**ORAL ARGUMENT NOT YET SCHEDULED**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 09-1119, 09-1148**

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**NATIONAL LABOR RELATIONS BOARD,**
**Petitioner/Cross-Respondent,**

**v.**

**FEDERAL LABOR RELATIONS AUTHORITY,**
**Respondent/Cross-Petitioner,**
**and**

**NATIONAL LABOR RELATIONS BOARD UNION,**
**Intervenor**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY**

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# BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

## A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the National Labor Relations Board Union (union) and the National Labor Relations Board (agency). The agency is the petitioner/cross respondent in this court proceeding; the Authority is the respondent/cross petitioner. The union is the intervenor.

## B. Ruling Under Review

The ruling under review in this case is the Authority's decision in *National Labor Relations Board*, Case Nos. WA-CA-07-0501, decision issued on February 11, 2009, reported at 63 F.L.R.A. 104.

## C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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* Authorities upon which we chiefly rely are marked by asterisks.

## GLOSSARY

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|---|---|
| *ACT* | *Ass'n of Civilian Technicians*, 55 F.L.R.A 657 (1999) |
| ALJ | Administrative Law Judge |
| Authority or FLRA | Federal Labor Relations Authority |
| Board | Chairman and Members of the National Labor Relations Board |
| Br. | Brief |
| GC | General Counsel of the National Labor Relations Board |
| *Ill. Nat'l Guard* | *Illinois National Guard v. FLRA*, 854 F.2d 1396 (D.C. Cir. 1988) |
| *IRS* | *Internal Revenue Service*, 56 F.L.R.A. 486 (2000) |
| NLRA | National Labor Relation Act |
| NLRB | National Labor Relation Board |
| *NLRB I* | *National Labor Relation Board*, 62 F.L.R.A. 25 (2007) |
| NLRBU or union | National Labor Relation Board Union |
| Section 3(d) | Section 3(d) of the National Labor Relations Act, 29 U.S.C. § 153(d) |
| Statute | Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) |
| ULP | Unfair Labor Practice |

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# BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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## STATEMENT OF JURISDICTION

The Federal Labor Relations Authority ("Authority" or "FLRA") issued the decision and order under review in this case on February11, 2009. The decision and order is published at 63 F.L.R.A. 104 and is included in the Joint Appendix

(JA) at JA __.[1] The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006) (Statute).[2] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute, and to grant enforcement of Authority orders pursuant to § 7123(b) of the Statute.

## STATEMENT OF THE ISSUE

1. Whether the Authority reasonably held that the National Labor Relations Board committed unfair labor practices by refusing to bargain with the union certified to represent a newly consolidated bargaining unit?

## STATEMENT OF THE CASE

This case arises out of an unfair labor practice (ULP) proceeding brought under § 7118 of the Statute. The case involves an Authority adjudication of a ULP complaint filed by the Authority's General Counsel based on a charge filed by the National Labor Relations Board Union ("NLRBU" or "union"). In pertinent part, the complaint alleged that the National Labor Relations Board ("agency" or "NLRB") violated § 7116(a)(1), (5), and (8) of the Statute by refusing to bargain

[1] A deferred appendix will be filed in this case.

[2] Pertinent statutory and regulatory provisions are set forth in the Addendum to this brief.

with the union over conditions of employment for employees in a newly-certified bargaining unit. The NLRB admitted that it refused to bargain as alleged, but denies such refusal constituted a ULP because the consolidated bargaining unit certified by the Authority was unlawful. The Administrative Law Judge (ALJ) to whom the case was assigned granted the Authority's General Counsel's motion for summary judgment, and concluded that the NLRB violated the Statute as alleged. After the NLRB filed exceptions to the ALJ's decision and recommended order, the Authority issued a final decision and order holding that the NLRB committed ULPs as alleged and ordering an appropriate remedy.

The NLRB now seeks review and the Authority seeks enforcement of the Authority's final order. The union has intervened on behalf of the Authority.

## STATEMENT OF THE FACTS

### A. Background

The NLRB administers the National Labor Relations Act, conducting elections to determine whether employees in the private sector wish to be represented by a union and resolving alleged ULPs committed by private sector employers and unions. The NLRB's functions are discharged by two components: (1) the General Counsel (GC), and (2) the Chairman and Members of the Board

(Board).[3] Pursuant to § 3(d) of the NLRA, 29 U.S.C. § 153(d), the GC investigates and prosecutes ULP cases[4] and exercises general supervision over all attorneys employed by the NLRB (except ALJs and legal assistants to the Board members) and over employees in the agency's regional offices. The GC is appointed by the President, subject to confirmation by the Senate, for a term of 4 years. 29 U.S.C. § 153(d). [5]

The Board is a quasi-judicial body that reviews decisions from Regional Directors in representation cases[6] and from ALJs in ULP cases. The Members of the Board are appointed by the President, subject to confirmation by the Senate, for a term of 5 years. 29 U.S.C. § 153(a).

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[3] For clarity, the Chairman and Members of the NLRB will be referred to simply as "the Board," the NLRB's General Counsel as "the GC," and the agency as a whole as the "NLRB."

[4] ULP cases are initiated by charges filed by private parties, *i.e.*, unions, employees, or employers.

[5] Section 153(d) of Title 29 will be referred to as "§ 3(d)."

[6] Representation cases include elections and appropriate bargaining unit determinations.

Until 2007, the union represented four separate bargaining units of the NLRB's employees as follows:

1) nonprofessional employees of the Board in Washington, DC;

2) nonprofessional employees of the GC in Washington, DC;

3) nonprofessional employees of the GC in regional offices; and

4) professional employees of the GC in regional offices.

**B. The Authority's Appropriate Unit Determination**

In December 2005, the union filed a petition to consolidate its four units pursuant to § 7112(d) of the Statute. RD Decision at 1 (JA __). After conducting a hearing, the Authority's San Francisco Regional Director (RD) issued a decision and order finding that the requested consolidated unit was appropriate under the Statute and granted the union's petition for consolidation. RD Decision at 21 (JA__).

The RD first addressed the NLRB's contention that § 3(d) precludes the appropriateness of a unit containing employees of the GC and employees of the Board.[7] According to the RD, § 3(d) does not by its terms address the NLRB's internal labor relations issues and the NLRB had a long standing practice of actual

[7] As noted above, p. 3, § 3(d) grants the GC the sole authority to investigate and prosecute allegations of ULPs and provides that the GC shall have general supervisory authority over employees in the NLRB's regional offices.

collaboration between the Board and the GC concerning the establishment of conditions of employment of the agency's employees. RD Decision at 16 (JA ___). The RD then determined that the proposed consolidated unit satisfied the criteria for appropriate bargaining units found in § 7112(a) of the Statute. *Id.* at 17-21 (JA ___). Accordingly, the RD granted the union's petition and ordered an election to determine if the professional employees wished to be in a unit with the non-professionals. *Id.* at 22 (JA ___).[8]

Pursuant to § 7105(f) of the Statute, the NLRB applied to the Authority for review of the RD's decision insofar as the decision required the consolidation of the unit of Board employees with the three units of GC employees. The NLRB did not object to the consolidation of the three units of GC employees. The Authority granted review, but ultimately upheld the RD's decision and order. *Nat'l Labor Relations Bd.*, 62 F.L.R.A. 25, 25-26 and n.5. (2007) (*NLRB I*).[9]

The Authority rejected the NLRB's contention that § 3(d) precludes a unit comprised of both GC employees and Board employees. As had the RD, the

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[8] Like § 9(b)(1) of NLRA, 29 U.S.C. § 159(b)(1), § 7112(b)(5) of the Statute provides that a mixed bargaining unit of professional and nonprofessional employees is not appropriate unless a majority of the professional employees vote for inclusion in the mixed unit.

[9] *NLRB 1* is included in the JA at ___.

Authority first noted that §3(d) does not address how the NLRB's internal labor relations should be organized. 62 F.L.R.A. at 31 (JA __). Further, the Authority also stated that nothing in the Statute specifies how § 3(d) or any other similar statutory provision affects the appropriateness of bargaining units. The Authority stated that in circumstances where there is no specific indication as to how Congress intended to integrate an agency's authority contained in a separate statute with the labor relations obligations set out in the Statute, the Authority will follow "basic rules of statutory construction" and will attempt to interpret both statutes so that they do not conflict. *Id.*

The Authority stated nothing in the Statute excepts the NLRB from § 7112(d) of the Statute, which permits unions to seek consolidation of units, as long as the resulting consolidated unit is appropriate. In addition, the Authority noted that the Statute contains provisions intended to prevent conflicts of interest in representational matters. Specifically, § 7112(c) of the Statute provides that employees who administer laws relating to labor relations may not be represented by a union subject to those laws.[10]

[10] Thus, NLRB employees may not be represented by a union that also represents employees of private sector employers who are subject to the NLRA. The NLRBU is an independent organization not affiliated with any other union.

The Authority also stressed, on the other hand, that Congress included no limitations concerning the appropriateness of including prosecutorial and adjudicative employees of a single agency in the same unit. In that regard, the Authority found that the separation of prosecutorial and adjudicative functions is common to many agencies and not unique to the NLRB. 62 F.L.R.A. at 31-32 (JA ___).

Further, the Authority found that the separation of functions mandated by § 3(d) is maintained and enforced by rules unrelated to the bargaining unit status of the agency's employees. For example, the NLRB prevents *ex parte* contact between its prosecuting attorneys and decision writers. 62 F.L.R.A. at 32 (JA __).

In addition, the Authority cited uncontested findings that the NLRB does not, in fact, separate Board and GC employees in critical respects. Specifically, the Authority found that the agency had centralized both personnel and labor relations authority and treated its budget for personnel as a central fund. The Authority also found that, for the most part, policy issues concerning working conditions are jointly agreed to by the GC and the Board; collective bargaining for the GC and Board units has been conducted jointly; and bargaining has resulted in "virtually identical contracts" for the two headquarters bargaining units. 62 F.L.R.A. 32-33 (JA __).

Finally with respect to the effect of § 3(d), the Authority rejected the agency's contention that consolidation is inconsistent with the separate supervisory authority of the GC and the Board provided in § 3(d). According to the Authority, consolidation would not prevent the Board and the GC from proposing different working conditions for different groups of employees even though they were included in a single collective bargaining agreement. The Authority found that the NLRB had provided no reason to conclude that consolidated bargaining would undermine the separate supervisory authorities of the Board and the GC. 62 F.L.R.A. at 33 (JA __).

The Authority also rejected the NLRB's claim that the RD's decision was inconsistent with the Authority's decisions in *United States Department of Defense, National Guard Bureau*, 55 F.L.R.A. 657 (1999) (*ACT*) and *United States Department of the Treasury, Internal Revenue Service*, 56 F.L.R.A. 486 (2000) (*IRS*). 62 F.L.R.A. at 33-34 (JA__). In *ACT*, the Authority concluded that it was proper to take into account the statutory role of state officials in supervising National Guard technicians in assessing the propriety of consolidating separate bargaining units in 39 states, the District of Columbia, Puerto Rico and the Virgin

Islands.[11] 55 F.L.R.A. at 661. The Authority distinguished *ACT* from the instant case by noting that in *ACT* consolidation would have bypassed state authority over the technicians, where here, supervisory control is vested in two components of the same agency, both of whom would participate in bargaining and setting working conditions for their respective employees. 62 F.L.R.A at 33 (JA __).

Regarding *IRS*, the NLRB contended that the RD ignored the lines of authority created by § 3(d) and the agency's internal delegations of authority. In *IRS*, the Authority held that statutory and regulatory delegations of authority are always relevant to appropriate unit determinations, but that such provisions are "not examined in isolation." *IRS*, 56 F.L.R.A. at 491. The Authority noted here that the RD did not ignore the delegations of authority, but rather expressly took them into account. However, the RD did not find the delegations to be dispositive and found that the NLRB's actual practices supported the conclusion that § 3(d) did not prohibit the consolidated unit.

[11] The National Guard technicians are under the supervision of the state Adjutants General. *ACT v. FLRA*, 283 F.3d 339, 340 (D.C. Cir. 2002). "[T]he employment status of National Guard technicians is a hybrid, both of federal and state, and of civilian and military strains." *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1398 (D.C. Cir. 1988). (*Ill. Nat'l Guard*).

Having found that § 3(d) does not prohibit the proposed consolidated unit, the Authority considered whether such a unit would be appropriate under the criteria of § 7112 of the Statute. The Authority found that the consolidated unit would: 1) ensure a clear and identifiable community of interest among the employees in the unit: 2) promote effective dealings with the agency involved and 3) promote the efficiency of the operations of the agency involved.[12] 62 F.L.R.A. at 34-36 (JA__). Accordingly, the Authority held that the NLRB had not established that the RD's decision was deficient on any of the grounds alleged. *Id.* at 36 (JA__).

**C. The Authority's ULP decision**

Following the Authority's decision in *NLRB I*, an election was held in which a majority of the affected professional employees voted to be included in the newly consolidated unit. The unit was certified on June 8, 2007. *Nat'l Labor Relations Bd., Wash., D.C.*, 63 F.L.R.A. 104, 105 (2009) (JA __). Since June 25 2007, the NLRB has refused to recognize and bargain with the union as the exclusive representative of the consolidated unit. *Id.* at 105 (JA__).

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[12] Before this Court, the NLRB is not contesting the Authority's application of the criteria for establishing the appropriateness of bargaining units under § 7112 of the Statute. NLRB Brief (Br.) at 16 n.3. The NLRB is contending here only that § 3(d) prohibits the consolidated unit and that the Authority's decision is inconsistent with *ACT*.

On August 15, 2007, the RD issued a complaint alleging that the NLRB committed ULPs in violation of § 7116(a)(1), (5), and (8) of the Statute. The NLRB admitted that it refused to bargain, but denied that it committed ULPs because it claimed that the consolidated unit is unlawful. *Id.* at 106-07 (JA__).

In proceedings before the ALJ, the full record in *NLRB 1* was incorporated into the record in the ULP case. 63 F.L.R.A. at 105 (JA__). Noting that he could not reconsider the merits of *NLRB I* under Authority regulations, and that the NLRB admitted that it refused to bargain, the ALJ granted the Authority's General Counsel's motion for summary judgment against the NLRB. *Id.* at 105 (JA__).

The NLRB filed exceptions with the Authority. Relying on its own precedent and that of the NLRB, the Authority stated that a respondent in a ULP proceeding is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding absent newly discovered or previously unavailable evidence or special circumstances. The Authority concluded that the NLRB offered no newly discovered or previously unavailable evidence or special circumstances. Accordingly, the Authority denied the NLRB's exceptions and held that the agency committed ULPs as alleged. 63 F.L.R.A. at 106-107 (JA__).

## STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp.* v. *FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992) (*PBGC*).

This Court has noted that "[w]e accord considerable deference to the Authority when reviewing an unfair labor practice determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Co.* v. *FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (*FDIC*) (internal quotations omitted). As a result, "[o]ur scope of review is limited." *PBGC*, 967 F.2d at 665. So long as the Authority "provide[s] a rational explanation for its decision," it will be sustained on appeal. *FDIC*, 977 F.2d at 1496.

Similarly, the Authority should be granted considerable deference with respect to its appropriate unit determinations. *Cf. Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) ("Determining what constitutes an appropriate unit involves of necessity a large measure of informed discretion, and the decision of the [NLRB], if not final, is rarely to be disturbed.") (internal

quotations omitted). Further, the Authority "need only select *an* appropriate unit, not the most appropriate unit." *See Dean Transp. Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009) (internal quotations omitted) (holding the same for the NLRB's appropriate unit determinations).

Where, as here, the Authority interprets its own enabling statute, "[the Court is] mindful that we owe great deference to the expertise of the Authority as it exercises its special function of applying the general provisions of the Act to the complexities of federal labor relations." *Ass'n of Civilian Technicians* v. *FLRA*, 269 F.3d 1112, 1115 (D.C. Cir. 2001) (internal quotations omitted). When the Authority interprets other statutes, although it is not entitled to deference, the Authority's interpretation should be followed to the extent the reasoning is "sound." *Ass'n of Civilian Technicians, Tex. Lone Star Chapter100 v. FLRA*, 250 F.3d 778, 782 (D.C. Cir. 2001) (quoting *Dep't of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988)). Similarly, "[the Court] defer[s] to the Authority's interpretation of its own precedent." *Nat'l Treas. Employees Union* v. *FLRA*, 399 F.3d 334, 339 (D.C. Cir. 2005).

Review of the Authority's factual determinations is narrow. The Court is "to affirm the FLRA's findings of fact if supported by substantial evidence on the record considered as a whole." *PBGC*, 967 F.2d at 665 (internal citations omitted);

*see also* 5 U.S.C. § 7123(c) ("[t]he findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive"). In addition, the Authority is entitled to have reasonable inferences it draws from its findings of fact not be displaced, even if the court might have reached a different view had the matter been before it *de novo*. *See AFGE, Local 2441 v. FLRA*, 864 F.2d 178, 184 (D.C. Cir. 1988); *see also LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997).

## SUMMARY OF ARGUMENT

1. The NLRB mistakenly argues that § 3(d) of the NLRA prohibits, as a matter of law, a consolidated bargaining unit that contains both employees of the GC and the Board. On the other hand, the NLRB does not contest the Authority's application of the criteria for appropriate bargaining units found at § 7112 of the Statute. Thus, because § 3(d) does not prohibit the consolidated unit, the Court should reject the NLRB's challenge to the appropriateness of the unit.

Contrary to the NLRB's contentions, § 3(d) does not provide for the "complete separation" of the GC from the Board. Rather the separation mandated by § 3(d) is limited to the performance of functions relating to the processing of ULPs and does not, by its terms or by implication, provide for any particular labor relations organization for the agency. Further, the plain terms of § 3(d) indicate

that the GC and the Board are not wholly independent. In that regard, the GC investigates and prosecutes ULPs "*on behalf of the Board*," and the GC "shall have such other duties *as the Board may prescribe[.]*" 29 U.S.C. § 153(d) (emphasis added).

In addition, the lines of supervisory authority provided in § 3(d) are not compromised by the consolidation of units because, even under consolidation, the GC retains the authority to set the conditions of employment for those employees under his or her supervision.

Second, agency practices do not evidence the "complete separation" of the GC from the Board. Rather, there is significant overlap in functions and lines of authority. For example, employees of the GC often perform functions on behalf of the Board. Further, most administrative functions are centralized, servicing the entire agency. Finally, there has been a long-standing agency practice of collaboration between the Board and the GC with respect to collective bargaining. For example, bargaining with the two headquarters nonprofessional units (one of GC employees, one of Board employees) has been conducted jointly since the 1970s and has resulted in virtually identical contracts for these units.

2. The NLRB's concerns that the independence of the GC and the Board will be compromised by a consolidated unit are unfounded. Nothing prevents the GC

and the Board, consistent with their statutory supervisory authorities, from proposing different conditions of employment for their respective employees in the context of consolidated bargaining for one contract. There is no meaningful distinction between memorializing such negotiated conditions of employment in separate agreements or as different sections of the same agreement.

3. Contrary to the NLRB's contentions, the Authority's appropriate unit determination does not deviate from established Authority precedent. The NLRB first contends that the Authority's determination is inconsistent with its prior decision in *United States Department of Defense, National Guard Bureau*, 55 F.L.R.A. 657 (1999) (*ACT*). However, *ACT* dealt with the unique employment situation of National Guard technicians. These technicians are a "hybrid class" of employees who work in a military environment under the immediate control of the state officers, *i.e.*, the state Adjutants General. The Authority found in *ACT* that the consolidated federal agency bargaining unit sought by the union would have completely bypassed state authority over the technicians. Here, the separate supervisory authorities of the GC and the Board are not compromised by a consolidated unit because both the GC and the Board would participate in bargaining and setting working conditions for their respective employees.

The NLRB also argues that the Authority has not followed its precedent in *United States Department of the Treasury, Internal Revenue Service*, 56 F.L.R.A. 486 (2000) (*IRS*) because the Authority ignored the lines of authority created by § 3(d) and the agency's internal delegations of authority. However, in *IRS*, the Authority held only that statutory and regulatory delegations of authority are one factor to be considered in making appropriate unit determinations, not that such delegations are, in and of themselves, dispositive. Contrary to NLRB's contentions, both the RD and the Authority considered the NLRB's delegations of authority, but found that, in the totality of circumstances, the consolidated unit was appropriate.

Because § 3(d) does not prohibit the consolidated unit sought by the union and because the Authority's decision is consistent with its own precedent, the NLRB's petition for review should be denied and the Authority's order should be enforced.

## ARGUMENT

### THE AUTHORITY REASONABLY HELD THAT THE NATIONAL LABOR RELATIONS BOARD COMMITTED UNFAIR LABOR PRACTICES BY REFUSING TO BARGAIN WITH THE UNION CERTIFIED TO REPRESENT A NEWLY CONSOLIDATED BARGAINING UNIT

Pursuant to its authority under § 7105(a)(2)(A) of the Statute, the Authority determined that a petitioned-for consolidated bargaining unit of NLRB employees was appropriate within the meaning of § 7112 of the Statute. Both before the Authority and this Court, the NLRB contends that the consolidated unit is not appropriate because such a unit, including employees of the GC and the Board, is prohibited by § 3(d) of the NLRA. The NLRB also contends that the Authority's appropriate unit determination in the instant case is inconsistent with prior decisions of the Authority. As will be discussed below, neither contention has merit. Accordingly, the NLRB's petition for review should be denied and the Authority's order requiring the agency to bargain with the consolidated unit's representative should be enforced.

### I. Section 3(d) of the NLRA Does Not Bar the Consolidated Unit

The NLRB contends that § 3(d) creates a "complete separation" between the GC and the Board. Based on this mistaken premise, the NLRB argues that recognizing and bargaining with a unit comprising both GC employees and Board

employees would be inconsistent, as a matter of law, with that separation. As will be demonstrated below, however, the separation mandated by § 3(d) is limited to the performance of functions relating to the processing of ULPs and does not, by its terms or by implication, provide for any particular labor relations organization for the agency. The limited scope of § 3(d) is evidenced by its terms, its legislative history, and the NLRB's own practices. Because § 3(d) does not prohibit a consolidated unit, the Authority's determination with respect to the appropriateness of such a unit is governed only by the application of § 7112 of the Statute, which the NLRB does not contest.

### A. Section 3(d) Is Limited to Separating the NLRB's Investigatory and Prosecutorial Functions from Its Adjudicatory Functions

Any inquiry into a statute's meaning proceeds from "the fundamental canon that statutory interpretation begins with the language of the statute itself." *Butler v. West*, 164 F.3d 634, 639 (D.C. Cir. 1999) (internal quotations omitted). As the Authority correctly noted, nothing in the plain terms of § 3(d) addresses specifically how the NLRB's labor relations activities should be organized, or more generally, how any of the agency's administrative functions should be structured. Section 3(d) of the NLRA states in full as follows:

(d) General Counsel; appointment and tenure; powers and duties; vacancy.

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 153(d).

As the text of § 3(d) plainly reflects, § 3(d) is limited to guaranteeing that the GC has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title [*i.e.*, with respect to ULPs] and in respect of the prosecution of such complaints before the Board[.]" That is, § 3(d) was intended to guarantee the separation of the specific functions of

investigating and prosecuting alleged ULPs from the adjudication of those charges.[13]

The NLRB greatly overstates § 3(d)'s scope as mandating the "complete separation" of the GC and the Board. First, as noted above, § 3(d) does not address anything other than the separation of the NLRB's investigatory and prosecutorial functions from its adjudicatory functions with regard to allegations of ULPs. It is silent with respect to other functions. Further, the plain terms of § 3(d) indicate that the GC and the Board are not wholly independent. In that regard, the GC investigates and prosecutes ULPs "*on behalf of the Board*," and the GC "shall have such other duties *as the Board may prescribe[.]*" 29 U.S.C. § 153(d) (emphasis added).

[13] To the extent that § 3(d) is ambiguous, the NLRB contends that its interpretation, namely that the separation of functions mandated by § 3(d) includes labor relations matters, is entitled to deference. However, there is no such interpretation to which the Court, or the Authority in the first instance, should defer. This Court has noted that there is some question whether an interpretive theory put forth only by agency counsel in litigation constitutes an "agency position" for the purposes of *Chevron* deference. *FLRA v. Dep't of the Treasury*, 884 F.2d 1446, 1455 (D.C. Cir. 1989). The particular interpretation urged here has only been articulated in the current litigation, both before the Authority and the Court. NLRB counsel cites no independent statement of the agency's position and, as will be discussed below, and contrary to the NLRB's contention, the agency's past practices do not evidence such an interpretation of § 3(b).

Further, nothing in those snippets of legislative history cited by the NLRB support the proposition that § 3(d) mandates separation in anything other than the NLRB's prosecutorial and adjudicative functions. For example, the NLRB cites (Br. 17-18) the Conference Report on what was to become the Taft-Hartley Act for the proposition that the GC is separate and independent from the Board.[14] However, the Conference Report merely states that "[the GC] . . . is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board *in respect of the investigation of charges and the issuance of complaints of unfair labor practices and in respect of the prosecution of such complaints before the Board.*" H.R. Rep. No. 80-510, at 541 (1947) (Conf. Rep.), *reprinted in* 1947 U.S. Code Congressional Service at 1142-43 (emphasis added). Thus, it is clear from the text of the report that the "independence" on which the NLRB relies, is specifically linked to the investigation and prosecution of ULPs and not to other matters.[15]

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[14] Section 3(d) was enacted as part of the Taft-Hartley Act, Ch.120, 61 Stat. 139 (1947).

[15] The NLRB argues (Br.18-19) that the concurrent change in the definition of supervisor in the Taft-Hartley Act supports its contention that § 3(d) was intended to create a GC who was independent from the Board in all respects, not merely with respect to the processing of ULP complaints. However, there is no apparent reason to believe that the two provisions are related. Section 3(d) was concerned

(footnote continued on next page)

Section 3(d) does provide that the GC "shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices." However, and as will be discussed in more detail below, the consolidation of bargaining units will not interfere with the lines of authority created by § 3(d). Within the consolidated unit, the GC retains the authority (subject to the collective bargaining obligation) to set the conditions of employment for those employees under his or her supervision.

As demonstrated above, neither the terms nor the legislative history of prohibit the consolidated unit found appropriate by the Authority.

### B. The NLRB's Practices Are Inconsistent with Its "Complete Separation" Theory

As the RD and the Authority found, the GC and the Board do not act with complete independence from one another. Rather, there is significant overlap in functions and lines of authority. For example, although the GC has responsibility for the supervision of the regional offices, nevertheless, in processing representation cases, *i.e.,* conducting elections or making appropriate unit

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only with the internal structure of the Board's processes whereas § 2(11) (the definition of supervisor) concerned the substantive law that the NLRB is authorized to enforce. In that regard, the NLRB, as an employer, is not subject to the substantive terms of the NLRA.

determinations, regional personnel are working on behalf of the Board, not the GC. RD Decision at 16, 18 (JA__).

Further, many components of the agency, mostly at the headquarters level, perform work for the entire agency. *Id.* at 7-8 (JA__). For example, the GC's Division of Enforcement Litigation is responsible for all NLRB litigation in the United States Courts, including enforcement of decisions issued by the Board. Other offices, such as the Office of Administration (responsible for budget, human resources, and other administrative functions), serve the entire agency and are shown on the agency's organizational chart as reporting to both the GC and the Board.[16] *Id.* at 7-8 (JA__).

In addition, the agency submits a single budget request to Congress and the agency has a single strategic plan that recognizes that each component contributes to the agency's singular mission. *Id.* at 18 (JA__); *see also* Appendix to Fiscal Year 2010 Budget of the United States at 1263-64. Moreover, the agency treats its budget for personnel as a central fund with the flexibility to shift funds from one component to another. 62 F.L.R.A. at 32 (JA ___).

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[16] Other such offices include the Office of the Inspector General, the Office of Employee Development (training), and the Office of the Chief Information Officer (information technology). RD Decision at 8. (JA __).

Lastly, and perhaps most significantly for the instant case, there has been a long-standing agency practice of collaboration between the Board and the GC with respect to collective bargaining. Agency labor relations policy is coordinated by a central office in the Division of Administration. RD Decision at 14 (JA__). Reflecting this integrated approach to labor relations, bargaining regarding the two headquarters nonprofessional units (one of GC employees, one of Board employees) has been conducted jointly since the 1970s and has resulted in virtually identical contracts for these units. *Id.* (JA ___). Similarly, some agency-wide initiatives have been bargained jointly with all agency bargaining units, including those represented by another union. *Id.* at 14-15 (JA __).

In contrast, in the specific area where § 3(d) mandates the separation between the GC and the Board, the NLRB's practice is to establish specific policies to enforce that separation. Prosecuting attorneys are prohibited from making *ex parte* communications with Members of the Board, their legal assistants, or employees of the Board's Executive Secretary.[17] RD Decision at 8, 14 (JA__); 29 C.F.R. §§102.126-102.133. With respect to the prosecution of ULPs, employees of the GC are treated as individuals outside the agency.

[17] The role of the Office of the Executive Secretary for the Board is analogous to that of the clerk's office of a federal court. RD Decision at 8 (JA__).

29 C.F.R. §102.127. Such protections are fully adequate to maintain the required separation of GC and Board functions and would be unaffected by the consolidation of units.

In sum, it is evident from the foregoing that there is no "complete separation" of the GC from the Board, other than in the specific function of investigating and prosecuting ULPs. As the NLRB correctly states (Br. at 28, citing Davis, Administrative Law Text (3d ed. 1972) at 259), § 3(d) mandates a complete separation *of the prosecutorial and adjudicative functions* that is unlike other agencies. However, as the plain language of § 3(d) also makes clear, § 3(d)'s mandate of separation is limited to these specific functions. In all other areas, the GC and the Board may, and in fact do, function as two integrated components of the same agency in a manner not unlike other agencies.[18]

**C. The NLRB's Other Arguments are Without Merit**

1. The NLRB also mistakenly argues (Br. 19-21) that the "complete separation" of the GC from the Board is evidenced by some of its personnel

[18] The legislative history of the Taft-Hartley Act is instructive in this regard. The House version of the legislation called for a separate agency to carry out the investigatory and prosecutorial functions, while the Senate version provided for no separation at all between the functions, *i.e.*, the status quo. The conference rejected the creation of an independent agency and instead provided § 3(d) as it currently exists. H R. Rep. No. 80-510, at 541 (1947) (Conf. Rep.), *reprinted in* 1947 U.S. Code Congressional Service at 1142-43.

delegations. Although some of the delegations clarify separate GC and Board lines of authority, the delegations do not support the proposition that § 3(d), by its terms, prohibits the consolidated unit. As the NLRB concedes (Br. 21), these delegations are not mandated by § 3(d), but were issued in the NLRB's discretion. Further, the NLRB specifically notes (Br. 21) that the delegations "[go] further than the Act itself required" (quoting from Address of General Counsel Robert N. Denham, June 4, 1948).

In any event, the RD took the delegations into account as they apply to the appropriate unit question. RD Decision at 16 (JA __). However, the RD determined that, based on the totality of circumstances, that the delegations were not an impediment to consolidation. *Id.*

2. The NLRB's attempt to minimize the significance of its history of coordinated labor relations policies and bargaining between the existing units is also flawed. The NLRB notes in this regard, (Br. 22) that such coordination has been a matter of agency discretion. Further, the NLRB contends that this practice is analogous to coordinated bargaining by different employers as is practiced in parts of the private sector, such as in the construction industry, and notes that the coordinated bargaining does not "undercut the independent status of these employers." *Id.*

The Court should reject those NLRB contentions. Rather than support the NLRB's contention that the GC is "completely separate" respects from the Board, this argument simply assumes what it is intending to prove, *i.e.*, that the GC and the Board are, in effect, separate employers. Put another way, if the terms of § 3(d) and other evidence indicated that the GC and the Board operated with complete independence from one another so as to be, in effect, separate employers, then the analogy with the construction industry would be valid. However, as demonstrated above, neither § 3(d) nor agency practices establish that the GC and the Board are *de facto* separate employers.

3. The NLRB also incorrectly argues (Br. at 24) that forcing the GC and the Board to bargain with a consolidated unit "would deny each body its long asserted right to insist on separate contracts including the terms that each has independently determined are critical." According to the NLRB (Br. 26), the GC and the Board must be able to have separate contracts so as to be able to determine labor relations policy separate and apart from one another. This NLRB objection has two flaws. The first is that the argument begs the question, *i.e.*, the argument assumes that the independence *mandated* by § 3(d) includes the independence to maintain completely separate personnel policies unrelated to the required separation of prosecutorial and adjudicatory functions. To the contrary, as demonstrated above,

§ 3(d) does not dictate any particular collective bargaining structure for the agency. Thus, there is no legal right to completely separate contracts.[19]

Secondly, as both the RD and the Authority have stressed, nothing prevents the GC and the Board, consistent with their statutory supervisory authorities, from proposing different conditions of employment for their respective employees in the context of consolidated bargaining for one contract. There is no meaningful distinction between memorializing such negotiated conditions of employment in separate agreements or as different sections of the same agreement. Consolidation of units does not therefore, in and of itself, interfere with the independent supervisory authorities provided for by § 3(d).

The NLRB's related concerns that future Board Members and GCs may refuse to acknowledge and respect each others' separate supervisory authorities under § 3(d) is unfounded. The respect for the separate authorities that has existed over the years is not grounded only in the "good will . . . of transient presidential appointees" (Br. 26) but is also, and perhaps primarily, based upon the statutory requirements found in § 3(d). It is, therefore, reasonable to assume, as did the

[19] The current practice of having separate contracts flows from the bargaining unit structure that the union sought to change. *See United States Food and Drug Admin, NE. and Mid-Atl. Regions*, 53 F.L.R.A. 1269, 1276 (1998) (the obligation to bargain attaches to the agency and those particular bargaining units certified as appropriate).

Authority, that future incumbents would not ignore the limitations of § 3(d) and usurp control of the working conditions of employees of the other components. *See Am. Fed'n of Gov't Employees v. Reagan*, 870 F.2d 723, 727 (D.C. Cir. 1989) (in the absence of clear evidence to the contrary, courts presume that government officials properly discharge their official duties).

In sum, the NLRB has not demonstrated that § 3(d) prohibits, as a matter of law, the consolidated bargaining unit certified by the Authority. As the NLRB does not contest the Authority's application of the Statute's criteria for the appropriateness of a bargaining unit, the Court should conclude that the consolidated unit was lawful and that the NLRB committed ULPs when it refused to recognize the union as the unit's representative.

## II. The Authority's Decision Does Not Conflict with Its Prior Consolidation Decisions

The NLRB mistakenly contends that the Authority's appropriate unit determination conflicts with prior decisions concerning the consolidation of units. As demonstrated below, the Authority's determination in the instant case is consistent with its precedent.

The *ACT* case, cited by the NLRB, is completely distinguishable. In *ACT*, the union sought the consolidation of existing bargaining units of National Guard technicians in 39 states, the District of Columbia, Puerto Rico and the Virgin

Islands. *ACT*, 55 F.L.R.A. at 657. The National Guard Technician Act, 32 U.S.C. § 709, establishes the unique employment situation of the technicians. The Technicians Act codifies the requirement that technicians be members of their state National Guard units and vests the Adjutants General of the various states with final discretion over most matters relating to their employment. *E.g.*, *Ill. Nat'l Guard v. FLRA*, 854 F.2d at 1398. "Thus, the employment status of National Guard technicians is a hybrid, both of federal and state, and of civilian and military strains." *Id.*

The Authority found that the proposed consolidated unit of technicians would require that bargaining take place at the national level and, therefore, bypass the authority of state Adjutants General. *ACT*, 55 F.L.R.A. at 660-62. The Authority, therefore, concluded that a consolidated unit was inappropriate because it would be inconsistent with the hybrid nature of the technicians' employment.

The Authority's decision in *ACT* was based on the unique "hybrid" employment status of National Guard technicians under the Technicians Act. Unlike the "hybrid" technicians, the employment status of the employees in the instant case is exclusively federal. Moreover, they are employed by the same agency, albeit in separate components.

Further, as the Authority noted, the separate supervisory authority of the GC and the Board is not compromised by the consolidation because both components would participate in bargaining and each would retain the authority to bargain for different conditions of employment for its respective employees. In contrast, in *ACT*, the state Adjutants General would not have been participants in the collective bargaining process for a consolidated unit. In that regard, the petitioner in *ACT* contended that, as regards the technicians, labor relations is solely a federal function and there is no state authority to control labor relations. *ACT*, 55 F.L.R.A. at 660. Thus, unlike the instant case, where statutory supervisory authority is maintained in the consolidation, in *ACT* the Adjutants General's authority would have been eliminated. ACT is, therefore, distinguishable.

Regarding *IRS*, the NLRB contends (Br. 39 n.13) that the Authority's decision "*sub silentio*" rejected internal delegations of authority to the GC. Contrary to the NLRB's contentions, the Authority did not "reject" the delegations and the Authority's decision is not inconsistent with *IRS*.

As noted by the Authority *IRS* holds only that internal delegations are relevant to appropriate unit determinations, but that they must be considered as just one factor, and are not, in and of themselves, dispositive. *NLRB I*, 62 F.L.R.A. at 33-34 (JA__). The Authority specifically noted that the RD expressly stated that

he was considering the impact of § 3(d) and the internal delegations. *Id.* (citing RD Decision at 16 (JA__)). While the NLRB may believe that the RD did not give sufficient weight to the impact of the delegations, that does not show that the RD and the Authority failed to follow *IRS*.

As demonstrated above, the Authority's decision did not depart from prior precedent. The Authority's decision in the instant case was based on the facts and statutory provisions specific to the NLRB. The Court should, reject the NLRB's challenge to the Authority's decision.

## CONCLUSION

The petition for review should be denied and the Authority's order should be enforced.

Respectfully submitted,

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October 2009

**CERTIFICATE OF COMPLIANCE REQUIRED BY FRAP RULE 32(A)(7)**

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure ("FRAP"), I hereby certify that the attached brief is written in a proportionally-spaced 14-point font and contains 7,431 words.

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October 14, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

| | | |
|---|---|---|
| NATIONAL LABOR RELATIONS BOARD,<br>Petitioner/Cross Respondent, | ) | |
| v. | ) | Nos. 09-1119, 09-1148 |
| FEDERAL LABOR RELATIONS AUTHORITY,<br>Respondent/Cross Petitioner, | ) | |
| and | ) | |
| NATIONAL LABOR RELATIONS BOARD UNION,<br>Intervenor | ) | |

**CERTIFICATE OF SERVICE**

I certify that a copy of the Brief for the Federal Labor Relations Authority has been served this day, by the Court's electronic case filing system and a hard copy of the brief was served, by hand delivery, upon the following:

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October 14, 2009

# Statutory Addendum

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**§ 7112. Determination of appropriate units for labor organization representation**

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or

labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

**§ 7116. Unfair labor practices**

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color,

creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which—

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat or reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

**§ 7123. Judicial review; enforcement**

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were

reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

**Sec. 153. National Labor Relations Board**

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) Annual reports to Congress and the President

The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) General Counsel; appointment and tenure; powers and duties; Vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

**§ 102.126 Unauthorized communications.**

(a) No interested person outside this agency shall, in an on-the-record proceeding of the types defined in §102.128, make or knowingly cause to be made any prohibited ex parte communication to Board agents of the categories designated in that section relevant to the merits of the proceeding.

(b) No Board agent of the categories defined in §102.128, participating in a particular proceeding as defined in that section, shall (i) request any prohibited ex parte communications; or (ii) make or knowingly cause to be made any prohibited ex parte communications about the proceeding to any interested person outside this agency relevant to the merits of the proceeding.

**§ 102.127 Definitions.**

When used in this subpart:

(a) The term *person outside this agency,* to whom the prohibitions apply, shall include any individual outside this agency, partnership, corporation, association, or other entity, or an agent thereof, and the general counsel or his representative when prosecuting an unfair labor practice proceeding before the Board pursuant to section 10(b) of the Act.

(b) The term *ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, subject however, to the provisions of §§102.129 and 102.130.

**§ 102.128 Types of on-the-record proceedings; categories of Board agents; and duration of prohibition.**

Unless otherwise provided by specific order of the Board entered in the proceeding, the prohibition of §102.126 shall be applicable in the following types of on-the-record proceedings to unauthorized ex parte communications made to the designated categories of Board agents who participate in the decision, from the stage of the proceeding specified until the issues are finally resolved by the Board for the purposes of that proceeding under prevailing rules and practices:

(a) In a preelection proceeding pursuant to section 9(c)(1) or 9(e), or in a unit clarification or certification amendment proceeding pursuant to section 9(b) of the Act, in which a formal hearing is held, communications to the regional director and members of his staff who review the record and prepare a draft of his decision, and members of the Board and their legal assistants, from the time the hearing is opened.

(b) In a postelection proceeding pursuant to section 9(c)(1) or 9(e) of the Act, in which a formal hearing is held, communications to the hearing officer, the regional director and members of his staff who review the record and prepare a draft of his report or decision, and members of the Board and their legal assistants, from the time the hearing is opened.

(c) In a postelection proceeding pursuant to section (c)(1) or 9(e), or in a unit clarification or certification amendment proceeding pursuant to section 9(b) of the Act, in which no formal hearing is held, communications to members of the Board and their legal assistants, from the time the regional director's report or decision is issued.

(d) In a proceeding pursuant to section 10(k) of the Act, communications to members of the Board and their legal assistants, from the time the hearing is opened.

(e) In an unfair labor practice proceeding pursuant to section 10(b) of the Act, communications to the administrative law judge assigned to hear the case or to make rulings upon any motions or issues therein and members of the Board and their legal assistants, from the time the complaint and/or notice of hearing is issued, or the time the communicator has knowledge that a complaint or notice of hearing will be issued, whichever occurs first.

(f) In any other proceeding to which the Board by specific order makes the prohibition applicable, to the categories of personnel and from the stage of the proceeding specified in the order.

**§ 102.129 Communications prohibited.**

Except as provided in §102.130, *ex parte* communications prohibited by §102.126 shall include:

(a) Such communications, when written, if copies thereof are not contemporaneously served by the communicator on all parties to the proceeding in accordance with the provisions of §102.114(a).

(b) Such communications, when oral, unless advance notice thereof is given by the communicator to all parties in the proceeding and adequate opportunity afforded to them to be present.

[42 FR 13113, Mar. 8, 1977, as amended at 51 FR 30636, Aug. 28, 1986; 51 FR 32919, Sept. 17, 1986]

**§ 102.130 Communications not prohibited.**

Ex parte communications prohibited by §102.126 shall not include:

(a) Oral or written communications which relate solely to matters which the hearing officer, regional director, administrative law judge, or member of the Board is authorized by law or Board rules to entertain or dispose of on an ex parte basis.

(b) Oral or written requests for information solely with respect to the status of a proceeding.

(c) Oral or written communications which all the parties to the proceeding agree, or which the responsible official formally rules, may be made on an ex parte basis.

(d) Oral or written communications proposing settlement or an agreement for disposition of any or all issues in the proceeding.

(e) Oral or written communications which concern matters of general significance to the field of labor-management relations or administrative practice and which are not specifically related to pending on-the-record proceedings.

(f) Oral or written communications from the general counsel to the Board when the general counsel is acting as counsel for the Board.

**§ 102.131 Solicitation of prohibited communications.**

No person shall knowingly and willfully solicit the making of an unauthorized ex parte communication by any other person.

**§ 102.132 Reporting of prohibited communications; penalties.**

(a) Any Board agent of the categories defined in §102.128 to whom a prohibited oral *ex parte* communication is attempted to be made shall refuse to listen to the communication, inform the communicator of this rule, and advise him that if he has anything to say it should be said in writing with copies to all parties. Any such Board agent who receives, or who makes or knowingly causes to be made, an unauthorized *ex parte* communication shall place or cause to be placed on the public record of the proceeding:

(1) The communication, if it was written,

(2) A memorandum stating the substance of the communication, if it was oral,

(3) All written responses to the prohibited communication, and

(4) Memoranda stating the substance of all oral responses to the prohibited communication.

(b) The executive secretary, if the proceeding is then pending before the Board, the administrative law judge, if the proceeding is then pending before any such judge, or the regional director, if the proceeding is then pending before a hearing officer or the regional director, shall serve copies of all such materials placed on the public record of the proceeding on all other parties to the proceeding and on the attorneys of record for the parties. Within 14 days after the mailing of such copies, any party may file with the executive secretary, administrative law judge, or regional director serving the communication, and serve on all other parties, a statement setting forth facts or contentions to rebut those contained in the prohibited communication. All such responses shall be placed in the public record of the proceeding, and provision may be made for any further action, including reopening of the record which may be required under the circumstances. No action taken pursuant to this provision shall constitute a waiver of the power of the Board to impose an appropriate penalty under §102.133.

[51 FR 32919, Sept. 17, 1986]

**§ 102.133 Penalties and enforcement.**

(a) Where the nature and circumstances of a prohibited communication made by or caused to be made by a party to the proceeding are such that the interests of justice and statutory policy may require remedial action, the Board, administrative law judge, or regional director, as the case may be, may issue to the party making the communication a notice to show cause, returnable before the Board within a stated period not less than 7 days from the date thereof, why the Board should not determine that the interests of justice and statutory policy require that the claim or interest in the proceeding of a party who knowingly makes a prohibited communication or knowingly causes a prohibited communication to be made, should be dismissed, denied, disregarded or otherwise adversely affected on account of such violation.

(b) Upon notice and hearing, the Board may censure, suspend, or revoke the privilege of practice before the agency of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication. However, before the Board institutes formal proceedings under this subsection, it shall first advise the person or persons concerned in writing that it proposes to take such action and that they may show cause, within a period to be stated in such written advice, but not less than 7 days from the date thereof, why it should be take such action.

(c) The Board may censure, or, to the extent permitted by law, suspend, dismiss, or institute proceedings for the dismissal of, any Board agent who knowingly and willfully violates the prohibitions and requirements of this rule.