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Note

NLRB Guidelines for Determining Health Care Industry Bargaining Units: Judicial Acceptance or Back to the Drawing Board

INTRODUCTION

The National Labor Relations Act (NLRA)\(^1\) provides a means by which employees can establish their right to be represented collectively in bargaining with their employer concerning the terms and conditions of employment.\(^2\) An essential aspect of establishing this right is determining whether a particular group of workers constitutes an appropriate unit for such representation.\(^3\) This determination is made by the National Labor Relations Board (NLRB or Board) pursuant to the NLRA. Section 9(b) of the NLRA broadly defines an appropriate collective bargaining unit as one which "assure[s] to employees the fullest freedom in exercising the rights guaranteed by ... [the NLRA]."\(^4\) Appropriate bargaining


\(^3\) See NLRA § 9(b), 29 U.S.C. § 159(b).

\(^4\) Id. NLRA section 9(b) provides:
(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 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
units invariably consist of groups of employees with the same or related job functions such as "all technical employees" or "all x-ray technicians." If the Board deems a unit appropriate and a majority of employees in that unit vote to be represented, then the employees have established a right to collectively bargain with their employer.

In 1974, Congress passed the Health Care Amendments to the NLRA (Amendments). These Amendments abolished the exclusion of nonprofit hospitals from NLRA coverage and thereby extended the NLRB's jurisdiction in the proprietary health care industry to encompass the nonprofit health care industry as well. The Amendments also imposed several anti-strike provisions upon collective bargaining relationships in the health care industry. In the Senate and House committee reports on the legislation, however, Congress
admonished the Board to prevent the undue proliferation of bargaining units in the health care industry.\textsuperscript{11}

Fifteen years after passage of the amendments and after an extended notice and comment period,\textsuperscript{12} the Board has issued its final rules for bargaining unit determinations in the health care field (Rules).\textsuperscript{13} Previously, the Board had not flexed its statutory rulemaking muscle\textsuperscript{14} to establish guidelines for the determination of appropriate bargaining units in the health care industry or other industries.\textsuperscript{15} In fact, the Board has acknowledged that this is its "first venture in major, substantive rulemaking."\textsuperscript{16}

The Rules' substantive provisions mark a drastic departure from the Board's traditional case-by-case method of making bargaining unit determinations. The Rules establish eight health care bargaining units, and the Board will sanction only one or more of these eight units for collective bargaining in the industry, absent special circums-
The Board asserts three reasons for resorting to rulemaking in this instance:

17 The Rules provide in full:
§ 103.30 Appropriate bargaining units in the health care industry.

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that various combinations of units may also be appropriate:

1. All registered nurses.
2. All physicians.
3. All professionals except for registered nurses and physicians.
4. All technical employees.
5. All skilled maintenance employees.
6. All business office clerical employees.
7. All guards.
8. All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. Provided that a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing nonconforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise applicable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term:
1. "Hospital" is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(e), as revised 1988);
2. "Acute care hospital" is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term "acute care hospital" shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is
First, rulemaking will reduce the need for lengthy and costly case-by-case adjudication of bargaining unit issues, and thus will provide more predictability for employers and labor organizations while easing the drain on the resources of the Board and all parties. Second, it will enable the Board to profit from empirical evidence (usually not presented in adjudicatory proceedings) as to the types of unit configurations that would or would not lead to unwarranted unit proliferation. Finally, the multiplicity of differing views among the various courts of appeal engenders little confidence that case-by-case adjudications ever will produce a single test or method of analysis that will withstand judicial scrutiny.\textsuperscript{16}

This Note primarily focuses upon the last reason given by the Board, though a brief treatment of the first two reasons will analyze the Rules' strengths and weaknesses in achieving these ends.

With respect to the first reason, as Burton Subrin, NLRB Director of Representation Appeals, has pointed out, rulemaking should save a significant amount of expense and delay in organization and litigation since the parties will know in advance whether a particular type of unit is appropriate. This, in turn, should lead to more stipulated units and, therefore, fewer cases requiring decisions by regional directors, the Board, and the courts, resulting in the further conservation of time, expense, and Board resources.\textsuperscript{19} The Rules, however, contain two glaring loopholes that parties potentially could use to impose upon an adverse party the same expense and delay inherent in the traditional case-by-case determination format.

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\textsuperscript{19} Subrin, \textit{supra} note 15, at 108.
The first loophole is an "extraordinary circumstances" clause, which allows parties to challenge the Rules' applicability in particular situations.\textsuperscript{20} Though the Board indicates that it will construe this exception narrowly to preclude the opportunity for unnecessary litigation and concomitant delay,\textsuperscript{21} the exception nevertheless exists and is subject to abuse. As this Note will illustrate, the Board has a constitutional and statutory duty to consider each and every claim of "extraordinary circumstances."\textsuperscript{22}

Another loophole presented by the Rules is an opportunity for parties to litigate the scope of the Rules' eight appropriate units. For example, the Rules provide no insight regarding what differentiates "all technical employees" from "all skilled maintenance employees" (two of the Rules' units) in terms of job function. Past Board decisions give some guidance, but gray areas continue to exist that can be resolved only through case-by-case adjudication or further rulemaking.

The Board's second purpose for engaging in rulemaking seems to have been accomplished. The Board was overwhelmed with evidence concerning unit configurations that would or would not lead to unwarranted unit proliferation, as summarized in its second notice of proposed rulemaking.\textsuperscript{23} However, "unwarranted unit proliferation" is such an amorphous term that the courts, or indeed Congress, could well reach different conclusions as to whether the Rules' eight bargaining units constitute "unwarranted" proliferation. This Note, to a limited extent, will further expand upon this point.\textsuperscript{24}

Regarding the third reason the Board has given for engaging in rulemaking, the Board has stated:

Since 1974, when Congress extended the protection of the National Labor Relations Act to nonprofit hospitals, the Board has taken literally hundreds of thousands of pages of testimony in a myriad of litigated cases regarding particular circumstances at various health care facilities. Nonetheless, to this day there is no one, generally phrased test for determining appropriate units in this industry that has met with success in the various circuit courts of

\textsuperscript{20} See supra note 17, at § 103.30(b).
\textsuperscript{22} See infra notes 126-29 and accompanying text.
\textsuperscript{24} See infra notes 230-31 and accompanying text.
appeal, and, unfortunately, parties have no clear guidance as to what units the Board and courts will ultimately find appropriate.25

This Note focuses upon the Board’s dilemma outlined above and the extent to which, if any, the Rules will be successful in establishing guidelines for health care bargaining unit determinations that will meet with general, if not unanimous, circuit court approval. In Part I, this Note reviews how the Board presently resolves disputes regarding the appropriateness of a health care unit for which a representation petition has been filed.26 This section then demonstrates how the Rules affect this status quo.27 Part II assesses the Rules’ validity, a prerequisite to judicial acceptance, in light of the NLRA and the legislative history behind the 1974 amendments.28 Part III evaluates the Rules’ prospects for uniform circuit court approval.29 In conclusion, this Note suggests measures which would facilitate unanimous judicial approval of the Rules.30

I. THE BARGAINING UNIT DETERMINATION PROCESS STATUS QUO

A. The Representation Procedure

Presently, bargaining unit determinations are made on a case-by-case basis by the Board based upon the weight of evidence received at a representation hearing. A representation hearing is convened by a representative of the Board in part to consider an “RC” petition.31 An “RC” petition is a petition filed with the Board by a union or a group of employees which alleges that a

26 See infra notes 31-63 and accompanying text.
27 See infra notes 64-84 and accompanying text.
28 See infra notes 85-203 and accompanying text.
29 See infra notes 204-32 and accompanying text.
30 See infra notes 232-38 and accompanying text.
31 See NLRA § 9(c)(1), 29 U.S.C. § 159(c)(1). Election petitions filed by unions seeking to organize employees or to replace an incumbent union pursuant to § 9(c)(1)(A)(i) are identified and docketed by the Board as “RC” petitions. Representation hearings also are held to consider petitions filed by employees or by a union on behalf of employees who seek to decertify an incumbent union (“RD” petitions) pursuant to § 9(c)(1)(A)(ii) and petitions filed by employers who have been confronted with a union demand for recognition or who seek to oust an incumbent union (“RM” petitions) pursuant to § 9(c)(1)(B). J. Freerick, H. Baer & J. Arfa, NLRB Representation Elections—Law, Practice & Procedure, 147-55, 165 (1979). For a discussion of other petitions considered at representation hearings, see id. at 155-65.
substantial number of employees\textsuperscript{32} wish to be represented for collective bargaining purposes and that their employer refuses to recognize their representative.\textsuperscript{33} At the representation hearing, the union and the employer can litigate the appropriateness of the unit described in the petition.\textsuperscript{34}

The Board's determination of what group of employees constitutes an appropriate unit\textsuperscript{35} can be of critical importance to union organization success or failure. Studies show that there is a definite correlation between the size of the unit deemed appropriate and union election success.\textsuperscript{36} That is, the narrower the unit, such as all registered nurses as opposed to all professionals, the better the probability of union success.\textsuperscript{37} As a result, in general, labor unions request narrower bargaining units and employers request broader bargaining units.\textsuperscript{38}

B. Determining "Appropriateness"

Since 1936, the Board has interpreted the definition of a "unit appropriate for the purposes of collective bargaining" under section 9(b) of the NLRA\textsuperscript{39} to require a "community-of-interests" among all employees in the unit.\textsuperscript{40} The criteria applied by the Board in

\textsuperscript{32} A substantial number of employees is defined as 30% of the requested unit. Such a required showing must be evidenced by union authorization cards signed by 30% of the requested unit's employees. NLRB, STATEMENT OF PROCEDURE § 101.18. See generally Freerick, supra note 31, at 167.

\textsuperscript{33} See NLRA § 9(c)(1), 29 U.S.C. § 159(c)(1).

\textsuperscript{34} Id.

\textsuperscript{35} The Board does not have to choose the union's or the employer's requested unit. The Board is free to determine its own appropriate unit. Furthermore, the Board's responsibility is not to choose the most appropriate bargaining unit, but to assure that the unit in question is appropriate under the circumstances. NLRB v. Southern Metal Serv., Inc., 606 F.2d 512, 514 (6th Cir. 1979). See also Continental Baking Co., 99 N.L.R.B. 777, 782 (1952); 15 N.L.R.B. Ann. Rep. 39 (1950).

\textsuperscript{36} See, e.g., 1 LAB. REL. WEEK 1017 (1987) (study shows that unions' success diminishes significantly as bargaining unit size increases); Continental Baking Co., 99 N.L.R.B. at 773 (study shows that unions generally are more successful winning elections in narrower units than in broader ones).

\textsuperscript{37} Id.

\textsuperscript{38} See supra note 4.

\textsuperscript{39} See, e.g., In re Chrysler Corp., 1 N.L.R.B. 164, 169-70 (1936); In re Int'l Mercantile Marine Co., 1 N.L.R.B. 384, 388-90 (1936); In re Int'l Filter Co., 1 N.L.R.B. 489, 494 (1936).
HEALTH CARE BARGAINING UNITS

Ascertaining a "community-of-interests" include, but are not limited to, "similarity of wages and hours, extent of common supervision, frequency of contact with other employees, degree of interchange and functional integration with other employees, and area practice and patterns of bargaining." If such criteria are established at the representation hearing, separate representation is warranted.

After passage of the 1974 Amendments, the Board began to apply this test to the nonprofit health care industry and continued to do so without interruption until its decision in St. Francis I. In St. Francis I, a 1982 decision, the Board adopted a new two-tier approach to determining appropriate bargaining units in the health care industry. Under this approach, seven basic employee groups were regarded as potentially appropriate health care units. If a requested unit fit within one of these groupings, the Board then applied the various "community-of-interests" criteria to determine whether the requested unit in fact constituted an appropriate unit. If a petition requested a unit smaller than one of the seven identified groups, it would be dismissed absent a showing of extraordinary circumstances.

The Board switched to this two-tier approach largely in response to a Third Circuit ruling that the legislative intent behind the 1974 Amendments, in particular the congressional admonition to prevent the proliferation of health care units, precluded the Board from relying solely on its traditional "community-of-interests" test in making health care unit determinations. Instead, the court held,

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45 112 L.R.R.M. (BNA) at 1160-61.

46 These seven classifications were physicians, registered nurses, other professionals, technicals, business office clericals, service and maintenance employees, and maintenance employees. Id.

47 Id.

48 Id.

49 St. Francis I, 112 L.R.R.M. (BNA) at 1154-55.
reaffirming an earlier decision, a balancing of the "community-of-interests" criteria with the public's interest in undue proliferation was required.50

Two years later in St. Francis II,51 the Board reconsidered its two-tier approach announced in St. Francis I, an approach which had yet to be reviewed by the circuit courts, and adopted a "disparity-of-interests" test in its place.52 This test presumes that only two units are appropriate (all professionals and all nonprofessionals) unless sharper than usual disparities between the wages, hours, and working conditions of the requested employees and those in an overall professional or nonprofessional unit are demonstrated.53 The Board made the switch after further reflection on the congressional intent behind the 1974 Amendments, concluding that the "disparity-of-interests" test was in order because "[r]equiring greater disparities in the usual community-of-interests elements to accord health care employees separate representation must necessarily result in fewer units and will thus reflect meaningful application of the congressional injunction against unit fragmentation."54

Practically speaking, however, adoption of the "disparity-of-interests" test was the consequence of a change in Board membership55 and a reaction to the Ninth and Tenth Circuit rulings that the Board must apply the "disparity-of-interests" test.56 Even before St. Francis II, however, several circuit courts had expressly rejected this new test,57 and today most circuit courts still require

52 St. Francis II, 116 L.R.R.M. at 1468-69. In St. Francis I, Board Chairman Van de Water and member Hunter dissented on the ground that the legislative history behind the 1974 Amendments mandated a "disparity-of-interests" test. St. Francis I, 112 L.R.R.M. at 1162-75.
53 Id.; "Requiring greater disparities in the usual community-of-interest elements to accord health care employees separate representation must necessarily result in fewer units and will thus reflect meaningful application of the congressional injunction against unit fragmentation." Id.
54 Id.; St. Francis I was decided by former Board Chairman Van de Water, and members Fanning, Jenkins, Zimmerman and Hunter. 112 L.R.R.M. 1153. St. Francis II was decided by Board Chairman Dotson, and members Zimmerman, Hunter and Dennis. 116 L.R.R.M. 1465.
55 See NLRB v. St. Francis Hosp., 601 F.2d 404, 419 (9th Cir. 1979); NLRB v. HMO Int'l, 678 F.2d 806, 812 n.17 (9th Cir. 1982); Southwest Community Health Serv. v. NLRB, 726 F.2d 611, 613 (10th Cir. 1984).
56 See Masonic Hall v. NLRB, 699 F.2d 626, 636 (2d Cir. 1983); Watonwan Memorial Hosp. v. NLRB, 711 F.2d 848, 850 (8th Cir. 1983); NLRB v. Walker County Medical Center, Inc., 722 F.2d 1535, 1540 (11th Cir. 1984).
only the traditional "community-of-interests" test to be balanced with the congressional admonition. Reflecting upon these divergent circuit court rulings, Board member Dennis, in her dissent to *St. Francis II*, stated:

By today's decision . . . the majority has demonstrated the futility of this Board's attempts to resolve this issue through traditional case-by-case adjudication. Rulemaking could provide an acceptable and feasible means to end the 10-year controversy. It would give the Board a chance to evaluate the industry's experiences under the law and to end the uncertainty over how to implement the congressional injunction against unit proliferation.

The futility referred to by Dennis was made more apparent when the D.C. Circuit refused to enforce the Board's order in *St. Francis II*. In *International Brotherhood of Electrical Workers Local 474 v. NLRB*, the D.C. Circuit held that the Board improperly adopted the "disparity-of-interests" test and therefore still must apply the "community-of-interests" criteria. As discussed below, this variance in circuit court holdings is attributable entirely to differing interpretations of the legislative intent behind the 1974 Amendments.

The D.C. Circuit's refusal to enforce *St. Francis II* was the straw that broke the proverbial camel's back. Less than two months after *Electrical Workers*, the Board voted in favor of engaging in informal rulemaking.

C. *A New Standard for Determining Appropriate Health Care Bargaining Units—The Rules*

The Rules, which are applicable only to acute care facilities, provide that only the following units will be appropriate for petitions filed pursuant to section 9(c)(1)(A)(1) or section 9(c)(1)(B) of the NLRA, except that various combinations of units also may be appropriate:

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58 See infra note 157 and accompanying text.
59 116 L.R.R.M. at 1475.
61 814 F.2d 697, at 711-12 (D.C. Cir. 1987). See infra note 190.
62 See infra notes 144-98 and accompanying text.
64 See supra note 17, at § 103.30(a).
66 See supra note 17, at § 103.30(a). For the Rules' treatment of non-conforming stipulations, see § 103.30(d).
(1) all registered nurses.  
(2) all physicians.  
(3) all professionals except registered nurses and physicians.  
(4) all technical employees.  
(5) all skilled maintenance employees.  
(6) all business office clerical employees.  
(7) all guards.  
(8) all nonprofessional employees except technical employees, skilled maintenance employees, business office clerical employees, and guards.

The Rules also contain an "extraordinary circumstances" exception to avoid unjust application of the Rules to uniquely situated acute care hospitals. The Board has indicated, however, that it will construe this exception narrowly. To qualify for the "extraordinary circumstances" exception, a party has the heavy burden of demonstrating that "its arguments are substantially different from those which have been carefully considered at the rulemaking proceeding."

To illustrate the mechanics of the Rules and its exception, if a union petitioned the Board for a requested unit of "all registered nurses," the issue of appropriateness would not be litigated at the representation hearing because the unit already has been deemed appropriate by the Rules. That is, unless the employer wishes to claim that extraordinary circumstances require that a unit of "all professionals" is appropriate. If the employer so chooses, the employer then would have to present evidence to the hearing officer...
demonstrating such extraordinary circumstances,⁷⁹ although the hearing officer would not be required to consider this evidence. The hearing officer can accept or reject the evidence, or, as the Board anticipates will happen far more frequently, refer the matter to the regional director for a ruling.⁸⁰ If the regional director decides that such evidence already has been weighed during the rulemaking proceedings, the evidence will not be considered.⁸¹ The regional director's determination can be appealed to the Board.⁸² On the other hand, if the regional director determines that the evidence demonstrates "unusual and unforeseen deviations from the range of circumstances revealed at the [rulemaking] hearings" such that "it would be unjust or an abuse of discretion for the Board to apply the rules to the facility involved," then the regional director will not apply the Rules.⁸³ Instead, the parties then would be forced to present evidence at the representation hearing, as if the Rules had not been adopted. However, the Rules neglect to state which of the pre-Rule standards will govern the hearing.⁸⁴

II. THE VALIDITY OF THE RULES⁸⁵

A. Section 9(b) of the NLRA

Administrative agencies can adopt substantive rules through one of two methods: adjudication or Administrative Procedure Act

⁷⁹ Id.
⁸⁰ Id.
⁸¹ Id.
⁸² Id.
⁸³ Id.
⁸⁴ The "disparity-of-interests" standard most probably would be used, as this was the standard employed immediately before the adoption of the Rules. See 53 Fed. Reg. 33,931 (1988); see also St. Vincent Hosp., 125 L.R.R.M. 1329, 1331 (1987) (the "disparity-of-interests" test is to be used until the Rules become effective).

⁸⁵ A prerequisite to uniform judicial acceptance of the guidelines for unit determinations created by the Rules is the validity of the Rules themselves. Consequently, this section assesses the Rules' validity in light of section 9(b) of the NLRA, 29 U.S.C. § 159(b) (1973), and the legislative history behind the 1974 Amendments.

This Note is limited in this regard due to considerations of brevity and because the Rules' validity seem most suspect with respect to these two issues. As far as compliance with the Administrative Procedure Act is concerned, the Board has complied with all of the requirements for agency informal rulemaking set out in the APA, 5 U.S.C. § 553 (1973). A proper notice of proposed rulemaking was published in the Federal Register, (52 Fed. Reg. 25,142 (1987)), and interested parties were invited to submit written data and views. Id. The Second Notice of Proposed Rulemaking evidences the Board's consideration of the
Previously, the Board promulgated collective bargaining unit rules through adjudication. However, the Supreme Court held that, as long as the rule is consistent with the various provisions of the NLRA, the ultimate choice between deciding an issue through adjudication or Administrative Procedure Act rulemaking is within the Board’s informed discretion. Because the Rules at issue deal with appropriate bargaining unit determinations, the Rules must be in conformity with section 9(b) of the NLRA, which confers authority upon the Board to determine appropriate bargaining units. If the Rules are not in conformity, then a court must either set aside a bargaining unit determined appropriate pursuant to the Rules or find the Rules themselves void as an unlawful exercise of agency discretion.

Section 9(b) of the NLRA provides: “The Board shall decide in each case . . . the unit appropriate for the purposes of collective bargaining . . . .” This language must be reconciled with the Rules’ provision that there are eight pre-determined appropriate bargaining units and that no petition for organization will be entertained that does not request such a unit, unless extraordinary circumstances are shown. As demonstrated below, the Rules’ bargaining unit determination process is consistent with section 9(b) and, at least to this extent, the Rules are valid.

There is no direct authority for the proposition that the Rules are consistent with section 9(b). Neither the legislative history nor relevant matters presented during the rulemaking proceedings and also contains a concise general statement of theRules’ basis and purpose. See 53 Fed. Reg. 33,900 (1988). The APA does not mandate a formal hearing unless required by statute, 5 U.S.C. § 553(c), and the NLRA imposes no such requirement. See 29 U.S.C. § 156, supra note 11; 5 U.S.C. § 553(c).


See supra notes 64-78 and accompanying text.

the U.S. Supreme Court have indicated whether the "in each case" language of section 9(b) precludes the use of rules to determine bargaining units. Moreover, a strong argument can be made that the Rules are adverse to section 9(b).

Such an argument begins with the premise that the language of section 9(b) is mandatory and conclusive. Section 9(b) is mandatory in the sense that it reads, "[t]he Board shall decide in each case. . . ." Moreover, this language should be afforded its plain meaning absent a clearly expressed, conclusive legislative intent to the contrary. Such legislative intent is absent; therefore, this language is conclusive and mandatory.

The Rules conflict with the language of section 9(b), in that, under the Rules, bargaining units are not determined in each case, but are pre-determined through the rulemaking process. Thus, the Rules are further inconsistent with section 9(b) in that they preclude the Board from exercising its specialized decisional function. This function, peculiar to case-by-case analysis, "assure[s] to employees the fullest freedom in exercising the rights guaranteed by [the NLRA]." As stated by Board member Johansen in opposition to adoption of the Rules:

In Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), the Supreme Court interpreted section 9(b), stating:

The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so. That settled, our power is at an end. Id. at 491-92. However, the passage never has been viewed as a direct reference to section 9(b)'s "in each case" language. Rather, this quote invariably is relied upon as authority for the proposition that the Board has broad discretion in determining appropriate bargaining units. See, e.g., South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 805 (1976); Presbyterian/St. Luke's Medical Center v. NLRB, 653 F.2d 450, 454 (10th Cir. 1981); NLRB v. West Suburban Hosp., 570 F.2d 213, 214 (7th Cir. 1978).

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98 NLRA § 9(b), 29 U.S.C. § 159(b) (emphasis added).


99 See supra note 94.

100 See supra note 94.

101 Sheraton-Kauai Corp. v. NLRB, 429 F.2d 1352, 1354-55 (9th Cir. 1970).
The Board cannot satisfactorily fulfill its statutory obligation\(^{101}\) by relegating its specialized decisional function in this area to rulemaking procedures . . . . Had Congress intended that the Board abandon the decisional approach and utilize a wholly new procedure for determining appropriate [bargaining] units in the health care industry, Congress would have told us so explicitly. It did not.\(^{102}\)

The more compelling position, however, is advanced by Professor Kenneth Culp Davis, a leading scholar of administrative law.\(^{103}\) As relied upon by the Board\(^{104}\) and buttressed by federal case law, Davis' position is that the Rules are consistent with section 9(b). Davis' argument illustrates the compatibility of the Rules with section 9(b) and highlights the shortcomings that undermine the opposing position.

According to Professor Davis, section 9(b)'s "in each case" language does not preclude the Board's use of precedent and classifications to decide appropriate bargaining units in each case.\(^{105}\) As Professor Davis stated:

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\text{[T]he Board may decide "in each case" with the help of such classifications, rules, principles and precedents as it finds useful. The mandate to decide "in each case" does not prevent the Board from supplanting the original discretionary chaos with some degree of order, and the principal instruments for regularizing the system of deciding "in each case" are classifications, rules, principles, and precedents. Sensible men could not refuse to use such instruments and a sensible Congress would not expect them to.}^{106}\]

Therefore, according to Professor Davis, Rules are acceptable and, in fact, are to be encouraged, if they merely regulate the system of deciding "in each case." Such is the case with the Rules under consideration. The appropriateness of the eight units prescribed by the Rules is presumptive, not absolute; there is the possibility "in each case" for the presumption to be rebutted through

\(^{101}\) To "assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA]." NLRA § 9(b).


\(^{105}\) K. Davis, Administrative Law Text, supra note 103, at 145.

\(^{106}\) Id.
a showing of extraordinary circumstances. Hence, notwithstanding the presumption, the result must be weighed separately "in each case." Consequently, by merely establishing rebuttable presumptions of appropriateness, the Rules are in accord with section 9(b).

Federal circuit court case law supports Professor Davis' liberal interpretation of 9(b).\textsuperscript{107} In \textit{Big Y Foods v. NLRB},\textsuperscript{108} petitioner refused to recognize meat department employees as a bargaining unit even though the Board had determined the unit appropriate.\textsuperscript{109} In making its determination, the Board had employed a presumption that a "separate meat department unit" is appropriate in a grocery store.\textsuperscript{110} The Board found that the petitioner failed to rebut this presumption.\textsuperscript{111} The First Circuit upheld use of the rebuttable presumption, specifically addressing section 9(b)'s "in each case" language:

The only pertinent limitation [on the Board's broad discretion to decide appropriate units] is the § 9(b) statutory direction to the NLRB to make a decision "in each case." It has been held that that statutory direction invalidates a conclusive presumption because it precludes the NLRB from making a determination based upon the unique circumstances of a particular group of employees. But that statutory direction does not invalidate a rebuttable presumption which has no such preclusive effect.\textsuperscript{112}

Similarly, the Ninth Circuit upheld the Board's use of a rebuttable presumption that separate craft units in the lumber industry are in inappropriate,\textsuperscript{113} and stated in dictum that "certain [section 9(b)] presumptions may be employed by the Board so long as interested parties are given the opportunity to effectively present evidence to rebut the presumption."\textsuperscript{114} The Seventh Circuit impliedly approved the use of section 9(b) presumptions when it suggested that the Board could and should exercise its dormant rulemaking powers in carrying out its section 9(b) duties.\textsuperscript{115}

\textsuperscript{107} See \textit{Big Y Foods v. NLRB}, 651 F.2d 40 (1st Cir. 1981).
\textsuperscript{108} 651 F.2d 40 (1st Cir. 1981).
\textsuperscript{109} Id. at 43.
\textsuperscript{110} Id. at 45.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 45-46 (citation omitted).
\textsuperscript{113} See Teamsters Local 690 v. NLRB, 375 F.2d 966, 976 (9th Cir. 1967).
\textsuperscript{114} NLRB v. St. Francis Hosp., 601 F.2d 404, 416 n.14 (9th Cir. 1979).
\textsuperscript{115} See Continental Web Press, Inc. v. NLRB, 742 F.2d 1087, 1093-94 (7th Cir. 1984) (The Board abruptly and retroactively failed to adhere to its own presumption that units of pressmen and preparatory employees are appropriate in lithographic plants. In explaining...
Notwithstanding the above, the Board has stated that “We have decided not to make the units only ‘presumptively’ appropriate, because one important advantage of rulemaking is the certainty it offers . . . . Though an ‘extraordinary circumstances’ exception has been included, it is anticipated that the exception will be little used and limited to truly extraordinary situations . . . .”116 With this statement the Board probably intended to indicate that the Rules impose “strong presumptions” as opposed to “mere presumptions” because the Rules’ eight units are “presumptively” appropriate. A presumption is defined as “a rule of law, statutory or judicial, by which finding of basic fact gives rise to the existence of presumed fact, until the presumption is rebutted.”117 With respect to the Rules, the basic facts gathered through the comment process have given rise to the presumed fact of the appropriateness of eight units, unless extraordinary circumstances are shown. Therefore, the Rules’ eight units are only presumptively appropriate.

If, however, the Rules’ consistency with section 9(b) is premised upon their equivalence to rebuttable presumptions, then so too must the Rules satisfy the requirements of valid presumptions under the NLRA. Board presumptions are subject to judicial review for consistency with the NLRA and for rationality,118 i.e., a logical connection between what is proved and what is inferred.119

As demonstrated above, the Rules are consistent with the NLRA.120 With regard to rationality, there must be a logical connection between the Rules’ eight units and their presumed appropriateness.121 This connection may be proved by factors other than the testimonial evidence in the case in which the presumption is used.122 For example, an NLRB presumption reflecting the Board’s experience in similar cases is likely to be rational because the nexus between what is assumed and what must be proved has been dem-

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117 BLACK'S LAW DICTIONARY 1067 (5th ed. 1979).
118 See Beth Israel Hosp., 437 U.S. at 501.
119 See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793, 804-05 (1945).
120 See supra notes 103-19 and accompanying text.
122 Id. at 32-34 (1969). See also Big Y Foods, 651 F.2d at 46.
Therefore, as the eight units in the Rules are the same units the Board has found ultimately appropriate in hundreds of past representation case proceedings, such a logical connection exists and, hence, the Rules are rational. In addition, rationality can easily be inferred from the lengthy and exhaustive record upon which the determinations of appropriateness were made.

Nor does the heavy burden of demonstrating "extraordinary circumstances" in order to rebut the Rules' presumptions modify the above conclusions because, while an interested person must be afforded an opportunity to rebut a section 9(b) presumption, the burden of asserting that right can be relatively high. As one commentator has stated: "An agency must follow its own rules and hence one asking it to deviate from an established rule must make an extraordinary showing."

Finally, the Rules do not abrogate the Board's duty under section 9(b) to determine appropriate bargaining units that "assure to employees the fullest freedom in exercising the rights guaranteed by the ... [NLRA]." The Board is afforded great discretion in deciding whether a particular unit assures these rights and the

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123 See Big Y Foods, 651 F.2d at 46.
125 See id. at 33,911-26.
127 See supra notes 108-14 and accompanying text.
128 See C. KOCH, 1 ADMINISTRATIVE LAW AND PRACTICE, § 4.112, p. 322-23 (1985); see also Indus. Broadcasting Co. v. FCC, 437 F.2d 680, 683 (D.C. Cir. 1970) (upholding heavy burden placed on one seeking to demonstrate that one's arguments are substantially different from those that were carefully considered at the rulemaking proceeding).
How should the agency respond to such application [for exception]? At the very least, the APA probably requires a statement of reasons for denial. Subsection 555(e) requires reasons for denial of any petition and most certainly applies to petition for waiver or variance. The agency should give evidence that it carefully considered all nonfrivolous applications including a meaningful statement of reasons.

129 C. KocH, supra note 128, § 4.112, at 323. However, "the agency should only rarely provide for a hearing on application for waiver or variance. The agency should not be forced to continuously justify its rules in order to deny an application for a hearing for individual treatment." Id. The latter is relevant because the Board has indicated that only rarely will it grant hearings to consider "extraordinary circumstances" claims.

130 See NLRA § 9(b), 29 U.S.C. § 159(b).
Board has ascertained through the rulemaking process that the Rules' eight units do assure these rights. Moreover, the Board will continue to exercise its "specialized decisional function" when it considers "extraordinary circumstances" claims.

In summary, the Board is free to decide which method of determining appropriate units best assures employees their rights under the NLRA and through which processes of law it is to exercise its specialized decisional function. This point forms the basis of Chief Judge Seitz's dissent from the Third Circuit's holding that section 9(b)'s "in each case" language precludes the Board from granting comity to state labor board unit determinations. Judge Seitz argued that:

[S]tatutory language directing the Board to determine a particular issue does not necessarily preclude the Board from relying on other processes of law, as long as it can assert a sound policy for doing so.

The Board's interest in determining how it will allocate its resources so as best to effectuate federal labor policy cannot be gainsaid.

Likewise, it cannot be gainsaid that the Board has enunciated sound policy reasons for engaging in rulemaking, and if the Board has decided that the Rules will best effectuate federal labor policy, then it is well within the Board's discretion to use them.

B. The Congressional Admonition Against Undue Proliferation

An assessment of the Rules' validity would be incomplete without an examination of the legislative intent behind the 1974 Amend-

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132 The Board is free to rely upon the rulemaking proceedings and the Rules themselves in indicating that it has exercised its discretion in assuring to employees the rights guaranteed by the NLRA. Of course, the Board may articulate the basis of its order by reference to other decisions or its general policies laid down in its rules and its annual reports, reflecting its "cumulative experience" so long as the basis of the Board's action, in whatever manner the Board chooses to formulate it, meets the criteria for judicial review. [NLRB v. Metropolitan Life Ins. Co.,] 380 U.S. at 443, note 6, 85 S. Ct. at 1064. (emphasis supplied)


133 Memorial Hosp. of Roxborough v. NLRB, 545 F.2d 351 (3d Cir. 1976) (NLRB may not delegate its responsibility of determining appropriate bargaining units).

134 Id. at 363.
ments and its impact upon health care bargaining unit determinations.\textsuperscript{135} In this regard, attention will be focused upon an issue central to passage of the 1974 Amendments, viz., Congress’ desire to avoid undue fragmentation of bargaining units in the health care industry, an industry especially susceptible to such fragmentation because of its diversity and multiplicity of occupational classifications.\textsuperscript{136}

1. The Congressional Concern Over Proliferation

Proliferation concerned many legislators because along with large numbers of bargaining units came increased strike potential and jurisdictional disputes which could have devastating effects upon continuous patient-care.\textsuperscript{137} To a lesser extent, there also was some concern that wage-competition among the numerous units might increase the cost of patient care.\textsuperscript{138} With regards to the proliferation issue, it is important to note that Congress was not so much concerned with unit proliferation per se as it was with the side-effects of such proliferation, such as disruption of patient care.\textsuperscript{139}

Nevertheless, if proliferation could be avoided, so too could its results. To this end, both the Senate and the House Committee Reports on the 1974 legislation included this now famous admonishment to the Board: “Due consideration should be given by the Board to preventing the proliferation of bargaining units in the health care industry.”\textsuperscript{140}

\textsuperscript{135} Discussions of the legislative history behind the 1974 Amendments can be found at Senate Subcommittee on Labor, Comm. on Labor and Public Welfare, Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974, 93rd Cong., 2d Sess. (Nov. 1974) 9-10, 104-12, 270-72, 372 [hereinafter Legislative History]; see also Fehely, Amendments to the National Labor Relations Act: Health Care Institutions, 36 Ohio St. L.J. 235 (1975); Bumpass, supra note 38; Vernon, supra note 8.

\textsuperscript{136} See, e.g., Legislative History, supra note 135, at 113, 120 Cong. Rec. 12,944-45 (May 2, 1974).

Congress was concerned with proliferation in the proprietary as well as the nonprofit health care industries. (The legislative history addressing the proliferation issue does not distinguish between proprietary and nonprofit health care facilities).

\textsuperscript{137} See id.

\textsuperscript{138} Id.

\textsuperscript{139} See, e.g., Vernon, supra note 8, at 215.

\textsuperscript{140} S. Rep. No. 766, 93d Cong., 2d Sess. 5 (1974), Legislative History, supra note 135, at 12; H. Rep. No. 1051, 93d Cong., 2d Sess. 607 (1974), Legislative History, supra note 135, at 274-75. In connection with this admonition, the House and Senate reports noted with approval the recent Board decisions in Four Seasons Nursing Center, 208
The pertinent legislative history reviewed by courts endeavoring to ascertain the congressional intent behind the Amendments varies from case to case, but invariably consists of the Committee Reports' admonition and the following pre-passage statements made by Senators Taft and Williams, sponsors of the amending legislation. Senator Taft stated that:

I believe [the committee report] is a sound approach and a constructive compromise, as the Board should be permitted some flexibility in unit determination cases. I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented.\textsuperscript{141}

At a later date Senator Taft further remarked:

Certainly, every effort should be made to prevent a proliferation of bargaining units in the health care field and this was one of the central issues leading to agreement on this legislation. In this area there is a definite need for the Board to examine the public interest in determining appropriate bargaining units.\textsuperscript{142}

Senator Williams commented that "the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry."\textsuperscript{143}

2. The Congressional Admonition's Impact on Health Care Bargaining Unit Determinations

The impact of the Committee Reports' admonition upon bargaining unit determinations in the health care industry has been considerable. As illustrated earlier,\textsuperscript{144} the circuit courts' differing

\textsuperscript{141} LEGISLATIVE HISTORY, supra note 135, at 113-14, 120 CONG. REC. 12,944-45 (May 2, 1974).

\textsuperscript{142} Id. at 255, 120 CONG. REC. 13,559-60 (May 7, 1974).

\textsuperscript{143} Mercy Hosp. of Sacramento, Inc., 217 N.L.R.B. 765, 767 (1975), 120 CONG. REC. 22,949 (July 11, 1974).

\textsuperscript{144} See supra notes 42-58 and accompanying text.
perceptions of the admonition and the role it should play in unit determinations has compelled the Board to apply several different standards to determine appropriate units in the health care industry. Thus, indirectly, the admonition ultimately compelled the Board to engage in rulemaking.\textsuperscript{145}

Initially, in two decisions less than a year after the passage of the Amendments, the Board bowed to the will of Congress, as expressed by the admonition, and took care to avoid the proliferation of units in the health care industry. In \textit{Mercy Hospitals of Sacramento, Inc.},\textsuperscript{146} the Board stated that "our consideration of all issues concerning the composition of appropriate bargaining units in the health care industry must necessarily take place against this background of avoidance of undue proliferation."\textsuperscript{147} Similarly, in \textit{Shriners' Hospitals for Crippled Children},\textsuperscript{148} the Board rejected a petition for a unit of five stationary engineers because sanctioning such a unit could "only lead to an undue fragmentation of bargaining units in the health care industry which would totally frustrate Congressional intent."\textsuperscript{149}

The first federal circuit court presented with the issue, the Third Circuit in \textit{St. Vincent's Hospital v. NLRB},\textsuperscript{150} relied on these initial Board decisions to hold that the mere application of the traditional "community-of-interests" criteria to decide that licensed boilermen were entitled to a separate bargaining unit was in conflict with the congressional admonition and, hence, unenforceable.\textsuperscript{151} Instead, the court held, to be in accord with congressional intent the Board must factor the public interest in non-proliferation into this traditional standard, though the court did not state how much weight should be assigned to this factor.\textsuperscript{152}

\textsuperscript{145} The Board, in its First Notice of Proposed Rulemaking, explained its dilemma in this way:

Thirteen years and many hundreds of cases [after passage of the Amendments], the Board finds that despite its numerous, well-intentioned efforts to carry out congressional intent through formulation of a general conceptual test, it is now no closer to successfully defining appropriate bargaining units in the health care industry than it was in 1974.


\textsuperscript{146} 217 N.L.R.B. 765 (1975).

\textsuperscript{147} \textit{Id.} at 766.

\textsuperscript{148} 217 N.L.R.B. 806 (1975).

\textsuperscript{149} \textit{Id.} at 808.

\textsuperscript{150} 567 F.2d 588 (3d Cir. 1977).

\textsuperscript{151} \textit{Id.} at 592.

\textsuperscript{152} \textit{Id.}
In *NLRB v. West Suburban Hospital*, the Seventh Circuit followed the Third Circuit's lead in holding that unit determinations in the health care field should not be made solely on the basis of "traditional factors". The court then took *St. Vincent's Hospital* one step further by requiring the Board to indicate the manner in which its unit determination in each case implements or reflects the congressional admonition.

Presently, every circuit court addressing the issue, save the D.C. Circuit, has held that "upon penalty of non-enforcement of the Board's order," the Board must balance the traditional "community-of-interests" criteria (or the "disparity-of-interests" standard) with the public interest against unit proliferation. Most courts also require the Board to indicate in each case how it has balanced these competing interests.

Board consideration of the admonition is all that these courts require. Board orders sanctioning narrower health care units have been enforced where the Board has demonstrated that the public

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153 570 F.2d 213 (7th Cir. 1978).
154 Id. at 215.
155 Id. at 216.
156 See, e.g., Mary Thompson Hosp., 241 NLRB No. 766 (1979) (certifying unit of licensed stationary engineers), enforcement denied, 621 F.2d 858 (7th Cir. 1978); Allegheny Gen. Hosp., 239 N.L.R.B. 872 (1978) (certifying unit of maintenance employees), enforcement denied, 608 F.2d 965 (3d Cir. 1979). The Board has no enforcement powers of its own. See NLRA § 10(e), 29 U.S.C. § 160(e).
157 E.g., NLRB v. Walker County Medical Center, Inc., 722 F.2d 1535, 1538-39 (11th Cir. 1984); Masonic Hall v. NLRB, 699 F.2d 626, 632-33 (2d Cir. 1983); Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 968-69 (3d Cir. 1979); Bay Medical Center, Inc. v. NLRB, 588 F.2d 1174, 1177-78 (6th Cir. 1978), cert. denied, 444 U.S. 827 (1979); cf. Watonwan Memorial Hosp., Inc. v. NLRB, 711 F.2d 848, 850 (8th Cir. 1983) ("[T]he 1974 Amendments require the Board to consider the congressional directive to avoid unit proliferation in each case involving health care institutions."); Vicksburg Hosp., Inc. v. NLRB, 653 F.2d 1070, 1075 (5th Cir. 1981) ("[I]n finding that a single unit of service, maintenance and technical employees was appropriate, the regional director and the Board were mindful of the congressional mandate ... ").

The Ninth and Tenth Circuits, on the other hand, require a balance with the "disparity-of-interests" standard. E.g., Southwest Community Health Servs. v. NLRB, 762 F.2d 611, 613 (10th Cir. 1984); NLRB v. HMO Int'l, 678 F.2d 806, 809-10 (9th Cir. 1982). The D.C. Circuit is the only circuit that has held otherwise. See Int'l Bhd. of Elec. Workers, Local 474 v. NLRB, 814 F.2d 697 (D.C. Cir. 1987).
158 E.g., NLRB v. West Suburban Hosp., 570 F.2d 213, 216 (7th Cir. 1978); accord *Walker County Medical Center*, 722 F.2d at 1539; Watonwan Memorial Hosp., 711 F.2d at 851; NLRB v. Frederick Memorial Hosp., 691 F.2d 191, 194 (11th Cir. 1982); NLRB v. Mercy Hosp. Ass'n, 606 F.2d 22, 27 (2d Cir. 1979); NLRB v. St. Francis Hosp., 601 F.2d 404, 416 (9th Cir. 1979); Bay Medical Center, 588 F.2d at 1178.
interest in broader units was outweighed by other factors. For instance, the Sixth Circuit enforced the Board's reconfirmation order of a separate "licensed practical nurses" unit where the hospital had sought to include them in a unit of "all technical employees." The Board, in reconfirming the unit, noted that their policy against disrupting existing bargaining relationships outweighed the public interest in non-proliferation.

Without question, the Committee Reports' admonition and the corresponding statements of Senators Taft and Williams demonstrate that Congress intended the Board to consider the public interest in non-proliferation of health care units. However, there are two items of legislative history that are highly relevant to congressional intent with respect to proliferation which remain relatively unexplored by these courts. These items, considered below, consist of: 1) the Amendment provisions regulating the conduct of collective bargaining in the health care industry, and 2) Congress' declination to amend section 9(b).


The first item overlooked by the courts is the actual statutory provisions that constitute the bulk of the 1974 Amendments and the intent behind their passage. Specifically, the 1974 Amendments impose upon the health care industry elaborate safeguards against

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159 See, e.g., NLRB v. Sweetwater Hosp. Ass'n, 604 F.2d 454, 458 (6th Cir. 1979). However, the court stated in dictum that a Board order that expressly concludes that other considerations outweigh the policy against proliferation may not be upheld if the unit amounts to unacceptable fragmentation of health care units. See also Vicksburg Hosp., 653 F.2d at 1075; Watonwan Memorial Hosp., Inc., 711 F.2d at 851. But see Frederick Memorial Hosp., 691 F.2d at 194 (Board reliance upon precedent is insufficient as "due consideration to the congressional admonition."). But cf. Walker City Medical Center, 722 F.2d at 1539-40 (Board reliance upon precedent is sufficient as "due consideration.").

160 Bay Medical Center, 588 F.2d at 1178.

161 Id.

162 Both Senators Taft and Williams made reference to NLRB v. Delaware-New Jersey Ferry Co., 128 F.2d 130 (3d Cir. 1942), in directing the Board to factor into its unit determinations the public interest in non-proliferation. See LEGISLATIVE HISTORY, supra note 135, at 362-63, 120 Cong. Rec. 22,949 (July 11, 1974) (remarks of Senator Williams). In Delaware-New Jersey Ferry Co., the Third Circuit refused to enforce a Board determination of a combined unit of deck hands and ship officers. In so holding, the court stated:

[T]he point here is not what the officers want, nor what the men want, nor what the company either wants or is willing to acquiesce in, but rather, what is the public interest. The Board's duty to serve the public interest cannot be affected by the desires or acquiescence of the parties.

128 F.2d at 137.
strikes, as well as regulations affecting the conduct of collective bargaining in the industry. These provisions are outlined below:

1) A party who wants to negotiate a new agreement may give a contract expiration notice to the other party before contract termination. These notice provisions are thirty days longer than comparable requirements instituted in other industries and were intended to promote continuous patient care service by allowing the parties an extended period in which to negotiate a new agreement.

2) After notice to the Federal Mediation and Conciliation Service (FMCS), the parties are obliged to engage in mandatory mediation via the FMCS.

3) Under certain circumstances, the director of the FMCS can refer contract disputes to a board of inquiry to explore unresolved issues between the parties and to make recommendations for their resolution. These boards are to be convened where "a threatened or actual strike or lock-out . . . will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned." Such a board can be convened if mandatory mediation fails to secure an agreement within thirty days.

4) Finally, the union must give ten days advance notice of a strike at a health care institution to the FMCS and to the institution itself, a requirement that is unique to the health care industry.

As Senator Taft stated, this requirement was included expressly in order "to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care."

These anti-strike motivated provisions, in conjunction with the provision removing the nonprofit health care industry exemption, constitute the entirety of the 1974 Amendments. Nevertheless, not a single federal circuit court has addressed the significance of these anti-strike provisions to the proliferation issue. At the very least, these anti-strike provisions evidence a congressional intent to counter...
the potential results of proliferation, i.e., the increased risk of strikes leading to disruption of patient care, with comprehensive statutory safeguards. The significance of this congressional intent will be made clear after examining the second item of legislative history that remains unexplored by the courts.

4. Congress' Failure to Amend Section 9(b)

There were two committee proposals made to amend section 9(b) and thereby counter potential unit proliferation directly. A proposal by Senator Taft would have restricted the number of bargaining units in the health care industry to four: (1) professional employees, (2) technical employees, (3) clerical employees, and (4) maintenance and service employees. The second proposal, made by William Whelan, representing the California Hospital Association, was to amend section 9(b) to read "appropriate bargaining unit[s] [in the health care industry] shall be the largest reasonable unit of employees of an employer." The Senate Labor and Public Welfare Committee refused to adopt these proposals, though not without some dissent. Senator Dominick voted against reporting the bill out of the committee because he felt "the potential for recognition of numerous bargaining units . . . merits specific statutory language."

The significance of the committee's refusal to adopt these proposals is inconclusive because there is no evidence of whether the committee members viewed the proposals as "too rigid, too broad
However, the committee probably refused to adopt the proposals because it felt an amendment of section 9(b) simply was unnecessary. It was unnecessary because Congress was confident that the Board would exercise its discretion wisely in the health care industry, just as it had in other industries. As Senator Williams commented, "[t]he National Labor Relations Board has shown good judgment in establishing appropriate units for the purpose of collective bargaining, particularly in wrestling with units in newly covered industries" and "the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units." An amendment of section 9(b) also was unnecessary because Congress had already decided to counter the potential results of proliferation, i.e., increased strike potential leading to disruption of patient care, with extensive anti-strike provisions. Secondary concerns over other results of proliferation, i.e., wage whipsawing and the like leading to increased cost of patient care, was to be left to the Board to avoid in its informed discretion.

Congress' outright refusal to amend section 9(b), in conjunction with the statement by Senator Williams, evidences a congressional desire to rely upon the Board's proper exercise of its discretionary powers to prevent excessive unit proliferation. Of much more significance to the success of the Rules, however, Congress' refusal to amend section 9(b) precludes the courts from attacking the Rules on the basis of the admonition contained in the Committee Reports, notwithstanding federal circuit court precedent to the contrary.

Established principles of statutory construction dictate that legislative history should be relied upon by courts only to clarify ambiguities in statutory language. The Supreme Court applied this principle in Packard Motor, where it declined to look at legislative history regarding whether "foremen" could constitute an appropriate bargaining unit. The Court stated:

[W]e are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or ... proposals which failed to become law.

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175 See HMO Int'l, 678 F.2d at 808, quoted in Masonic Hall, 699 F.2d at 636.
178 Id. at 492.
The rationale behind this reasoning is quite simple. If there are no ambiguities to be resolved in Statute X, then courts interpreting the meaning of Statute X need go no further than to examine the language of the statute itself.179

Since the Amendments failed to modify section 9(b) in any way, they could not have created any ambiguities with respect to section 9(b). Consequently, the Committee Reports’ admonition cannot serve as the basis for denying enforcement of the Board’s section 9(b) orders. As Judge Fairchild of the Seventh Circuit stated in his dissent to *Mary Thompson Hospital, Inc. v. NLRB*,180 "the ‘admonition’ is not appropriate for application by the courts in deciding whether an order of the Board conforms to the statute or whether the Board has abused the discretion conferred on it by the statute."181

Judge Edwards of the D.C. Circuit, a well-known labor law scholar, cited Judge Fairchild’s dissent with approval in *International Brotherhood of Electrical Workers Local 474 v. NLRB*.182 In this case, the D.C. Circuit refused to enforce a Board order to bargain with a unit that the Board had determined to be “appropriate” under the newly adopted “disparity-of-interests” test. The court refused to enforce the order because, in the court’s view, the Board was erroneous in its conclusion in *St. Francis II*183 that the legislative history behind the 1974 Amendments compelled the Board to adopt a “disparity-of-interests” test.184 The court concluded no such compulsion existed, stating: “Congress, in the final analysis, decided against modifying section 9(b) of the Act; . . . hence, the same statutory standards that had existed before the enactment of the 1974 Amendments with respect to unit determinations and

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180 621 F.2d 858 (7th Cir. 1980) (Fairchild, J., dissenting).
181 *Id.* at 864.
184 In *St. Francis Hospital III*, 286 N.L.R.B. 123, 126 L.R.R.M. 1361 (1987), the Board, on remand from the D.C. Circuit, insisted upon applying its “disparity-of-interests” test, stating that the “disparity-of-interests” test was not adopted due to any mandate from Congress. Rather, according to the Board, it was adopted in the Board’s discretion in response to congressional concerns over proliferation of bargaining units in the health care industry. Moreover, the Board stated that the “disparity-of-interests” test is but a variation of the “community-of-interests” test. Consequently, the Board affirmed its prior decision under *St. Francis II*. *See* 126 L.R.R.M. at 1362; *accord* St. Vincent’s Hospital, 285 N.L.R.B. 64, 125 L.R.R.M. 1329 (1987).
certification procedures remained in the statute, entirely unmodified.\textsuperscript{1185}

Judge Edwards cited the following Supreme Court statement as support for the court’s position: “\textsuperscript{1186}Despite the [Committee] Report’s seeming endorsement of a \textit{per se} rule, we are hesitant to rely on that inconclusive legislative history either to supply a provision \textit{not} enacted by Congress . . ., or to define a statutory term enacted by a prior Congress.’’ Judge Edwards emphasized that the congressional admonition against undue proliferation was not made part of the NLRA, that section 9(b) was never amended, and that courts have no authority to enforce principles “gleaned solely from legislative history that have no statutory reference point.’’\textsuperscript{1187} Therefore, the admonition is not enforceable.\textsuperscript{1188}

Recently, the First Circuit, the only circuit yet to address the significance of the congressional admonition, explicitly adopted the reasoning of \textit{Electrical Workers Local 474}. In interpreting a statute, the court refused to give any weight to the language of a committee report that the committee had expressly declined to incorporate into the statute.\textsuperscript{1189} The court held that to enforce the language would be to treat the report as an “independent statutory source having the force of law.’’\textsuperscript{1190}

This is not to suggest, however, that the congressional admonition is of no consequence whatsoever. On the contrary, the admonition is a clear order to the Board to try to avoid undue proliferation. The point is that the admonition is purely a matter between Congress and the Board. Judge Fairchild echoed this in his dissent to \textit{Mary Thompson Hospital}: “‘Under the circumstances, the ‘admonition’ and the Board’s response to it seems to be a matter between the Board and Congress. If the Board may be thought by members of Congress to pay insufficient heed to the ‘admonition’, the Board may be courting a statutory change.’’\textsuperscript{1191}

Judge Buckley, concurring in \textit{Electrical Workers Local 474}, argued that the congressional admonition serves a political rather than a legal purpose:

\textsuperscript{1185} \textit{Elec. Workers}, 814 F.2d at 701.
\textsuperscript{1186} \textit{American College of Physicians}, 475 U.S. at 846-47, cited in \textit{Elec. Workers}, 814 F.2d at 712.
\textsuperscript{1187} \textit{Elec. Workers}, 814 F.2d at 708.
\textsuperscript{1188} \textit{Id.} (noting the court was operating under an erroneous view of the law).
\textsuperscript{1189} \textit{Paris v. Dept. of Housing and Urban Development}, 843 F.2d 561, 569-70 (1st Cir. 1988).
\textsuperscript{1190} \textit{Id.} at 570.
\textsuperscript{1191} 621 F.2d at 864.
The agreement to include the report language was [not] an empty gesture. To the contrary, there can be little doubt that the two committees expected the Board to pay attention to their directive—not because it had the force of law, but because agencies are not given to ignoring the commands of potentates who control their budgets and oversee their operations [not to mention appoint them]. As counsel for one agency recently acknowledged in oral argument before this court, while an instruction in an oversight committee's report did not bind his agency legally, it did so "as a practical matter." To underscore his point, he added: "[W]e are not talking law school enforcement, legal textbook arguments; we're talking political reality here."\(^\text{192}\)

Notwithstanding the foregoing, the vast majority of federal circuit courts continue to enforce the Committee Reports' language. However, these courts have failed almost uniformly to address the significance of Congress' failure to amend section 9(b) and inclusion of the anti-strike provisions which make up the bulk of the amendments.\(^\text{193}\) Indeed, of the ten circuits that enforce the admonition, only half have engaged in their own analysis of the Amendments' legislative history, with the other half relying instead upon their sister courts' prior incomplete analysis.\(^\text{194}\)

Only two circuits have discussed the implications of Congress' failure to amend section 9(b) in 1974: the D.C. Circuit and the Seventh Circuit. The Seventh Circuit advanced a reply to Judge Fairchild's dissent in *Mary Thompson Hospital*, stating:

> There is a question how much weight we should give the committees' admonition. If Congress passes a statute, the committee reports may provide important evidence of legislative purpose. But Congress did not enact any statute in 1974 dealing with bargaining units. It did not amend section 9(b) . . . . On the other hand, Congress did change the law in 1974—it put nonprofit health care institutions under the National Labor Relations Act for the first time in 27 years—and maybe the committees' state-

\(^\text{192}\) 814 F.2d at 716, quoting Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987).

\(^\text{193}\) But see NLRB v. Res/Care, Inc., 705 F.2d 1461, 1470 (7th Cir. 1983); Frederick Memorial Hosp., 691 F.2d at 193-94.

\(^\text{194}\) Every circuit court except for the First and the D.C. Circuits enforces Board implementation of the admonition. Of these ten circuits, the Fourth, Fifth, Eighth, Tenth, and Eleventh have not engaged in their own analysis. See, e.g., Walker City Med. Center, 722 F.2d at 1539 (11th Cir.); Watonwan Mem. Hosp., 711 F.2d at 850 (8th Cir.); Frederick Mem. Hosp., 691 F.2d at 194 (4th Cir.); Vicksburg Hosp., Inc., 653 F.2d at 1075 (5th Cir.); Presbyterian/St. Luke's Med. Center, 653 F.2d at 457 (10th Cir. 1981).

\(^\text{195}\) Elec. Workers, 814 F.2d 697. See supra notes 182-87 and accompanying text.
ment should be viewed as a source of guidance to the courts in interpreting the impact of the amendment on the whole Act; by changing the coverage of a statute, you can also change its meaning. 196

However, the court failed to cite any authority for this argument and did not itself seem convinced by it. Instead, the court buttressed its position by stating: "In any event, the circuits including ours have treated the . . . [admonition] as authoritative . . . and we are not disposed to reexamine the issue here; it would not in any event change our result." 197

Similarly, many commentators on the 1974 amendments have simply just assumed the enforceability of the congressional admonition. For example, in 1979, one commentator, cited numerously by courts reviewing the legislative intent behind the Amendments, 198 had no doubt about the admonition's enforceability, not because of any principles of statutory construction, but because at that time no one had questioned the admonition's significance: "The language of the 1974 amendments themselves contained no mention of the bargaining units issue . . . [However,] neither the Board, nor any court of appeal, nor any party to pertinent litigation has questioned the significance of the language contained in the committee reports with respect to bargaining unit proliferation." 199

Presently, however, the D.C. Circuit has raised substantial questions regarding the admonition's significance. And with respect to the Board, it should not question the significance of the Committee Reports' language, as it is a clear political directive to the Board. Ironically, the Board's voluntary implementation of the admonition in its first post-1974 health care decisions misled the original circuit courts into requiring Board implementation thereafter. 200 Moreover, the Board has questioned the judicial significance of the admonition. The Board has stated that, by refusing to amend section 9(b), "Congress, in the final analysis, left the matter of determination of appropriate units to the Board" 201 and that "[i]f Congress had wanted to preclude the Board from using traditional criteria in

196 Res/Care, Inc., 705 F.2d at 1470.
197 Id.
198 Bumpass, supra note 38; see, e.g., HMO Int'l, 678 F.2d at 808 n.2; Res/Care, Inc., 705 F.2d at 1470; Long Island Jewish-Hillside Medical v. NLRB, 685 F.2d 29, 33 (2d Cir. 1982).
199 Bumpass, supra note 38, at 877.
200 See supra notes 146-49 and accompanying text.
making unit determinations in the health care industry, it could have easily amended Section 9(b) to so provide."

In the final analysis, the majority's position that the admonition should be enforced because it is indicative of legislative intent is oblivious to the principles enunciated in *Electrical Workers Local 474*. Moreover, it disregards Congress' demonstrated intent *not* to invade Board discretion, but instead, to counter the effects of proliferation with the statutory safeguards actually incorporated into the Amendments.

Congressional intent has been frustrated by the courts. In effect, the courts have attached statutory significance to an issue that Congress determined did not warrant statutory treatment. Simply put, Senators Taft and Dominick have accomplished through judicial fiat what they could not through legislative consent.

In fact, as it stands today, the Board's application of the Rules to determine appropriate units is rendered suspect by these circuit court holdings. To successfully withstand judicial scrutiny in most courts, the Rules must give the Board freedom to balance the interests of employees against the public interest in non-proliferation *in each case* and to demonstrate how each unit that is determined to be appropriate reflects such a balancing of interests. The following section assesses the extent to which the Rules allow the Board such freedom and, consequently, the extent to which they should be judicially accepted.

### III. Prospects for Uniform Judicial Acceptance

The divergent circuit court interpretations of the 1974 Amendments have resulted in three distinct standards: (1) the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits hold that the Board *may* apply its traditional "community-of-interests" criteria, so long as the Board explicitly weighs the public interest in avoiding unit proliferation against employees' organizational rights; (2) the Ninth and Tenth Circuits interpret the legislative history behind the 1974 Amendments to *compel* a rigid

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203 814 F.2d at 709-14. See supra notes 182-88 and accompanying text.
204 See supra note 157.
205 See id.
"disparity-of-interests" test and also require the Board to demonstrate, in each case, how it considered the admonition; and (3) the D.C. Circuit interprets the legislative history behind the 1974 Amendments to not compel any Board action and that Congress implicitly approved continued use of the "community-of-interests" approach to determine appropriate bargaining units in the health care industry through its failure to amend section 9(b).

The Rules' guidelines for determining appropriate units, i.e., eight presumptively appropriate units, allow the Board to comply with standard (1). The Second, Third, Fifth, Eighth and Eleventh Circuits have all held that the Board's duty to demonstrate explicit consideration of the congressional admonition in each case can be satisfied by citation to Board precedent in which the unit in question was found to be appropriate. The Fourth Circuit, in Frederick Memorial Hospital, has held otherwise, but also has indicated that the result may be different if the precedent relied upon by the Board involves a presumptively appropriate unit (The Sixth and Seventh Circuits have not considered the issue).

The "disparity-of-interests" test, in the form required by these two circuits, is rigid in the sense that narrow units may only be approved by the Board if the differences between employees in the unit sought and other employees are so great as virtually to preclude the approval of broader units, i.e., "all professionals" and "all non-professionals." See, e.g., NLRB v. HMO Int'l/Cal. Medical Group Health Plan, 678 F.2d 806, 808, 812 n.17 (9th Cir. 1982); Southwest Comm. Health Serv. v. NLRB, 726 F.2d 611, 613 (10th Cir. 1984). See generally supra note 50-54 and accompanying text (discussing "disparity-of-interests" test).

See supra note 158.

See supra notes 182-87 and accompanying text.

Int'l Bd. of Elec. Workers Local 474, 814 F.2d at 711, 715. The court did indicate, however, that the Board in its discretion under section 9(b), might switch to another standard if it adequately explained the switch. Id. at 711-12 n.65.

See, e.g., St. John's Gen. Hosp. of Allegheny v. NLRB, 825 F.2d 740, 743 (3d Cir. 1987) (Board citing precedent of business office clericals unit); NLRB v. Walker Co. Medical Center, 722 F.2d 1535, 1539 (11th Cir. 1984) (Board citing precedent of registered nurses unit); Masonic Hall v. NLRB, 699 F.2d 626, 632 (2d Cir. 1983) (Board citing precedent of service and maintenance unit); Watonwan Memorial Hosp. v. NLRB, 711 F.2d 848, 851 (8th Cir. 1983) (Board citing precedent of technical employees); Vicksburg Hosp. v. NLRB, 653 F.2d 1070, 1074 (5th Cir. 1981) (Board citing precedent of combined unit of service, maintenance, and technical employees).

NLRB v. Frederick Memorial Hosp. Inc., 691 F.2d 191 (4th Cir. 1982).

Id.

The Fourth Circuit stressed that, "[i]n Frederick Memorial the Board reiterated its disavowal that a registered nurses' unit was per se appropriate," leaving room for the Fourth Circuit to approve Board reliance on per se appropriate units. Id.

However, in NLRB v. Res/Care, Inc., 705 F.2d 1461, 1470 (7th Cir. 1983), the Seventh Circuit, in the absence of explicit consideration by the Board, cited to Board precedent in upholding a Board determination of technical employee unit appropriateness.
Accordingly, when determining appropriate units under the Rules, reference to the rulemaking notice and comment period should suffice as an explicit consideration of the congressional admonition by the Board. In particular, the Board has stated that during the rulemaking process:

[H]as carefully considered the Congressional admonition against proliferation set forth in the legislative history 1974 health care amendments as well as its own strongly-held view that the number of units found appropriate should not be so many as to lead to a splintering of the workforce into the myriad of occupations and professions found within the industry. The Board has examined the units found appropriate to ensure they are not so numerous as to create a never-ending round of bargaining sessions, and that each unit represents truly distinctive interests and concerns.215

Therefore, based upon the above considerations and current case law in circuits adhering to standard (1), the guidelines should meet with judicial acceptance in at least a majority of federal circuit courts.

Likewise, the Rules' guidelines should withstand judicial scrutiny in the D.C. Circuit, a proponent of standard (3). Under this standard, the congressional admonition in no way prevents the Board from implementing the Rules' guidelines.216 Therefore, so long as the Rules are found to be valid under the NLRA217 and the Board has adequately explained the reasons for their adoption,218 the Rules should pass muster in the D.C., and presumably the First, Circuits.219

However, prospects for the Rules' acceptance in both the Ninth and Tenth Circuits under standard (2) are bleak. It is not altogether clear how the Ninth Circuit would regard the Rules' guidelines. On one hand, the Ninth Circuit has held, in St. Francis Hospital of Lynwood,220 that presumptions could be used by the Board if, at

215 53 Fed. Reg. 33,933 (1988). For the Board's discussion of each of the Rules' separate units and the non-proliferation issue, see id. at 33,911 (registered nurses), 33,917 (physicians), 33,917 (other professionals), 33,918 (technical), 33,920 (skilled maintenance), 33,924 (business office clericals).
216 See supra notes 182-88 and accompanying text.
217 See Elec. Workers, 814 F.2d at 710.
219 See notes 185-86 and accompanying text (First Circuit has indicated that it agrees with D.C. Circuit's view that the congressional admonition has no impact on bargaining unit determinations).
220 NLRB v. St. Francis Hosp. of Lynwood, 601 F.2d 404 (9th Cir. 1979).
some prior occasion, the Board articulated the basis for the presumptions such that the court could review their propriety in light of the congressional admonition and "if interested parties are given the opportunity to effectively present evidence to rebut the presumption[s]." Moreover, this "basis" may consist of Board precedent if such precedent adequately demonstrates a "disparity-of-interests" between the unit deemed appropriate and other hospital employees. On the other hand, in *HMO International*, the Ninth Circuit relied on *St. Francis Hospital* and held that the Board cannot rely upon precedent to demonstrate a "disparity-of-interests" between the unit determined appropriate and other hospital employees.

In light of *St. Francis Hospital*, which specifically approves the use of presumptions to demonstrate a "disparity-of-interests," and *HMO International*, which specifically disallows the Board's use of precedent to demonstrate a "disparity-of-interests," it is unclear how the Ninth Circuit would react to the Rules' guidelines. Nevertheless, as *HMO International* is an extension of *St. Francis Hospital* and the latter clearly indicates that presumptions are acceptable if certain requirements are met, the Ninth Circuit should approve of the guidelines.

There is no question, however, that based upon current precedent, the Tenth Circuit would not condone application of the Rules' guidelines. "We hold that requiring health care industry employers to bear the burden of producing evidence that limited bargaining units are more inappropriate than broader bargaining units runs contrary to the Congress' admonition." Furthermore, the Second Circuit, though not adhering to the "disparity-of-interests" standard, concurs in this respect. The Second Circuit also has

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221 *Id.* at 416 n.14.
222 *Id.* at 416.
223 "[A] problem in this case is that the Board relies on the presumption established in its *Mercy* decision, and the *Mercy* opinion is woefully inadequate as to the facts which support the Board's reliance." *Id.* at 416 n.14.
224 *NLRB v. HMO Int'l/Cal. Medical Group Health Plan*, 678 F.2d 806 (9th Cir. 1982).
225 See *id.* at 810. "It is apparent that the only mention of the nonproliferation mandate was an interpretive gloss placed on an NLRB decision, the principle of which has been judicially invalidated for failure to implement congressional intent." *Id.* at 810 n.8.
227 See *supra* note 157 and accompanying text.
228 *Long Island Jewish Hosp. v. NLRB*, 685 F.2d 29, 35 (2d Cir. 1982). "[W]e believe
indicated that Board reliance upon precedent (and therefore, presumably, reference to the rulemaking process) may not be sufficient to demonstrate consideration of the congressional admonition.\textsuperscript{229}

In addition, it is quite possible that some or most of the circuit courts may refuse to enforce the Rules because the Rules' eight appropriate units constitute \textit{prima facie} "undue" proliferation. It is true that the Board sanctioned and the courts enforced each of the Rules' eight units before the Rules' adoption.\textsuperscript{230} However, the Rules do not foreclose the possibility of eight units in a single hospital,\textsuperscript{231} and the courts have \textit{never} been presented with that situation. Some negative circuit court reaction to such unit proliferation would be inevitable.

\section*{Conclusion}

The only hope for unanimous judicial acceptance of the Rules is for the Supreme Court to decide the weight the admonition should be given by reviewing courts. The congressional admonition "joker" must be removed from the deck of judicial review.\textsuperscript{232} The irony of the Board's present predicament is such, however, that if the Supreme Court were to grant certiorari and rightfully put asunder the notion of the admonition's enforceability, then the Board's ultimate objective for rulemaking no longer would exist. In fact, if the Supreme Court had come to the succor of the Board earlier, then the Board's continued adherence to the "two-tier" approach,\textsuperscript{233} an approach strikingly similar to the Rules' process for determining health care units, might well have obviated the need to engage in rulemaking altogether. Additionally, the other two Board reasons for engaging in rulemaking would not be so compelling.\textsuperscript{234} As stated by Board member Johansen:

\begin{quote}
that [employee organization rights] must be weighed against the public interest in nonproliferation without the introduction of burden-shifting presumptions . . . . Because the use of the single-facility presumption may have improperly tipped the balance in favor of certification, we must reverse and remand. . . .’’ \textit{Id.}
\end{quote}

\textsuperscript{229} \textit{See Masonic Hall}, 699 F.2d at 632.
\textsuperscript{231} \textit{See supra} notes 64-78 and accompanying text.
\textsuperscript{232} The congressional admonition was referred to by the Seventh Circuit in 1983 as a "joker in the deck" that has caused the Board much difficulty in developing a consistent standard of health care unit determinations. NLRB v. Res/Case, Inc., 705 F.2d 1461, 1469 (7th Cir. 1983).
\textsuperscript{233} \textit{See supra} notes 45-50 and accompanying text.
\textsuperscript{234} \textit{See supra} note 18 and accompanying text.
Contrary to the stated expectations of my colleagues, setting unit configurations by rulemaking will not in fact substantially reduce the amount of litigation in this area. It may serve to change part of the focus of that litigation, while at the same time creating more. The amount of evidence produced in rulemaking is not the point. The difficulties encountered over the last several years have not been for lack of evidence. Rather, they have revolved around differing interpretations of the statute and, particularly, the legislative history and the deference to be accorded the Board and its expertise in its role as the primary decision maker under the Act. I do not see that announcing rules by administrative fiat will resolve the divergent views on these fundamental questions. We still will not have obtained a definitive resolution of the basic issues which is so sorely needed.235

Perhaps the Rules are an attempt by the Board to force the Supreme Court’s hand. The Court has refused more than once to resolve the proliferation issue.236 The time is well past due, however, for the Court to intercede in this matter. The Court should grant certiorari and confirm the validity of the Rules in relation to the NLRA.237 In doing so, however, the Court must confirm the rationale of Electrical Workers Local 474238 and thereby send a signal to the circuit courts that it is not within their domain to enforce the admonition. Conversely, a Court decision vindicating the circuit courts’ enforcement of the admonition inevitably would spell doom for the prospects of the Board’s latest and most ambitious attempt to establish a consistent standard for the determination of appropriate bargaining units in the health care industry.

John Robert Shelton*

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236 The U.S. Supreme Court has twice refused to grant certiorari on this issue. See NLRB v. Mercy Hosp. Ass'n, 606 F.2d 22 (2d Cir. 1979), cert. denied, 445 U.S. 971 (1979); Long Island College Hosp. v. NLRB, 566 F.2d 833 (2d Cir. 1977), cert. denied, 435 U.S. 996 (1978). Also, the Solicitor General refused to file petitions for certiorari, despite the Board's request that he do so, in NLRB v. Frederick Memorial Hosp., 691 F.2d 191 (4th Cir. 1982) and NLRB v. HMO International, 678 F.2d 806 (9th Cir. 1982).
237 See supra notes 85-134 and accompanying text.
238 See supra notes 177-87 and accompanying text.

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