Justices' Coming Fisheries Ruling May Foster NLRA Certainty

By **Corey Franklin** (October 17, 2023)

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Practitioners attuned to the National Labor Relations Board's everchanging interpretations of the National Labor Relations Act will attest that the only certainty in their practice is uncertainty.

Dissents offered by board members while sitting in the partisan minority commonly become majority holdings as soon as the partisan balance flips. A few years later, when the partisan balance flips back, the process repeats itself.

It suffices to say federal labor law, as interpreted and applied by the NLRB, lacks anything resembling the stability and predictability associated with the practice of corporate law before the Delaware Chancery Court.

As fundamental tenants of American labor law continue to shift dramatically every few years, good faith compliance becomes increasingly more difficult and outcomes less predictable. The board's frequent retroactive application of its decisions further undermines good faith compliance.

A party acting in firm accordance with the board's interpretation of the act may one day, without warning, be deemed to have violated the act.

Broad deference applied by courts reviewing the board's decisions serves to encourage unpredictability. Unpredictability renders compliance difficult for employers and leaves unions and employees to question the scope of their protection under the act.

Earlier this year, the U.S. Supreme Court granted certiorari in Loper Bright Enterprises, v. Raimondo, placing the question of judicial deference to legal interpretations by federal agencies, like the board, squarely before the court.

Courts reviewing the board's interpretations of the act currently apply the standard of review developed under Chevron v. Natural Resources Defense Council.[1]

In Chevron, the Supreme Court in 1984 held that courts should defer to an agency's interpretation of an ambiguous statute if the agency's interpretation is reasonable. Though Chevron deference, as it is colloquially known, has guided judicial review of agency decisions for nearly 40 years, its application has become increasingly controversial.

Among other piques, its critics contend the standard violates separation of powers by vesting the executive branch with judicial power[2] and due process guarantees by permitting agencies to decide what an ambiguous law means after a regulated party has acted, denying them fair notice of the conduct forbidden or required.[3]

To date, practitioners suggesting courts should abandon the application of Chevron deference to the NLRB's decisions have not found success.[4] That soon may change.

In the 2019 Kisor v. Wilkie decision, the Supreme Court effectively diminished an analogous standard applied to determine when an agency's interpretations of its own ambiguous regulations should receive judicial deference, the so-called Auer deference.[5]

The court's plurality in Kisor declined to overturn Auer altogether, preferring instead to reduce its holding "to the role of a tin god — officious but ultimately powerless." However, Justice Neil Gorsuch's concurrence delivered a forceful argument against courts subordinating their judgment on the meaning of a regulation to administrative personnel.

Justice Gorsuch's argument echoed previously espoused critiques of administrative deference founded on prioritization of Congress' role in making laws and the judiciary's role in interpreting their application.[6]

In its current term, the U.S. Supreme Court will decide a facial challenge to Chevron's ongoing vitality.[7] Loper Bright involves a suit by several small commercial fishing companies against the National Marine Fisheries Service alleging a fishery conservation statute did not authorize the service to impose a rule requiring herring fisherman to accommodate a government monitor on their boats and to pay the monitor's wages.

Loper Bright asserts the relevant statute does not support the service's imposition of such a requirement. U.S. Court of Appeals for the District of Columbia Circuit deferred to the service's interpretation of the extant statute and ruled against Loper Bright.

If the Supreme Court reverses the holding of the D.C. Circuit, its decision will likely have significant implications for the administrative state as we know it and for the board in particular.

The board's administration of the act is not analogous to the narrow gap-filling function performed by the U.S. Environmental Protection Agency in Chevron or the regulation the Marine Fisheries Service adopted through notice and comment rulemaking at issue in Loper Bright.

The NLRB relies almost exclusively on adjudication to create binding interpretations of the act. The board does not premise its holdings on the narrow scientific or technical expertise of its career staff.

Instead, its decisions reflect broad policy judgments and ideological preferences espoused by partisan political appointees. And, much to the consternation of employers and unions alike, they increasingly have fairly short lifespans.

In cases concerning the nature and scope of employee rights under the NLRA, federal courts defer to the board's reasonable interpretations of the NLRA under Chevron.

Perhaps unsurprisingly, this lenient approach appears to have emboldened independent federal agencies like the board to constantly change positions, pursue policies that expand their authority, and impose new regulatory obligations without congressional direction and with only milquetoast judicial oversight.

Indeed, because it constantly oscillates between divergent interpretations of the act, the board has rendered the act profoundly unstable. Somewhat ironically, the board's own policy of nonacquiescence to circuit court rulings it disagrees with only serves to exacerbate this instability and unpredictability of outcomes.[8]

The board's novel interpretation and application of the act in its most controversial Aug. 25 decision, Cemex Construction Materials Inc., appears to leave no shortage of appealable issues.[9] However, three other recent decisions offer more straightforward examples of

interpretations of the act that, on their face, appear to exceed the scope of the agency's statutory authority.

As such, these decisions appear particularly prone to appellate reversal in the absence of Chevron deference.

- In the Aug. 26 American Federation for Children Inc. decision, the board interpreted Section 7 of the act as covering concerted advocacy by statutory employees on behalf of nonemployees.[10] Its holding overturned a prior decision that found "mutual aid or protection" did not encompass efforts to advocate on behalf of individuals who do not meet the definition of "employee" under Section 2(3) of the act.

- In the Feb. 21 McLaren Macomb decision, the board ruled an employer violates Section 7 by proffering employees separation agreements that included broad confidentiality and nondisparagement waivers. It premised its holding on the notion that such clauses impede the exercise of all former employees' Section 7 rights.[11] Section 2(3) of the act defines the term "employee" and expressly states the act only applies to former employees "whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" and have "not obtained any other regular and substantially equivalent employment."

- In the Aug. 25 Miller Plastic Products Inc. decision, the board reexamined whether its definition of "concerted activities" included an individual employee's complaints to management.[12] The decision overturned a 2019 holding that provided a five-factor test for examining whether a single employee's complaint constituted a "group activity." Under the board's new definition, a lone employee's conduct may be deemed "concerted activity without any evidence that the employee engaged in group activity or tried to induce any such activity. Indeed, under this new test, the board may find an employee's conduct protected if it merely could lead to group action sometime later.

Nearly 20 years before its holding in Chevron, the Supreme Court, in American Shipbuilding Co. v. NLRB held in 1965 that the board lacks the "general authority to define national labor policy by balancing the competing interests of labor and management."[13]

And with its 1965 ruining in NLRB v. Brown, the court held that "courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[14]

Still earlier, in the 1949 Colgate-Palmolive-Peet Co. v. NLRB decision, the court observed that the policy of Congress "cannot be defeated by the board's policy, which would make an unfair labor practice out of that which is authorized by the Act."[15]

In the 2018 Epic Systems Corp. v. Lewis decision,[16] the Supreme Court refused to afford Chevron deference to the NLRB's interpretation of the NLRA and the Federal Arbitration Act.

Rejecting the NLRB's expansive application of Section 7, the court upheld the validity of employment agreements containing class and collective action waivers. The court applied a narrow interpretation of Section 7, flatly rejecting the dissent's application of "a vast construction on Section 7's language noting "a statute's meaning does not always 'turn solely' on the broadest imaginable 'definitions of its component words.'"[17]

Given the court's narrow construction of Section 7 in Epic Systems, one would not expect the board's recent decisions espousing expansive and, in some cases, novel interpretations of the act's coverage to receive a favorable appellate treatment in the absence of Chevron deference.[18]

Applying Chevron deference to the board's rulings serves the interests of neither employers nor unions. Chevron deference all but ensures the board will continue its interminable cycle of aligning its interpretation of the act in lockstep with the policy prerogatives of the reigning presidential administration.

A predictable body of law benefits all sides. With it, employers can act with confidence that their conduct will not later be deemed an unfair labor practice and unions can identify both the limits of their rights and the corresponding point at which employer conduct infringes upon the protections afforded under the act.

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[1] Chevron, U.S.A. Inc. v. Nat. Res. Def. Council (NRDC) Inc., 467 U.S. 837 (1984).

[2] Indeed, it has been observed that Chevron deference can compel a court to adopt "reasonable" statutory interpretations it deems inferior to alternatives, including those the court may have previously developed. See, e.g., Kennedy v. Butler Fin. Sols. LLC, 2009 WL 290471 *4 ("The FTC's regulation strikes the Court as reasonable, though perhaps not the best interpretation of the law."); Padilla-Caldera v. Holder, 637 F.3d 1140, 1147-52 (10th Cir. 2011)(holding Chevron required the court to defer to a the Bureau of Immigration Appeals interpretation of the Immigration and Nationality Act over its own prior interpretation of the same provision.); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005)("Chevron teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative.").

[3] FCC v. Fox Television Stations Inc., 567 U.S. 239, 253 (2012).

[4] See, e.g., United Natural Foods Inc. v. NLRB, 66 F.4th 536, 544 n.9 (2023).

[5] Kisor v. Wilke, 139 S.Ct. 2400, 2414-18 (2019)(clarifying the extent to which the Supreme Court has cabined the scope of Auer deference); Auer v. Robbins, 519 U.S. 452 (1997).

[6] See, e.g., De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015).

[7] The Supreme Court granted certiorari to resolve the following question: "Whether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Loper Bright Enterprises, et al. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), cert. granted 143 S.Ct. 2429 (2023).

[8] See, e.g., Heartland Plymouth Court MI LLC v. NLRB, 838 F.3d 16 (2016)(sanctioning the Board for litigating in bad faith under its nonacquiesence policy and observing "the NLRB's history with nonacquiescence reveals 'its primary goal is ... to see its interpretation of the federal labor laws prevail in as many cases as possible, rather than to change contrary law in particular circuits or ... serve as a percolator for the Supreme Court.'").

[9] 372 NLRB No. 130, 2023 WL 5506930 *44-46 (2023)(Member Kaplan, dissenting in part).

[10] 372 NLRB N0. 137 (August 26, 2023).

[11] McLaren Macomb, 372 NLRB No. 58, 2023 WL 2158775, at *7 (Feb. 21, 2023).

[12] 372 NLRB No.134 (2023).

[13] American Shipbuilding Co. v. NLRB, 380 U.S. 300, 316 (1965).

[14] NLRB v. Brown, 380 U.S. 278, 291-92 (1965)("Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute ... Congress has not given the Board untrammeled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent.").

[15] Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 363 (1949).

[16] Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1625-26 (2018)("All of which suggests that the term "other concerted activities" should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation.").

[17] Id. at 1631.

[18] Between 1993 and 2020, the NLRB prevailed in nearly 84% of cases challenging its decisions where the reviewing court relied on Chevron. But, where a reviewing court did not apply Chevron deference in any form, the NLRB's interpretation of the Act survived judicial scrutiny only 36.4% of the time. Amy Semet, Statutory Interpretation and Chevron Deference in the Appellate Courts: An Empirical Analysis, 12 U.C. Irvine L. Review 621 (2022).