

BRACKET CREEP OVERBURDENS
NATIONAL LABOR RELATIONS
BOARD

HON. ERNEST J. ISTOOK, JR.

OF OKLAHOMA

IN THE HOUSE OF REPRESENTATIVES

Thursday, May 20, 1999

Mr. ISTOOK. Mr. Speaker, I rise today to urge my colleagues to cosponsor H.R. 1620, a bill to free the National Labor Relations Board from being overburdened because bracket creep that has forced them to accept cases from very small employers in this nation. Here is a copy of my "Dear Colleague" and a report from the Labor Policy Association that outlines the problem and why it is important to small businesses in America to correct this problem.

U.S. CONGRESS,
Washington, DC.FREE THE NATIONAL LABOR RELATIONS BOARD
(NLRB): HELP REDUCE UNNECESSARY BURDEN
ON SMALL BUSINESS

DEAR COLLEAGUE: This Congress, Mr. Istook is introducing legislation to help the NLRB manage their huge caseload. Each year the NLRB requests additional funding to help them administer and manage their caseload. This legislative reform simply makes adjustments for inflation in the financial jurisdictional thresholds of the NLRB, most of which were set in 1959. The NLRB can still adjudicate special cases below these thresholds, just as they can do today. It is crucial that we provide the NLRB with this freedom. We urge you to cosponsor this bill. Two former NLRB Chairs support this change.

The National Labor Relations Board (NLRB) is the government agency designed to settle labor disputes between unions and management. In 1959, Congress passed a law to give NLRB jurisdiction over businesses based on gross receipts. Once a business passes that threshold of gross receipts, it is subject to intervention by the NLRB. Businesses below the threshold are subject to actions brought in state courts, instead of the NLRB.

Without an adjustment for inflation, businesses and the NLRB have been caught in "bracket creep," as inflation has increased since 1959, the NLRB has acquired jurisdiction over much smaller businesses than was ever intended, escalating the expense and workload for the NLRB as well as for business. These now include very small businesses, for whom the cost of such intervention is unbearable. Up to 20% of the NLRB's workload now is these very small businesses. For example, NLRB has jurisdiction over non-retail businesses with gross receipts over \$50,000, an inflation adjustment would raise that threshold to \$275,773. NLRB has jurisdiction over retail business and restaurants doing more than \$500,000 worth of business, but adjusting for inflation since 1959 would raise this to \$2.7 million. Congress never intended to subject small businesses to such a have regulatory hammer.

The NLRB is powerless to change its jurisdiction without an act of Congress. So this legislation will do exactly that. By indexing the jurisdiction to the rate of inflation, the NLRB could again focus upon the larger businesses for whom the law was originally written. Small businesses have been severely burdened by dealing with the far-off NLRB instead of their local state courts (Examples on Reverse).

This bill's simple adjustment both frees NLRB deal with significant cases truly af-

fecting interstate commerce, and also removes the problems very small business have with NLRB oversight (See Example on the Reverse). If you have any questions, please call Mr. Istook's office and speak with Dr. Bill Duncan at (202) 225-2182.

Tom DeLay, House Majority Whip; Bill Young, Chairman, Appropriations Committee; John Boehner, Chairman, Employer/Employee Relations Subcommittee; John Porter, Chairman, Labor, HHS, Education Subcommittee; Jim Talent, Chairman, Small Business Committee; Henry Bonilla, Member, Appropriations Committee; Ernest Istook, Member, Appropriations Committee; Dan Miller, Member, Appropriations Committee; Jay Dickey, Member, Appropriations Committee; Roger Wicker, Member, Appropriations Committee; Anne Northup, Member, Appropriations Committee; Randy "Duke" Cunningham, Member, Appropriations Committee; John Hostettler; Chris Cannon.

EXAMPLES OF SMALL BUSINESS NLRB CASES

Larry Burns, of Houston, Texas, (8 employees), had 2 charges filed against his business by the NLRB. One was thrown out, the other settled for \$160 (1 days pay). Larry Burns spent \$11,000 in attorneys fees and wasted time fighting the NLRB when these problems could have been solved cheaper and easier in state courts. Also, Mr. Burns, under state law, could have recovered ½ of his attorney's fees under loser pays (which helps eliminate frivolous charges).

Randall Borman, of Evansville, Indiana (4 employees). Three charges were filed with the NLRB. All were dismissed. He could have recovered all of his legal fees under Indiana state law. Instead he lost \$7,500 in attorney's fees and lost revenue and had to lay off workers to cover this expense.

EXAMPLES OF DELAYS IN PROCESSING NLRB
CASES

Julian Burns, of Charlotte, North Carolina, (23 employees). His case should be heard by the NLRB. However, the NLRB's workload is so overloaded with cases from very small businesses that it took 2½ years to hear his case. Rather than getting his day in court, he settled for \$10,000 after paying \$35,000 in attorney's fees, and \$250,000 for losses in manpower and reduced workforce, for a total cost of \$295,000.

ACHIEVING NLRB BUDGET SAVINGS BY
UPDATING SMALL BUSINESS THRESHOLDS¹

The National Labor Relations Board (NLRB or Board) exercises exclusive jurisdiction over all labor disputes that are considered to be of significant national interest. The Board, itself, has set the standards for determining which labor disputes reach this threshold. Unfortunately, most of these standards are based on 1959 dollar figures that have not been adjusted for inflation over time. The result is that the Board's method for asserting jurisdiction has become outdated and should be changed to reflect present economic realities. Such a change could result in substantial savings to the U.S. Government.

The NLRB's jurisdiction, in both representation and unfair labor practice cases, extends to all enterprises that "affect" interstate commerce.² This expansive statutory grant of authority has been held by the Supreme Court to mean that the Board's jurisdiction extends to "the fullest . . . breadth

constitutionally permissible under the commerce clause."³

Traditionally, however, the Board has never exercised its full authority. Since its establishment, the Board has considered only cases that, in its opinion, "substantially affect" interstate commerce. In 1959, Congress endorsed this practice in the Labor-Management Reporting and Disclosure Act. The act specifically allowed the Board to "decline to assert jurisdiction over any labor dispute . . . where . . . the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction."⁴ Congress did not leave the Board total discretion, however. It instructed that the Board "shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."⁵

Thus, although Congress recognized that the Board needed to exercise discretion in interpreting the term "affecting commerce," it clearly did not want the Board to establish lower thresholds than were already in place. In 1959, however, the Board's prevailing jurisdictional thresholds were based on raw dollar amounts. The difficulty with this jurisdictional approach is that it fails to take inflation into account.

The problem with not adjusting jurisdictional thresholds is clearly illustrated in the following example. In 1959, the Board exercised jurisdiction over non-retail businesses that sold or purchased goods in interstate commerce totaling \$50,000 or more annually. In other words, in 1959, \$50,000 of interstate business "substantially affected commerce." Today, the Board continues to exercise jurisdiction using the \$50,000 threshold, but the effect on commerce of \$50,000 today is not nearly what it was in 1959. The value of \$50,000 today is equivalent to \$9,065 in 1959. Thus, just as \$9,065 did not warrant the Board's jurisdiction in 1959, \$50,000 should not warrant the Board's jurisdiction today.

Since 1959, the Board has established separate thresholds for particular types of businesses that did not fall into the 1959 categories. Although these thresholds are more recent, they nonetheless suffer from the same major flaw—they fail to consider inflation.

Figure 1, below, list the Board's current jurisdictional thresholds for various business sectors along with the year in which those thresholds were established. These sums are then converted into their present value—making it clear that the Board's present procedure for asserting jurisdiction is both unrealistic and outdated. Consequently, 29 U.S.C. §164(c)(1) should be amended to reflect the present value of these jurisdictional thresholds.

A second flaw in basing jurisdiction solely on the volume of the employer's business is that such a method fails to consider the size of the bargaining units involved. As a result, the Board spends scarce federal resources pursuing relatively small benefits. Figure 2 clearly illustrates this position. In 1994, the Board expended nearly 20% of its representation effort on bargaining units of 9 persons or less. Yet, this 20% effort reached less than 2% of the total number of employees involved in representation elections that year (3,393 out of a total of 188,899). In other

³ *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963).

⁴ 29 U.S.C. §164(c)(1). Parties involved in labor disputes that did not meet the Board's jurisdictional requirements were not left without recourse by Congress. The act specifically provided that agencies or state courts jurisdiction over these claims. 29 U.S.C. §164(c)(2). Of course, state courts would have to be empowered by state law to do so.

⁵ 29 U.S.C. §164(c)(1).

¹ This analysis was prepared by the staff of the Labor Policy Association.

² 29 U.S.C. §160.

words, the Board could have reduced its effort by 20% while maintaining 98% effectiveness had it declined to assert jurisdiction over these small units.

What is even more surprising is that the NLRB conducts elections in units as small as

two workers. The Board refuses to release statistics on this point to the public, but such statistics would be available to the Appropriations Committee.

Leaving jurisdiction over these small business units to the states would be most efficient use of federal resources and could result in significant savings to the Federal Government.

FIGURE 1—PRESENT VALUE OF NLRB JURISDICTIONAL THRESHOLDS BY BUSINESS ACTIVITY

Business activity	Jurisdictional threshold	Present value
Non-retail enterprises; enterprises that combine retail and wholesale; and architectural firms (1959)	¹ \$50,000	\$275,773
Retail enterprises; restaurants; automobile dealers; taxicab companies; country clubs; and service establishments (1959)	² 500,000	2,757,732
Instrumentalities, links, and channels of interstate commerce (1959)	³ 50,000	275,773
Public utilities; transit companies (1959)	⁴ 250,000	1,378,870
Printing; publishing; radio; television; telephone; and telegraph companies (1959)	⁵ 200,000	1,103,093
Office buildings; shopping centers; and parking lots (1959)	⁶ 100,000	551,546
Day care centers (1976)	⁷ 250,000	705,185
Health care facilities (1975):		
—nursing homes	100,000	298,327
—hospitals	⁸ 250,000	745,818
Hotels and motels (1971)	⁹ 500,000	1,981,481
Law firms (1977)	¹⁰ 250,000	662,129

¹ Figure represents annual interstate sales or purchase. *Siemons Mailing Serv.*, 122 NLRB 81 (1958); *Wurster, Bernardi and Emmons, Inc.*, 192 NLRB 1049 (1965).

² Figure represents annual volume of business including sales and taxes. *Red and White Airway Cab Co.*, 123 NLRB 83 (1959); *Carolina Supplies and Cement Co.*, 122 NLRB 723 (1958); *Bickford's, Inc.*, 110 NLRB 1904 (1954); *Claffery Beauty Shoppes*, 110 NLRB 620 (1954); *Wilson Oldsmobile*, 110 NLRB 534 (1954); *Walnut Hills Country Club*, 145 NLRB 81 (1963).

³ Figure represents annual income derived from furnishing interstate passenger or freight transportation. *HPO Serv., Inc.*, 202 NLRB 394 (1958).

⁴ Figure represents total annual volume of business. Public utilities are also subject to the \$50,000 non-retail threshold. *Charleston Transit Co.*, 123 NLRB 1296 (1959); *Sioux Valley Empire Elec. Ass'n*, 122 NLRB 92 (1958).

⁵ Figure represents total annual volume of business. *Belleville Employing Printers*, 122 NLRB 92 (1958); *Raritan Valley Broadcasting Co.*, 122 NLRB 90 (1958).

⁶ Figure represents total annual income. *Mistletoe Operating Co.*, 122 NLRB 1534 (1958).

⁷ Figure represents gross annual revenues. *Salt & Pepper Nursery School*, 222 NLRB 1295.

⁸ Figure represents gross annual revenues. *East Oakland Health Alliance, Inc.*, 218 NLRB 1270 (1975).

⁹ Figure represents total annual volume of business. *Penn-Keystone Realty Corp.*, 191 NLRB 800 (1971).

¹⁰ Figure represents gross annual revenues. *Foley, Hoag, & Eliot*, 229 NLRB 456 (1977).