The NLRB's Proposed Rule on the Appropriateness of Single Location Bargaining Units: Clarity and Predictability, But Has Anything Changed?

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THE NLRB’S PROPOSED RULE ON THE APPROPRIATENESS OF SINGLE LOCATION BARGAINING UNITS: CLARITY AND PREDICTABILITY, BUT HAS ANYTHING CHANGED?

All You’ll Need is “a Calculator and Odometer.”

I. INTRODUCTION

Congress enacted the National Labor Relations Act2 ("NLRA" or "Act") to protect employees from employer attempts to disrupt union organization and the collective bargaining process.3 The National Labor Relations Board ("NLRB" or "Board") was created in 1935 to implement the federal government’s labor policies embodied in the Act.4 The Board’s purpose is to develop and administer a national labor policy which protects an employee’s right to unionize.5

In implementing a national labor relations policy, the Board has the power to engage in rulemaking or adjudication.6 Until recently, the

3. See id. §151. Declaring that it is, [T]he policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.

4. See id. § 153(a).
5. See id. § 153. The Act mandates that [E]mployees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

Id. § 157.
Board had relied solely on adjudication,\(^7\) deciding each dispute brought before it on a case-by-case basis.\(^8\) This was true until 1987, when the Board promulgated its first rule regarding the appropriateness of a bargaining unit in the health care industry.\(^9\) This rule was implemented in accord with procedures set forth in the Administrative Procedure Act\(^10\) ("APA"), and was subsequently found to be a valid exercise of the Board’s power by the Supreme Court.\(^11\)

As a consequence of the successful implementation of the rule in the health care arena, the Board is now seeking to implement a rule regarding appropriate bargaining units in other industries. On September 25, 1995, the NLRB published a notice of proposed rulemaking on the issue of appropriate bargaining units for all employers within the Board’s jurisdiction.\(^12\) The proposed rule spells out what the Board has determined to be the most relevant factors in deciding the appropriateness of single location bargaining units.\(^13\) The rule creates a presumption that the single location unit is the most appropriate unit, provided that three elements are satisfied.\(^14\)

This Note will describe the rulemaking process, and examine the propriety of the Board’s decision to promulgate a rule for single location bargaining units. Furthermore, this Note will examine the practicality of the proposed rule as if it were applied retroactively to Board precedent. This Note will demonstrate that the rule is a valid means to reduce

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7. See 29 C.F.R. § 103.30(b) (1995).
8. See 5 U.S.C. § 554 (1994) (describing the adjudicatory process); see also 29 U.S.C. §§ 159-
160 (1994) (describing the procedures available to the Board when resolving labor disputes).
9. See 29 C.F.R. § 103.30(a)-(d) (1995). The Board’s rule provides that eight defined employee units are appropriate for collective bargaining in acute care hospitals. See id. The Board permitted three exceptions: (1) cases presenting “extraordinary circumstances,” (2) cases where units that do not comply with this rule are already in existence, and (3) cases in which labor organizations wish to merge any of the eight units. Id.
11. See American Hosp. Ass’n v. NLRB, 499 U.S. 606 (1991). The Supreme Court found that the Board had the authority, under its broad rulemaking powers of section 6 of the NLRA, to resolve disputes regarding appropriate bargaining units through its rulemaking power. See id. at 614. Further, the Court found that section 9(b)'s mandate that the Board decide the appropriate unit “in each case” should be read to mean that whenever there is a dispute between an employer and an employee concerning the appropriateness of a bargaining unit, the Board must resolve the dispute. See id. at 611. When doing so, the Court said, the Board may rely on rules it has created to resolve issues of general applicability. See id.
13. See discussion infra Part IV.
14. See discussion infra Part IV. (describing the elements of the rule, as well as the extraordinary circumstances exception).
NLRB case load and expense, with little sacrifice to substantive case law. Finally this Note reviews the Board's contention that the implementation of this rule will not substantially alter previous rulings, and will be advantageous for both sides of the bargaining table.

II. THE CHOICE BETWEEN POLICYMAKING BY RULE OR ADJUDICATION

When a government agency engages in policymaking, it does so either by announcing it as a rule or as an order. Rulemaking is the means for the creation of a rule, and adjudication is the process for the formulation of an order. The choice between these two policymaking tools is essentially a tactical one.

In practice, rules have general or specific applicability, but are designed to have a prospective effect. This gives targeted parties notice of agency policy and increases the potential of reliance. Orders, on the other hand, have a specific effect. They are the outcome of administrative hearings in which all issues on a particular matter are presented and resolved with respect to specific parties, and at the same time result in new agency policy.

Agencies are given wide discretion to select which vehicle they will use to advance their policies. The Supreme Court articulated this principle in SEC v. Chenery Corp., where the Securities Exchange Commission approved the reorganization of federal public utilities by way of an order. The Court held that agencies must be allowed to use their informed discretion to choose between acting by general rule or by individual adjudication. It reasoned that in certain cases where the

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15. See WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 131 (2d ed. 1994).
17. See id. § 551(7).
20. See Fox, supra note 15, at 133.
24. See id. at 201.
25. See id. at 203. The Court stated that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." Id.
issue is uniquely complex and specialized, it may be impossible for an agency to address the problem by a general rule.26

Prior to 1974, the Supreme Court had not defined the boundaries of agencies’ discretion. Then, in NLRB v. Bell Aerospace Co.,27 the Court set forth the criteria that agencies should follow when deciding whether to take action through rule or order.28 The Court found that an agency’s decision to announce new policy in an adjudicative proceeding is valid, unless there was an abuse of discretion under Cheney.29 The Court stated that an agency’s decision to announce new policy will not be permitted in an adjudicative proceeding if rulemaking is expressly required by statute, the agency had in the past acted by rule in similar circumstances, or when the agency intends to have its policy apply generally over many individuals.30

With respect to the proposed rulemaking, the NLRB is not confronted with a unique situation in which an individual or a small group of individuals are being affected. As an administrative agency acting to implement national labor policy, the Board has the statutory and legal authority to use its rulemaking power.31

While the Board clearly has the authority to create rules, it has chosen to do so sparingly in the past.32 Rather, the Board has consistently maintained adjudication as its primary source of policymaking.33

26. See id. at 202-03.
28. See id. at 294. The Court refused to preclude the Board from announcing new policies through adjudication, noting that the “choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.” Id. Acknowledging that the choice of one over the other may be an abuse of discretion or a violation of the Act, the Court conceded that it is doubtful that “any generalized standard could have more than marginal utility.” Id. (resolving that there could be no standard mechanism for courts to review when an agency should have implemented its policies through rulemaking or adjudication). Further, the Court pointed to the possible benefits of rulemaking over adjudication, indicating that it could produce relevant information through the solicitation of comments from affected parties. See id. at 295. However, the Court concluded consistent with its premise of deference, that agency discretion would rule, noting that the adjudication process might produce similarly relevant information, albeit by the affected parties to each case. See id.
29. See id. at 293.
30. See id. at 294-95; see also FOX, supra note 15, at 140-41.
31. See supra notes 15-25 and accompanying text. Furthermore, the Act specifically indicates that the Board shall have the power to “make, amend, and rescind” rules necessary to implement the provisions of the Act, so long as it is done in the manner proscribed by the APA. 29 U.S.C. § 156 (1994).
33. See id. at 392.
Numerous commentators have frequently criticized the wisdom of that choice. Still, others have argued that the Board’s reliance on adjudication better fits the field over which it reigns. Namely, the Board’s sole reliance on adjudication serves to minimize congressional and judicial intervention in the Board’s policies, and maintains a certain flexibility that is necessary in order to maintain a politically responsive national labor policy.

Those who criticize the Board’s infrequent use of rulemaking condemn the Board’s reliance on the adjudicative process. They argue that “rulemaking is a more equitable process than adjudication; that rulemaking increases the agency’s access to relevant information and facilitates future planning; and that rulemaking provides an important political check on agency discretion.” Further, critics have asserted that rulemaking serves to reduce litigation over “ambiguities and inconsistencies” in Board policies.

Alternatively, the practice of resisting rulemaking and implementing labor policies exclusively through adjudication allows the Board to

34. See, e.g., Congressional Oversight of Administrative Agencies (NLRB): Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. 916-18 (1968) (statement of Henry J. Friendly) (arguing that the NLRB’s refusal to implement rulemaking causes many administrative problems); Merton C. Bernstein, The NLRB’s Adjudication-Rule Making Dilemma Under the Administrative Procedure Act, 79 YALE L.J. 571, 622 (1970) (maintaining that the Board might be well purposed in its exclusive use of adjudication, “but rule making may help reinvigorate agencies now settled into dull, time-consuming, and relatively unproductive adjudicatory routines that are unequal to growing case loads and the increasing complexity of the areas to be regulated.”); Cornelius J. Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 YALE L.J. 729, 761 (1961) (finding that the NLRB’s reliance on an ad hoc approach to policymaking produces grossly unsatisfactory results).

35. See generally Note, NLRB Rulemaking: Political Reality Versus Procedural Fairness, 89 YALE L.J. 982, 984 (1980) (discussing the Board’s choice as a “trade-off between administrative flexibility and procedural fairness.”).

There is a trade-off between the autonomy of the agency and the effective administration of the Act. See Flynn, supra note 32, at 424. Straightforward policymaking by rulemaking is much less likely to survive judicial scrutiny, than a adjudicative policy disguised in a so-called multi-factorial fact finding approach. See Flynn, supra note 32, at 434-47 (concluding that realistically, the Court’s tendency to overreach in their review of straightforward policy determinations, even in light of Chevron and its progeny, justifies an ambiguous approach to rulemaking in order to avoid such judicial usurpation).

36. See Note, supra note 35, at 983-84. The Note argues that the need for flexibility in addressing labor issues far outshines the procedural benefits of promulgated rules. See Note, supra note 35, at 983-84.

37. Note, supra note 35, at 984. The author rejects these assertions, acknowledging that the “issue of procedural fairness is at the core of the controversy,” but maintaining that the NLRB cannot and should not be compelled to use rulemaking against its better judgement. Note, supra note 35, at 984-85.

38. See Note, supra note 35, at 985 n.19.
develop its rules in a form most likely to survive judicial scrutiny.\(^{39}\) NLRB rulemaking would permit courts to interfere with the Board’s development of labor policy and have a hand in policy formulation, thereby stifling its political responsiveness.\(^{40}\) Furthermore, enhanced flexibility through adjudication increases the chance that the national labor policy will be responsive to industry developments and individual disputes.\(^{41}\)

Nevertheless, there have been assertions that rulemaking in collective bargaining unit determinations would lead to greater predictability and less time and expense for both the Board and the parties.\(^{42}\) In an article entitled, \textit{Conserving Energy at the Labor Board: The Case for Making Rules on the Collective Bargaining Units},\(^{43}\) Berton Subrin outlines the advantages of rulemaking in collective bargaining unit determinations.\(^{44}\) Subrin predicts four major advantages which might stem from rulemaking in this area: (1) through the rulemaking process, the Board will become more familiar with the realities of organizing and collective bargaining,\(^{45}\) (2) neither of the parties to an action would be

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\item See Note, \textit{supra} note 35, at 989; Flynn, \textit{supra} note 35, at 434.
\item See Flynn, \textit{supra} note 32, at 433-39.
\item [The federal courts’ record] suggests that when presented with a clear policy “target,” the courts are all too prone to substitute their views for those of the agency—deference be damned. A central problem is that doctrines of judicial review of agency action are extremely malleable; as with the canons of statutory construction, judges can generally find one that gets them where they want to go. The combination of the courts’ tendency toward overreaching and these varied flexible doctrines is so lethal, according to some, that whether the agency’s policy stands or falls often turns on little more than the circuit panel’s ideological bias.
\item See id. at 108-11.
\end{enumerate}
confused as to which factors the Board will find critical,\textsuperscript{46} (3) prior knowledge on the part of unions and employers will reduce a significant amount of time and expense caused by litigation,\textsuperscript{47} and (4) with a clear rule, there will be less for parties to litigate, and more stipulations.\textsuperscript{48}

\textit{A. Rulemaking in Collective Bargaining Unit Determinations}

The Supreme Court validated the statutory power of the NLRB to engage in rulemaking in collective bargaining unit determinations in \textit{American Hospital Ass’n v. NLRB}.\textsuperscript{49} In that case, the American Hospital Association challenged the facial validity of the Board’s rule on appropriate bargaining units for acute care hospitals.\textsuperscript{50} Specifically, the employer claimed that: (1) the Board did not have the authority to engage in rulemaking in this area, (2) the rule violated a congressional admonition to avoid “undue proliferation of bargaining units in the health care industry,” and (3) the rule was “arbitrary and capricious.”\textsuperscript{51}

The Hospital Association essentially criticized the NLRB’s rule as being an arbitrary use of administrative rulemaking power.\textsuperscript{52} In response, the Board relied on an extensive record that it had developed during its rulemaking process, as well as on the Board’s experience in deciding cases “during the 13-year period between the enactment of the health care amendments and its notice of proposed rulemaking.”\textsuperscript{53} The Court found that the rule was not arbitrary and capricious,\textsuperscript{54} and upheld

\textsuperscript{46} See id. With the presently employed adjudicative process, the Board frequently recites a litany of facts, but ultimately rests its conclusion on an “under all the circumstances” rationale. \textit{Id.}

\textsuperscript{47} See id. Delayed unit determination decisions are common and do not facilitate labor relations stability. \textit{See id.}

\textsuperscript{48} See id. If more parties stipulate to which is the most appropriate collective bargaining unit, there will be fewer cases requiring decisions by Regional Directors, the Board, and the courts. \textit{See id.} The prospective economizing effects would benefit all parties involved.


\textsuperscript{50} \textit{Id.} at 608.

\textsuperscript{51} \textit{Id.} at 608-09.

\textsuperscript{52} \textit{Id.} at 617-20. The hospital argued that the rule was arbitrary and capricious because “it ignores critical differences among the more than 4,000 acute-care hospitals in the United States, including differences in size, location, operations, and work-force organization.” \textit{Id.} at 617.

\textsuperscript{53} \textit{Id.} at 618.

\textsuperscript{54} \textit{Id.} at 619. The Court noted: the extensive notice and comment period, the Board’s demonstration of why diversity had not affected results of previous bargaining unit determinations in the past, and the Board’s well reasoned justification of why the eight factors support generalization. \textit{See id.} at 618-19. The Court also took note of the “extraordinary circumstances” exception. \textit{See id.} at 619.
the Board’s authority under section 9(b) of the NLRA to resolve disputes regarding appropriate units through its rulemaking authority.\textsuperscript{55}

The Supreme Court’s examination and subsequent validation of the Board’s health care unit rule evidenced a deference to an agency’s decision to utilize rulemaking promulgated in accordance with the APA. Notably, the Board’s successful use of rulemaking in deciding appropriate units for collective bargaining in the health care industry has prompted an attempt to further exercise its rulemaking in other industries. This proposed rule is the embodiment of that attempt.

\textit{B. The Process of NLRB Rulemaking}

Notice of any proposed rulemaking is required to be published in the Federal Register.\textsuperscript{56} Such notice must include, “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”\textsuperscript{57} After notice, the APA requires that the agency promulgating the rule give all interested persons the opportunity to participate in the rulemaking.\textsuperscript{58}

The NLRB published Advanced Notice of Proposed Rulemaking on the issue of the appropriateness of the single location bargaining unit rule in June 1994.\textsuperscript{59} Notice of proposed rulemaking, as required by the APA,

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\textsuperscript{55} See American Hosp., 499 U.S. at 620. Section 9(b) of the Act requires that the NLRB determine the appropriate bargaining unit in each case. See 29 C.F.R. § 159(b) (1994). Section 9(a) of the Act provides that the representative “designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes” shall be the exclusive bargaining representative. See 29 C.F.R. § 159(a) (1995).

\textsuperscript{56} See 5 U.S.C. § 553(b) (1994) (governing agency rulemaking).

\textsuperscript{57} Id. § 553(b)(1)-(3).

\textsuperscript{58} See id. § 553(c) (stating that all interested persons shall be able to participate, “through submission of written data, views, or arguments with or without opportunity for oral presentation.”).

\textsuperscript{59} See Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 59 Fed. Reg. 28,501 (June 2, 1994) (to be codified at 29 C.F.R. pt. 103). The Board outlined several reasons why it was considering promulgating a rule, but specifically stated that it “has made no decision on the propriety of any form of rulemaking in this area,” and invited all interested parties to comment. Id.
was published on September 28, 1995.\textsuperscript{60} The Board set a comment period for interested parties who wished to submit comments on how the Board "may best fulfill its statutory obligation to determine an appropriate unit when a single location bargaining unit is requested."\textsuperscript{61} The deadline for all comments was the close of business April 12, 1996.\textsuperscript{62}

Furthermore, the House Small Business Committee slated a public hearing for March 7, 1996.\textsuperscript{63} Among the topics discussed at the hearing were the prospective effects of the Board’s proposed rulemaking on the issue of single location bargaining units and how the proposed rulemaking affects the competitiveness of small businesses.\textsuperscript{64} As a result of matters raised at the hearing, and requests by groups who attended, the Board extended the comment period to allow more organizations to voice their opinions on the rule.\textsuperscript{65}

Both the bulk of the commentary made during the House hearing, and the letters submitted to the NLRB, have attacked the proposed rule as being a deviation from present Board practice and as too pro-union.\textsuperscript{66} Those in opposition to this proposal dismiss the Board’s justifications for the rule as a mere smoke screen for its blatant efforts to promote unionization at the expense of private businesses.\textsuperscript{67}

\textsuperscript{60} See Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50,146 (Sept. 28, 1995) (to be codified at 29 C.F.R. pt. 103).

\textsuperscript{61} Id.


\textsuperscript{64} See id.

\textsuperscript{65} See Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 61 Fed. Reg. at 10,709.


\textsuperscript{67} See id.
III. THE BOARD’S MOTIVATION TO PROMULGATE THIS RULE

Questions regarding appropriate bargaining units are decided by a case-by-case adjudication process where the Board examines the facts of each case and determines the appropriate bargaining unit.68 The Board recognizes a presumption that the single plant unit is the appropriate unit.69 This presumption is based on Board decisions which note that section 9(b) of the NLRA lists the single plant unit as one of the units appropriate for collective bargaining.70 The presumption, however, is rebuttable. To determine whether the presumption has been rebutted, the Board will look at the degree of central control over day-to-day operations and labor relations; similarities in skills; functions and working conditions; the amount of employee interchange; the distance between locations; and any relevant bargaining history.71

The Board’s efforts to promulgate a rule on single location bargaining units stem from its desire to codify those factors which it feels to be the most determinative.72 The rulemakers contend that much of the current litigation concerning appropriate bargaining units is fueled by parties’ attempts to persuade the Board of the existence of certain facts or factors which the parties’ believe will be determinative.73 The purpose of the proposed rule, “is to let the public and practitioners know what is required for a single location unit to be found appropriate.”74 The Board advanced this new rule with the hopes that it will reduce the amount of bargaining unit determination litigation and facilitate more efficient use of Board resources.75

68. See Dixie Belle Mills, Inc., 139 N.L.R.B. 629, 631 (1962); see also infra note 83 and accompanying text (developing a presumption favoring single location bargaining units).
69. See Dixie Belle Mills, 139 N.L.R.B. at 631.
70. See id. at 631 n.4; 29 U.S.C. § 159(b) (1994).
72. See Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50,146, at 50,149 (Sept. 28, 1995). Litigants will no longer have to attempt to persuade the Board that certain facts exist, and argue the meaning of those facts, not knowing which will be determinative. See id.
73. See id.
74. Id. at 50,147. Nevertheless, that the Board will continue to decide new or unusual cases by adjudication through the extraordinary circumstances exception. See id.
75. See id. The Board predicts that with a codified bright-line rule, labor organizations and employers alike will be in a more knowledgeable position to negotiate, and there will likely be more bargaining unit stipulations. See id. at 50,149. The Board maintains that “knowing in advance what facts are determinative will eliminate much of the confusion and uncertainty inherent in the current approach.” Id.
IV. THE RULE

The proposed rule is a synthesis of factors the Board has found to be determinative in deciding the appropriateness of single location units. As proposed, the new rule would be codified at 29 C.F.R. pt. 103.40.76 The rule would apply to all employers over which the Board has jurisdiction, with three exceptions.77

The rule declares that an unrepresented single location unit will be found appropriate for the purposes of collective bargaining, provided:

(1) [t]hat 15 or more employees in the requested unit are employed at that location,
(2) [t]hat no other location of the employer is located within one mile of the requested location, and
(3) [t]hat a supervisor within the meaning of Section 2(11) of the National Labor Relations Act is present at the requested location for a regular and substantial period.78

The rule, as proposed, contains an “extraordinary circumstances” exception. This exception renders the rule inapplicable in extreme cases.79 Although the burden is on the labor organization to establish that the aforementioned elements exist for the rule to apply, the employer may show, by an offer of proof, that the elements are not satisfied or that extraordinary circumstances exist.80 Where one of the elements is not

76. See id. at 50,157-58.
77. See id. at 50,157. Excepted industries include: “public utilities; employers engaged primarily in the construction industry; and employers in the maritime industry in regard to their ocean-going vessels.” Id.
78. Id. at 50,157-58.
79. See id. at 50,158. Extraordinary circumstances will be found to exist if
10 percent or more of the unit employees have been temporarily transferred to other facilities of the employer for 10 percent or more of their time during the 12 month period preceding the filing of a petition for an election, or where no petition for election has been filed during the 12 month period preceding either the demand for recognition or the time when a bargaining obligation would arise.
Id.
80. See id. at 50,156. Although the exception provides a means for an employer to escape the reaches of the rule, the Board has declared that, like the health care rule, it is “our intent to construe the extraordinary circumstances exception narrowly, so that it does not provide an excuse, opportunity, or ‘loophole’ for redundant or unnecessary litigation and the concomitant delay that would ensue.” Id.
fulfilled, or an extraordinary circumstance exists, the Board will decide the unit determination by adjudication.\textsuperscript{81}

V. \textbf{MORE THAN THIRTY YEARS OF CASE LAW FOLLOWING THE REBUTTABLE PRESUMPTION}

In addressing the question of whether the requested single location unit presumption has been rebutted, the Board has taken a number of factors into consideration. The Board, over the years, has created "rules" of general applicability\textsuperscript{82} under which it will presume the single facility unit to be the most appropriate collective bargaining unit.

With its decision in \textit{Dixie Belle Mills, Inc.},\textsuperscript{83} the Board began to develop a presumption favoring single location bargaining units.\textsuperscript{84} Because a single plant unit is listed in section 9(b) of the NLRA as an appropriate unit, the Board concluded that, the single unit would be presumptively appropriate even if there was a more appropriate unit.\textsuperscript{85} The Board noted that the presumption will remain intact if there is no evidence that the single bargaining unit is inappropriate.\textsuperscript{86} Even where evidence is presented to rebut the presumption, however, the Board may still find the single location bargaining unit to be the appropriate unit.

For example, in \textit{Dixie Belle Mills}, the Board was forced to decide whether the appropriate unit included both the employer's manufacturing

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\item \textsuperscript{81} See \textit{id.} at 50,158.
\item \textsuperscript{82} See Appropriateness of Requested Single Location Bargaining Units, 60 Fed. Reg. at 50,149; Health Care Industry, Final Rule, 54 Fed. Reg. 16,336, 16,338 (1989) (noting that the Board has long made use of those "rules" of general applicability with regards to bargaining unit determinations).
\item \textsuperscript{83} 139 N.L.R.B. 629 (1962).
\item \textsuperscript{84} See \textit{id.} at 631; Haag Drug Co., 169 N.L.R.B. 877 (1968). In \textit{Haag}, the Board extended the rule, noting that the single location unit furthers certain policy considerations outlined in the NLRA. See \textit{id.} at 877. The Board in \textit{Haag} found that the purpose of section 9(b) is to, "assure employees the fullest freedom in exercising the rights guaranteed by this Act" and that the single location bargaining unit furthers this purpose. \textit{Id.} (quoting 29 U.S.C. § 159(b) (1988)). If there has been no evidence to "destroy the separate identity" of the unit, then the single location unit provides the employees' "fullest freedom." \textit{Haag Drug}, 169 N.L.R.B. at 877.
\item \textsuperscript{85} See \textit{Dixie Belle Mills}, 139 N.L.R.B. at 631.
\item \textsuperscript{86} See \textit{id.} The question presented in unit determination cases is whether the requested unit is an appropriate one, not whether it is the most appropriate one. \textit{See id.} The Act does not require that the bargaining unit approved by the Board is the only appropriate unit, or even the most appropriate one; all that is required is that the unit be an appropriate unit. \textit{See} Friendly Ice Cream Corp. v. NLRB, 705 F.2d 570, 574 (1st Cir. 1983); NLRB v. J.C. Penney Co., 620 F.2d 718, 719 (9th Cir. 1980); Haag Drug Co., 169 N.L.R.B. 877 (1968); Morand Bros. Beverage Co., 91 N.L.R.B. 409, 418 (1950).
\end{itemize}
plant and warehouse, or each entity separately.\textsuperscript{87} The Board found that the facts did not show "such a degree of integration," or "merger of operations" so as to require a rejection of the requested single location unit.\textsuperscript{88} The Board determined that while the operations of these two entities were integrated to the extent that they involved management planning, procurement and sales, coordination and allocation of materials and equipment and personnel and accounting services, all other functions were done through separate operations.\textsuperscript{89}

Through years of adjudication on this issue, the Board has identified factors which it claims to consider when determining whether or not the employer has succeeded in rebutting the single unit presumption. The Board has indicated, for example, that it looks to such factors as: prior bargaining history, the geographic proximity to other facilities of the same employer, the degree of day-to-day managerial responsibility exercised by the branch facility management, the frequency of employee interchange, and whether the requested single-facility unit constitutes a homogeneous, identifiable, and distinct employee grouping.\textsuperscript{90}

In formulating the proposed rule, the Board looked to the aforementioned indicia in determining whether or not to rebut the presumption.\textsuperscript{91} This "multi-factorial approach" was utilized in the Board’s decision in \textit{J & L Plate}.\textsuperscript{92} In that case, the Board found that the employer's policies regarding wages and benefits were centrally controlled, that the manufacturing operations were functionally integrated, and that job classifications and qualifications were similar.\textsuperscript{92} Nevertheless, these conditions were insufficient to rebut the single location unit presumption.\textsuperscript{94}

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    \item \textsuperscript{87} See \textit{Dixie Belle Mills}, 139 N.L.R.B. at 630.
    \item \textsuperscript{88} See id. at 632. The Board concluded that where a unit had not been so functionally integrated, or so effectively merged into a more comprehensive unit, so as to lose its separate identity— the single location unit will be presumed to be the appropriate unit. See id. at 631.
    \item \textsuperscript{89} See id. at 630-31.
    \item \textsuperscript{90} \textit{J & L Plate}, Inc., 310 N.L.R.B. 429 (1993); General Mills Restaurants, Inc., 300 N.L.R.B. 908, 910 (1990); \textit{Haag Drug}, 169 N.L.R.B. at 877-80; Kapok Tree Inn, 232 N.L.R.B. 702, 703 (1977); see also \textit{Esco Corp.}, 298 N.L.R.B. 837, 839 (1990) (including among the relevant factors: "the extent of local autonomy; similarity of the employee skills, functions, and working conditions; degree of employee interchange; distance between locations; and bargaining history, if any.").
    \item \textsuperscript{91} See generally Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50,146, 50,152-55 (1995) (identifying factors noted by the Board in prior single location cases, and revealing the origin of the proposed rule).
    \item \textsuperscript{92} 310 N.L.R.B. 429 (1993); see \textit{Esco}, 298 N.L.R.B. at 839; Bowie Hall Trucking, 290 N.L.R.B. 41, 42 (1988); \textit{Sol's}, 272 N.L.R.B. 621 (1984); Gray Drug Stores, 197 N.L.R.B. 924, 925 (1972); \textit{Dixie Belle Mills}, 139 N.L.R.B. at 631.
    \item \textsuperscript{93} See \textit{J & L Plate}, 310 N.L.R.B. at 429.
    \item \textsuperscript{94} See id.
\end{itemize}
By refusing to rebut the presumption, the Board rejected the employer's argument that the union had not offered evidence of local autonomy in the day-to-day operations. The Board found that the burden was on the employer to rebut the single unit presumption by introducing evidence which demonstrated a lack of autonomy. The decision considered the presumption to be more compelling than mere evidence of centralized control and functional integration. In *J & L Plate*, the Board categorized the evidence as insufficient to rebut the single location unit presumption, even though some evidence indicated that a multi-plant unit might have been appropriate.

The Board further elaborated on the factors it deemed material in resolving bargaining unit disputes in *General Mills Restaurants, Inc.* In arriving at its decision, the Board applied the relevant factors. Specifically, the average distance between the restaurants was seven miles, and there was no history of collective bargaining. Further, the Board found little evidence of employee interchange, and any that did occur was found to be voluntary, and done as a matter of convenience for employees rather than as a condition of employment. Permanent transfers only occurred eleven times within a combined work force of 185 employees. The Board also indicated that the local general managers retained sufficient authority at the individual locations to

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95. See id.
96. See id.
97. See id. The Board noted that it is the burden of the party opposing the unit to present evidence to overcome the presumption. See id.; *General Mills Restaurants*, 300 N.L.R.B. at 910-11. Furthermore, the Regional Director had "erred by construing the absence of evidence regarding local autonomy (i.e., that the record was supposedly silent) as being the equivalent of affirmatively presenting evidence to rebut that presumption." *J & L Plate*, 310 N.L.R.B. at 429.
98. See *J & L Plate*, 310 N.L.R.B. at 430. The Board concluded that, "on the balance the evidence presented does not establish that the J & L plant has been 'so effectively merged into a more comprehensive unit, or is so functionally integrated that it has lost its separate identity.'" Id. (quoting *Esco Corp.*, 298 N.L.R.B. 837, 839 (1990) (citing *Dixie Belle Mills*, 139 N.L.R.B. 629, 631 (1962)).
101. See id. at 908.
102. See id. at 911.
103. See id.
104. See id. Moreover, the Board noted that permanent transfers are less indicative of actual interchange. See id.
support the presumption. The Board gave no clear indication that one factor was more determinative than any of the others.

Significantly, the Board held that even though there were employee transfers among the various restaurant locations, and there was centralized administration, the single facility unit was appropriate. Furthermore, the Board reiterated that the presence of a general manager at each location whose responsibilities were to supervise the day-to-day activities of the employees, rate employee job performance, and affect employee job status was sufficient to support a single location unit.

A. The New Rule Will Not Significantly Disturb Single Location Bargaining Unit Precedent

When drafting the proposed rule, the Board was forced to discern which factors were truly determinative in finding the appropriate bargaining unit. Specifically, the Board selected temporary employee interchange, geographic proximity, local autonomy, and unit size as the most determinative factors for consideration. Although the Board has summarily omitted factors which it had previously noted to be determinative in past single location unit cases, the omissions will likely not substantially altered the results in single location bargaining unit cases.

The factors the NLRB omitted from the proposed rule include: functional integration, centralized control, common skills, permanent transfers, and bargaining history. Admittedly, although these factors have been excluded, Board decisions which have used these criterion in
the past would not have different outcomes if they were decided under the current proposal.\textsuperscript{112}

Although functional integration and centralized management are two elements which the Board has considered in past unit determinations, they were not singularly determinative.\textsuperscript{113} Moreover, the Board has found that evidence of the above two elements, without more, will not be enough to overcome the presumption of the appropriateness of the single unit.\textsuperscript{114} In \textit{Courier Dispatch}, for example, despite evidence of functional integration\textsuperscript{115} and centralized supervision\textsuperscript{116} among the employer’s New England facilities, the Board looked only to those primary determinative factors identified in the rule.\textsuperscript{117}

In \textit{Courier Dispatch}, the Board specifically identified employee interchange as a “critical factor” which cannot be clearly established by mere integration.\textsuperscript{118} Furthermore, the fact that the individual facilities each had a local supervisor, who was responsible for the day-to-day operation of the unit, was not overshadowed by the existence of a regional director who had some control over personnel.\textsuperscript{119} In \textit{Courier Dispatch}, the Board highlighted the geographic distance between the facilities and the lack of significant employee interchange as particularly determinative factors in finding that the presumption had not been rebutted.\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{113} See \textit{Courier Dispatch Group, 311 N.L.R.B. at 728.}
\item \textsuperscript{114} See \textit{id. at 728; J & L Plate, 310 N.L.R.B. at 430; Esco, 298 N.L.R.B. at 840; Hegins, 255 N.L.R.B. at 1236; Penn Color, 249 N.L.R.B. at 1118; Black and Decker, 147 N.L.R.B. at 828.}
\item \textsuperscript{115} See \textit{Courier Dispatch Group, 311 N.L.R.B. at 731.}
\item \textsuperscript{116} See \textit{id.} The Board agreed with the employer that administrative and personnel functions were centralized in that the ultimate responsibility for the fate of the employee was decided at a regional level. See \textit{id.}
\item \textsuperscript{117} See \textit{id.}
\item \textsuperscript{118} See \textit{id.} The Board refused to apply significant weight to facts which suggested some employee interchange evidenced by occasional employee back-up and brief substitutions. See \textit{id. at 731-32; Bowie Hall Trucking, 290 N.L.R.B. 41, 43 n.11 (1988); cf. Dayton Transport Corp., 270 N.L.R.B. 1114, 1115-16 (1984).}
\item \textsuperscript{119} See \textit{Courier Dispatch Group, 311 N.L.R.B. at 731 (citing Penn Color, Inc., 249 N.L.R.B. 1117, 1119 (1980) (finding that where the plant managers “handle the day-to-day supervision of their employees, we find this more significant in determining the appropriateness of the unit sought than the existence of central record-keeping or product integration.”)); Rezetti’s Market, 238 N.L.R.B. 174, 176 (1978); \textit{Haag Drug}, 169 N.L.R.B. at 878 (1968); \textit{Black & Decker Mfg.}, 147 N.L.R.B. at 828 (1964).}
\item \textsuperscript{120} \textit{Courier Dispatch Group, 311 N.L.R.B. at 731-32 (1993); see also Bowie Hall Trucking, 290 N.L.R.B. at 43 (1988); United Artists Comm., 280 N.L.R.B. 1056, 1064 (1986).}
\end{itemize}
The outcome in this case would likely be the same if the proposed bargaining unit rule is applied. The facts of *Courier Dispatch* satisfy the following elements that the proposed rule requires: geographic distance,121 the presence of a statutory supervisor,122 and the requisite number of employees.123 There was also insufficient evidence to prove significant employee interchange to qualify under the extraordinary circumstances exception.124 In short, this decision would not likely be disturbed by the implementation of this rule.

Among the other factors which the Board has considered in past bargaining unit determinations, but which it has not chosen to include in the proposed rulemaking are: permanent transfers, bargaining history, centralized control, and functional integration. Though it seems that lip-service has been given to these factors in the past, the Board has failed to find any of these alone to be sufficient to rebut the single unit presumption.

Where the union or the employer has challenged the appropriateness of the current bargaining unit,125 the Board has looked to past bargaining history to determine whether the current unit is still appropriate.126 It seems clear that where a unit is unrepresented, bargaining history should not play a substantial role in determining the appropriateness of the employee requested single location unit.

For example, the Board’s decision in *Rock-Tenn Co.*,127 demonstrated that a finding of a rich bargaining history is not solely determinative in a unit clarification case.128 In *Rock-Tenn*, a single plant unit was found to be the only appropriate unit, despite a fifteen year collective bargaining history as a two-plant unit.129 Again, as in the original representation cases, the Board looked to more determinative factors to

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121. *Courier Dispatch Group*, 311 N.L.R.B. at 729. The distances between the facility in question and the employer’s other facilities were 238 miles, 103 miles, 93 miles, 43 miles, 40 miles, and 38 miles. See id.
122. See id.
123. See id. at 730. The employer had fifteen drivers who were based at the requested facility. See id.
124. See id. at 730-31. The evidence offered at the adjudicative proceeding seemed to indicate that there had not been enough interchange in order to meet the “10 percent of employees for 10 percent of the time” exception. See id.
125. See generally id. at 731.
128. See id. at 773.
129. Id.
indicate appropriateness of the bargaining unit. The Board found the fact that there was no interchange among the employees of the two facilities, and that there was individual plant autonomy by way of decentralized labor relations control in the hands of separate plant managers and personnel officers to be determinative.

The proposed rule would not apply in this instance, because it was a unit clarification action. The Board's dismissal of the importance of bargaining history in a unit clarification case, however, seems to indicate that the Board would also downplay its importance in deciding an original representation action. The "compelling circumstances" which were found to supersede the weight of the bargaining history have been included in the elements of the proposed rule.

In Batesville Casket Co., the Board was again faced with the issue of whether or not a multi-plant unit was still appropriate. The Board refused to find a single unit appropriate in a unit clarification action where the determinative factors, as identified in the proposed rulemaking did not exist. Because the employer had not presented sufficient evidence of a substantial recent change in the bargaining unit, the Board refused to hold that the single location unit was the only appropriate one. There, again, the Board considered proof of a longstanding collective bargaining relationship, yet found that it was not singularly determinative.

Although neither Rock-Tenn, nor Batesville Casket would have fallen within the proposed rule, both cases depict the Board's refusal to give significant weight to bargaining history in light of the more determinative elements which the Board has integrated into its proposed rule. With regards to the absence of permanent transfers, the Board

130. See id. at 773.

131. See id. The Board found significant changes in the organizational structure and operation of the companies two facilities that negated any community of interest that might have existed previously among the two plants, and that such constituted "compelling circumstances" for disregarding the bargaining history. Id.

132. Id. (citing Crown Zellerbach Corp., 246 N.L.R.B. 202, 204 (1979) (finding that where there are "compelling circumstances," the bargaining history may be overlooked); see Capehart-Farnsworth Co., 111 N.L.R.B. 800, 802 (1955) ("Although we accord great weight to collective bargaining history, we do not regard it as determinative in deciding the appropriateness of a multi-plant unit . . . ."); cf. Mennen Co., 108 N.L.R.B. 355, 356 (1954) (noting that the production and warehousing operations were carried on at different locations several miles apart).


134. Id. at 796.

135. See id. at 797.

136. See id.

137. See id.
recently clarified that temporary interchange has proven to be much more significant in determining if the presumption that a single location bargaining unit is appropriate.138

Two other factors which have in the past been considered in bargaining unit determination, but which have been left out of the proposed rule are centralized control and functional integration. The importance of these two elements, however, has also been minimized by the Board in the past.139 In Haag Drug, for example, the Board acknowledged that there was a high degree of both centralized administration as well as integration in the retail chain industry.140 The Board, however, found "little significance" in these factors for "determining whether or not the employees at a single location comprise an appropriate unit for bargaining."141 Rather, the Board's determination focused on control of the day to day matters of the individual locations, and whether there was someone on the premises who had sufficient control thereof.142

B. Board Decisions That Might Be Disturbed

There are cases in which it appears that the result would be different if decided in accordance with the proposed rule. Nevertheless, despite a slight departure from Board precedent in a few instances, the proposed rule would present minimal disturbance to settled case law.

In Globe Furniture Rentals,143 for example, the Board ruled that a multi-store unit was the only appropriate unit where the shortest distance between the five stores was two miles, and the farthest distance was twenty five miles.144 Each store had a manager who had some

138. See Sol's, 272 N.L.R.B. 621, 623 (1984); General Mills Restaurants, 300 N.L.R.B. at 911 (1990). In General Mills Restaurants, the Board even took note that permanent transfers are not a significant indication of actual employee interchange. See id.
139. See, e.g., Haag Drug, 169 N.L.R.B. at 878 (1968); Courier Dispatch Group, 311 N.L.R.B. at 728 (1993) (finding that despite evidence of centralized administration, offered by the employer, the lack of evidence of overlapping supervision and transfers was determinative in holding that the single unit presumption had not been rebutted).
140. See id.
141. Id.
142. See id. The Board specifically indicated, that despite the presence of some degree of centralized control and integration, "it is clear that no factors are present to rebut the presumption of the appropriateness of the single-store unit." Id at 879.
144. Id.
control over the day-to-day operations. 145 Although this case appears as though it would fit into the rule as a single unit, a closer examination of the Board’s reasoning indicates that it might not.

The Board found the degree of autonomy of the local managers to be inconsequential with respect to labor relations and personnel policies and procedures. 146 From the evidence provided, it was questionable whether local managers, who had as little authority as the managers in Globe Furniture Rentals, could be considered supervisors under the Act. 147 Notwithstanding the supervisory status of the local managers, 148 the Board’s primary justification for rebutting the single unit presumption was the significant degree of employee interchange. 149 Because the evidence demonstrated that there was no geographic proximity, operational centralization, local autonomy, or substantial employee interchange, the employees at the requested location were not so distinct and separate as to warrant the establishment of a separate unit. 150

Applying the proposed rule to the seemingly contradictory holding in Globe Furniture Rentals, it becomes evident that the outcome would probably have been the same. Although there was not sufficient evidence to determine whether the employees would have been able to show that the local managers were statutory supervisors, it seems fairly certain that there was sufficient employee interchange for the exception to have applied. Significantly, the employer presented evidence that there had been seventy-seven temporary and permanent transfers in the two years prior to the action. 151 Many more transfers which were too temporary to have been documented, because they did not cross over payroll periods, also took place between the employers five locations. 152 Where Globe Furniture Rentals employed a total of seventy-five unit employees

145. See id. at 289.
146. See id. at 289. All policies concerning wage, hours, and terms and conditions of employment were formulated by regional directors and personnel managers who controlled all five stores. See id.
147. See infra text accompanying note 170.
148. The Board concedes that the managers possess little or no actual authority, and could be considered at best statutory supervisors. See Globe Furniture Rentals, 298 N.L.R.B. at 289-90.
149. See id. In fact, the Board stated, “we find that the record evidence shows a substantial and significant amount of employee interchange.” Id. at 290.
150. Id.
151. See id. at 290.
152. See id.
at its five locations,\textsuperscript{153} it seems most likely that the exception to the proposed rule would have applied to this case.

Another case which seemingly provides a problem for proponents of the proposed rule is \textit{NLRB v. Chicago Health & Tennis Clubs, Inc.}\textsuperscript{154} In that case, the Seventh Circuit reviewed Board decisions with regard to the single location presumption.\textsuperscript{155} With respect to \textit{Saxon Paints}, the court set aside the Board's bargaining order, holding that the single store unit determination was arbitrary and unreasonable.\textsuperscript{156}

The court held that the Board erred when it determined the most relevant factors.\textsuperscript{157} It found evidence which indicated that Saxon Paints was highly integrated,\textsuperscript{158} and that personnel, labor related policies, and actual operations were centrally located.\textsuperscript{159} Furthermore, evidence indicated that there was frequent temporary transfer of employees, as well as a history of collective bargaining.\textsuperscript{160}

Finally, and perhaps most determinative, was the court's conclusion that the local store managers had little, if any, authority.\textsuperscript{161} The local store manager had absolutely no authority with regard to any labor relations and was subject to complete detailed instructions from the

\begin{thebibliography}{9}
\bibitem{153} See \textit{id.} at 288.
\bibitem{154} 567 F.2d 331 (7th Cir. 1977).
\bibitem{155} The court reviewed two Board decisions, \textit{Saxon Paints} and \textit{Chicago Health Clubs}. See \textit{id.} at 336, 339. For purposes of relevant analysis, this note will address the court's review of only the \textit{Saxon Paints} ruling.
\bibitem{156} See \textit{Chicago Health & Tennis Clubs}, 567 F.2d at 339. Board determinations are subject to limited judicial review. See \textit{id.} at 335. The court must determine whether the Board's unit determinations were unreasonable, NLRB v. Krieger-Ragsdale & Co., 379 F.2d 517, 521 (7th Cir. 1967); whether they were arbitrary or capricious, \textit{State Farm}, 411 F.2d at 358; or whether they were lacking the support of substantial evidence, NLRB v. Pinkerton's Inc., 416 F.2d 627, 630 (7th Cir. 1969).
\bibitem{157} See \textit{Chicago Health & Tennis Clubs}, 567 F.2d at 336 (noting that the Board placed too much weight on the role of the local store manager).
\bibitem{158} See \textit{id.} at 336. All the stores sell the same things, the layout of each store is similar, and they run the same sales and promotions. See \textit{id.} With respect to the integration of their operations, "the stores are 'as much alike in this respect as peas in a pod.'" \textit{id.} (quoting NLRB v. Frisch's Big Boy III-Mar, Inc., 356 F.2d 895, 896 (7th Cir. 1966)).
\bibitem{159} See \textit{Chicago Health} \& \textit{Tennis Clubs}, 567 F.2d at 336.
\bibitem{160} See \textit{id.} at 338.
\bibitem{161} See \textit{id.} at 337. The store manager’s involvement in labor relations and personnel matters was severely limited. See \textit{id.} The manager had no authority to

\begin{itemize}
\item[(a)] hire new employees;
\item[(b)] grant promotions, wage increases or changes in job classifications;
\item[(c)] discharge or suspend employees for disciplinary reasons;
\item[(d)] lay-off employees;
\item[(e)] handle employee grievances;
\item[(f)] grant requests for vacations or leaves of absence;
\item[(g)] permanently or temporarily transfer between any of the stores; and
\item[(h)] post the weekly work schedule without prior approval by the district manager.
\end{itemize}

\textit{Id.}
central office. Based on these conclusions, the appellate court found that the Board erred in its judgment. The court resolved, "it is apparent that there is no local autonomy among the individual stores and that the store managers lack the authority to resolve issues which would be subject to collective bargaining."  

The court analogized the Saxon Paint case to Frisch’s Big Boy, where in a similar factual scenario, the court determined that the individual restaurants lacked sufficient autonomy. In Frisch’s Big Boy, as in Chicago Health & Tennis Clubs, the single store unit was found inappropriate because the local managers were not involved in any significant elements of employment relations and could not affect employees in the “context of collective bargaining.”  

The court in Chicago Health & Tennis Clubs seemingly gave weight to factors not included in the proposed rulemaking. They considered functional integration, similarity of wages and working conditions, centralized management, and bargaining history. The court, however, was careful to note that it found no single factor determinative, implying, rather that it gave equal weight to all elements considered. On its face, this case seems to devalue the proposed rule, as it considered certain factors not included in the proposed rulemaking.

Be that as it may, the outcome in Chicago Health & Tennis Clubs would probably be no different under the new rule as proposed. Applying the elements to the facts of this case demonstrates that the petitioners would likely not be able to fulfill all of the requirements. Although, the employee interchange extraordinary circumstances exception will likely not apply, the lack of local autonomy through a statutory supervisor will keep the rule from attaching. In overturning the Board’s decision, the court indicated that it felt that the Board had substantially “exaggerated the control exercised by the store manager.” Moreover, based on their total lack of impact on labor relations, the local managers in the Chicago Health & Tennis Clubs case, will likely not be proven to be

162. See id.
163. See id.
164. Id.; see NLRB v. Frisch’s Big Boy Ill-Mar, Inc., 356 F.2d 895, 897 (7th Cir. 1966).
165. Frisch’s Big Boy, 356 F.2d at 897.
166. See Chicago Health & Tennis Club, 577 F.2d at 339.
167. Chicago Health & Tennis Club, 567 F.2d at 339; see Frisch’s Big Boy, 356 F.2d at 897.
169. See id.
170. See id. at 335 (citing State Farm Mut., 411 F.2d at 358).
171. Id. at 336.
supervisors within the meaning of section 2(11) of the Act.\textsuperscript{172} Therefore, where the petitioner will not be able to provide proof of the existence of each of the elements of the proposed rule, the case would be decided by adjudication and the result would be the same.

VI. IS THE RULE PRO-UNION?

Some critics have classified the rule as pro-union and slanted against the employer. This revelation is no more surprising than that of previous commentators who have accused the NLRB of implementing primarily pro-union policies.\textsuperscript{173} It is quite obvious that smaller bargaining units are preferred given the Board’s already existing precedent.\textsuperscript{174} Furthermore, it is accepted for the most part, that unions prefer, and employers dislike smaller units,\textsuperscript{175} because they are both easier to organize\textsuperscript{176} and facilitate effective collective bargaining.\textsuperscript{177} Therefore, rules which favor smaller units are considered to be pro-organizational, or pro-union.\textsuperscript{178}

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\textsuperscript{172} See id. at 336 (stating that there is insufficient evidence to support a finding that the store manager possesses autonomy and authority over the operations of the store); section 2(11) defines a “supervisor” as [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.
\textsuperscript{174} The very nature of the presumption is to assure that even where another unit might be more appropriate, when requested, the single unit will be granted. See discussion supra Part V.
\textsuperscript{175} See Flynn, supra note 173, at 402.
\textsuperscript{176} See Flynn, supra note 173, at 403 (citing ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 67-68 (1976)); Christine G. Cooper & Nancy J. Brent, The Nursing Profession and the Right to Separate Representation, 58 CHI.-KENT L. REV. 1053, 1063 (1982); see also Note, The National Labor Relations Board’s Proposed Rules on Health Care Bargaining Units, 76 VA. L. REV. 115, 121 (1990) (noting that unions have noticeably greater success in elections when the units are small).
\textsuperscript{177} See Flynn, supra note 173, at 403 (citing American Hosp. Ass’n v. NLRB, 899 F.2d 651 (7th Cir. 1990), aff’d, 499 U.S. 606 (1991)). In American Hospital, Judge Posner explained the reason that unions prefer smaller units is because they are easier to organize, as it is easier to get members of the unit to agree on a mutually advantageous course of collective bargaining. Diversity among the proposed unit makes it more likely that conflicts of interest will develop, and it could be substantially more difficult to gain majority support, or having gained it, to bargain effectively. See Flynn, supra note 172, at 403 n.67, (citing American Hosp., 899 F.2d at 654).
\textsuperscript{178} See Flynn, supra note 173, at 403.
\end{flushright}
Such a determination, however, is inconsequential in evaluating the viability of the proposed rule. The NLRB was created to implement a national labor policy guided by the structure set forth in the NLRA.\textsuperscript{179} As such, the Board is directed to find a bargaining unit “appropriate for the purposes of collective bargaining,”\textsuperscript{180} which “assures the employee the fullest freedom in exercising the rights guaranteed” by the NLRA.\textsuperscript{181} This language can, and has been, read to suggest that the Board should find, where requested, smaller units as opposed to larger ones.\textsuperscript{182} Therefore, the fact that the proposed rule might favor unions, in favoring the finding of smaller units, is inconsequential as to whether Board should promulgate a rule in this area.

\textbf{VII. CONCLUSION}

The Board has the authority under the APA and the NLRA to promulgate rules which facilitate the implementation of Board policy.\textsuperscript{183} Specifically, the Board has the power to make rules regarding appropriate single location bargaining units.\textsuperscript{184}

The proposed rule provides clear-cut lines along which labor organizations and employers will be able to establish, without litigation, the appropriate bargaining unit in a given situation. Furthermore, with the maintenance of adjudication in new, extraordinary, and unusual circumstances, the rule as proposed will result in little, if any, deviation from established Board precedent.

The proposed rule has met with significant opposition from those who advance that this is just another area where the Board is sacrificing the interests of private business in order to advance those of unionization. While this is not entirely false, this position is futile in lieu of the NLRB’s current predicament in this era of government downsizing and limited resources. More NLRB rulemaking is inevitable.

The mere fact that this rule might advance the interests of unions as it favors single location units, seems immaterial. The proposed rule,

\begin{itemize}
\item \textsuperscript{179} See 29 U.S.C. § 153 (1994).
\item \textsuperscript{180} Id. § 159(b).
\item \textsuperscript{181} Id.
\item \textsuperscript{182} See Flynn, supra note 173, at 403 (citing American Hosp., 899 F.2d at 654); see also Cooper & Brent, supra note 176, at 1064 (reasoning that because greater homogeneity of employee interests effectuates the rights to organize and bargain collectively, which are guaranteed by the Act, the Board’s preference for smaller units fulfills the mandate of section 9(b)).
\item \textsuperscript{183} See supra notes 15-48 and accompanying text.
\item \textsuperscript{184} See supra notes 49-67 and accompanying text.
\end{itemize}
which was properly formulated and presented for public comment, will not be held to be arbitrary and capricious. Further, in light of the pending appropriations bill, it is highly unlikely that opposition to this rule will have to resort to challenging the proposal on legal grounds.185

In a world of special interest politics, however, it is not surprising that this issue will be decided on capital hill. Such a resolution may or may not be proper in this instance. Yet with the Board’s legal authority to promulgate a rule in this area validated by the Supreme Court via *American Hospital Ass’n*, those opposed to Board rulemaking may not be so lucky in the future as to have Congress come to the rescue by administering the all powerful pocket book veto to supersede this agency’s initiative.

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185. With the end of the comment period, opponents of the rule were elated to see the introduction of an appropriations bill which specifically identified the Board’s proposal. *See* H.R. 3755, 104th Cong. (1996). Included in the budget bill are funds appropriated to the NLRB, provided “[t]hat none of the funds made available by this Act shall be used in any way to promulgate a final rule (altering 29 C.F.R. part 103) regarding single location bargaining units in representation cases.” *Id.*

At the time of the publication of this Note the budget bill which included the above provision had passed in the House, 142 CONG. REC. H7475 (July 11, 1996), and was being considered by the Senate. *See* 142 CONG. REC. D928 (Sept. 12, 1996).