# MUST THE NLRB FOLLOW RULE 56 IN ITS SUMMARY JUDGMENT OPINIONS?

*R. Pepper Crutcher, Jr.*



## INTRODUCTION

In the Wagner Act,[1] Congress created an independent agency, the National Labor Relations Board ("NLRB"), to police union-employer relations through two sorts of proceedings. Representation cases resolve disputes regarding employee selection of union representatives for collective bargaining. Unfair labor practice cases enforce the NLRB's regulation of collective bargaining.[2] As amended in 1947, section 10(b) of the act sets certain ground rules for unfair labor practice proceedings. Among them is that:

[1] National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151-169.

[2] The NLRB's unfair labor practice cases are a form of adjudication under the Administrative Procedure Act, 5 U.S.C. §§ 551-559.

> Any such proceeding shall, *so far as practicable*, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.[3]

The NLRB has pasted this text into its Statement of Procedures.[4] But, as explained below, and based mainly on legislative history, the NLRB understands "so far as practicable" as a grant of a complete agency discretion to set and administer its own set of procedural rules, unconstrained by the text of comparable Federal Rules of Civil Procedure.[5] Perhaps the NLRB has failed to notice the sea change in statutory interpretation that makes its position tenuous.

## I. STATUTORY INTERPRETATION THEN AND NOW

"You see, out there it's the 1990s, but in this house, it's 1954," said Tony Soprano to Meadow Soprano in *The Sopranos* episode, *Nobody Knows Anything*.[6] In the Jurassic period of judicial review of agency actions, it was fashionable to cherry-pick legislative history to support preferred policy outcomes. Later, judicial deference became all the rage. Today, whatever remains of *Chevron*'s deference is set up to be whacked like Tommy DeVito.[7] Legislative history had a closed casket funeral in *Bostock v. Clayton County*.[8] If the NLRB's discretion to ignore Federal Rules of Civil Procedure is to be defended successfully, it must be defended on good textualist ground. Is there any?

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[3] 29 U.S.C. § 160(b) (emphasis added).

[4] 29 C.F.R. § 101.10 (2022).

[5] *See* 80 CONG. REC. 6517 (1947).

[6] *The Sopranos: Nobody Knows Anything* (HBO Mar. 21, 1999), https://www.hbo.com/the-sopranos/season-1/11-nobody-knows-anything [https://perma.cc/S2L4-D3DS].

[7] Joe Pesci's character in the movie GOODFELLAS (Warner Bros. 1990). *See* Buffington v. McDonough, 143 S. Ct. 14, 16 (2022) (Gorsuch, J., dissenting) (concluding that *Chevron* deference "deserves a tombstone no one can miss.").

[8] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

## II. BY THE WAY, THE LEGISLATIVE HISTORY WASN'T HELPFUL

Originally, Congress directed the NLRB to make and follow its own procedural rules in unfair labor practice cases. Section 10(b) of the Wagner Act said, "In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling."[9] But in 1947, Congress reversed course. The Senate accepted a House revision that changed the text to read, "[a]ny such proceeding *shall*, *so far as practicable*, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States."[10] Nevertheless, like Tony Soprano, the NLRB has maintained its view that the Federal Rules of Civil Procedure are not controlling.[11]

To affirm its discretion over pretrial procedures, the NLRB's early decisions referenced a debate statement by Senator Taft.[12] Senator Pepper was attacking, and Senator Taft was defending the "so far as practicable" Federal Rules requirement in a Conference Report concession to the House.[13] The bill analysis explained that the new "so far as practicable" text would apply to "proceedings under the act," replacing "the present rule in the [Wagner Act] that 'the rules of evidence prevailing in courts of law and equity [are] not controlling.'"[14] Senator Pepper disputed Senator Taft's assurance that the NLRB could continue, despite this amendment, to ignore the Federal Rules. Putting it bluntly, Senator Pepper said, "Now, they must read the statute as meaning something to them; and if

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[9] National Labor Relations (Wagner) Act, Pub. L. No. 74-198, § 10(b), 49 Stat. 449, 454 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

[10] 29 U.S.C. § 160(b) (emphasis added).

[11] Case Search Results, Holtec Decommissioning Int'l, LLC (HDI), Comprehensive Decommissioning Int'l, LLC (CDI), and Holtec Int'l, as alter egos; and Champion Specialty Servs., LLC as a joint employer with HDI/Holtec, https://www.NLRB.gov/case/02-CA-292090 [https://perma.cc/3HPP-ZP3S]. *See* Swaney, Inc., (Mine Workers, Dist. 31), 95 N.L.R.B. 576, 548-49 (1951) (Congress meant to give the Board complete discretion regarding compliance); Armstrong Cork Co., 112 N.L.R.B. 1420, 1421 (1955) (same result and has become the standard cite for this holding); Holtec Int'l, LLC, Cases 04-CA-29171, 01-CA-292021, 02-CA-202090 (Sept. 28, 2022) (citing *Armstrong Cork*, denying summary judgment based on conclusory complaint allegations).

[12] The relevant colloquy appears at 80 CONG. REC. 6517 (1947).

[13] *Id.*

[14] *Id.* at 6505 (second alteration in original).

they obey the law, they, as a practical matter, are going to feel under greater compulsion to apply rigid court rules and technical procedures."[15] That's not clear legislative history confirming the NLRB's discretion. It shows only that Senators disputed whether the NLRB would change its policy to comply with the amendment.

## III. PRACTICAL SIGNIFICANCE AND NLRB PERIL

Does it matter, practically speaking? In at least one common situation, it does. Summary judgment motion practice under Rule 56 of the Federal Rules of Civil Procedure has evolved materially since 1947. When the NLRB published *Armstrong Cork*, summary judgment was so disfavored that a motion could be denied even when the parties filed cross-motions based on their stipulated record.[16] Today, however, a movant is entitled to summary judgment when it appears that there is no material fact dispute raising doubt about the legal outcome.[17] Presented with evidence supporting entry of judgment as a matter of law, the non-movant may not rest on its pleading but must show that its evidence makes a triable case.[18] Conclusory assertions will not suffice.[19] But the NLRB, citing *Armstrong Cork*, routinely denies Respondents' summary judgment motions in reliance on conclusory allegations made in complaints filed by its General Counsel. Consequently, many Respondents settle to avoid the costs of trying and appealing cases that those Respondents are entitled to win as a matter of law. If NLRB prosecutors lose this leverage, because the NLRB must function more judicially, unfair labor practice Respondents may be less easily rolled.

## IV. THE TALE OF THE TEXT

How does the NLRB reconcile its intransigence with the statutory text? It doesn't and seems to perceive no obligation to try. A clear, current SCOTUS majority has condemned reliance on

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[15] *Id.* at 6517 (decisions supporting NLRB discretion fail to cover Senator Pepper's side of the debate).

[16] *See* Hycon Mfg. Co. v. H. Koch & Sons, 219 F.3d 353, 355 (9th Cir. 1955).

[17] FED. R. CIV. P. 56.

[18] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

[19] *See id.* at 332; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 263 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 600 (1986).

legislative history to dodge clear statutory text.[20] So, let's follow the textual trail.

Section 160(b) of the National Labor Relations Act says that "[a]ny such proceeding *shall*, *so far as practicable*, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States."[21] What did "practicable" mean in common American English usage in 1947?[22] Here's the full definition from Webster's New International Dictionary from 1944:

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[20] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("After all, only the words on the page constitute the law adopted by Congress and approved by the President.").

[21] 29 U.S.C. §160(b) (emphasis added).

[22] Statutory construction starts with the canon of ordinary meaning: "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) (citing Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982)). This does not have to begin with the dictionary, but often does:

> The text of the Act provides three reasons for concluding that the Secretary's interpretation is reasonable. First, an ordinary understanding of the word "harm" supports it. The dictionary definition of the verb form of "harm" is "to cause hurt or damage to: injure." Webster's Third New International Dictionary 1034 (1966). In the context of the [Endangered Species Act], that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.

Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995).

> When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. *See* Perrin v. United States, 444 U.S. 37, 42 (1979) (words not defined in statute should be given ordinary or common meaning). Accord, *post*, at 242 ("In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning."). Surely petitioner's treatment of his MAC–10 can be described as "use" within the everyday meaning of that term. Petitioner "used" his MAC–10 in an attempt to obtain drugs by offering to trade it for cocaine. Webster's defines "to use" as "[t]o convert to one's service" or "to employ." Webster's New International Dictionary 2806 (2d ed. 1950).

Smith v. United States, 508 U.S. 223, 228-29 (1993). This is another case where the Court in fact, though not expressly, began with the dictionary:

> **Prac'ti-ca-ble** […] **1**. That may be practiced or performed; capable of being put into practice, done or accomplished; feasible; as, a *practicable* method; a *practicable* aim; a *practicable* good. **2**. Capable of being used; usable; as, a *practicable* weapon; *specif*., *Threat*., that may be used as real, as a door. **3**. Readily practiced on; gullible; pliant. *Slang*.
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> **Syn.** – PRACTICABLE, PRACTICAL are sometimes confused. That is PRACTICABLE (opposed to *impracticable*) which is capable of being accomplished; that is PRACTICAL (opposed to *theoretical* and the like) which can actually be turned to account. See POSSIBLE.

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> Neither the statute nor the Sentencing Guidelines define the terms "mixture" and "substance," nor do they have any established common-law meaning. Those terms, therefore, must be given their ordinary meaning. *See* Moskal v. United States, 389 U.S. 103, 106 (1990). A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." Webster's Third New International Dictionary 1449 (1986).

Chapman v. United States, 500 U.S. 453, 461-62 (1991). More generally:

> But apart from where its logic might lead, the Commission would add a gloss to the operative language of the statute quite different from its commonly accepted meaning. *See*, *e.g.*, Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 617-18 (1944). The argument simply ignores the use of the words "manipulative," "device," and "contrivance"—terms that make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence.

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 198-99 (1976):

> To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. . . . After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

*Holly Hill Fruit Prods., Inc.*, 322 U.S. at 617-18. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536-37 (1947).

**Ant.** – Impracticable, impossible.[23]

Certainly, this supports the NLRB's disregard for federal jury trial rules. Nothing in the Administrative Procedure Act ("APA") or in the NLRA empowers the NLRB to summon, examine, or impanel jurors. But the dictionary definition does not seem to support the NLRB's disdain for Rule 56. The NLRB has a summary judgment rule and regularly awards summary judgments to its General Counsel.[24] Clearly, summary judgment is authorized and practicable. Was "so far as practicable" a legal term of art that had a peculiar meaning supporting NLRB discretion to ignore some feature of the judicial rule?

## V. LEGAL IDIOM?

"So far as practicable" isn't and wasn't an obscure or ambiguous legal term. It appears fifty-three other times in the United States Code.[25] It appears eighty-seven times in Supreme Court opinions dating back to 1819.[26] Statutory uses appear, on their faces, to match the dictionary definition, but the wide array of differing contexts sheds almost no light on a potentially relevant legal idiom in the NLRB summary judgment context.[27]

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[23] WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1944) (pronunciation and origins omitted).

[24] 29 C.F.R. §102.24 (2022).

[25] 5 U.S.C. §§ 903, 3105; 7 U.S.C. §§ 93, 608c, 1423, 3104, 3105; 10 U.S.C. §§ 123, 1128, 1444, 1455, 2421, 2721, 2736, 2737, 2771, 8135, 1037, 10202, 12301, 12309, 12311, 12404; 12 U.S.C. §§ 1454, 1719, 2279aa-8; 14 U.S.C. § 3733; 16 U.S.C. § 460n-3; 18 U.S.C. § 4122; 21 U.S.C. § 341; 25 U.S.C. § 385; 26 U.S.C. § 3121; 30 U.S.C. § 1201; 31 U.S.C. § 3801; 32 U.S.C. §§ 325, 701, 706, 710, 714; 33 U.S.C. §§ 988, 1253; 40 U.S.C. §§ 321, 602, 605; 42 U.S.C. §§ 2000e-5, 7402, 7405; 44 U.S.C. § 2116; 45 U.S.C. §§ 231f; 1205; 47 U.S.C. § 155; 49 U.S.C. § 20702; 54 U.S.C. § 200305.

[26] Weightman v. Caldwell, 17 U.S. (4 Wheat.) 85, 90-91 (1819).

[27] Most instances use "practicable" consistently with its quoted definition, but without examining, or needing to examine, the possibility of a distinct meaning. Sometimes the Court's opinion includes "so far as practicable" because that phrase appears in a cited regulation, cited judicial opinion, deed, contract, will, or other legal instrument discussed in the opinion. Only plausibly informative opinions are discussed here.

## VI. OTHER STATUTES

It seems that no other federal statute corresponds to the use of this phrase in 29 U.S.C. § 160(b), but two statutes concern employment and direct the agency to do certain things "so far as practicable."

The Railroad Retirement Board has taken literally the command in 45 U.S.C. § 231f(c)(1) to arrange its benefit payments:

> [S]o that the sums appropriated to the Dual Benefits Payments Account for a fiscal year *so far as practicable*, are expended in equal monthly installments throughout such fiscal year, and are distributed so that recipients are paid annuity amounts which bear the same ratio to the annuity amounts such recipients would have received but for such regulations as the ratio of the total sums appropriated to pay such annuity amounts bear to the total sums necessary to pay such annuity amounts without regard to such regulations.[28]

Title VII of the 1964 Civil Rights Act directs the EEOC to conclude its investigations "as promptly as possible and, *so far as practicable*, not later than one hundred and twenty days from the filing of the charge,"[29] but that provision has no enforcement mechanism. No court has determined the meaning of "practicable" in this context, probably because Title VII has other, more specific, longer provisions regarding time to sue. For this reason, no court has barred an EEOC suit based on the EEOC's failure to hit this 120-day target.

### *A. No Supreme Court Holding*

Only one Supreme Court opinion has commented on the import of "so far as practicable" in 29 U.S.C. § 160(b).[30] In *NLRB v. Curtis Matheson Scientific, Inc*., the dissent of Justices Scalia,

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[28] 45 U.S.C. § 231f(c)(1) (emphasis added). The process of dual benefit monthly benefit calculation is summarized online. U.S. RAILROAD RETIREMENT BOARD, Q&A: DUAL BENEFIT PAYMENTS (2021), https://rrb.gov/NewsRoom/NewsReleases/DualBenefitPayments [https://perma.cc/LK2E-PCNM].

[29] 42 U.S.C. § 2000e-5(b) (emphasis added).

[30] NLRB v. Curtis Matheson Sci., Inc., 494 U.S. 775, 803-04 (1990) (Scalia, J., dissenting).

O'Connor, and Kennedy concluded that the command to follow the Federal Rules "so far as practicable" makes NLRB unfair labor practice proceedings "more judicialized than ordinary formal adjudication," but the appeal raised no issue regarding NLRB compliance with any particular judicial rule.[31]

Congress often has provided that statutory amendments "shall govern proceedings so far as practicable in cases pending when it takes effect."[32] The Supreme Court has taken those instructions literally.[33]

In *Illinois ex rel. Gordon*, the Court held that statutory text incorporating enforcement provisions of a list of other tax laws made all those enforcement tools available "so far as practicable" for collection of Social Security taxes.[34] It sufficed that the collection tool used was one of those adopted by reference.[35]

In *Boyce Motor Lines v. United States*, the Court held "so far as practicable" to have a meaning sufficiently definite to overcome a defense of unconstitutional vagueness.[36] The criminal offense was established by an agency regulation that required carriers of certain hazardous materials to avoid, so far as practicable, traveling through certain places where crowds normally assemble.[37] The Court deemed this language to impose on the accused a burden to show that no substantially safer route could have been taken under the particular circumstances.[38]

In *Yakus v. United States*, the Court sustained a congressional delegation of agency authority to regulate certain wages and prices to achieve stated goals "so far as practicable."[39] The Court held that a congressional authorization to peg certain rental rates, so far as practicable, to those prevailing during a specified time period

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[31] *Id.* at 803.

[32] Dickinson Indus. Site, Inc. v. Cowan, 309 U.S. 382, 383 (1940).

[33] *See, e.g.*, Dickinson Indus. Site, Inc. v. Cowan, 309 U.S. 382, 383-84 (1940) (applying the amendmentory act to an appeal taken after its effective date).

[34] 328 U.S. 8, 11 (1946).

[35] *Id.*

[36] 342 U.S. 337, 340-43 (1952).

[37] *Id.* at 338-39.

[38] *Id.* at 343.

[39] 321 U.S. 414, 421 (1944).

constrained agency discretion enough to avoid a non-delegation doctrine challenge.[40]

### *B. Circuit Courts of Appeal Are Split*

Only the Ninth Circuit has discussed whether Rule 56 compliance is optional for the NLRB. But, in *Sheet Metal Workers' International Association, Local No. 355 v. NLRB*, the panel refused to answer the question because the Respondent's summary judgment evidence fell short of that required to require an evidentiary response under Rule 56.[41] Other circuits (excepting the Eleventh Circuit and D.C. Courts of Appeal) have considered this text but in other contexts, with varying modes of analysis yielding conflicting results. No appellate court has discussed the application of *Bostock* textualism to the apparent Federal Rules compliance command of NLRA section 10(b).

The Fifth Circuit applied the ordinary meaning of the text to hold that the NLRB must conduct unfair labor practice cases substantially in compliance with Rules 4, 59, and 60 of the Federal Rules of Civil Procedure.[42] The Fourth Circuit has taken a similar view of the NLRB's obligation to comply with Rules 15[43] and 45.[44] The Eighth Circuit also has read the statutory text to compel Rule 15 compliance.[45]

The Ninth Circuit leaned into "so far as practicable" in holding that variance from Rules 34 and 45 should be permitted if the NLRB shows necessity "because of the peculiar characteristics of administrative hearings."[46]

Third Circuit dicta has contrasted the text of NLRA sections 9 (representation disputes) and 10 (unfair labor practice disputes) ,

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[40] *Id.* at 447.

[41] 716 F.2d 1249, 1253-54 (9th Cir. 1983).

[42] NLRB v. Clark, 468 F.2d 459, 463 (5th Cir. 1972) (Rule 4(d)); NLRB v. Jacob E. Decker & Sons, 569 F.2d 357, 363 (5th Cir. 1978) (Rules 59 and 60).

[43] Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1361 (4th Cir. 1969).

[44] NLRB v. Interbake Foods, LLC, 637 F.2d 492, 497 (4th Cir. 2011).

[45] *See* Am. Boiler Mfrs. Ass'n v. NLRB, 366 F.2d 815, 821 (8th Cir. 1966).

[46] Gen. Eng'g, Inc. v. NLRB, 341 F.2d 367, 374 (9th Cir. 1965) (holding that the NLRB failed to justify departure*). See also* Frito Co., Western Div. v. NLRB, 330 F.2d 458, 464-65 (9th Cir. 1964) (substantially the same view of the NLRB's duty to comply with Rule 15); Harvey Aluminum v. NLRB, 335 F.2d 749, 753 n.9, 758 n.32 (9th Cir. 1964).

focusing on the command to apply the Federal Rules in relatively unfair labor practice cases.[47] That may suggest a plain-meaning approach to the text, but it is not a binding precedent.

Originally, the Second Circuit read section 10(b) plainly, holding the NLRB to the substance of Rule 15(b).[48] But in *NLRB v. Interboro Contractors, Inc.*, the court adopted the view, shared with the First, Sixth, and Seventh Circuits, that the pretrial discovery silence of the APA should prevail over the NLRA's command to comply with the Federal Rules of Civil Procedure "so far as practicable."[49] The Second Circuit may have back-peddled a bit in *NLRB v. Consolidated Bus Transit, Inc.*, holding that the NLRB's pleading amendment rules were close enough to Rule 15 to warrant judicial deference.[50]

In *Raser Tanning Company v. NLRB*, the Sixth Circuit held that the "so far as practicable" text of section 10(b) is trumped by the failure of the APA to provide for pretrial discovery of witness statements.[51] "Since there is no specific provision in the Act for discovery procedures, it is the responsibility of the Board, so long as it conforms to the requirements of due process, to formulate its own rules as to when discovery is available to a party."[52] That reasoning (i.e., since section 10(b) does not compel compliance with discovery rules, the NLRA lacks any such requirement) seems circular on its face, but the Seventh Circuit reached substantially the same conclusion in *NLRB v. Vapor Blast Manufacturing Co.*[53]

The deferential holdings of the First, Second, Sixth, Seventh, and Tenth Circuits are puzzling if genuinely founded on the APA.

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[47] *See* NLRB v. ARA Servs., Inc., 1982 WL 20490, at *15 (3d Cir. Apr. 13, 1982) (Gibbons, J., dissenting), *reh'g granted*, 717 F.2d 57, 70 (3rd Cir. 1983).

[48] *See* NLRB v. Local 138, Int'l Union of Operating Eng'rs, 380 F.2d 244, 253 (2d Cir. 1967).

[49] 432 F.2d 854, 858-60 (2d Cir. 1970).

[50] 577 F.3d 467, 475-76 (2d Cir. 2009).

[51] 276 F.2d 80, 83 (6th Cir. 1960).

[52] NLRB v. Valley Mold Co., 530 F.2d 693, 694-95 (6th Cir. 1976) (citing Electromec Design & Dev. Co. v. NLRB, 409 F.2d 631, 635 (9th Cir. 1969)).

[53] 287 F.2d 402, 407 (7th Cir. 1961), which the Tenth Circuit adopted in N. Am. *Rockwell Corp. v. NLRB*, 389 F.2d 866, 871-72 (10th Cir. 1968) (citing *Raser Tanning Co.*, 276 F.2d 80 (6th Cir. 1960)); NLRB v. Quest-Shon Mark Brassiere Co., 185 F.2d 285 (2d Cir. 1950), *cert. denied*, 342 U.S. 812 (1951)). *Accord* P.S.C. Res., Inc. v. NLRB, 576 F.2d 380, 386-87 (1st Cir. 1978).

The APA was enacted in 1946.[54] Congress amended the Wagner Act to require Federal Rules compliance in 1947.[55] When statutes conflict and one must prevail, the later-enacted statute routinely wins.[56]

There seems to be only one other textualist approach that might support these deferential holdings (i.e., only those adjudication procedures expressly authorized by the APA are "practicable" under NLRA section 10(b)). Nothing in the deferential appellate opinions voices that view expressly. And it seems to contradict the Scalia-O'Connor-Kennedy dissent in *NLRB v. Curtis Matheson Scientific, Inc.*, that the 1947 amendment made NLRB unfair labor practice proceedings "more judicialized than ordinary formal adjudication."[57]

More directly, nothing in the APA precludes or disfavors summary judgments, and the NLRB concedes that the APA authorizes them.[58]

## CONCLUSION

The National Labor Relations Act commands the NLRB to apply the Federal Rules of Civil Procedure in its unfair labor practice cases *so far as practicable*. That's a definite legal term consistent with its ordinary meaning. The Supreme Court has not spoken. The Circuits are split. The reason for judicial deference to the NLRB is doubtful, and no court that defers to the NLRB has had to square its deference with the textualism required by *Bostock*.

Seventy-five years after Congress amended the statute, the NLRB continues to treat Rule 56 as if the Senate had rejected the House revision of Wagner Act section 10(b). If "only the words on the page constitute the law adopted by Congress," then the NLRB has three choices: (1) apply Rule 56 to Respondents' summary judgment motions; (2) make the case, in each case, that doing so

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[54] Administrative Procedure Act, 5 U.S.C. §§ 551-559.

[55] 80 CONG. REC. 6505 (1947).

[56] *See* Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298, 2317 n.4 (2021) (Barrett, J., dissenting) (explaining when and how the canon against implied repeal applies to conflicting statutory text).

[57] 494 U.S. 775, 803 (1990).

[58] *See* 29 C.F.R. §§ 102.24(b), 102.50 (2022) (directing parties to submit summary judgment motions to the NLRB).

would be impracticable; or (3) hope that this procedural roguery will elude *Bostock* review.