Nos. 12-2000 & 12-2065

In the United States Court of Appeals for the Fourth Circuit

HUNTINGTON INGALLS INCORPORATED,

Petitioner / Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent / Cross-Petitioner,

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION FOR ENFORCEMENT OF SAME

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, AMERICAN HOTEL & LODGING ASSOCIATION, HR POLICY ASSOCIATION, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER SEEKING REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 12-2000 Caption: Huntington Ingalls Incorporated v. NLRB

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Ronald E. Meisburg Date: October 17, 2012

Counsel for: Amici Curiae

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I certify that on October 17, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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(signature)

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(date)

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No. 12-2000 Caption: Huntington Ingalls Incorporated v. NLRB

Pursuant to FRAP 26.1 and Local Rule 26.1,

Coalition for a Democractic Workplace
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Pursuant to FRAP 26.1 and Local Rule 26.1,

American Hotel & Lodging Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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No. 12-2000 Caption: Huntington Ingalls Incorporated v. NLRB

Pursuant to FRAP 26.1 and Local Rule 26.1,

HR Policy Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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No. 12-2000 Caption: Huntington Ingalls Incorporated v. NLRB

Pursuant to FRAP 26.1 and Local Rule 26.1,

International Foodservice Distributors Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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No. 12-2000 Caption: Huntington Ingalls Incorporated v. NLRB

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Manufacturers
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Wholesaler-Distributors
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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No. 12-2000 Caption: Huntington Ingalls Incorporated v. NLRB

Pursuant to FRAP 26.1 and Local Rule 26.1,

Society for Human Resource Management
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, AMERICAN HOTEL & LODGING ASSOCIATION, HR POLICY ASSOCIATION, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER SEEKING REVERSAL

STATEMENTS OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses, representing

300,000 direct members and having an underlying membership of over 3 million businesses and professional organizations of every size and in every relevant economic sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases such as this one involving issues of vital concern to the nation's business community.[1]

The Coalition for a Democratic Workplace ("CDW"), which consists of hundreds of members representing millions of employers nationwide, was formed to give its members a meaningful voice on labor reform. CDW has advocated for its members on several important legal questions, including the one at issue here: the standard used by Respondent/Cross-Petitioner National Labor Relations Board ("Board") to determine appropriate bargaining units under the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. §§ 151-169.

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[1] The *amici* certify that all parties have consented to the filing of this brief; no counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

The American Hotel & Lodging Association ("AH&LA") is the only national trade association representing all segments of the lodging industry. The mission of AH&LA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AH&LA serves the lodging industry by providing representation at the national level and in government affairs, education, research and communications. AH&LA also represents the interests of its members in litigation raising issues of widespread concern to the lodging industry.

The HR Policy Association is a public policy advocacy organization representing the chief human resource officers of major employers. The HR Policy Association consists of more than 330 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of the HR Policy Association's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

The International Foodservice Distributors Association ("IFDA") is the non-profit trade association that represents more than 135 companies in the foodservice distribution industry. IFDA's members are found across North America and internationally and include leading broadline, system, and specialty distributors that operate more than 700 distribution facilities and represent annual sales of more than $110 billion.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Association of Wholesaler-Distributors ("NAW") is comprised of direct member companies and a federation of national, regional, state, and local associations and their member firms, which collectively total approximately 40,000 companies with locations in every State. NAW members are a constituency at the core of our econ-

omy—the link in the marketing chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. Industry firms vary widely in size, employ millions of American workers, and account for over $4 trillion in annual economic activity.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. SHRM represents over 250,000 human resources professionals who make up its membership. The purposes of SHRM, as set forth in its bylaws, are to promote the use of sound and ethical human resources management practices in the profession, and (a) to be a recognized world leader in human resources management; (b) to provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resources management; (c) to be the voice of the profession on human resources management issues; (d) to facilitate the development and guide the direction of the human resources profession; and (e) to establish, monitor, and update standards for the profession.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a tale of two cases. The first case did not involve Petitioner/Cross-Respondent Huntington Ingalls Incorporated ("Huntington"), but instead a health care facility known as Specialty Healthcare and Rehabilitation Center of Mobile. In that case, a majority of the Board issued a decision establishing a sweeping new rule that

> in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees.

Specialty Healthcare & Rehab. Ctr. of Mobile, 357 NLRB No. 83, at *1 (Aug. 26, 2011), *cross-appeals pending sub nom. Kindred Nursing Ctrs. E., LLC v. NLRB*, Nos. 12-1027 & 12-1174 (6th Cir.).

The second case involves Huntington and is the one presently before this Court. A majority of the Board applied the *Specialty Healthcare* rule and found that a unit comprised of technical employees working in a particular department of Huntington's Newport News, Virginia shipyard constituted an appropriate bargaining unit, rejecting Hunting-

ton's argument that all of the shipyard's technical employees should be included in the bargaining unit. 2 J.A. 1241-46.

Huntington refused to bargain with Intervenor International Association of Machinists and Aerospace Workers in order to challenge the Board's unit determination. 2 J.A. 1264-65. Huntington's petition for review in this Court and the Board's cross-application for enforcement followed after the Board issued a decision finding that Huntington's refusal to bargain constituted an unfair labor practice. 2 J.A. 1402-04; *see also NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1579 (4th Cir. 1995) (reviewing similar unit determination after employer refused to bargain, drawing an unfair-labor-practice charge).

The Court should grant Huntington's petition for two fundamental reasons.

First, application of the *Specialty Healthcare* test eliminates consideration of important, historically recognized factors in the unit-determination process that are necessary to assure a unit is appropriate given workplace realities. The Board's abandonment of its longstanding unit-determination precedent will likely disrupt the smooth operation of employers' processes at a time when, more than ever, American em-

ployers are subject to unprecedented economic and competitive pressures. The Board's ill-advised policy decision is made all the worse because of the negative effect it will likely have on the ability of American employers to invest, grow, and create badly needed jobs in today's economy.

Second, the *Specialty Healthcare* test violates at least two provisions of the Act. Section 9(c)(5) provides that, in determining an appropriate bargaining unit, the "extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). As this Court explained in *Lundy*, Section 9(c)(5) prohibits the Board from assigning the extent of organizing either exclusive or controlling weight. That is effectively what the *Specialty Healthcare* test does by ensuring that, in all but the rarest cases in which an employer can establish an "overwhelming community of interest," the unit deemed appropriate by the Board will be the unit in which the union has identified based on the extent of its organizing.

The *Specialty Healthcare* test also violates Section 9(b) of the Act, which provides that the Board "shall decide in each case" whether the bargaining unit is appropriate in order to "assure to employees the full-

est freedom in exercising the rights guaranteed by" the Act. 29 U.S.C. § 159(b). In addition to abdicating the Board's responsibility to make individualized determinations regarding the appropriate bargaining units "in each case," the *Specialty Healthcare* test is arbitrary and capricious because, in creating the test, the Board failed to consider the right of employees to refrain from collective activities. Section 9(b)'s plain language requires the Board to assure employees the fullest freedom in exercising *all* of the rights guaranteed by the Act, including the right to refrain. The Act does not permit the Board to pick and choose which rights to protect when making bargaining-unit determinations.[2]

[2] Some of the *amici* have moved to intervene in *Noel Canning v. NLRB*, Nos. 12-1115 & 12-1153 (D.C. Cir.), which presents the issue whether the three purportedly recess-appointed members serving on the Board at the time of that decision were improperly appointed. This case presents the same issue. *See* Huntington's Br. at 19-22.

ARGUMENT

I. *SPECIALTY HEALTHCARE*'S APPLICATION ELIMINATES CONSIDERATION OF THE EMPLOYER'S INTERESTS IN A UNIT DETERMINATION THAT RATIONALLY REFLECTS THE REALITY OF THE WORKPLACE

For over half a century, the Board faithfully followed the statutory injunction under Section 9(b) of the Act to make its unit determinations "in each case." 29 U.S.C. § 159(b). The resulting body of Board precedent established a careful balancing of competing interests of employees, employers, and unions, with a goal of approving units "in each case" that allow individual employers to efficiently run their respective businesses while protecting the rights of employees to engage in meaningful collective bargaining.

Virtually every employer subject to the Board's jurisdiction is affected by the *Specialty Healthcare* test, whether they are engaged in manufacturing, distribution, retail sales, or the multitude of other activities that make up the American economy. Historically, the Board weighed carefully the potential consequences of recognizing a bargaining unit that covered only a portion of a particular facility, whether it be a plant, warehouse, retail store, restaurant, or other establishment. The Board was particularly mindful of the disruption smaller or multiple

units could have on business operations, stable labor relations, and realistic collective bargaining.

The precedent in the manufacturing sector involved in this case is typical of the care taken by the Board. It is reflected in a series of cases decided over many decades in which the Board was consistently clear that it would not make a unit determination without taking into consideration the realities of the particular business setting and how a given unit might affect the employer's operations so that neither bargaining rights nor industrial peace and stability were undermined. The Board articulated its mission as follows:

> As we view our obligation under the [Act], it is the mandate of Congress that this Board shall decide in each case . . . the unit appropriate for the purpose of collective bargaining. *In performing this function, the Board must maintain the twofold objective of insuring to employees their rights to self-organization and freedom of collective bargaining and of fostering industrial peace and stability*. . . . At the same time it creates the *context within which the process of* [*collective*] *bargaining must function*. Because the scope of the unit is so basic to and permeates the whole of the collective-bargaining relationship, each unit determination . . . must have a direct *relevancy to the circumstances within which the collective bargaining is to take place*. For, *if the unit determination fails to relate to the factual situation* with which the parties must deal, *efficient and stable collective bargaining is undermined rather than fostered*.

Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962) (internal citations and quotations omitted) (emphasis added).

In *Kalamazoo Paper*, the Board rejected an attempt to sever truck drivers from an existing production and maintenance bargaining unit at a manufacturer. In rejecting this attempt, the Board articulated the problem with using job classifications as the basis for unit determinations, explaining:

> In these circumstances, permitting severance of truck drivers as a separate unit based upon a traditional title . . . would result in *creating a fictional mold within which the parties would be required to force their bargaining relationship*. Such a determination could only *create a state of chaos* rather than foster stable collective bargaining, and could hardly be said to 'assure to employees the fullest freedom in exercising the rights guaranteed by this Act' as contemplated by Section 9(b).

Id. at 139-40 (emphasis added).

The "chaos" the Board sought to avoid is not theoretical or speculative; rather, it represents the real, negative consequences that naturally flow from unit proliferation that carves up an employer's workplace. *Specialty Healthcare* permits multiple smaller bargaining units, drawn along discrete groupings such as job title, department, or similar lines, instead of larger units reflecting the employer's functional inte-

gration and the resulting community of interests shared by its employees. The employer's bargaining obligations are thus diffused among different groups that bear no relation to the way in which the employer has organized its operations.

Such smaller and/or multiple units disrupt both the efficient operation of the business and effective collective bargaining. More time must be spent negotiating contracts and more resources deployed to keep the artificially separated groups of employees functioning efficiently. An employer's operations, once divided into units that bear little or no relationship to the function of the business, will tend to evolve in different directions as each unit's terms and conditions of employment develop through separate bargaining, spurred on by employee and union rivalry to outpace the other groups at the bargaining table. Employer flexibility and employee advancement lose out as separate bargaining units isolate employees in different seniority systems and job classifications, and the opportunities to move to other jobs with the employer are blocked by separate bidding systems and seniority rights.

These negative consequences also cause the odd result of empowering a union based on which portion of the employer's business it hap-

pens to represent, while disenfranchising employees in other parts of the operation. Normally dependent on the solidarity of its membership, the strength of the union under *Specialty Healthcare* will now largely depend on whether it controls a unit consisting of "employees identifiable as a group" in the portion most crucial to the operation of the employer's business. If, for example, a smaller yet operationally crucial bargaining unit calls for a boycott of the employer or work stoppage at the facility, the employer may find itself at the mercy of a fraction of its overall complement of employees. Of equal importance, many if not most employees will not have any say in the matter even though it could result in a work stoppage by default for them.

As discussed in Section II, below, Section 9(b) of the Act also requires the Board to approve units that assure employees the "fullest freedom in exercising rights guaranteed by" the Act. 29 U.S.C. § 159(b). Units that recognize the functional integration of a business process provide employees with a means for exercising all of the rights guaranteed by the Act. For these reasons, Board policy for decades has been to look beyond the groupings of title, department, and the like—which are given virtually controlling weight under *Specialty Healthcare*—to con-

sider and evaluate how the requested unit might affect the employer's business.

Indeed, the "context" the Board referred to in *Kalamazoo Paper* is the functional *integration of employees in a business process*. The Board had stressed that all community-of-interest factors necessarily should be viewed through the lens of the employer's business and whether both industrial stability and effective collective bargaining are served by the unit deemed "appropriate." For example, in *International Paper Co.*, 96 NLRB 295 (1971), the Board refused to assign welders to a particular craft unit. In doing so, the Board noted that the welders were assigned to work throughout the plant, explaining: "We have always assumed it obvious that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *Id.* at 298 n.7.

The Board has acknowledged that this principle, by its nature, must be applied in a variety of business settings and always must take

into consideration the ever-changing workplace as technology and other business applications and processes are adopted:

> The Board must hold fast to the objectives of the [Act] using an empirical approach to adjust its decisions to the evolving realities of industrial progress and the reflection of that change in organizations of employees. To be effective for that purpose, each unit determination *must have a direct relevancy to the circumstances within which collective bargaining is to take place*. While many factors may be common to most situations, in an evolving industrial complex the effect of any one factor, and therefore the weight to be given it in making the unit determination *will vary from industry to industry and from plant to plant*. We are therefore convinced that collective-bargaining units *must be based upon all the relevant evidence in each individual case*.

Am. Cyanamid Co., 131 NLRB 909, 911 (1961) (emphasis added).

Since *Kalamazoo Paper*, *International Paper*, and *American Cyanamid* were decided, the Board had continued to consider the nature of how the employer has organized its business, taking care to avoid units that would destroy the functional integration of an employer's operations. *See, e.g.*, *Buckhorn, Inc.*, 343 NLRB 201, 203 (2004) (finding maintenance-only unit inappropriate because of employer's "highly integrated" operations); *Avon Products, Inc.*, 250 NLRB 1479, 1482 (1979) (reversing regional director's decision that failed to account for employer's "highly integrated process").

It is this well-developed and highly rational body of case law that has now been disrupted by *Specialty Healthcare*. Inexplicably and without warrant, *Specialty Healthcare* eliminates consideration of the context of the unit sought as it relates to the employer's overall operations in favor of an "employees readily identifiable as a group" framework that slavishly pays heed to job titles, departments, or classifications, without regard to how such a unit integrates into the daily practicalities of operating the business in the individual case before the Board.

The inevitable result of *Specialty Healthcare* will be a proliferation of smaller, multiple units that can only cause disruption in the workplace. Indeed, this process has already begun. *See, e.g.*, *Nestlé Dryer's Ice Cream Co.*, No. 31-RC-66625, 2011 WL 6835227 (NLRB Dec. 28, 2011) (denying review in bargaining-unit dispute where regional director approved unit comprised solely of maintenance employees at an ice cream manufacturing plant), *cross-appeals pending*, Nos. 12-1684 & 12-1783 (4th Cir.); *Gen. Elec. Co.*, No. 14-RC-073765, slip op. at 45-46 (Mar. 12, 2012) (rejecting functionally integrated plant-wide unit in favor of smaller unit requested by union), *perm. app. denied*, 2012 WL 2046932 (NLRB June 6, 2012); *Prevost Car U.S.*, No. 3-RC-071843, slip

op. at 31-32 (Feb. 17, 2012) (approving bargaining unit at transit bus assembly plant limited to assemblers and excluding mechanics, technicians, and material handlers), *perm. app. denied*, 2012 WL 928253 (NLRB Mar. 15, 2012).

Application of the *Specialty Healthcare* test has not been limited to manufacturing or even to the health care context in which it arose. Rather, the *Specialty Healthcare* test is being applied broadly throughout all sectors of the American economy. *See*, *e.g.*, *Neiman Marcus Group, Inc.*, No. 02-RC-076954 (May 4, 2012) (applying "overwhelming community of interest" test to approve bargaining unit limited to 46 women's shoe department employees in large department store with over 400 sales employees), *perm. app. granted*, 2012 WL 1951475 (NLRB May 30, 2012); *DTG Operations, Inc.*, 357 NLRB No. 175, at *3 (Dec. 30, 2011) (applying test to approve bargaining unit limited to 31 car rental agency employees and to exclude 78 employees); *1st Aviation Servs., Inc.*, No. 22-RC-061300, slip op. at 24-25 (Sept. 13, 2011) (applying test to approve bargaining unit limited to 34 aviation-services employees and exclude 74 employees), *perm. app. denied*, 2011 WL 4994731 (NLRB Oct. 19, 2011).

The Board's abandonment of its longstanding unit-determination precedent is, in itself, an unwise policy choice because of its disruptive effect on the smooth operation of businesses that today, more than ever, are subject to extreme economic and competitive pressures. The Board's poor policy choice is compounded because of the negative effect it will have not only on business efficiency and profitability, but on the ability of businesses to invest, grow, and create badly needed jobs in today's economy. What is worst, however, is that the *Specialty Healthcare* test violates the Act, as demonstrated below.

II. REGARDLESS OF THE CONTEXT IN WHICH IT IS APPLIED, *SPECIALTY HEALTHCARE* CONTRAVENES AT LEAST TWO PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT

A. *Specialty Healthcare* Violates Section 9(c)(5)

Section 9(c)(5) of the Act provides that, in determining an appropriate bargaining unit, the "extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). As this Court has explained, Section 9(c)(5)'s prohibition "does not merely preclude the Board from relying 'only' on the extent of organization. The statutory language is more restrictive, prohibiting the Board from assigning this factor either exclusive or 'controlling' weight." *Lundy*, 68 F.3d at 1580.

Thus, Section 9(c)(5) specifically prohibits, and *Lundy* specifically rejected, what *Specialty Healthcare* establishes as a rule, i.e., Board "determined" bargaining units that in all but the rarest of cases will be the exact one requested by the petitioning union on the basis of the union's extent of organizing.

In *Lundy*, the union requested a unit that excluded certain quality-control, laboratory, industrial-engineering, and other employees. 68 F.3d at 1579. The Board's regional director presumed that the petitioned-for unit was appropriate but allowed the excluded employees to vote in the election under challenge. *Id.* On review, the Board held that the excluded employees' ballots should not be counted because they did not share an "overwhelming community of interest" with the employees included in the unit. *Id.* at 1581.

Following the employer's refusal to bargain with the pared-down unit and the Board's finding that refusal to be an unfair labor practice, the employer petitioned this Court claiming that the unit approved by the Board was inappropriately based on the extent of union organization. *Id.* at 1579. The Court agreed, holding that the Board violated

Section 9(c)(5) because it had given "controlling weight" to the extent of union organization within the employer's facility. *Id.*

Key to the Court's decision in *Lundy* was the Board's holding that the unit requested by the union could only be challenged if the employer could demonstrate that the excluded employees shared an "overwhelming community of interest" with those employees the union had included in the unit. In rejecting the Board's use of this standard in *Lundy*, the Court explained: "By presuming the union-proposed unit proper unless there is an overwhelming community of interest with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. *This is because the union will propose the unit it has organized*." *Id.* at 1581 (internal quotations and citation omitted) (emphasis added).

The Court further observed that under these circumstances, the Board's ruling made it "impossible to escape the conclusion that the . . . ballots [of the quality-control and industrial-engineering employees] were excluded [by the Board] 'in large part because the Petitioners do not seek to represent them.'" *Id.* (quoting underlying Board decision).

Thus, the Board's ruling bore "the indicia of a classic [Section] 9(c)(5) violation." *Id.*

The Board's decision in *Specialty Healthcare* and its application in this case violates Section 9(c)(5) in an even more egregious way than it did in *Lundy*. In *Specialty Healthcare*, the Board announced a new, short-hand test for determining an appropriate unit, stating:

> [W]hen employees or a labor organization petition for an election in a unit of *employees who are readily identifiable as a group* . . . and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an *overwhelming community of interest* with those in the petitioned[-]for unit.

357 NLRB No. 83, at *12-13 (emphasis added and footnote omitted).

This test requires a unit to meet two criteria. First, it must be composed of "employees who are readily identifiable as a group." Second, it must be established that the employees *in the group* share a community of interest with one another. Once these two criteria are met, a challenging employer (or rival union) can only expand the requested unit if it can show that employees excluded from the petitioned-

for unit share an "overwhelming community of interest" with the employees in the proposed unit.

The *Specialty Healthcare* test effectively gives controlling weight to the "employees . . . identifiable as a group" in a way that is even more egregious than in *Lundy*. First, *no* unit could be appropriate in which its members do not share a community of interest. Thus, what really governs the appropriate unit under *Specialty Healthcare* is the employees "identifiable as a group." Such a group will almost certainly be chosen by the union based on the extent to which employees have organized. *See Lundy*, 68 F.3d at 1581 (explaining that the "union will propose the unit it has organized"). Upon what other basis would a readily identifiable group of employees be chosen by the union? Under *Specialty Healthcare* and its growing progeny, this question is never asked and never answered.[3]

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[3] In *Lundy*, this Court observed that the Board had "generally avoided § 9(c)(5) violations" by applying community-of-interest factors "sufficiently independent of the extent of union organization." 68 F.3d at 1580. The *Specialty Healthcare* test destroys the "independent" community-of-interest analysis by limiting it to the group of employees identified by the union.

Second, as in *Lundy*, the union's requested unit is elevated to controlling status save only if an employer or a rival union can show an overwhelming community of interest with excluded employees. The petitioned-for unit is thus insulated from alteration in all but the rarest of cases, with the result being that extent of organizing is effectively given controlling weight.

In sum, the *Specialty Healthcare* test begins with a presumption that the petitioned-for unit—one almost certainly based on the extent of union organizing—is appropriate simply because the members of the unit share a community of interests among themselves, without regard to any other factors. It then effectively insulates that unit from challenge by erecting the "overwhelming community of interest" barrier.

Dissenting Board Member Hayes accurately described the effect of the new test on the Board's establishment of bargaining units, explaining: "This will in most instances encourage union organizing in units as small as possible, in tension with, if not actually conflicting with, the statutory prohibition in Section 9(c)(5) against extent of organization as the controlling factor in determining appropriate units." *Specialty Healthcare*, 357 NLRB No. 83, at *19 (Member Hayes, dissenting) (foot-

note omitted). This is the same problem that this Court in *Lundy* recognized as a "classic [Section] 9(c)(5) violation." 68 F.3d at 1581.

B. *Specialty Healthcare* Violates Section 9(b)

As discussed above, the Board's historical approach in determining the propriety of bargaining units considered "in each case" the interests not only of those in the petitioned-for unit, but all of the factors necessary to protect the "rights guaranteed by" the Act. This decades-long policy was grounded in the plain language of Section 9(b) of the Act. As demonstrated below, the rejection of that approach through the Board's decision in, and continued application of, *Specialty Healthcare* violates Section 9(b).

1. The Board Violated Section 9(b)'s Command to Decide the Appropriate Bargaining Unit "In Each Case"

Section 9(b) of the Act provides that the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). The words "shall decide in each case" mean that "whenever there is a

disagreement about the appropriateness of a unit, the Board shall resolve the dispute. . . . Congress chose not to enact a general rule that would require plant unions, craft unions or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611 (1991).

The legislative history of Section 9(b) demonstrates Congress's belief that the Board must have discretion to determine unit issues based on the circumstances before it. Section 9(b) is based on Section 2(4) of the Railway Labor Act of 1934 ("RLA"), which provides that employees "shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have a right to determine who shall be the representative of the craft or class for the purpose of this act." *Comparison of S. 2926 and S. 1958*, at 30 (Comm. Print 1935), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act of 1935*, at 1355 (1949) ("*1935 Legislative History*").

This RLA provision is different from what became Section 9(b) of the Act in a critical respect: the RLA does *not* contain language mandat-

ing a decision by the National Mediation Board ("NMB") as to the appropriate unit "in each case." Congress explained this fundamental difference in its comparison of Senate Bill 2926 (the original Senate bill proposing the Act) to Senate Bill 1958 (what ultimately was enacted as the Act): "The same necessity for unit determinations is embraced in the definition of majority rule in the [RLA] as set out above, *although in that industry the nature of the department or craft alinement* [sic] *is so clearly defined as to require no express elaboration*." *Id.* (emphasis added), *reprinted in* 1 *1935 Legislative History* 1356.

In making this distinction, Congress recognized that the range of employers and areas of commerce that fall under the jurisdiction of the Act are vastly broader than, and different from, the railroad (and now airline) industry in any number of material respects. Unlike the RLA, the Act covers virtually unlimited types of businesses, employing individuals with myriad levels of skill sets, ranging in size from but a few employees to hundreds of thousands of employees, having but a single location to having hundreds or thousands of locations around the country, all following multiple lines of ownership, organization, and business purpose.

While Congress recognized that a "one size fits all" approach to bargaining-unit determination might be acceptable in the more homogeneous business types covered by the RLA, that approach would be neither possible nor desirable for the far broader range of employers and employees in the industries subject to the Act. For that reason, the Board was directed to make its determinations not on the basis of a simplistic formula, but to consider the factors making up an appropriate unit "in each case."

The specific role of the Board in making a decision "in each case" under Section 9(b) was part of a larger debate over the wisdom of majority elections. This "majority rule" debate naturally led to a discussion of why the Board needed to decide in what *unit* the majority would be determined:

> The major problem connected with the majority rule is not the rule itself, but its application. *The important question is to what unit the majority rule applies*. . . . Section 9(b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. . . . The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: Shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? To lodge the power of determining this question with the employer would invite unlimited

> abuse and gerrymandering the units would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and, *by breaking off into small groups, could make it impossible for the employer to run his plant*.

Hearings on S. 1958 Before the S. Comm. on Educ. & Lab., 74th Cong. 82 (1935) (statement of Francis Biddle, then-Chairman of the precursor to the Board) (emphasis added), *reprinted in* 1 *1935 Legislative History* 1458. The rule in *Specialty Healthcare* is contrary to concerns raised by Congress in investing the Board with the authority to make unit determinations "in each case."

2. The Board Ignored Section 9(b)'s Command to Assure Employees the Fullest Freedom in Exercising All of the Rights Guaranteed by the Act

The presumption of regularity that accompanies agency action does not shield it from a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). As is relevant here, agency action is subject to reversal as being "arbitrary" and "capricious," 5 U.S.C. § 706(2)(A), if the agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). More-

over, agency action can be arbitrary and capricious even if it is supported by substantial evidence. *Bowman Transp., Inc. v. Ark. Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974).

When Congress amended the Act in 1947, one of the key changes made to Section 7 of the Act, 29 U.S.C. § 157, was the addition of a "right to refrain" from being represented by a union for collective bargaining. This language was added to ensure that employees could exercise free choice on the important question of union representation. It was considered so important that Congress also amended Section 9(b) of the Act to assure that in making unit determinations, the Board took into account not just the right to organize for collective bargaining, but all of the rights guaranteed under the Act, including the right to refrain. As demonstrated below, however, the Board failed to fulfill its statutory obligation to consider the right to refrain in developing the *Specialty Healthcare* test.

a. Section 9(b) Requires the Board to Consider the Right of Employees To Refrain From Collective Activities

The Board's bargaining-unit determination has significant ramifications for employees included in the unit who do not wish to be repre-

sented by a union. In relevant part, Section 9(a) of the Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive* representatives of *all* the employees in such unit for the purposes of collective bargaining . . . ." 29 U.S.C. § 159(a) (emphasis added). Section 9(b) of the Act therefore instructs that the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the *rights guaranteed by this subchapter*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b) (emphasis added).

The "rights guaranteed by this subchapter" include not only the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." NLRA § 7, 29 U.S.C. § 157. Importantly, the "rights guaranteed by this subchapter" also include the "right to refrain from any or all" of the foregoing activities. *Id.*

When Congress added the right to refrain to the Act in 1947, it did so using language demonstrating that the newly added right should not be accorded second-class status by the Board. *See* Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 7, 61 Stat. 136, 140. For example, at the same time that it added the right to refrain to the Act, Congress amended what had been a pro-unionization unit-determination standard and replaced it with a neutral standard requiring the Board to respect *all* of the rights guaranteed to employees under the Act, including the right to refrain.

In its original form, Section 9(b) required the Board to "decide in each case whether, in order to insure to employees *the full benefit of their right to self-organization and collective bargaining*, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." National Labor Relations Act (Wagner Act), ch. 372, § 9(b), 49 Stat. 449, 453 (1935) (emphasis added). In 1947, Congress deleted Section 9(b)'s "right to self-organization and collective bargaining" language and replaced it with the Act's current, neutral language, which reads, in relevant part: "The Board shall de-

cide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Taft-Hartley Act, sec. 101, § 9(b), 61 Stat. at 143; *see also* 29 U.S.C. § 159(b) (codifying the Taft-Hartley Act's language and replacing the phrase "this Act" with "this subchapter").

Accordingly, Congress's modification of the Act in 1947 "emphasized that one of the principal purposes of the [Act] is to give employees full freedom to choose *or not to choose* representatives for collective bargaining." H.R. Rep. No. 80-510, at 47 (1947) (Conf. Rep.), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 551 (1948) (emphasis added). By guaranteeing "in express terms the right of employees to refrain from collective bargaining or concerted activities if they choose to do so," Congress believed it would "result in a substantially larger measure of protection of those rights when bargaining units are being established than has heretofore been the practice." *Id.*

b. The Board Ignored the Right To Refrain

Claiming that the "right to self-organization" is the "first *and central* right set forth in Section 7 of the Act," *Specialty Healthcare*, 357 NLRB No. 83, at *8 (emphasis added), the *Specialty Healthcare* majority asserted that employees "exercise their [Section] 7 rights not merely by petitioning to be represented, but by petitioning to be represented in a particular unit," *id.* at *8 n.18. "A key aspect of the right to 'self-organization,'" the majority believed, "is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude." *Id.* The majority therefore interpreted Section 9(b)'s command as requiring the Board to assure employees the fullest freedom in exercising the "right to self-organization" by protecting the "right to choose whom to associate with, when [the Board] determine[s] whether their proposed unit is an appropriate one." *Id.*

At no point in devising a new standard for determining appropriate bargaining units did the Board ever consider the right of employees to *refrain* from activities protected by the Act. Instead, the language of the majority's decision demonstrates that it deemed the "right to self-organization" as more important than all other Section 7 rights. That

policy decision, however, was not for the Board to make. In adding the right to refrain to the Act and enacting a facially neutral unit-determination standard 65 years ago, Congress made a policy decision the Board was bound to respect.

In view of the importance that Congress attached to the right to refrain and its relevance during the unit-determination process, it is telling that nowhere did the Board address how this right might be affected by the rule announced. Nor is it difficult to see how the rule announced could adversely impact the right to refrain.

For example, under the Board's traditional, pre-*Specialty Healthcare* standard for determining appropriate bargaining units, a union seeking to organize would have to contend with the fact that a majority of individuals in a presumptively appropriate unit might not want to be represented by a union that would, if elected, become their exclusive agent for purposes of collective bargaining. The union could respond to this reality either by foregoing the organizing effort or by initiating a campaign to win over those employees who did not wish to be represented. Under the regime announced in *Specialty Healthcare*, however, the union now has a third option: organize in a gerrymandered unit in

which the union knows it has majority support. In such a gerrymandered unit, the union does not have to worry about convincing those individuals who may wish to exercise their right to refrain, because they are outnumbered. The rule established thus relegates those individuals to an artificial minority position.

Congress enshrined the right to refrain in the Act itself so that it would be recognized and protected by the Board, particularly during the unit-determination process. Because agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and because the Act requires the Board to consider all of the rights guaranteed by the Act, at a minimum, this case should be remanded with instructions for the Board to obey Congress's unambiguous command, for the Board's discretion does not extend "to the point where the boundaries of the Act are plainly breached," *Lundy*, 68 F.3d at 1583.

CONCLUSION

For the foregoing reasons, the Court should grant Huntington's petition for review and deny the Board's cross-application for enforcement.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-2000 **Caption:** Huntington Ingalls Incorporated v. NLRB

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

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(s) s/Ronald E. Meisburg

Attorney for U.S. Chamber of Commerce, et al.

Dated: October 17, 2012

CERTIFICATE OF SERVICE

The undersigned certifies that on this seventeenth day of October, 2012, he caused the foregoing brief *amici curiae* to be filed using the Court's Electronic Case File system, which will automatically generate and send by e-mail a Notice of Docket Activity to counsel for all parties. The undersigned also certifies that, as required by Local Rule 31(d), he caused eight (8) true and correct copies of the foregoing *amicus* brief to be transmitted to the Clerk of Court by third-party commercial carrier for next-day delivery.

s/Ronald E. Meisburg
Ronald E. Meisburg

STATUTORY ADDENDUM

ADDENDUM TABLE OF CONTENTS

ner prescribed by subchapter II of chapter 5 of title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

(July 5, 1935, ch. 372, §6, 49 Stat. 452; June 23, 1947, ch. 120, title I, §101, 61 Stat. 140.)

CODIFICATION

''Subchapter II of chapter 5 of title 5'' substituted in text for ''the Administrative Procedure Act'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

AMENDMENTS

1947—Act June 23, 1947, amended section generally to provide that the rules and regulations issued by the Board should be in the manner prescribed by the Administrative Procedure Act.

EFFECTIVE DATE OF 1947 AMENDMENT

For effective date of amendment by act June 23, 1947, see section 104 of act June 23, 1947, set out as a note under section 151 of this title.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

(July 5, 1935, ch. 372, §7, 49 Stat. 452; June 23, 1947, ch. 120, title I, §101, 61 Stat. 140.)

AMENDMENTS

1947—Act June 23, 1947, restated rights of employees to bargain collectively and inserted provision that they have right to refrain from joining in concerted activities with their fellow employees.

EFFECTIVE DATE OF 1947 AMENDMENT

For effective date of amendment by act June 23, 1947, see section 104 of act June 23, 1947, set out as a note under section 151 of this title.

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of

tice any act which was performed prior to the date of the enactment of this act [June 23, 1947] which did not constitute an unfair labor practice prior thereto, and the provisions of section 8(a)(3) and section 8(b)(2) of the National Labor Relations Act as amended by this title [subsecs. (a)(3) and (b)(2) of this section] shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act [June 23, 1947], or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8(3) [see subsec. (a)(3) of this section] of the National Labor Relations Act prior to the effective date of this title [sixty days after June 23, 1947] unless such agreement was renewed or extended subsequent thereto.''

§ 158a. Providing facilities for operations of Federal Credit Unions

Provision by an employer of facilities for the operations of a Federal Credit Union on the premises of such employer shall not be deemed to be intimidation, coercion, interference, restraint or discrimination within the provisions of sections 157 and 158 of this title, or acts amendatory thereof.

(Dec. 6, 1937, ch. 3, § 5, 51 Stat. 5.)

CODIFICATION

This section was not enacted either as part of the Labor Management Relations Act, 1947, which comprises this chapter, or as part of the National Labor Relations Act, which comprises this subchapter.

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consist-

ent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

(July 5, 1935, ch. 372, § 9, 49 Stat. 453; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 143; Oct. 22, 1951, ch. 534, § 1(c), (d), 65 Stat. 601; Pub. L. 86–257, title II, § 201(d), title VII, § 702, Sept. 14, 1959, 73 Stat. 525, 542.)

AMENDMENTS

1959—Subsec. (c)(3). Pub. L. 86–257, § 702, substituted ''Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike'' for ''Employees on strike who are not entitled to reinstatement shall not be eligible to vote.''

Subsecs. (f), (g). Pub. L. 86–257, § 201(d), repealed subsecs. (f) and (g) which required unions to file their constitutions, bylaws and a report, prescribed the contents of the report and directed the filing of annual financial reports, and are now covered by section 431 of this title.

Subsec. (h). Pub. L. 86–257, § 201(d), repealed subsec. (h) which related to affidavits showing union's officers free from Communist Party affiliation or belief.

1951—Subsec. (e). Act Oct. 22, 1951, § 1(c), struck out par. (1) and renumbered pars. (2) and (3) as (1) and (2).

Subsecs. (f) to (h). Act Oct. 22, 1951, § 1(d), struck out ''No petition under section 159(e)(1) shall be entertained'' wherever appearing.

1947—Act June 23, 1947, amended section generally to allow employees to carry their grievances directly to the employer, to circumscribe certain powers of the Board, to make the union file with the Secretary of Labor its constitution, bylaws, and report before being certified as a bargaining agent, to require annual reports by labor unions, and to require labor unions to file affidavits with the Board showing that none of its officers are affiliated with or believe in the Communist Party.

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by section 702 of Pub. L. 86–257 effective sixty days after Sept. 14, 1959, see section 707 of Pub. L. 86–257, set out as a note under section 153 of this title.

EFFECTIVE DATE OF 1947 AMENDMENT

For effective date of amendment by act June 23, 1947, see section 104 of act June 23, 1947, set out as a note under section 151 of this title.

CERTAIN CERTIFICATIONS OF BARGAINING UNITS UNAFFECTED

Section 103 of title I of act June 23, 1947, provided that: ''No provisions of this title [amending this subchapter] shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act [this section] prior to the effective date of this title [sixty days after June 23, 1947] until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title [sixty days after June 23, 1947], until the end of the contract period or until one year after such date, whichever first occurs.''

§ 160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon

of the United States of Mexico. In the event that such lands are so determined to be lands subject to the jurisdiction of the United States of Mexico and that as a result of such determination the owners or their assignees lose their title thereto and the lease is canceled, the United States shall pay to the owners or their assignees the fair value of the building at the completion of its construction (but not in excess of the actual cost of construction), less an amount equal to one-third of 1 per centum of such cost or value for each month that the lease was in effect prior to such determination.

Payment to owners.

Deduction.

SEC. 2. There is authorized to be appropriated such amounts as may be necessary to pay the installments of rent provided for in such lease."

Appropriation authorized.

Approved, July 3, 1935.

[CHAPTER 372.]

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

July 5, 1935.
[S. 1958.]
[Public, No. 198.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

National Labor Relations Act.
Findings and policy.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers

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Transfer of employees, records, etc.

to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

Expense allowances.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

Principal office.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Prosecution of inquiries.

Administrative rules.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

Rights of employees specified.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Unfair labor practices.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

Vol. 48, p. 195; *Ante*, p. 375.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

Representatives and elections.

Majority rule principle in collective bargaining, etc.

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

Proviso. Individual right to present grievances.

Standards for appropriate bargaining, etc.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Representatives of employees. Method for selecting, etc.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertin [1] such representatives.

Hearings.

Board orders based on foregoing results.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Enforcement or review.

PREVENTION OF UNFAIR LABOR PRACTICES

Prevention of unfair labor practices, affecting commerce. Authority of Board.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

Complaints; filing.

Service of charges.

Notice of hearing.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing

Amendment of complaint.

[1] So in original.

[CHAPTER 114]

AN ACT

June 21, 1947
[H. R. 1874]
[Public Law 100]

To amend the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes", approved July 11, 1916, as amended and supplemented, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (d) of section 4 of the Federal-Aid Highway Act of 1944, Public Law 521, Seventy-eighth Congress, approved December 20, 1944, is hereby amended by striking out the term "one year" where it appears in said paragraph and inserting in lieu thereof the term "two years".

58 Stat. 840.

Approved June 21, 1947.

[CHAPTER 120]

AN ACT

June 23, 1947
[H. R. 3020]
[Public Law 101]

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

49 Stat. 449.
29 U. S. C. §§ 151-166.

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the

Review of trial examiner's report.

as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

Use, etc., of other agencies and services.

Payment of expenses.

"(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

Principal office.

"SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Rules and regulations.

"SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

Employer.

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Intervening certification of Board.

Loss of status by employee.

"REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Decision of Board regarding appropriate unit.

Investigation of petition; hearing.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto.

Election by secret ballot.

If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

Post, p. 147.

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Petition to make agreement with employer.

"(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organ-

ization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Filing of constitution, etc., prior to action by Board.

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

Report showing receipts, etc.

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

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Obligation of labor organizations to file annual reports.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

Affidavit that labor officer is not member of Communist Party, etc.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

52 Stat. 197. 18 U. S. C. §§ 80, 83-85.

"PREVENTION OF UNFAIR LABOR PRACTICES

Powers of Board.

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

Issuance of complaint, etc.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at www.ca4.uscourts.gov/cmecftop.htm.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 12-2000 & 12-2065 as

☑ Retained ☐ Court-appointed(CJA) ☐ Court-assigned(non-CJA) ☐ Federal Defender ☐ Pro Bono ☐ Government

COUNSEL FOR: See Attachment

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s)

s/Ronald E. Meisburg
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CERTIFICATE OF SERVICE

I certify that on October 17, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/Ronald E. Meisburg
Signature

October 17, 2012
Date

11/17/2011
SCC

ATTACHMENT TO APPEARANCE OF COUNSEL FORM OF RONALD E. MEISBURG

COUNSEL FOR:

American Hotel & Lodging Association
Chamber of Commerce of the United States of America
Coalition for a Democratic Workplace
HR Policy Association
International Foodservice Distributors Association
National Association of Manufacturers
National Association of Wholesaler-Distributors
Society for Human Resource Management