has a persistent suspicion of and hostility toward the institution of collective bargaining); see also *NLRB Rulemaking*, *supra* note 9, at 999 (stating that courts’ lack of deference makes labor policy less able to respond to evolving circumstances).

56. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (commanding courts to defer to any reasonable agency interpretation of its governing statute where Congress has not specifically spoken to the issue involved). NLRA language is ambiguous, which should leave the NLRB free to reasonably make policies. See, e.g., 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, 257 (1968) (noting the Act has “general provisions” and little legislative history, which leaves agencies free to interpret its provisions).

57. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979) (stating that courts must defer to NLRB decisions that are rational and consistent with the Act).

58. See Flynn, *supra* note 1, at 439–40 (arguing that the *Lechmere* decision, where despite *Chevron* the Court overturned an agency interpretation and factual findings, illustrates judicial animus toward collective bargaining (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992))).

59. See *id.* at 425 (“Judicial review has subjected [the NLRB] to . . . uncertainty” as courts disregard its policymaking agenda); see also R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 257 (1992) (“[C]ourts often make a mess of policy because they have a poor understanding of administrative agencies . . .”).

60. See Lubbers, *supra* note 5, at 427–29 (calling for Congress to remove this unnecessary double judicial review procedure from the NLRA to facilitate rulemaking).

61. See generally LUBBERS, *supra* note 31 (describing how most agencies have moved from rulemaking to issuing informal guidance documents as rulemaking has ossified and decreased).

become . . . inefficient.”<sup>62</sup> The RFA and the CRA are the primary statutes that apply to independent agencies like the NLRB, and each imposes additional procedural requirements when rulemaking.<sup>63</sup>

First, any NLRB rulemaking will have to address the RFA,<sup>64</sup> which requires agencies to consider the impact that their proposed rules will have on small businesses and come up with less burdensome alternatives.<sup>65</sup> Unless the agency certifies to the Small Business Administration’s Chief Counsel for Advocacy that the rule will not have a significant impact on small businesses, the agency must prepare an initial regulatory flexibility analysis to be published in the *Federal Register* alongside the proposed rule.<sup>66</sup> If the rule will have a significant economic impact, the agency must also use special techniques to give small entities the opportunity to participate in the rulemaking process.<sup>67</sup> Although it is unclear how much of a burden the RFA imposes on the NLRB, an NLRB rule could have a significant impact on a substantial number of small businesses.<sup>68</sup>

The CRA<sup>69</sup> requires that the agency submit all major rules of general applicability with impact statements to both Congress and the Comptroller General before rules take effect.<sup>70</sup> The Act’s purpose is to give Congress a fast way to disapprove agency rules, but its impact has been slight—although hundreds of rules go to Congress each month, Congress has only

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62. Stephen M. Johnson, *Junking the “Junk Science” Law: Reforming the Information Quality Act*, 58 ADMIN. L. REV. 37, 61 (2006).

63. See Lubbers, *supra* note 5, at 420, 426 (noting that the National Environmental Protection Act (NEPA) also applies, as does reporting to the Office of Management and Budget (OMB) vis-à-vis Executive Order 12,866, but those requirements are insignificant to the NLRB). The Paperwork Reduction Act (PRA) may also pose an obstacle to the NLRB, which would require approval from the OMB for information collection requests. *Id.* at 420–21 (citing 44 U.S.C. § 3507(f) (2006)).

64. 5 U.S.C. §§ 601–612 (2006).

65. *Id.* § 603(a)–(c).

66. *Id.* § 605(b); see Lubbers, *supra* note 5, at 421–22 (explaining that the initial regulatory flexibility analysis is subject to judicial review).

67. See Lubbers, *supra* note 5, at 422 & n.60 (explaining additionally that if the rule has a significant economic impact, the agency must also publish a final regulatory flexibility analysis (citing 5 U.S.C. § 604(a))).

68. See *id.* at 422 (noting that, should the NLRB’s rule have a “significant economic impact on a substantial number of small entities . . . [it] would need to [perform] the requisite analysis” under the RFA). In the NLRB’s healthcare bargaining unit rule, the RFA imposed a slight burden on the NLRB, which issued a second notice of proposed rulemaking to add an RFA certification. *Id.*

69. 5 U.S.C. §§ 801–808 (2006).

70. A “major” rule has an impact of \$100,000, *id.* § 804(2)(A), and it has a delayed effectiveness of sixty days, *id.* § 801(a)(2)(B)(3)(A). A nonmajor rule goes into effect immediately. *Id.* § 801(a)(4).

ever disapproved of one using the CRA.<sup>71</sup> It remains on the books as a potential tool for congressional intervention, but Congress uses the CRA so infrequently that the NLRB should not fear its impact when deciding to engage in rulemaking.<sup>72</sup>

Additionally, the agency faces internal burdens when rulemaking,<sup>73</sup> and the NLRB is concerned that it lacks the capacity to concentrate on rulemaking without diverting its resources away from adjudication.<sup>74</sup> Rulemaking would be a more realistic prospect for the NLRB in the future if the agency had a staff of experts to call upon should it choose to create policy through the notice-and-comment process.<sup>75</sup>

## II. ARGUMENTS FOR INCREASED RULEMAKING AT THE NLRB

Despite these perceived drawbacks, scholars have been urging the NLRB to engage in rulemaking for years with little success.<sup>76</sup> Recently, scholars have renewed this discussion because the NLRB and the political climate in general are currently “more hospitable to collective bargaining.”<sup>77</sup> Professor Samuel Estreicher, for example, published an article suggesting that the NLRB engage in rulemaking to “promote certainty and establish a process likely to lead to better rules.”<sup>78</sup> Similarly, William Gould, a retired Chairman of the NLRB, suggested that the new Board “might be better served by engaging in rulemaking” instead of simply reversing old precedent.<sup>79</sup>

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71. See Lubbers, *supra* note 5, at 425 & n.78 (describing how Congress successfully used the CRA to overturn the Clinton Administration’s controversial Occupational Safety & Health Administration (OSHA) ergonomics regulations). See also Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the “Substantially Similar” Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707 (2011).

72. See LUBBERS, *supra* note 31, at 255–56 (explaining that although the CRA is basically moribund, agencies cannot be sure Congress will not oppose their final major rules).

73. See *id.* at 261–63 (stating that agencies now devote more resources to write longer preambles because courts rely on them during arbitrary and capricious review (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983))).

74. See Grunewald, *supra* note 1, at 322 (suggesting the agency could solve this by hiring staff “that could be called upon to provide support regardless of the . . . subject of the rulemaking”).

75. See *id.* (indicating that in the wake of the healthcare bargaining unit rule, the NLRB should hire a staff of rulemaking experts to facilitate future rulemaking).

76. See sources cited *supra* note 1.

77. Gould, *supra* note 4, at 44 (arguing that the current NLRB should take advantage of its Democratic majority to reverse Bush II Board decisions permanently).

78. Estreicher, *supra* note 10, at 14.

79. Gould, *supra* note 4, at 44.

Rulemaking presents many advantages for the NLRB. First, policies promulgated through rulemaking set a clearly articulated standard and provide the public with more guidance as to their legal responsibilities.<sup>80</sup> It also encourages the agency to engage in empirical analysis when formulating policy, thus reaching a more reasoned decision.<sup>81</sup> The NLRB recognized the value of such data when they decided to engage in notice-and-comment rulemaking to create a concrete rule preventing further confusion when defining healthcare bargaining units on a case-by-case basis.<sup>82</sup>

Second, rulemaking leads to a fairer and more effective administration of the rule because it allows the NLRB to set agency policy prospectively, encourages interested parties to participate, and avoids relitigating ambiguities.<sup>83</sup> Rulemaking allows the agency to act in a quasi-legislative capacity and express its policy preferences, unlike its role in adjudicating where agency fact-finders are expected to be impartial.<sup>84</sup>

Finally, rulemaking would reduce the problem of “policy oscillation” at the NLRB that occurs with every new Administration, and thus enhance public and judicial respect for the Board.<sup>85</sup> While not all subjects are

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80. See Estreicher, *supra* note 1, at 173–74 (discussing why fact-specific policymaking results in hard-to-follow rules for the public); Flynn, *supra* note 1, at 394 (criticizing the NLRB for manipulating the adjudicatory process to disguise policymaking as fact-finding); Grunewald, *supra* note 1, at 282 (asserting that rulemaking provides clarity and stability).

81. See Estreicher, *supra* note 1, at 176 (declaring that collecting empirical data creates an aura of legitimacy); see also Administrative Conference of the United States Recommendations Regarding Administrative Practice and Procedures, 56 Fed. Reg. 33,841, 33,852 (July 24, 1991) (codified at 1 C.F.R. pt. 305 (1991)) (arguing that rulemaking allows the agency to analyze empirical data not collected in adjudications).

82. See Grunewald, *supra* note 1, at 293 (noting that the NLRB considered “whether rulemaking would stimulate the submission of useful empirical data” in deciding to make the rule).

83. See *id.* at 282 (emphasizing how rulemaking facilitates agency planning because accidental litigation facts do not influence policymaking); *id.* at 288–89 (noting the NLRB embraced rulemaking after the Ninth Circuit rejected and “misunderstood the Board’s rationale” for its healthcare bargaining unit adjudications).

84. See LUBBERS, *supra* note 31, at 103 (arguing that rulemaking procedures are more flexible for the agency because it does not have to separate its judicial from its policymaking function as it does when adjudicating). But see Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They’re Not*, 59 ADMIN. L. REV. 79, 91 (2007) (highlighting the difference between notice-and-comment rulemaking and congressional legislation, which does not require public participation).

85. See Estreicher, *supra* note 1, at 171 (policy oscillations foster court reluctance to defer to agency policymaking); Gould, *supra* note 4, at 43 (rulemaking would decrease policy oscillations because an agency can only overturn policy set in rulemaking by engaging in another rulemaking); Hirsch, *supra* note 45, at 26 (rulemaking would provide the NLRB with more judicial deference).

appropriate for rulemaking, the NLRB could engage in rulemaking when an issue has been highly litigated and requires further clarification, and where nationwide uniformity makes sense.<sup>86</sup> Further, the NLRB could prevent policy oscillations by rulemaking in areas that fluctuate frequently to create longer lasting policy and increase deference to the NLRB.<sup>87</sup> The Administrative Conference of the United States (ACUS) recommended that the NLRB identify subjects appropriate for rulemaking by considering the need for empirical data on the subject, the value of participation by the affected public, the need to establish stable policy in a subject area, and the degree to which rulemaking would curb future litigation and enforcement costs by setting clear policy.<sup>88</sup>

Since policymaking via APA notice-and-comment rulemaking could benefit the NLRB's public image and create more stable agency policies, it is useful to analyze the recent rulemaking at the NMB—a “sister agency” of sorts to the NLRB in that it also deals with national labor relations, simply in a more narrow slice of the economy—and to pinpoint the ways in which the NMB successfully promulgated its new election rule despite the obstacles of rulemaking in a highly political industry.<sup>89</sup> The NMB faced challenges when it engaged in rulemaking in the labor industry: its members did not agree that rulemaking was the proper course of action,<sup>90</sup> trade organizations challenged the final rule in the District Court for the District of Columbia,<sup>91</sup> and Congress tried to issue a joint resolution against the rule.<sup>92</sup> However, the NMB carefully solicited comments from the interested public and issued a thorough final rule refuting opposing views, and the rule has so far survived judicial review.<sup>93</sup> The NLRB can use these

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86. See Estreicher, *supra* note 10, at 13–14 (suggesting that the NLRB engage in rulemaking for nationwide uniformity to prevent disparate results in litigation in different circuits); Gould, *supra* note 4, at 42–43 (noting that rulemaking would save money where an issue is highly adjudicated).

87. See Hirsch, *supra* note 45, at 26 (finding rulemaking's “increased predictability” would strengthen judicial deference to the NLRB's clearly articulated policy decisions).

88. Administrative Conference of the United States Recommendations Regarding Administrative Practice and Procedures, 56 Fed. Reg. 33,841, 33,852 (July 24, 1991) (codified at 1 C.F.R. pt. 305 (1991)); see Estreicher, *supra* note 10, at 13 (recommending that the NLRB promulgate a rule describing a model authorization card used for ascertaining election interest and card majority).

89. Final Rule, 75 Fed. Reg. 26,062 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206 (2011)).

90. See *id.* at 26,083–89 (Dougherty, Chairman, dissenting) (arguing the NMB acted to aid unions).

91. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010).

92. See H.R.J. Res. 97, 111th Cong. (2010); S.J. Res. 30, 111th Cong. (2010).

93. See *infra* Part III.B. (examining the history of the rule since its promulgation).

techniques moving forward in its own rulemaking efforts to overcome obstacles and promulgate successful, long-lasting policies.

### III. CASE STUDY OF THE NMB REPRESENTATION ELECTION PROCEDURES

Given the statutory and structural similarities between the NLRB and the NMB, the model of the NMB's procedures should be especially illuminating for the NLRB.<sup>94</sup> Congress created the NMB in the 1934 amendments to the Railway Labor Act (RLA)<sup>95</sup> so that "[e]mployees . . . have the right to organize and bargain collectively through representatives of their own choosing."<sup>96</sup> The NMB resolves representation disputes, certifies collective bargaining elections, and "establish[es] the rules to govern the election" of employees' representative unions.<sup>97</sup>

The NMB is an independent, bipartisan agency composed of three members;<sup>98</sup> the NLRB is also a bipartisan, independent agency with an odd number of members "appointed by the President by and with the advice and consent of the Senate."<sup>99</sup> Moreover, § 2, Fourth of the RLA is quite similar in construction to § 9(a) of the NLRA, each requiring its respective agency to certify unions that have achieved a majority of votes in the craft or class.<sup>100</sup> Neither statute contains a provision for judicial review of

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94. See Lubbers, *supra* note 5, at 431 (noting that the NMB is the NLRB's "sister agency").

95. Pub. L. No. 73-442, ch. 691 sec. 2, 48 Stat. 1185 (1934).

96. Railway Labor Act (RLA), 45 U.S.C. § 152, Fourth (2006).

97. *Id.* § 152, Ninth. The Supreme Court has afforded the NMB discretion to enforce election procedures. See *Bhd. of Ry. & S.S. Clerks v. Ass'n for the Benefit of Non-Contract Emps. (ABNE)*, 380 U.S. 650, 668-69 (1965) (stating that as long as the NMB "insure[s] freedom from carrier interference . . . [i]ts determinations . . . [are] not subject to judicial review").

98. 45 U.S.C. § 154, First. At least one member must be from an opposing party, appointed by the President with advice and consent of the Senate, and members are removable only for cause. *Id.*

99. National Labor Relations Act (NLRA), 29 U.S.C. § 153(a). The five NLRB members are appointed for five-year terms, and members are only removable for neglect of duty. *Id.*

100. The NLRA § 159(a) reads: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining," while RLA § 152, Fourth reads, "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class . . ." The NMB relied on the opinion of Attorney General Clark in 1947, stating that § 9(a) of the NLRA was modeled after § 152, Fourth of the RLA. See Representation Election Procedure (NPRM),

rulemaking in the courts of appeals.<sup>101</sup> The similarities between the two agencies demonstrate that the NLRB can also successfully engage in notice-and-comment rulemaking, and it should look to the NMB's procedures as a guideline for its future rulemaking endeavors.<sup>102</sup>

This Part will analyze the processes that the NMB used during its union election rulemaking, from its inception through the decision in the District Court for the District of Columbia, and discuss how the NMB overcame the NLRB's concerns about notice-and-comment rulemaking.

### A. NMB's Rulemaking Procedures

#### 1. The Proposed Rule Change

In moving forward with its future rulemaking activities, the NLRB should learn from the NMB's mistakes and triumphs by closely examining how the NMB followed APA procedures in going about its rulemaking, an adherence which allowed for meaningful participation and facilitated judicial approval of the final rule.<sup>103</sup> On November 3, 2009, the NMB published a notice of proposed rulemaking in the *Federal Register* proposing a change to its tallying mechanism during representation elections.<sup>104</sup> The RLA provides that a "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class."<sup>105</sup> Under the old rule, the NMB interpreted this provision to require a majority of eligible voters in the craft or class to cast ballots in favor of a union, counting any abstentions as "no" votes.<sup>106</sup> The NMB had used the old interpretation since 1935 because it was based on "what seemed . . . best [to the 1935 Board] from an administration point of

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74 Fed. Reg. 56,750, 56,751 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2011)).

101. See Lubbers, *supra* note 5, at 427 (noting that the NLRA, like the RLA, does not provide for pre-enforcement review in the courts of appeals, making rulemaking potentially more onerous).

102. See, e.g., Gould, *supra* note 4, at 42 n.116 (describing the NMB as "an analogue to the NLRB on recognition issues in the railway and airline industries").

103. See *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 37-45 (D.D.C. 2010) (affirming the rule in part because of the detail with which the agency explained its reasoning and refuted commentators' concerns).

104. See generally Representation Election Procedure (NPRM), 74 Fed. Reg. 56,750 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206) (suggesting that the new procedure will better measure sentiment).

105. 45 U.S.C. § 152, Fourth (2006). The NMB has discretion to decide the manner in which that right should be exercised. *Id.* § 152, Ninth; *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 560 (1937).

106. Representation Election Procedure (NPRM), 74 Fed. Reg. at 56,752.

view.”<sup>107</sup> The NMB proposed a new rule amending its long-held interpretation to mean that the majority of valid ballots cast would determine the craft or class representative, thus deeming an abstention to be indifference rather than an automatic “no” vote.<sup>108</sup> This Part will summarize two lessons the NLRB can learn from the NMB’s proposed rule: First, the NLRB may wish to select a less controversial rule to begin rulemaking, and second, the NLRB should work to promote internal agency harmony, even where members disagree over a rule change, to avoid appearances of political bias.

*a. Selecting Less Controversial Policies Ripe for Rulemaking*

Given its concern that rulemaking will attract unnecessary congressional and judicial attention, the NLRB may wish to choose less controversial areas to focus on than the NMB chose. The NMB’s controversial decision to change election procedures fueled the arguments against rulemaking.<sup>109</sup> Its representation election rule change was particularly controversial because the NMB had already twice rejected requests to alter the old rule.<sup>110</sup> The NMB first considered the rule change in 1987 when the Chamber of Commerce petitioned to change the NMB’s decertification procedures to make it easier for employees to end the union relationship and the International Brotherhood of Teamsters requested a change in election procedures whereby a majority of voters would determine the election.<sup>111</sup> The NMB consolidated the requests and held a full evidentiary hearing with witnesses subject to cross-examination, but ultimately denied both requests because the NMB has “made it a policy to limit rulemaking activities only to those matters required by statute.”<sup>112</sup> Similarly, when during a disputed election at Delta in 2008, the Association of Flight

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107. *Id.* at 56,751.

108. *Id.* at 56,750, 56,752.

109. *See id.* at 56,753 (Dougherty, Chairman, dissenting) (suggesting the rule survived several political eras and the NMB erred by abandoning its practice of proposing only essential changes).

110. *See generally* Chamber of Commerce, 14 N.M.B. 347 (1987) (declining to change a functional rule); Delta Air Lines, Inc., 35 N.M.B. 129 (2008) (deeming the change nonessential).

111. *See* Chamber of Commerce, 14 N.M.B. at 347, 349, 352 (describing how the Chamber of Commerce wished to change the decertification process, which is complex because the RLA contains no provisions for decertifying unions).

112. *Id.* at 355.

Attendants–CWA, AFL–CIO requested its election be subject to a “yes/no” ballot, the NMB refused the request.<sup>113</sup>

Despite its past decisions, the NMB issued the representation election procedure proposal one month after the Transportation Trades Department of the AFL–CIO wrote a letter to the Board requesting it to change its election policy and “allow employees to more effectively exercise their statutory right” to collectively bargain.<sup>114</sup> This time, instead of holding a hearing on the proposal before initiating rulemaking procedures as it did in *Chamber of Commerce*, the NMB decided to use APA procedures to change the election rule.<sup>115</sup> The APA does not require the NMB—or any agency—to hold a hearing or consider public comments before engaging in rulemaking.<sup>116</sup> Yet, to quell appearances of political bias the agency could have been more careful to explain in the proposal the reason it changed the policy at this particular time, as opposed to in 2008 when it was last rejected.<sup>117</sup> In her dissent, Chairman Dougherty argued that politics motivated the majority’s rule change, as the majority disregarded *Chamber of Commerce* and *Delta*’s mandate to proceed only with essential rules, and overturned a rule that “has been applied consistently for 75 years—including by Boards appointed by Presidents Roosevelt, Truman, Johnson, Carter, and Clinton.”<sup>118</sup> Moving forward, the NLRB may wish to address any such issues carefully in its notices of proposed rulemaking through detailed explanation of the nonbiased circumstances that led to the decision, especially given the NLRB’s propensity to change its policies.<sup>119</sup>

However, the NLRB can take solace in the fact that even without addressing why it decided to change the rule at this time—as opposed to

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113. See *Delta Air Lines, Inc.*, 35 N.M.B. at 129, 132 (rejecting the change as nonessential to uphold the RLA).

114. Letter from Transp. Trades Dep’t, AFL–CIO to the NMB (Sept. 2, 2009) (on file with Author).

115. See NPRM, 74 Fed. Reg. 56,750, 56,750 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (noting that this proposal is a part of the agency’s “efforts to further the statutory goals of the Railway Labor Act”).

116. See 5 U.S.C. § 553(b) (2006) (providing that the Administrative Procedure Act (APA) requires only a general notice of proposed rulemaking to be published in the *Federal Register*).

117. The majority mentioned that the 2008 *Delta Air Lines* decision relied on the assumption that the old rule helped maintain labor stability, but that they now believed this stability was more directly related to the NMB’s mediation function. Representation Election Procedure (NPRM), 74 Fed. Reg. at 56,751. Yet, the dissent still argued that the NMB had not answered why views have changed at this particular time. See *id.* at 56,753 (Dougherty, Chairman, dissenting) (arguing that stability explanation is insufficient reason to depart from its past precedent).

118. *Id.* at 56,753.

119. See Estreicher, *supra* note 1, at 163–64 (noting the frequency and import of policy oscillations).

contemporaneously with the 2008 *Delta* election—the NMB wrote a detailed notice of proposed rulemaking that explained its reasons for the change in policy and survived judicial review.<sup>120</sup> The NMB published a thorough preamble delineating its justifications for the proposed rule change that spanned two pages of the *Federal Register*.<sup>121</sup> The NMB first described its statutory authority to enact the change and discretion to interpret § 2, Fourth of the RLA.<sup>122</sup> It drew on the similarity in language between this section of the RLA and § 9(a) of the NLRA to show that it had reasonably interpreted the RLA when enacting the new rule.<sup>123</sup> Further, the NMB stated that the election procedure would not hinder the labor stability because the low incidence of strikes among railway and airline unions was, in its opinion, more directly related to the NMB’s mediation function than to its representation functions.<sup>124</sup> Finally, the NMB described how changed circumstances since the enactment of the RLA justified this new rule.<sup>125</sup> Thus, the NLRB should carefully select issues for rulemaking that may be less controversial to acclimate itself to rulemaking, and should also explain in some detail its neutral reasons for the policy change to avoid appearances of political bias.

*b. Promoting Internal Cooperation Among Members*

Like the NMB, the members of the NLRB may split along ideological lines when deciding whether to create agency policy through rulemaking and also over the content of the policy.<sup>126</sup> The NMB’s notice of proposed rulemaking contained a dissent by the only Republican Member of the

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120. *See infra* Part III.B.

121. Representation Election Procedure (NPRM), 74 Fed. Reg. at 56,750–52.

122. *Id.* at 56,751 (citing the opinion of Attorney General Tom C. Clark in 1947, stating that the NMB has the power to certify any organization which receives a majority of votes cast).

123. *Id.* (noting that the Attorney General’s opinion relied on the way in which the NLRB had interpreted its election procedures, especially because the House Committee report on the bill that became the NLRA contained a statement that the NLRA is “merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act”).

124. *See id.* (stating that the RLA’s mandatory mediation process stabilizes labor relations).

125. *See id.* at 56,752 (finding the new rule is more democratic and prevents the NMB from substituting its opinion for that of the employee by registering an abstention as a “no” vote).

126. Republican Member Johansen dissented from the NLRB’s healthcare rule, for example, because the “language of the Act” foreclosed the rule. Collective-Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336, 16,347 (Apr. 21, 1989) (codified at 29 C.F.R. pt. 103.30 (2011)).

NMB, Chairman Elizabeth Dougherty, who implied that politics influenced the majority's decision to change the old rule.<sup>127</sup> She argued that the NMB did not articulate a rationale for the policy reversal, that it lacked statutory authority to make such a change under the RLA, and that to be fair to both management and unions, the NMB must simultaneously consider changing decertification procedures.<sup>128</sup> Indeed, Chairman Dougherty pointed out that “this independent agency has never been in the business of making controversial, one-sided rule changes at the behest of only labor or management.”<sup>129</sup>

By isolating Chairman Dougherty, the only Republican Member, the NMB attracted congressional attention. In a letter to several Republican senators written after the NMB published the notice of proposed rulemaking, Chairman Dougherty claimed that her colleagues had prejudged the issue. She argued that the majority excluded her from the drafting process, did not provide her with sufficient time to prepare a dissent, and denied her the opportunity to publish her full dissent in which she complained publically about the internal Board proceedings.<sup>130</sup> When an agency acts to relegate a Commissioner of a minority party, the agency is more likely to attract congressional interest—which can lead to the type of congressional intervention the NLRB fears.<sup>131</sup> Up until this point, the NMB did not have contact with Congress regarding the proposed rule; so to quell its fears of congressional intervention, the NLRB may wish to allow dissenting member more time to formulate their arguments and publish them in the *Federal Register*.<sup>132</sup>

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127. See Representation Election Procedure (NPRM), 74 Fed. Reg. at 56,753 (Dougherty, Chairman, dissenting) (noting that “the composition of the Board” should not influence rule changes made “at the behest of only labor or management”).

128. *Id.* at 56,754 (faulting the majority for not requesting comment on “several related issues” including decertification procedures and soliciting comments on these issues specifically).

129. *Id.* at 56,753.

130. Letter from Elizabeth Dougherty, Chairman, Nat'l Mediation Bd., to Sens. McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr (Nov. 2, 2009) (on file with Author) (describing that she had little time to review the proposal and that the NMB removed her complaints about the Board's “exclusionary” partisan behavior from the published dissent).

131. If the NLRB avoids rulemaking to avoid presenting an open “target” to Congress, it should not create internal dissension leading a member to reach out to Congress specifically. *Cf.* Flynn, *supra* note 1, at 412 (noting that “it in no way benefits the Board to alert Congress to a judgment it has made in a politically divisive area”).

132. The APA does not contain a publication requirement for dissenting views. See 5 U.S.C. § 553(b) (2006) (requiring the NPRM to only contain a statement of basis and purpose and legal grounds for the rule change to constitute constructive notice).

The split among the NMB members along party lines evidences the highly political nature of the proposed rule.<sup>133</sup> The NLRB's fears of rulemaking in a political arena are not unfounded.<sup>134</sup> However, this rule is the type envisioned by scholars as ripe for rulemaking—it is a form of “policy oscillation” or change in policy that makes sense to unify in the national labor market.<sup>135</sup> As discussed, the NLRB may wish to choose a less divisive policy to change during rulemaking to avoid some of the issues the NMB faced in its representation election proceeding.<sup>136</sup> But even if it does not, it can learn from the NMB, which overcame its obstacles by carefully explaining its rationale for the change in policy and eliciting comments from the interested public.<sup>137</sup> That Chairman Dougherty dissented is unsurprising, and it is not uncommon for agency members to file such opinions in rulemakings.<sup>138</sup> The APA does not address whether agencies must publish separate opinions in the *Federal Register*, but many agencies, as a matter of comity, choose to do so to promote internal harmony.<sup>139</sup> To prevent displeased minority members from seeking congressional assistance and to make its policies less susceptible to congressional intervention, the NLRB should publish any dissenting opinions in the *Federal Register*.<sup>140</sup>

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133. At the time of the rulemaking, the Board was composed of Chairman Elizabeth Dougherty, appointed by George W. Bush, Member Harry R. Hoglander, a Clinton appointee, and Member Linda Puchala, appointed by President Obama. NAT'L MEDIATION BD., [www.nmb.gov/directory/prinoffs.html](http://www.nmb.gov/directory/prinoffs.html) (last visited Nov. 1, 2011).

134. See *supra* Part I.A.1 (discussing concerns with rulemaking and the impact of congressional intervention).

135. See *supra* notes 86–88 and accompanying text.

136. See *supra* note 109 and accompanying text.

137. Commenters argued that the NMB did not have to engage in APA rulemaking, as the Court in *ABNE*, 380 U.S. 650, 669 (1965), held that the NMB's election procedures were unreviewable by the Judiciary, but the Board chose to proceed per the APA anyway. Representation Election Procedure (Final Rule), 75 Fed. Reg. 26,062, 26,070 n.15 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206 (2011)).

138. Jeffrey Lubbers cites to six proposed and final rules from federal administrative agencies that include the dissenting views of their members. Lubbers, *supra* note 5, at 431–32 n.102. For example, the Consumer Product Safety Commission posted a dissenting view on its website. Substantial Product Hazard Reports, 71 Fed. Reg. 42,028 (July 25, 2006) (codified at 16 C.F.R. pt. 1115 (2010)).

139. See Lubbers, *supra* note 5, at 431–32 n.102 (noting that many agencies choose to allow the public to see dissents by publishing, paraphrasing, or referring readers to online dissenting opinions).

140. Perhaps Chairman Dougherty would not have alleged that the majority prejudged the issues had she felt included in the process. Cf. Letter from Elizabeth Dougherty, Chairman, Nat'l Mediation Bd., to Sens. McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr (Nov. 2, 2009) (on file with Author) (writing of the NMB's partisan and “exclusionary behavior”).

## 2. *Comments and Statutory Ossification Imposed a Low Burden*

The second stage of the NMB's representation election rulemaking, during which the agency conducted a public hearing, reviewed thousands of comments, and conducted analysis under the RFA, demonstrates that the NLRB's concerns regarding its capacity to engage in a rulemaking while continuing its adjudicatory duties are less founded than the agency fears.<sup>141</sup> Additionally, the NMB encountered few congressional hurdles—representatives and senators responded during the comment period but did not hold any additional hearings—which shows that the agency remained free to formulate its own policymaking agenda.<sup>142</sup>

First, the NMB had the resources to hold a public hearing regarding the representation election rulemaking and to receive and respond to nearly 25,000 written comments, which should alleviate the NLRB's concerns that it lacks the capacity to engage in rulemaking.<sup>143</sup> The NMB is a much smaller agency than the NLRB, so its ability to handle a large public response is encouraging for rulemaking in the labor industry.<sup>144</sup>

In addition to providing for a sixty-day comment period,<sup>145</sup> the NMB published a meeting notice in the *Federal Register*, inviting all interested parties to attend an open meeting with the NMB and share their views on the proposed rule change.<sup>146</sup> The NMB held the meeting on December 7, 2009, at the NLRB's facilities, where thirty-one speakers presented their

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141. See *supra* notes 73–75 and accompanying text.

142. This interaction with Congress did not “embarrass” or “paralyze” the agency, as the NLRB fears. See *NLRB Rulemaking*, *supra* note 9, at 994 (stating that oversight hearings embarrass the NLRB and impede work because staff members spend all of their time preparing for hearings instead of completing other necessary tasks).

143. See, e.g., Zebrak, *supra* note 1, at 128 & n.14 (finding the NLRB reluctant to promulgate rules because the cost of adjudication is relatively lower than the cost of rulemaking).

144. In 2010, the NLRB received \$283.4 million in congressional appropriations, while the NMB received \$13.4 million. See S. REP. NO. 111-243, at 254 (2010) (summarizing the agencies' budgets in fiscal year 2010 and suggesting a new budget for 2011). Of course, the NLRB regulates all private sector labor relations excluding airlines and railway industries, see 29 U.S.C. § 152(2) (2006) (defining *employer* under the NLRA to exclude government employers and those subject to the Railway Labor Act), so it may receive more comments than the NMB did, *id.*

145. See Representation Election Procedure (NPRM), 74 Fed. Reg. 56,750, 56,750 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (instructing parties to submit comments by January 4, 2009). The APA does not specify a minimum comment period but only that final rules be published at least thirty days before going into effect. 5 U.S.C. § 553(d). Additionally, Executive Order 12,866 provides that most rulemakings should provide at least a sixty-day comment period. Exec. Order 12,966, § 6(a), 3 C.F.R. 638, 644 (1994), *reprinted as amended* in 5 U.S.C. § 601 app. at 745 (2006).

146. Meeting Notice, 74 Fed. Reg. 57,427 (Nov. 6, 2009).

comments orally.<sup>147</sup> Speakers included representatives from unions, universities, trade organizations, flight attendants, pilots, and others involved in the industry.<sup>148</sup> The hearing took place in one day, the NMB allotted each speaker ten minutes to present their comments, and no NMB member made any remarks.<sup>149</sup>

The type of evidence the agency heard varied—some organizations presented their written comments orally,<sup>150</sup> while others presented nonlegal, anecdotal testimony.<sup>151</sup> Through the process, the agency was able to hear not only legal arguments but also personal experiences—which the agency may not have the chance to consider through written comments alone.<sup>152</sup> Thus, even though the APA does not require a hearing in an informal rulemaking proceeding,<sup>153</sup> here the agency had the capacity to conduct an abbreviated hearing, without cross-examination, to collect additional empirical data it would not have gathered in an adjudication. Additionally, the NMB heard first-hand accounts of how the rule affected the witnesses personally, as it would have in an adjudication.<sup>154</sup>

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147. See Representation Election Procedure (Final Rule), 75 Fed. Reg. 26,062, 26,062–63 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206) (explaining the NMB’s response to the oral and written comments).

148. For a full text transcript of the hearing, visit: NMB REPRESENTATION RULEMAKING, [http://www.nmb.gov/representation/transcript\\_voting-proposal-hearing\\_12-07-09.pdf](http://www.nmb.gov/representation/transcript_voting-proposal-hearing_12-07-09.pdf) (last visited Nov. 1, 2011).

149. See *id.* at 5 (statement of Mary Johnson, General Counsel) (stating for the record that no cross-examination would take place at the hearing and that speakers would have no opportunity to ask the NMB questions).

150. See, e.g., *id.* at 6–7 (statement of Robert Siegel, Air Transport Association (ATA)) (noting the ATA’s full comments would be in writing, but outlining three main subjects about which he would speak).

151. See, e.g., *id.* at 185–91 (statement of David Boehm, Sky West) (a pilot for SkyWest telling the agency “a story” about his unsuccessful union campaign in 2007, in which only a small fraction of employees voted because of a lack of education among the new, young employees at the airline).

152. See Grunewald, *supra* note 1, at 297–98 (finding that the NLRB held an oral hearing during its healthcare bargaining unit rulemaking procedure to hear from as many interested parties as possible and allow those who otherwise may not write in a chance to comment).

153. See 5 U.S.C. § 553(c) (2006) (providing that the APA contemplates opportunity for comment in informal rulemaking “with or without opportunity for oral presentation”); see also *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978) (explaining that courts cannot impose upon agencies additional procedural requirements other than those required by the APA). A hearing is required only when the agency’s enabling statute requires a hearing “on the record.” LUBBERS, *supra* note 31, at 305 (stating that §§ 556 and 557 of the APA are triggered only if the statute requires rules “to be made on the record after opportunity for an agency hearing” (citing 5 U.S.C. § 553(c) (2006))).

154. See Administrative Conference of the United States Recommendations Regarding Administrative Practice and Procedures, 56 Fed. Reg. 33,841, 33,851–52 (July 24, 1991)

In the past, the NLRB has recognized the value of gathering empirical data by holding hearings during the rulemaking process.<sup>155</sup> During its one successful rulemaking attempt in recent years—where it engaged in notice-and-comment rulemaking to formulate a rule defining bargaining units in the healthcare industry—the NLRB invited public participation through a series of hearings before an administrative law judge in which the NLRB cross-examined witnesses.<sup>156</sup> At the time, the NLRB used the hearing process both to ensure the broadest public participation possible while engaging in a new method of policy formation, and to get a nonlegal perspective on the issue that it would not have gotten through written comments alone.<sup>157</sup> Both the healthcare bargaining rule and the NMB's final rule survived judicial review, suggesting that courts feel more comfortable upholding a rule where the agencies seek broad participation.<sup>158</sup> Although the NLRB is not required to hold public hearings, an abbreviated hearing excluding cross-examination may be valuable in controversial rulemakings in the labor industry because it encourages wide-ranged public participation and reassures reviewing courts that the agency acted fairly and democratically.<sup>159</sup>

Just as the NMB's hearing procedures facilitated public participation which, contrary to the NLRB's fears, allowed for fact-specific information

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(codified at 1 C.F.R. pt. 305 (1991)) (suggesting that data gathered while adjudicating is relevant to discrete parties, and that rulemaking provides empirical data upon which the agency forms policy).

155. See *Collective-Bargaining in the Health Care Industry*, 52 Fed. Reg. 25,142 (notice of proposed rulemaking and notice of hearing, Jul. 2, 1987) (inviting the public to orally participate in the healthcare bargaining unit proposed rule at several hearings).

156. See Grunewald, *supra* note 1, at 298 (hearings took place in D.C., Chicago, and San Francisco).

157. See *Administrative Conference of the United States Recommendations Regarding Administrative Practice and Procedures*, 56 Fed. Reg. at 33,852 (noting that the NLRB managed to gather a wide range of empirical data during the hearings that it would not have gotten in an adjudication); see also Grunewald, *supra* note 1, at 300, 319 (noting that the NLRB heard 144 oral comments during its hearings, which was a good idea in such a controversial rulemaking).

158. See generally *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (finding that the rule was within the NLRB's broad rulemaking power and was not arbitrary and capricious); *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010) (finding the NMB did not have to hold an evidentiary hearing before initiating the rulemaking).

159. See LUBBERS, *supra* note 31, at 205 (noting that the ACUS has recommended that agencies decide whether to hold public meeting or trial-type hearings in informal rulemaking under the circumstances). In moving forward, the NLRB may also wish to hold a less formal hearing without the opportunity to cross-examine witnesses to cut costs. See Grunewald, *supra* note 1, at 319–20 (finding the healthcare hearings were perhaps “procedural overkill” and the NLRB should conduct a cost–benefit evaluation in the future).

to come into the record,<sup>160</sup> the NMB also showed that handling a large amount of comments from a divisive and interested public is manageable. The NMB had to respond to a deceptively high number of comments—although the NMB received 24,962 written comments, it only deemed 2% of them to be substantive.<sup>161</sup> A majority of the commentators supported the rule change.<sup>162</sup> Those who did not claimed, among other things, that the NMB lacked statutory authority to proceed and that Members of the majority party should be disqualified from participating in the rulemaking because they had “unalterably closed mind[s]” and were therefore unfit to make objective labor policy.<sup>163</sup>

The NLRB’s fears concerning congressional intervention were somewhat realized during the NMB’s rulemaking, as several members of Congress commented on the rule change.<sup>164</sup> Predictably, some of the congressional members supported the rule change, and some strongly opposed the new rule.<sup>165</sup> The rulemaking proceeding may have attracted congressional attention in a way that went beyond a policy made through adjudication.<sup>166</sup> Although the NLRB’s fear of political intervention is legitimate, the NMB responded to all of the comments and Congress did not subject the agency to an additional oversight hearing during or after the rulemaking procedure.<sup>167</sup> Although congressional intervention will likely take place

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160. See Brief for NLRB at 15, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (No. 463) (arguing that labor policy is better developed through “specific factual patterns . . . [that] emerge from actual industry experience” (alteration in original) (internal citation omitted)).

161. See Representation Election Procedure (Final Rule), 75 Fed. Reg. 26,062, 26,063 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (estimating that approximately 98% of the comments received were either form letters, or personal anecdotes).

162. See *id.* (explaining that those in favor agreed that the NMB had the statutory authority to change the election procedures and that the current rule is contrary to democratic principles).

163. See *id.* at 26,063–64 (describing the ATA’s motion to disqualify Members Puchala and Hoglander from the rulemaking because they had previously worked for unions and excluded the one Republican Member from the proposal process).

164. See *NMB Representation Rulemaking*, NAT’L MEDIATION BD., <http://www.nmb.gov/representation/proposed-rep-rulemaking.html> (last visited Nov. 1, 2011) (showing that the NMB received a total of eight letters from congressional members during the comment period).

165. In its final rule, the NMB cited Democrat Glenn Nye who believed rail workers should not be subjected to a more “onerous process” than other private sector workers and refuted the position of Republican members who believed two appointed, unelected Democrats should not change the election procedure. Representation Election Procedure (Final Rule), 75 Fed. Reg. at 26,063, 26,066.

166. See *supra* Part I.A.1.

167. See *generally* Representation Election Procedure (Final Rule), 75 Fed. Reg. at 26,062 (showing that the agency was not bound by congressional involvement).

during the rulemaking process, it was not in the NMB's case nearly as intrusive as the NLRB fears.<sup>168</sup>

Finally, the NLRB can rest assured that ossification did not pose a large obstacle for the NMB.<sup>169</sup> The NMB did have to publish a rule clarification because the notice of proposed rulemaking omitted the factual basis for its certification that the rule would not affect a significant number of small businesses to trigger the RFA, but the revised notice only included a short statement concerning the agency's conclusion on the matter.<sup>170</sup> The NLRB should not let its concerns with ossification stand in the way of its rulemaking efforts.<sup>171</sup> Although the NLRB will have to address the RFA and, depending on the rule, may have to devise alternative options to accommodate small businesses, the NMB addressed the statute quickly and was able to move forward with little interference.<sup>172</sup>

### 3. *The Final Rule*

The NLRB should publish its future final rules with a detailed preamble, as the NMB's preamble to its election procedure rule addressed each substantive comment and refuted arguments against the rule change.<sup>173</sup> On May 11, 2010, only six months after the NMB published its notice of proposed rulemaking, it published the final rule with a preamble spanning twenty-seven pages in the *Federal Register* adopting the proposed rule.<sup>174</sup> The NMB painstakingly reviewed each substantive comment, took a considerable amount of time addressing the negative commentators' concerns, responded to Chairman Dougherty's dissent, and thoroughly

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168. See *NLRB Rulemaking*, *supra* note 9, at 997 (predicting debilitating congressional intervention in NLRB rulemaking).

169. See Representation Election Procedure (NPRM), 74 Fed. Reg. 56,750, 56,754 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (certifying that the rule would not affect small businesses under the RFA, and OMB need not approve of the rule under the PRA).

170. Proposed Rule Clarification, 74 Fed. Reg. 63,695, 63,695 (Dec. 4, 2009) (codified at 29 C.F.R. pts. 1202, 1206) (describing that the rule change would not directly affect any small entities as defined under the RFA).

171. See *supra* Part I.A.3.

172. See Lubbers, *supra* note 5, at 422 ("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 [RFA] analysis.").

173. See generally Final Rule, 75 Fed. Reg. 26,062 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206) (refuting arguments that the NMB was required to hold a comment period before initiating rulemaking, that the rule lacked statutory authority, and that the rule was arbitrary and capricious because it did nothing to create a parallel decertification procedure).

174. See *id.* (explaining its rationale for the final rule in detail).

discussed its rationale for adopting the new election procedure, which “more accurately measure[s] employee choice in representation elections.”<sup>175</sup>

An example of the amount of detail the NMB used to refute commentators’ counterarguments is the way it responded to allegations of agency bias.<sup>176</sup> ATA and Right to Work, two trade associations, filed a motion for disqualification of Members Hoglander and Puchala, the two Members supporting the proposed rule.<sup>177</sup> They argued the NMB’s process for proposing changes to its election procedure was inadequate because it did not follow the preliminary hearing method used in the *Chamber of Commerce* proceeding. Additionally, the trade associations argued that the majority excluded Chairman Dougherty from the rulemaking proceedings and that the rule was rushed through notice-and-comment to accommodate the unions that had elections pending in postmerger Delta Air Lines.<sup>178</sup> The NMB took each argument in turn and explained that the petitions failed to make the requisite clear and convincing showing that the two Democratic Members each had an “unalterably closed mind on matters critical to the disposition of the rulemaking” and should have been disqualified.<sup>179</sup>

The NLRB should adhere to the same level of detail in formulating its own final rules. To the extent possible, it should substantively address each valid argument for and against the final rule, including the dissenting opinions of its members.<sup>180</sup> Formally, the APA only requires that final rules

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175. *Id.* at 26,072. Additionally, the NMB stated that the new rule brings the agency in line with private sector unionism nationwide and that it conforms to basic principles of democracy. *Id.* at 26,074. Finally, according to the NMB, adopting the new rule ensures that all employees can register their support for or opposition to a union affirmatively rather than passively, and allow abstainers the right to be indifferent about unionization. *Id.* at 26,076.

176. *See id.* at 26,063 (“Rulemaking requires a decision maker to choose between competing priorities . . . . Prejudgment and/or bias is not established by the mere fact . . . that a [rule] is controversial . . .”).

177. *Id.*

178. *See id.* at 26,064 (arguing also that Hoglander and Puchala prejudged the issues because they worked with unions in the past).

179. *Id.* at 26,063 (quoting *Ass’n of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979)). The Board also relied on *United States v. Morgan*, 313 U.S. 409, 421 (1941), for the presumption that agency heads are capable of acting neutrally despite their political leanings. *Id.* at 26,065.

180. An NLRB member dissented from the healthcare bargaining rule; in the highly political labor industry, bipartisan members will not always agree. *See* Grunewald, *supra* note 1, at 306 (noting that Member Johansen formally dissented from the NLRB’s healthcare bargaining rule in 1989).

contain “a concise general statement of their basis and purpose.”<sup>181</sup> Yet today, judges look primarily to the published preamble when reviewing final rules.<sup>182</sup> Given its concerns that the Judiciary will look unfavorably upon its policies promulgated during rulemaking, the NLRB should include a detailed statement of basis and purpose—taking into consideration and refuting any counterarguments—in any future rulemaking endeavors, especially since the reviewing judge in the NMB rulemaking case looked favorably upon the NMB’s detailed preamble.<sup>183</sup>

Thus, the NMB had the capacity to substantively respond to an overwhelming number of comments and took the time to articulate its rationale for rejecting those comments.<sup>184</sup> In labor relations, there will be several competing views, so it is likely that any rulemaking by the NLRB will similarly encounter large backlash.<sup>185</sup> But by explaining its rationale thoroughly in the preamble to the final rule, the agency may be able to overcome accusations of politicking in rulemaking.

#### B. *The Litigation: How the NMB’s Processes Paid Off*

The NLRB’s fear of pre-enforcement judicial review came to light in the NMB representation election rulemaking; yet, the Judiciary afforded the NMB deference and ultimately upheld the rule, suggesting that the Judiciary is not inherently suspicious of collective bargaining in all circumstances.<sup>186</sup> On May 17, 2010, shortly after the final rule was published, ATA filed a lawsuit in the District Court for the District of Columbia alleging that the new rule violated the RLA, that the rule change was arbitrary and capricious, and that Members Hoglander and Puchala had prejudged the issue and ignored comments against the final rule.<sup>187</sup> Although the NMB’s success in one case cannot prove the NLRB will

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181. 5 U.S.C. § 553(c) (2006).

182. See LUBBERS, *supra* note 31, at 261–62 (explaining that the APA does not require long preambles, but that judges do look to them during judicial review). After the Supreme Court’s decision in *Motor Vehicles Manufacturer’s Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), agencies must address and refute major opposition to the rule in the preamble to survive arbitrary and capricious review. *Id.* at 262–63, 265.

183. See *Air Transp. Ass’n of Am. v. Nat’l Mediation Bd.*, 719 F. Supp. 2d 26, 37–45 (D.D.C. 2010) (describing how the NMB’s detailed explanation for its rule change helped it survive judicial review under both *Chevron* and arbitrary and capricious review).

184. See *supra* notes 173–76 and accompanying text.

185. See Grunewald, *supra* note 1, at 301 (noting that the NLRB in its healthcare bargaining rule received 114 oral and 33 substantive comments during the notice-and-comment period).

186. See generally *Air Transp. Ass’n of Am.*, 719 F. Supp. 2d at 26 (upholding the final rule as a reasonable interpretation of the RLA).

187. *Id.* at 29–30.

prevail in future cases, studying the path that the NMB rulemaking took demonstrates that it is possible for collective bargaining rules to survive judicial review if the agency follows APA rulemaking procedures. This section will first explain how the court presumed that the NMB majority did not prejudge the issues in its order denying ATA's motion for expedited discovery, and then will demonstrate how the court ultimately deferred to the agency's policy choice to argue that the NLRB's fears concerning the federal Judiciary's inherent suspicion of labor policymaking should not prohibit the agency from undertaking rulemaking.

### 1. *Motion for Expedited Discovery*

The district court afforded deference to the NMB when rejecting the plaintiff's allegation that Members Hoglander and Puchala showed bias during the rulemaking, which refutes the NLRB's fear that the Judiciary will not defer to the agency's policy choices and will instead seek to undercut its decisions.<sup>188</sup> Courts place a very high burden on the party alleging bias, as judges presume that agency members are "collaborative instrumentalities of justice" acting in good faith.<sup>189</sup> Courts also recognize that agency heads act as legislatures and not as neutral adjudicators when rulemaking, so agency members are only disqualified when "there has been a clear and convincing showing that the agency member[s] ha[ve] an unalterably closed mind on matters critical to the disposition of the proceeding."<sup>190</sup>

First, the NMB litigation rebuts the NLRB's fear that the Judiciary will impose its own policy choices because the party challenging the rulemaking must overcome a general presumption that an agency head acts in good faith.<sup>191</sup> In its motion for expedited discovery, the ATA argued that the majority had prejudged the issues, as evidenced by Chairman Dougherty's letter to the Republican senators detailing the internal procedures of the Board and by the fact that unions withdrew their election campaigns just

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188. *See* *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, No. 10-0804, at 11 (D.D.C. June 4, 2010) (order denying motion for expedited discovery) (concluding that the plaintiffs failed to show evidence of "bad faith or improper behavior" as to warrant discovery on the issue of bias).

189. *See id.* at 6 (quoting *United States v. Morgan*, 313 U.S. 409, 422 (1941)) (explaining that without this presumption, courts frequently look into the agencies' deliberative process).

190. *Ass'n of Nat'l Advertisers, v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

191. *See, e.g., Morgan*, 313 U.S. at 421 (finding agency heads "are not assumed to be flabby creatures any more than judges are" and courts presume both to be impartial).

before the NMB published the proposal in the *Federal Register*.<sup>192</sup> The court, however, concluded that even a direct accusation by a colleague that the majority was acting with “unalterably closed minds” was insufficient to grant the plaintiff’s discovery on the issue.<sup>193</sup> The letter merely showed “dysfunction” at the Board and that the NMB did not act in the “spirit of collegiality.”<sup>194</sup> Yet, the court recognized the political composition of the NMB at the time, saying the Chairman’s alleged exclusion was the product of her being in the political minority. Further, the court concluded that the structure of the internal debate was not appropriate for the judicial review.<sup>195</sup> This assertion should reassure the NLRB if it moves forward with a rule that may polarize the bipartisan Board, as the court recognized that internal agency disputes exceed the scope of judicial review and would not overturn a policy without concrete allegations that agency members predetermined the outcome.<sup>196</sup>

Second, courts recognize that agency heads act in a quasi-legislative capacity when promulgating rules, and thus are not held to the same standard as a neutral adjudicator.<sup>197</sup> When adjudicating, agency heads are disqualified when “a disinterested observer may conclude that [the agency] has . . . adjudged the facts as well as the law of a particular case in advance of hearing it.”<sup>198</sup> When rulemaking, the test is much less stringent: an agency member is only disqualified if the member acts with “an unalterably closed mind on matters critical to the disposition of the proceeding.”<sup>199</sup> In this case, Chairman Dougherty’s letter and the timing of the rulemaking were not enough to show Members Hoglander and Puchala had “unalterably closed minds” because the NMB carefully proceeded through

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192. *Air Transp. Ass’n of Am.*, No. 10-0804, at 2–6 (claiming that Hoglander and Puchala had a pro-union agenda because each had a labor background, and that they excluded Chairman Dougherty to further that agenda).

193. *Id.* at 11 (denying the plaintiff’s motion and discovery on the prejudgment issue).

194. *Id.* at 7.

195. *See id.* (finding even Chairman Dougherty was unsurprised that she “was not included in the initial crafting of the proposed rule” given her policy disagreement with the majority).

196. *See id.* at 6 (noting that internal dysfunction does not “require the inference that the majority Board Members were acting with closed minds . . . regarding issuance of the New Rule”).

197. *See, e.g., Ass’n of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1168–69 (D.C. Cir. 1979) (noting that the neutral and detached role of an adjudicator is inapplicable to rulemaking).

198. *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (alteration in original) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 451, 469 (2d Cir. 1959)).

199. *Ass’n of Nat’l Advertisers*, 627 F.2d at 1170.

the rulemaking.<sup>200</sup> Indeed, the court found that the “level of detail with which the agency considered and discussed negative comments in the Final Rule belies ATA’s allegations that the Board rushed its consideration.”<sup>201</sup>

Thus, if the NLRB engaged in rulemaking rather than adjudicatory policymaking, it would be further insulated from any bias claims that may arise.<sup>202</sup> In moving forward, the NLRB may wish to avoid internal conflicts by being more open among the Board members so as not to allow a court to accuse them of being “dysfunctional,” even though the internal agency proceedings exceed the scope of judicial review.<sup>203</sup> Even if the agency faces internal disagreements, the NMB rulemaking demonstrates that when the agency writes a detailed preamble, the court can see if the agency considered alternate views; thus, the NLRB should attempt to achieve the level of detail the NMB used in its final rule.<sup>204</sup>

## 2. *The Decision*

In its decision, the District Court for the District of Columbia deferred to and upheld the NMB’s collective bargaining policy choice, showing that, at least in the case of the NMB rulemaking, the Judiciary has no inherent suspicions of collective bargaining as the NLRB fears.<sup>205</sup> On June 28, 2010, two months after the ATA filed its lawsuit, the court held for the NMB, denying the plaintiff declaratory and injunctive relief and finding that the new rule did not violate the APA or the RLA.<sup>206</sup>

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200. See *Air Transp. Ass’n of Am.*, No. 10-0804, at 7–8 (looking at the “context of the rulemaking as a whole” to conclude that the agency did not rush the rule, as it took six months).

201. *Id.* at 8.

202. Compare *Ass’n of Nat’l Advertisers*, 627 F.2d at 1170 (rulemakers are disqualified only if they act with “unalterably closed mind[s]”), with *Cinderella Career & Finishing Schs.*, 425 F.2d at 591 (adjudicators are disqualified if “a disinterested observer may conclude that [the agency] has . . . adjudged the facts as well as the law of a particular case in advance of hearing it” (alteration in original) (citation omitted)).

203. See *Air Transp. Ass’n of Am.*, No. 10-0804, at 6 (stating that the contents of the letter show the Board has been “dysfunctional” since President Obama appointed a second Democrat).

204. See *id.* at 8 (noting that the detailed preamble to the final rule demonstrates the majority’s willingness to waver from its policy decisions during the rulemaking).

205. See Flynn, *supra* note 1, at 439–40 (arguing that the Court in *Lechmere* overturned agency interpretation of its own ambiguous statute, proving the Judiciary’s inherent animus toward collective bargaining (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992))).

206. See *Air Transp. Ass’n of Am. v. Nat’l Mediation Bd.*, 719 F. Supp. 2d 26, 45 (D.D.C. 2010) (granting summary judgment in favor of the NMB and denying the plaintiff’s request for relief).

The court used two deferential doctrines, which should demonstrate to the NLRB that collective bargaining rules can survive pre-enforcement review in the federal district courts.<sup>207</sup> First, the court used *Chevron* to conclude that “nothing in the statute unambiguously requires that a majority of all eligible voters select the representative of the employees . . . . This silence creates ambiguity.” Second, the agency reasonably interpreted the RLA.<sup>208</sup> In the first step, the court relied in part on the similarity between the RLA and the NLRA and the NMB’s broad discretion to determine the method of resolving election disputes.<sup>209</sup> Under the second *Chevron* prong, the court cited to the NMB’s reliance on empirical evidence and explanation of the changed circumstances in both the notice of proposed rulemaking and final rule to conclude that the new policy consistently upheld the broad construction and statutory mission of the RLA.<sup>210</sup>

In theory, *Chevron* should insulate the NLRB from judicial overreaching: the NLRA is inherently ambiguous, so the agency should move to the deferential second step of the test.<sup>211</sup> Yet, scholars argue that *Chevron* has not prevented the Judiciary from imposing its own views on the agency.<sup>212</sup> While courts have overturned agency decisions using *Chevron* in the past, several recent cases show just the opposite.<sup>213</sup> Additionally, one scholar

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207. See Lubbers, *supra* note 5, at 427–28 (suggesting that Congress amend the NLRA to account for preenforcement review of final rules in the federal court of appeals to encourage rulemaking).

208. *Air Transp. Ass’n of Am.*, 719 F. Supp. 2d at 33–34.

209. See *id.* at 33–37 (concluding that the NMB’s interpretation of the RLA—to allow for a majority vote where management interferes with an election—proves statutory ambiguity).

210. *Id.* at 39 (“The Board’s explanation of its reasons for adopting the New Rule shows that the New Rule is compatible with the Board’s statutory mission to investigate representation disputes . . .”).

211. E.g., Flynn, *supra* note 1, at 437 (“The NLRA is by its terms extremely general, and the legislative history on most points is either nonexistent or unilluminating.”).

212. See *id.* at 442 (arguing that the Court imposed its own value judgment in deciding that § 7 of the NLRA was unambiguous under *Chevron* step one, which shows that *Chevron* does not prevent judicial overreaching (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992))).

213. See, e.g., *Loparex LLC v. NLRB*, 591 F.3d 540, 550 (7th Cir. 2009) (granting *Chevron* deference to the NLRB’s interpretation of § 2(11) of the NLRA defining “responsible direction”); *SEIU v. NLRB*, 574 F.3d 1213, 1214 (9th Cir. 2009) (affirming the NLRB’s determination that § 8(g) applies only to hospitals because the *Chevron* doctrine requires deference to the NLRB); *Va. Mason Med. Ctr. v. NLRB*, 558 F.3d 891, 894 (9th Cir. 2009) (enforcing an NLRB enforcement order because of *Chevron*). But see *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 510 (D.C. Cir. 2009) (finding that single-route drivers were independent contractors rather than “employees” under the NLRA, overturning the agency’s interpretation despite *Chevron*).

argues that the Judiciary may be hesitant to apply a deferential standard because it is suspicious of the NLRB's resistance to rulemaking—perhaps then rulemaking could restore judicial confidence in the agency and lead to a more deferential standard of review.<sup>214</sup>

Second, in light of the Supreme Court's ruling in *FCC v. Fox Television Stations, Inc.*,<sup>215</sup> an agency action is not subject to a heightened standard of review when it changes administrative policy.<sup>216</sup> Thus, should the NLRB wish to change its policy interpretations through rulemaking, it would need only to provide a "reasoned explanation" for its action that demonstrates it is changing policy.<sup>217</sup> The district court's analysis under *Chevron* step two and of the arbitrary and capricious standard under the APA addressed the NMB's policy reversal in the new rule.<sup>218</sup> The court rejected the plaintiff's argument that the longevity of the old rule necessarily makes the change to the new rule unreasonable because the NMB presented empirical data that showed a "no union" option would improve representation elections and explained that "there is evidence that the [Original Rule's] procedures were adopted in response to an era of widespread company unionism."<sup>219</sup> *Fox Television Stations* provides an additional layer of deference for agencies changing policy and an incentive to carefully craft a detailed preamble in a final rule.<sup>220</sup> Thus, the NLRB should be able to take advantage of the

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214. See Hirsch, *supra* note 45, at 26 ("Rulemaking's increased predictability may also reduce the hostility that some courts exhibit towards the Board's adjudications.").

215. 129 S. Ct. 1800 (2009).

216. *Id.* at 1810 (finding the APA mentions no heightened standard for reviewing policy reversals).

217. *Id.* at 1811 (explaining that an agency may deviate from a past practice when "the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency believes it to be better, which the conscious change of course adequately indicates").

218. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 40 (D.D.C. 2010) ("[M]uch of the analysis regarding the Board's stated reasons for its promulgation of the New Rule overlaps with that under *Chevron* step two.").

219. *Id.* at 38 (alteration in original) (citation omitted). The court rejected the plaintiff's argument that the NMB's decision in *Chamber of Commerce*, 13 N.M.B. 90 (1986), bound the agency to a full evidentiary hearing. The court further stated that even if that decision had been binding, "the Board has not run afoul of the APA because . . . the Board has adequately explained its reasons for the change." *Id.* at 44.

220. Since the *Fox* decision, courts have upheld well-reasoned policy changes that acknowledge their departure from agency precedent in the preamble. See, e.g., *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1035 (9th Cir. 2010) (agency explicitly recognized it was changing a policy when it determined a new policy better served the statutory function). Courts have rejected policy alterations that fail to acknowledge a departure. See, e.g., *Wyoming v. U.S. Dep't of Interior*, Nos. 09-CV-118J, 09-CV-138J, 2010 WL 4814950, at \*2 (D. Wyo. Nov. 18, 2010) (overturning a final rule where the Fish and Wildlife Service failed to acknowledge a change in its recovery criteria and provide reasoned analysis for that change).

deferential standards the district court afforded to the NMB when rulemaking if it adequately explains its reasons for changing policy and adopting a new rule in a detailed preamble.<sup>221</sup>

### 3. *Post-Decision: Appeal, Effect of the Rule, and Congressional Intervention*

To date, the procedures the NMB utilized during its representation rulemaking created a successful final rule—indeed, the postmerger Delta flight attendants somewhat ironically rejected union representation in November 2010 using the new rulemaking procedures.<sup>222</sup> The outcome of the NMB's rulemaking refutes the NLRB's concern that judicial review will delay its policies significantly, as litigation at the district court only delayed the NMB rule's effective date by twenty days.<sup>223</sup> However, the NMB has faced two of the NLRB's primary concerns with rulemaking: pre-enforcement review in the federal district courts<sup>224</sup> and an attempted congressional intervention.<sup>225</sup>

On October 7, 2010, the ATA appealed to the U.S. Court of Appeals for the District of Columbia Circuit, so now the rule faces at least one more layer of judicial scrutiny.<sup>226</sup> Scholars have recommended that Congress amend the NLRA to facilitate pre-enforcement judicial review in the courts of appeals to avoid this double layer of judicial review.<sup>227</sup> There is no way to predict how the appeals court will rule because the courts of appeals

221. By rulemaking, the NLRB may increase the Judiciary's faith in the legitimacy of the NLRB's policy choices. See Hirsch, *supra* note 45, at 26 (rulemaking would increase judicial deference because of the "more thorough explanation of the Board's reasons for a policy and a more explicit recognition of competing views on an issue").

222. Charles Riley, *Delta Flight Attendants Reject Union*, CNNMONEY.COM (Nov. 4, 2010, 9:09 AM), [http://money.cnn.com/2010/11/04/news/companies/delta\\_union/index.htm](http://money.cnn.com/2010/11/04/news/companies/delta_union/index.htm).

223. See Representation Election Procedure (Final Rule; Delay of Effective Date), 75 Fed. Reg. 32,273, 32,273 (June 8, 2010) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (notifying the public that the NMB pushed back the effective date of the representation election procedure from June 10, 2010, to June 30, 2010, due to ongoing litigation).

224. See *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010), *appeal docketed*, No.10-5254 (D.C. Cir. July 29, 2010) (recounting the ATA's argument that the new rule exceeds the scope of the RLA, is arbitrary and capricious, and that the majority prejudged the issue).

225. H.R.J. Res. 97, 111th Cong. (2010); S.J. Res. 30, 111th Cong. (2010).

226. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010), *appeal docketed*, No.10-5254 (D.C. Cir. July 29, 2010).

227. See Grunewald, *supra* note 1, at 321 (suggesting that Congress increase NLRB rulemaking, by amending the NLRA to require that any pre-enforcement review take place in the courts of appeals); see also Administrative Conference of the United States Recommendations Regarding Administrative Practice and Procedures, 56 Fed. Reg. 33,841, 33,852 (July 24, 1991) (codified at 1 C.F.R. pt. 305 (1991)) (recommending a congressional amendment to the NLRA because the double judicial scrutiny is unnecessary).

defer only to agencies' policy choices and not to the judgment of lower courts.<sup>228</sup> The agency has followed APA procedures and written a thorough preamble to the final rule, which should facilitate a favorable decision when the court of appeals applies *Chevron*, *State Farm*, and *Fox Television Stations*.<sup>229</sup>

Second, both houses of Congress attempted to use their power under the CRA to disapprove of the final rule.<sup>230</sup> Republican Senator Johnny Isakson of Georgia sponsored the Senate joint resolution, which the Senate rejected by a narrow vote of 43 to 56.<sup>231</sup> Likewise, Republican Representative Phil Gingrey of Georgia's eleventh district sponsored the House joint resolution, which died out before a vote took place.<sup>232</sup> Even if the resolutions had passed, the President would have to sign the joint resolution into law before invalidating the final rule.<sup>233</sup> The NLRB's fear that rulemaking will increase its congressional contact is legitimate—indeed, under a different political circumstance, these joint resolutions could have passed, thwarting the NMB's ability to make labor law independently.<sup>234</sup> However, this process has only succeeded once, so it should not be a prohibitive consideration should the NLRB commence rulemaking activities, especially if it first begins rulemaking in a less divisive area.<sup>235</sup>

Congress has otherwise not posed a problem for the NMB, as it held no oversight hearings about the policy change during or after the

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228. See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 215 (2002) (applying *Chevron* independently to uphold the Social Security Administration's statutory interpretation and overturn the Fourth Circuit's decision); *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996) (overturning the district court's finding that a final rule was not arbitrary and capricious and that it was reasonable under *Chevron* by performing its own analysis).

229. See *supra* Part III.A.3; see, e.g., *Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 234 (D.C. Cir. 2000) (upholding a final rule under *Chevron* step two and arbitrary and capricious review because the Secretary of Agriculture "took account of [negative] comments, just as the designers of 'notice and comment' rulemaking intended").

230. See H.R.J. Res. 97, 111th Cong. (2010); S.J. Res. 30, 111th Cong. (2010).

231. See S.J. Res. 30, 111th Cong. (2010) (the vote took place on September 23, 2010).

232. See H.R.J. Res. 97, 111th Cong. (2010) (the House referred the rule to a subcommittee on September 24, 2010, and has not since acted on the resolution).

233. Congressional Review Act, 5 U.S.C. § 801(a)(2)(B)(3)(B) (2006) (explaining that it takes both houses of Congress to override a presidential veto of the resolution).

234. The Senate Resolution lost by a narrow 46 to 53 vote. S.J. Res. 30, 111th Cong. (2010).

235. Lubbers, *supra* note 5, at 425 & n.78 (describing that the only time Congress successfully used the CRA to overturn a final rule was with the Clinton Administration's controversial OSHA ergonomics regulations in 2001).

rulemaking.<sup>236</sup> Congress is free to intervene in an agency's activities at any time—whether the agency is making policy through rulemaking or adjudication.<sup>237</sup> In 2008, for example, the NMB faced a congressional oversight hearing regarding its decision to refrain from making an election procedure rule change in connection with the disputed 2008 Delta election.<sup>238</sup> Many representatives in that hearing expressed a desire that the NMB make the rule change.<sup>239</sup>

These drawbacks are unpredictable and could come during adjudication or rulemaking. The NLRB thus should consider the significant benefits of rulemaking, including increased agency legitimacy, public participation, and data gathering when deciding to engage in rulemaking.<sup>240</sup> Further, the political timing of any rule change may be key to avoiding unwanted congressional intervention.<sup>241</sup>

#### IV. LOOKING AHEAD: THE NLRB'S MOST RECENT NOTICE OF PROPOSED RULEMAKING

On December 22, 2010, the NLRB issued its first substantive notice of proposed rulemaking in years.<sup>242</sup> If adopted, the rule would require employers subject to “the NLRA to post notices of employee rights under the NLRA .”<sup>243</sup> Thus, the NLRB is beginning to heed scholar's cries to promulgate long-lasting, stable, and legitimate labor policy through notice-and-comment rulemaking, and has thus far mirrored the procedures the NMB used in its rulemaking.<sup>244</sup>

236. *See generally* Representation Election Procedure (Final Rule), 75 Fed. Reg. 26,062 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (noting congressional participation in the comment period but no hearings).

237. *See supra* notes 51–53 and accompanying text.

238. *See generally* *National Mediation Board Oversight of Elections for Union Representation: Hearing Before the H. Comm. on Transp. and Infrastructure*, 110th Cong. (2008) (hearing testimony about the NMB's refusal to alter the representation election procedures when petitioned to do so by a union that contested the 2008 Delta election, alleging interference by management).

239. *See, e.g., id.* at 14 (statement of Rep. Jerrold Nadler) (asking the current NMB Chairman, Read C. Van de Water, why the union election procedures are unlike any other democratic election).

240. *See supra* Part II.

241. *See* Gould, *supra* note 4, at 44 (arguing that the current political climate presents a good opportunity to clarify the application of the Bush II Board's decisions by engaging in rulemaking instead of reversing its decisions permanently).

242. Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104).

243. *Id.* at 80,412.

244. *See supra* Part II.

First, like the NMB's rule, the NLRB's rule is of the type scholars have suggested that the NLRB undertake.<sup>245</sup> In fact, Samuel Estreicher suggested that the NLRB propose a rule "setting forth the text of a poster reciting the rights of employees under the NLRA that employers would be required to post" to avoid its past problems with rulemaking where the NLRB tried to rigidify Board standard.<sup>246</sup> The rule appears to be less controversial than the NMB's representation election procedure rulemaking, which should lead to an easier process—however, like the NMB's representation election rule, some have suggested the NLRB lacks the statutory authority to promulgate the rule.<sup>247</sup>

The NLRB appears to have heeded the NMB's example by writing a thorough preamble to the proposed rule, explaining its reasoning for undertaking the process and the statutory authority for the new rule.<sup>248</sup> To anticipate any challenges to the final rule, if the NLRB chooses to adopt it, the agency should respond substantively to any negative commentators and explain its reasons for adoption in detail.<sup>249</sup>

Additionally, the NLRB chose to publish the dissenting view of Brian E. Hayes, a Republican Obama nominee, whose appointment came after the majority of the NLRB decided to grant the rulemaking petitions and proceed with the rule.<sup>250</sup> Member Hayes expressed his view that the NLRB lacked statutory authority to promulgate the rule.<sup>251</sup> He did not, however, allege any impropriety within the agency or that his colleagues had "prejudged" the issues, as did Chairman Dougherty in the representation

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245. See, e.g., Estreicher, *supra* note 10, at 13 (suggesting that the NLRB make rules to stabilize policy oscillations and encourage nationwide uniformity).

246. *Id.*

247. Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. at 80,415 (Hayes, Member, dissenting) (encouraging public comment on the NLRB's lack of statutory authority).

248. See *id.* at 80,410–20 (explaining in its ten-page preamble that "the NLRA stands out as an exception to the widespread notice-posting practice that has long been common in the workplace").

249. The thorough preamble helped the NMB survive judicial review. See *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 37–39 (D.D.C. 2010) (relying on the NMB's explanation of the its reasons for the policy change to uphold the rule under *Chevron* step two).

250. See Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. at 80,415 (Hayes, Member, dissenting) (noting that had he been a member earlier, he would have voted against rulemaking).

251. *Id.* ("The absence of . . . express language in [the NLRA] is a strong indicator, if not dispositive, that the Board lacks the authority to impose such a requirement.").

election rulemaking, which makes it less likely that commentators will allege agency bias.<sup>252</sup>

Finally, like the NMB, the NLRB spent time conducting an analysis under the RFA and concluded that the proposal would not affect small businesses.<sup>253</sup> So the ossification statutes have not prohibited the NLRB from rulemaking.<sup>254</sup> It appears as though the NLRB has mirrored the NMB's early processes in its rulemaking, which bodes well for the agency should it adopt the rule and should parties challenge it during judicial review. The NLRB should continue to learn from the NMB by considering going above and beyond the requirements of the APA and holding an abbreviated public hearing on the issue without opportunity for cross-examination, and writing a thorough preamble to the final rule addressing negative commentators and Member Hayes's dissent.<sup>255</sup>

### CONCLUSION

The NLRB recently dipped its toes into rulemaking, despite its previously expressed fears of political and judicial intervention into its ability to set labor policy. The NLRB should look at the NMB's controversial rulemaking concerning union elections as a guideline in conducting itself in the future. Like the NLRB, the NMB is an independent, bipartisan agency operating in the inherently controversial and political labor field. The care the NMB took in addressing its constituents' concerns in its final rule and its lengthy explanation of its reasons for the policy change instilled confidence in the reviewing court that the NMB had not acted with bias or in dereliction of its duties under the RLA and the APA. The ATA has since appealed the decision, meaning the NMB will have to devote more court time and resources to the litigation, but the deferential standards of review the District Court for the District of Columbia applied in its decision bodes well for the agency on appeal.

It is impossible to argue that the NMB's success will translate precisely to successful rulemaking at the NLRB. Considering, however, the significant

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252. Representation Election Procedure (NPRM), 74 Fed. Reg. 56,750, 56,752 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (Dougherty, Chairman, dissenting) (alleging the majority "prejudged" the issue and should have engaged in a prerulemaking comment period to hear alternative viewpoints).

253. See Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. at 80,415-16 (explaining that the rule will affect many entities, but each employer will only have to spend around two hours posting).

254. The NLRB also certified that the rule did not trigger the PRA and invited comment if parties believed otherwise. *Id.* at 80,416.

255. See *supra* Parts III.B.2.

benefits of rulemaking—increased public participation in agency policymaking, agency legitimacy, and perhaps judicial confidence in the agency's policies—the NLRB can learn from the NMB's experiment and successfully set stable labor policy through notice-and-comment rulemaking in the inherently controversial labor industry. The NLRB will have to consider the political circumstances and the context in deciding whether to make policy through adjudication or rulemaking. In the NMB's case, that Congress was unwilling to dispose of a seemingly pro-union final rule contributed to the rule's success. In addition to writing a thorough preamble to both the proposed and final rules, the NLRB may also consider going beyond the APA requirements and holding an informal, abbreviated public hearing and working cooperatively with its dissenting members throughout the process to avoid allegations of bias and instill confidence in any potential reviewing courts.

In a field such as labor relations, there will always be groups opposing a rule they feel will harm trade interests, and unions opposing rules they feel are pro-management. But the NMB experience shows that even in a highly controversial area, APA notice-and-comment rulemaking procedures, when followed correctly, can be a successful way of overcoming challenges to a divisive policy choice adopted in a rulemaking proceeding. Hopefully, the NLRB will continue to engage in rulemaking even after concluding its current rulemaking proceeding, looking to the NMB's processes to create strong and stable prospective policies in the highly political and controversial labor industry.