08-3822-ag (L)

08-4336-ag (XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SNELL ISLAND SNF LLC d/b/a SHORE ACRES REHABILITATION AND NURSING CENTER, LLC AND HGOP, LLC d/b/a CAMBRIDGE QUALITY CARE, LLC
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

AOTOP, LLC v. NLRB,
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Allen Tyler & Son,
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Assure Competitive Transport, Inc. v. United States,
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Ayrshire Collieries Corp. v. United States,
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Boire v. Greyhound Corp.,
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Bon Harbor Nursing & Rehabilitation Center,
345 NLRB 905 (2005).....33

Bricklayers & Allied Craftworkers, Local #5-New Jersey,
337 NLRB 168 (2001).....31

Bridgeport Fittings, Inc. v. NLRB,
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Commonwealth ex rel. Hall v. Canal Comm'rs ,
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Contempora Fabrics, Inc.,
344 NLRB 851 (2005).....46

Donovan v. National Bank of Alaska,
696 F.2d 678 (9th Cir. 1983).....24

Eastland Co. v. FCC,
92 F.2d 467 (D.C. Cir. 1937).....18

European Parts Exchange, Inc.,
264 NLRB 224 (1982).....45

Cases--Cont'd **Page(s)**

Exxon Chemical Co. NLRB,
386 F.3d 1160 (D.C. Cir. 2004).....34

Falcon Trading Group, Ltd. v. SEC,
102 F.3d 579 (D.C. Cir. 1996).....21,29

Freund Baking Co.,
330 NLRB 17 (1999).....3

Gaetano & Associates, Inc. v. NLRB,
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G. Heileman Brewing Co.,
290 NLRB 991 (1988), *enforced*,
879 F.2d 1526 (7th Cir. 1989).....31

Georgia-Pacific Corp.,
197 NLRB 252 (1972).....44,45

Hall-Brooke Hospital v. NLRB,
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Henderson Trumbull Supply Corp. v. NLRB,
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KFC National Management Corp. v. NLRB,
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Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB,
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Liebman & Co.,
112 NLRB 88 (1955).....45

Lipman Motors, Inc. v. NLRB,
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Cases--Cont'd **Page(s)**

Liquid Transporters, Inc.,
336 NLRB 420 (2001) 45

Michigan Department of Transportation v. ICC,
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Molded Acoustical Products, Inc. v. NLRB,
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Murray v. National Broadcasting Co.,
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NLRB v. A.J. Tower Co.,
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NLRB v. Arthur Sarnow Candy Co.,
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NLRB v. Basic Wire Products, Inc.,
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NLRB v. Black Bull Carting, Inc.,
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NLRB v. Davenport Lutheran Home,
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NLRB v. Dobbs House, Inc.,
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NLRB v. Erie Brush & Manufacturing Corp.,
406 F.3d 795 (7th Cir. 2005) 41,46

NLRB v. Ferguson Electric Co.,
242 F.3d 426 (2d Cir. 2001) 6

NLRB v. Hale Manufacturing Co.,
602 F.2d 244 (2d Cir. 1979) 46,47

Cases--Cont'd **Page(s)**

NLRB v. HeartShare Human Services of New York, Inc.,
108 F.3d 467 (2d Cir. 1997) 34,35,36

NLRB v. Hood Furniture Manufacturing, Co.,
941 F.2d 325 (5th Cir. 1991) 39,43

NLRB v. Hydrotherm, Inc.,
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NLRB v. Nixon Gear,
649 F.2d 906 (2d Cir. 1981) 46

NLRB v. O'Daniel Trucking Co.,
23 F.3d 1144 (7th Cir. 1994) 43

NLRB v. Precision Indoor Comfort, Inc.,
456 F.3d 636 (6th Cir. 2006) 42

NLRB v. Saulk Valley Manufacturing Co.,
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NLRB v. Semco Printing Ctr., Inc.
721 F.2d 886 (2d Cir. 1983) 38,41,42

NLRB v. Southern Bell Telegraph & Telegraph Co.,
319 U.S. 50 (1943), *enforcing*
35 NLRB 621 (Sept. 23, 1941).....16

NLRB v. Superior of Missouri, Inc.,
233 F.3d 547 (8th Cir. 2000) 35

NLRB v. V&S Schuler Engineering, Inc.,
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NLRB v. Whitney Museum of American Art,
636 F.2d 19 (2d Cir. 1980) 38,39

Cases--Cont'd **Page(s)**

Nguyen v. United States,
539 U.S. 69 (2003) 27

Nicholson v. ICC,
711 F.2d 364 (D.C. Cir. 1983).....29,31

Pacific Bell Telegraph Co.,
344 NLRB 243 (2005).....31

People v. Wright,
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Photo-Sonics, Inc. v. NLRB,
678 F.2d 121 (9th Cir. 1982).....15

Polymers, Inc. v. NLRB,
414 F.2d 999 (2d Cir. 1969) 39

Railroad Yardmasters of America v. Harris,
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Regency Electronics, Inc.,
198 NLRB 627 (1972).....45

Service Corp., International v. NLRB,
495 F.3d 681 (D.C. Cir. 2007).....35

United States v. Wyder,
674 F.2d 224 (4th Cir.1982).....24

Wheeling Gas Co. v. City of Wheeling,
8 W.Va. 320, 1875 WL 3418 (W.Va. 1875).....24

Woelke & Romero Framing v. NLRB,
456 U.S. 645 (1982) 6

TABLE OF AUTHORITIES

Statutes

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 1 (29 U.S.C. § 151) 22
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Section 3(b) (29 U.S.C. § 153(b))
..... 3,8,9,10,11,12,13,14,15,16,22,23,25,26,27,29,30,32,33
Section 7 (29 U.S.C. § 157) 7,34
Section 8(a)(1) (29 U.S.C. §158(a)(1)).....2,4,7,34
Section 8(a)(5) (29 U.S.C. §158(a)(5)).....2,4,7,34
Section 9(c) (29 U.S.C. § 159(c)) 2
Section 9(d) (29 U.S.C. § 159(d)).....2
Section 10(a) (29 U.S.C. §160(a)) 2
Section 10(e) (29 U.S.C. § 160(e)) 3,6
Section 10(f) (29 U.S.C. § 160(f)) 3

Court of Appeals, Assignment of judges; panels; hearings; quorum.
(28 U.S.C. §46(b)).....26,27

Other Authorities:

Quorum Requirements, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003) 32

Miscellaneous: **Page(s)**

Board Annual Reports:

Second Annual Report of the NLRB (1937).....17

Seventh Annual Report of the NLRB (1941) 16

Sixth Annual Report of the NLRB (1942) 16

Thirteenth Annual Report of the NLRB (1948).....20

Miscellaneous--Cont'd
Page(s)

Publications:

BNA, *Daily Labor Report*,
No. 53 at A-11 (Mar. 19, 2008) 12
No. 166 at A-1 (Aug. 29, 2005) 33

James A. Gross, *The Reshaping of the NLRB: National Labor Policy in Transition, 1937-1947* (1981) 17

Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (1950) 17

Robert's Rules of Order 3 (1970) 23

Robert's Rules of Order 16 (rev. ed. 1981) 28

Legislative History Materials:

1 NLRB, Legislative History of the National Labor Relations Act, 1947 (1947)
61 Stat. 136 19
H.R. 3020, 80th Cong. § 3 17
H.R. Conf. Rep. No. 80-510 19
H.R. Rep. No. 80-3020 17
S. 1126, 80th Cong. §3 17
S. Rep. No. 80-105 18

2 NLRB, Legislative History of the National Labor Relations Act, 1947 (1947)
93 Cong. Rec. 3837 (Apr. 23, 1947) (Remarks of Sen. Taft) 18

2 NLRB, Legislative History of the National Labor Relations Act, 1935 (1935)
Act of July 5, 1935, 49 Stat. 449 16

93 Cong. Rec. 4433 (May 2, 1947) (Remarks of Sen. Ball) 18

Miscellaneous--Cont'd
Page(s)

1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations, 100th Cong. 45-46 (1988) 20

Act To Provide for the Termination of Federal Control of Railroads, 41 Stat. 492 18

Communications Act of 1934, 48 Stat. 1068 18

Labor-Management Relations: Hearings Before J. Comm. on Labor-Management Relations, 80th Cong. Pt 2. 19

Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982) 27

Staff of J. Comm. On Labor-Management Relations, 80th Cong., Report on Labor-Management Relations (J. Comm. Print. 1948) 19

Treatises:

Restatement (Third) Of Agency (2006) 23

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Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the joint petition of Snell Island SNF LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC ("Shore Acres") and HGOP, LLC d/b/a Cambridge Quality Care, LLC ("HGOP") (collectively "the

Company") to review and set aside, and on the cross-application of the National Labor Relations Board ("the Board" or "the NLRB") to enforce, a Board order finding that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, 158(a)(5) and (1)) ("the Act" or "the NLRA") by failing to recognize and bargain with the United Food and Commercial Workers Union, Local 1625 ("the Union").

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act (29 U.S.C. § 160(a)). The Board's Decision and Order issued on July 18, 2008, and is reported at 352 NLRB No. 106 (2008), 2008 WL 2962651. (A 46-48.)[1] Because the Board's Order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 12-RC-9281), the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp*., 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board's actions in the representation case solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair labor practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. §

[1] "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following a semicolon are to the supporting evidence.

159(c)) to resume processing the representation case in a manner consistent with the Court's rulings. *See Freund Baking Co*., 330 NLRB 17 n.3 (1999) (citing cases).

The Company filed its petition for review on August 4, 2008. The Board filed its cross-application for enforcement on September 3, 2008. Those filings were timely because the Act imposes no time limits on proceedings for the review or enforcement of Board decisions. The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the Board's Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). However, because the Company challenges the Board's Order on that basis, that question is now presented for decision.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Chairman Schaumber and Member Liebman, sitting as a two-member quorom of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted within the full powers of the Board in issuing the Board's Order in this case.

2. Whether the Board abused its discretion by overruling, without a hearing or interviewing witnesses, Company election Objections 1 and 2, and

therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the Board-certified representative of a unit of its employees.

STATEMENT OF THE CASE

The Board found (A 97) that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit of employees at its St. Petersburg, Florida facility.[2] The Company (Br 2) does not dispute that it refused to bargain. It contests the Union's certification on two grounds. First, that the Board had no authority to issue a decision with only two sitting members. Second, that the Board abused its discretion by overruling its election Objections 1 and 2 without conducting a hearing or interviewing witnesses. Relevant portions of the procedural history of the case before the Board are summarized below.

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[2] The bargaining unit includes "[a]ll full-time, regular part-time and PRN Certified Nursing Assistants, restorative aides, staffing coordinators, ward clerks, central supply clerks, cooks, dietary aides, housekeeping assistants, laundry aides, maintenance assistants, activity assistants and receptionists." (A 97.)

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

Shore Acres, a Florida company, operates a nursing home on Indianapolis Street in St. Petersburg, Florida. (A 96; 80-81.) HGOP, a New York company, provides employee staffing to operators of nursing homes and other health care facilities, including this particular Shore Acres facility. (A 96; 80-81.) Shore Acres and HGOP are joint employers. (A 97; 83.) On November 1, 2007, the Union filed a representation petition with the Board seeking to represent a unit of the Company's employees at its St. Petersburg facility. (A 12.)

On December 12, 2007, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election among the designated employees. (A 14-22.) The tally of ballots showed that, of approximately 82 eligible employees, 49 cast ballots for the Union and 23 against it, with 1 challenged ballot, an insufficient number to affect the election results. (A 23.) The Company filed 13 timely objections to the election. (A 34-35.)

After reviewing the Company's evidence in support of its objections to the election, the Board's Regional Director issued her Report on Objections without a hearing, recommending that the Company's objections be overruled, and that the Union be certified as the employees' bargaining representative. (A 34-36.) The

Company filed exceptions to the Regional Director's decision relating to Objections 1-4 and 6, including an exception claiming that the Regional Director erred by overruling the Company's objections without conducting a formal hearing. (A 53-59.) Before this Court, the Company has challenged only the Regional Director's overruling of Objections 1 and 2, where the Company alleged that employee union supporters and union agents engaged in improper threats and coercion.

On March 13, 2008, the Board (Members Liebman and Schaumber) adopted the Regional Director's recommendations and certified the Union as the exclusive bargaining representative of a unit of the Company's employees at its St. Petersburg, Florida facility. (A 71.)[3]

B. The Unfair Labor Practice Proceeding

After the Board's certification issued, the Company refused to bargain with the Union. (A 96; 84-85.) Based upon the Union's unfair labor practice charge, a

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[3] Since the Company did not file exceptions with the Board to the Regional Director's overruling of Company Objections 5, and 7-13, it is barred from challenging those findings. 29 U.S.C. § 160(e). *See Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982); *NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 435 (2d Cir. 2001). The Company has waived any challenge to the Regional Director's, as affirmed by the Board, overruling of Objections 3, 4, and 6, by concededly (Br 9 n. 5) not challenging those findings in its opening brief. *See Gaetano & Associates, Inc. v. NLRB*, 183 Fed. Appx. 17, 22 (2d Cir. 2006).

complaint issued alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (29 U.S.C. §158(a)(5) and (1).) (A 73-79.) The Company admitted its refusal to bargain, but disputed the validity of the Union's certification as the employees' bargaining representative. (A 85.) In light of the Company's admission that it refused to bargain with the Union, the Board's General Counsel filed a motion for summary judgment, and a notice to show cause why the General Counsel's motion should not be granted. (A 96; 87-93.) The Company responded, arguing that the Board should not grant summary judgment because it had improperly certified the Union as the exclusive bargaining representative in the underlying representation proceeding. (A 96; 94-95.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On July 18, 2008, the Board (Chairman Schaumber and Member Liebman) issued its Decision and Order, granting the General Counsel's motion for summary judgment, because all issues were or could have been litigated in the prior representation proceeding, and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act. (A 96-97.) The Board's Order requires the Company to cease and desist from the unfair labor practice found and from "in any like or related manner" interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

(29 U.S.C. § 157.) (A 97.) Affirmatively, the Order directs the Company to bargain with the Union upon request, embody any understanding reached in a signed agreement, and post an appropriate remedial notice to employees. (A 97.)

SUMMARY OF ARGUMENT

The Company does not dispute that it refused to bargain with the Union as the Board-certified representative of a unit of its employees. Rather, the Company primarily challenges the Board's Order by claiming that the Board, composed of two sitting members, cannot issue valid decisions and orders because it is not authorized to do so under Section 3(b) of the Act (29 U.S.C. § 153(b)). In deciding this issue of first impression, the Court should reject that challenge because Chairman Schaumber and Member Liebman acted with the full powers of the Board in issuing the valid Order in this case.

Section 3(b) of the Act provides that the Board can delegate its powers to a group of three members; that vacancies do not impair the authority of remaining Board members to exercise the powers of the Board; and that two members shall constitute a quorum of any three-member Board group established pursuant to the Board's delegation authority. Read in combination, the plain meaning of those delegation, vacancy, and quorum provisions authorizes the Board's action in this case. Here, in anticipation of the expiration of the appointments of two Board

members on December 31, 2007, the four-member Board delegated its powers to a three-member group, which included Member Schaumber and Member Liebman. With the expiration of the appointment of the third member of that group, Members Schaumber and Liebman were properly constituted as a two-member Board quorum authorized to act as the Board, and to continue to issue decisions and orders, thereby permitting the agency to avoid the shutdown of its day-to-day decisionmaking.

The legislative history supports that construction of Section 3(b) and confirms that Congress intended for the Board to have the option of adjudicating cases with a two-member quorum. Under the 1935 Wagner Act, which provided that a vacancy on the original three-member Board would not impair the quorum of the two remaining members from exercising all of the powers of the Board, the Board frequently decided cases with a quorum of two members when one of the three seats was not filled. In amending the NLRA in 1947 to expand the Board's size from three to five members and to authorize the Board to delegate its powers to three-member groups, Congress acted solely to enable the Board to increase its casehandling capacity, and not because it believed more members were needed to determine federal labor policy. The 1947 Congress made no change to the 1935 Act's vacancy provision. In practical terms, the 1947 amendment authorized the

Board's new three-member groups, who had been delegated the Board's adjudicatory authority, to function as the original Board had done, i.e., to issue decisions and orders with only two of three seats filled.

Contrary to the Company's contentions, the Board's December 28, 2007 delegation of powers to the three-member Board group was not improper even though it was made with the expectation that the Board's composition would soon be reduced to two members; courts have upheld similarly-timed actions under other statutes, and considered them prudent. Nor did the Board's delegation of powers terminate with the departure of the third member of the three-member group. Under established common law principles, institutional delegations of power are not affected by changes in personnel; delegated powers are held not individually, but collectively among the members of a public board or commission. Moreover, the Company incorrectly relies on the statute governing the assignment of cases to federal appellate panels, which requires that each case be assigned to a three-judge panel. That statute does not apply to the Board, which is governed by the broader delegation authority set forth in Section 3(b).

Also mistaken is the Company's argument that the Board cannot issue decisions and orders with less than three sitting members. Decisionmaking by a minority of the Board's total membership is inherent in the statutory design that the

1947 Congress created for the Board. Indeed, this and other courts have upheld minority decisionmaking by other federal agencies, when they have similarly suffered multiple vacancies that leave the agency with a minority of their full complement of members. The Company's argument, moreover, constitutes a misdirected attack on Congress' determination that two members constitute a Board quorum under the present circumstances and provide an adequate safeguard against the potential abuses the Company posits.

The Board's current exercise of its Section 3(b) authority to issue decisions and orders with a two-member Board quorum is also not undermined by the Board's caution in previously choosing, under different circumstances, not to exercise that authority. The Board's decision to exercise that authority now, when faced with an extended period of three vacancies potentially covering more than a year, not only is consistent with the view expressed in a 2003 opinion of the United States Department of Justice's Office of Legal Counsel, but has enabled the Board to continue to promote the Act's purpose of avoiding industrial strife.

Finally, the Board did not abuse its discretion by overruling, without a hearing or interviewing witnesses, Company election Objections 1 and 2. The Company offered vague hearsay evidence, including a mere allegation that union agents had engaged in misconduct. Having failed to offer specific evidence that, if

credited, would warrant setting aside the election, the Company was not entitled to a hearing. For the same reason, the Board did not abuse its discretion by declining to investigate Objections 1 and 2.

ARGUMENT

I. CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN ACTED WITH THE FULL POWERS OF THE BOARD IN ISSUING THE VALID ORDER IN THIS CASE

Chairman Schaumber[4] and Member Liebman, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order in this case. As we now show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable circumstances under other federal statutes, and general principles of administrative law. In contrast, the Company's argument must be rejected because it is based on an incorrect reading of Section 3(b), and a misunderstanding of the statute governing federal appellate panels, which has no application to the NLRA, and is otherwise contrary to law.

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[4] On March 18, 2008, President Bush announced the designation of Member Schaumber as chairman of the Board. *See* BNA, *Daily Labor Report*, No. 53, at p. A-11 (Mar. 19, 2008).

A. Background

The Act provides that the Board's five members will be appointed by the President with the advice and consent of the Senate, and will serve staggered terms of 5 years. *See* Section 3(a) of the Act, 29 U.S.C. § 153(a). The delegation, vacancy, and quorum provisions that govern the Board are contained in Section 3(b) of the Act, which provides in pertinent part as follows:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. . . . [29 U.S.C. § 153(b).]

Pursuant to this provision, the four members of the five-member Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a three-member group, consisting of Members Liebman, Schaumber and Kirsanow. When, three days later, Member Kirsanow's recess appointment expired, a two-member quorum of that group remained, consisting of Members Liebman and Schaumber.[5] Since January 1, 2008, this two-member quorum, consistent with the express terms of Section 3(b), has issued over 163 published decisions in unfair labor practice and representation

[5] Member Walsh's recess appointment also expired on December 31, 2007.

cases (see, for example, 352 NLRB Nos. 1 through 126, and 353 NLRB No. 1, et seq.), as well as numerous unpublished orders.

B. Section 3(b) of the Act, By Its Terms, Provides That a Two-Member Quorum May Exercise the Board's Powers

The plain meaning of the delegation, vacancy, and quorum provisions in Section 3(b) authorizes the Board's action. Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate "all of the powers which it may itself exercise" to a group of three or more members; (2) a statement that vacancies shall not impair the authority of the remaining members of the Board to operate; and (3) a quorum provision stating that three members shall constitute a quorum, with an express *exception* stating that two members shall constitute a quorum of any three-member group established pursuant to the Board's delegation authority.

It is the *combination* of these provisions that authorized the Board's action here. The Board first delegated all of its powers to a three-member group, as authorized by the delegation provision. As provided by the quorum provision, after Member Kirsanow's recess appointment expired on December 31, a two-member quorum of that three-member group remained. And because of the vacancy provision, a vacancy in that three-member group does not impair the remaining two members from exercising all the authority that was delegated to them.

Although no court has previously addressed this exact issue,[6] in a case where the Board had four members, the Ninth Circuit has held that Section 3(b)'s two-member quorum provision authorized a three-member panel to issue decisions even if the decision issued after the resignation of one of the three panel members. *See Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121, 122 (9th Cir. 1982). In addition, the United States Department of Justice's Office of Legal Counsel ("the OLC") has directly addressed the issue presented in a formal legal opinion. The OLC concluded that the Board possessed the authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. *See Quorum Requirements,* Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

The Company, refusing to give full effect to Section 3(b)'s express terms, asserts that Section 3(b) "presupposes that the Board actually has three or more [sitting] members." (Br. 19.) Essentially, the Company asks this Court to read into Section 3(b) an implicitly-required minimum number of three sitting members

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[6] This issue will be argued before the D.C. Circuit on December 4, 2008 in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162 and 08-1214.

necessary for issuing decisions. Neither the statutory language nor the legislative history supports the imposition of such a requirement, as we now show.

C. Section 3(b)'s History Also Supports the Authority of a Two-Member Quorum To Issue Board Decisions and Orders

A brief history of the Board's operations and of the legislation that ultimately became Section 3(b) of the Act confirms that Congress intended for the Board to have the option of adjudicating cases with a two-member quorum. As originally enacted in 1935, the NLRA created a three-member Board and provided in Section 3(b) of the Act that a vacancy would not impair the quorum of the two remaining members from exercising all powers.[7] Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued hundreds of decisions with only two of its three seats filled. *See, e.g., NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).[8]

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[7] *See* Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 449, reprinted in *2 NLRB, Legislative History of the National Labor Relations Act, 1935* (hereinafter "*Leg. Hist. 1935*"), at 3272 (1935).

[8] From 1935 to 1947, the original Board issued 466 decisions during three discrete periods when it had only two seated members. First, from August 27 through October 11, 1941 (see *Seventh Annual Report of the NLRB* 8 n.1 (1942)), the two-member Board issued 224 decisions. *See* 35 NLRB Nos. 7-227; 36 NLRB Nos. 1-4. Second, from August 27 to November 26, 1940 (see *Sixth Annual Report of the NLRB* 7 n.1 (1941)), a two-member Board issued 239 decisions. *See* 27 NLRB Nos. 1-218; 28 NLRB Nos. 1-19. Third, from August 31 to September 23, 1936

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.[9] In 1947, however, when Congress was considering the Taft-Hartley amendments, the original two-member quorum provision was not a matter of concern. Indeed, the House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.[10]

The Senate bill, while proposing to enlarge the Board and amend the quorum requirement, was careful to do so in a manner that explicitly preserved the Board's authority to exercise its powers through a two-member quorum. Thus, the Senate bill would have expanded the Board to seven members, four of whom would be a quorum. However, that same bill authorized the larger Board to delegate its powers "to any group of three or more members," two of whom would be a quorum.[11] The Senate bill's preservation of the two-member quorum option

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(see *Second Annual Report of the NLRB* 7 (1937)), a two-member Board issued three decisions. *See* 2 NLRB 198; 2 NLRB 214; 2 NLRB 231.

[9] See James A. Gross, *The Reshaping of the NLRB: National Labor Policy in Transition, 1937-1947* (1981); Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (1950).

[10] *See* H.R. 3020, 80th Cong. § 3 (1947), reprinted in *1 NLRB, Legislative History of the Labor Management Relations Act, 1947* (hereinafter "*Leg. Hist. 1947*"), at 171-72 (1948); H.R. Rep. No. 80-3020, at 6, *1 Leg. Hist. 1947*, at 297.

[11] S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

demonstrates that the proposed enlargement was not to ensure a greater diversity of viewpoint in deciding cases, contrary to the suggestion of one Senator.[12] Rather, as the Senate Committee on Labor explained, the proposed expansion of the Board was designed to "permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage."[13] Senator Taft similarly stated that the Senate bill was designed to "increase[] the number of the members of the Board from 3 to 7, in order that they may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much."[14] *See Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981) (recognizing Congress' purpose "to enable the Board to handle an increasing caseload more efficiently"). The Conference Committee accepted,

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[12] Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

[13] S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

[14] Remarks of Sen. Taft, 93 Cong. Rec. 3837 (Apr. 23, 1947), *2 Leg. Hist. 1947*, at 1011. The three-member groups that the Senate proposed for the NLRB were similar to the three-member divisions that Congress had previously enacted for the Interstate Commerce Commission ("the ICC") and the Federal Communications Commission ("the FCC"). Both the FCC and ICC statutes identically provided that "[t]he Commission is . . . authorized . . . to divide [its] members . . . into . . . divisions, each to consist of not less than three members. . . ." 48 Stat. 1068; Act To Provide for the Termination of Federal Control of Railroads, ch. 91, § 431, 41 Stat. 492. *See Eastland Co. v. FCC*, 92 F.2d 467, 469 (D.C. Cir. 1937).

without change, the Senate bill's delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members.[15]

Despite having only two additional members, rather than four more as proposed by the Senate, the new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee created by Title IV of the Taft-Hartley Act to study labor relations issues[16] reported to Congress the following year:

> Section 3(a) of the [A]ct increased the membership of the Board from three to five members, and authorized it to delegate its powers to any three of such members. Acting under this authority, the Board in January 1948, established five panels for consideration of cases. Each of the Board members acts as chairman of one panel, and serves on two additional panels. Decisions in complaint cases arising under the Taft-Hartley law, and in representation matters involving novel or complicated issues, are still made by the full Board. A large majority of the cases, however, are being determined by the three-member panels.

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948).[17] In this way, the Board

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[15] 61 Stat. 136, 139 (1947), *1 Leg. Hist. 1947*, at 4-5; H.R. Conf. Rep. No. 80-510, at 36-37 (1947), *1 Leg. Hist. 1947*, at 540-541.

[16] *See* 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

[17] *See also Labor-Management Relations: Hearings Before J. Comm. on Labor-Management Relations*, 80th Cong. Pt. 2 at 1123 (statement of Paul M. Herzog, Chairman, NLRB) (reporting that "[o]ver 85 percent of the cases decided by the

was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.[18]

In sum, by authorizing the Board to delegate its powers to a three-member group, two of whom constitute a quorum, Congress enabled the Board to increase its casehandling capacity by operating in groups identical to the original three-member Board. In practical terms, the Act's two-member quorum provision authorized the Board's new three-member groups to function as the original three-member Board had done, *i.e.*, to issue decisions and orders with only two of three seats filled.

D. The Board Effectively Delegated Its Adjudicatory Powers to the Three-Member Group

As shown, in anticipation of the expiration of the recess appointments of Members Kirsanow and Walsh, the Board delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers.

Board in the past 3 months have been handled by rotating panels of 3 Board members" and that the panel system "has added greatly to the Board's productivity.").

[18] The Board continues to decide the overwhelming majority of its cases by means of these three-member panels. *See Thirteenth Annual Report of the NLRB (1948)*, at 8-9; *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, 100th Cong. 45-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman James M. Stephens' statement) ("*1988 Oversight Hearings*").

The Company attacks this delegation as a "sham" (Br. 19) on the grounds that the Board was aware that Member Kirsanow's departure was imminent and that the delegation would soon result in the Board's powers being exercised by a two-member quorum consisting of Members Liebman and Schaumber.

Contrary to the Company's argument, the fact that the Board delegated its authority to this three-member group in anticipation that it would soon be operating as a two-member quorum does not defeat the authority of that two-member quorum. Similar eleventh-hour actions by a federal agency that were taken to permit the agency to continue to function despite vacancies have been upheld. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996), for example, after the five-member Securities and Exchange Commission ("the SEC") had suffered two vacancies, the remaining three sitting members promulgated a new quorum rule so the agency could continue to function in the face of an additional upcoming vacancy. *Id.* at 582 & n.3. In upholding both the rule and a subsequent decision issued by a two-member quorum of the SEC, the D.C. Circuit declared the rule "prudent," because "at the time it was promulgated the [SEC] consisted of only three members and was contemplating the prospect it might be reduced to two." *Id.* at 582 n.3.

Likewise, in *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335 (D.C. Cir 1983), the D.C. Circuit upheld the delegation of powers by the two sitting members of the three-member National Mediation Board ("the NMB") to one member, despite the fact that one of the two delegating members resigned "later that day," leaving a single member to conduct agency business. The court reasoned that if the NMB "can use its authority to delegate in order to operate more efficiently, then *a fortiori* [it] can use [that] authority in order to continue to operate when it otherwise would be disabled." *Id.* at 1340 n.26. Similarly, the NLRB properly relied on the combination of its delegation, vacancy, and quorum provisions to ensure that it would continue to operate despite upcoming vacancies. The NLRA, after all, was designed to avoid "industrial strife," 29 U.S.C. § 151, and an interpretation of Section 3(b) that would allow the Board to continue functioning under the present circumstances would not only give effect to the plain language of the Act but would also further the Act's purpose.

To be sure, *Railroad Yardmasters* is distinguishable, as the Company argues (Br. 20-22) at some length. What the Company overlooks is that the critical distinction points directly to the greater strength of the Board's case. In *Railroad Yardmasters*, the D.C. Circuit faced the question whether an agency that acted principally in a non-adjudicative capacity could continue to function when its

membership fell short of the quorum required by its authorizing statute. *See* 721 F.2d at 1341-42. That problem is not presented here. In the present case, unlike *Railroad Yardmasters*, the statutory requirements for adjudication are satisfied, because Section 3(b) expressly provides that two members of a properly-constituted, three-member group is a quorum. In contrast to the one-member problem at issue in *Railroad Yardmasters,* the presence of the Board quorum that adjudicated this case "'is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.'" *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980)) (*quoting* Robert's Rules of Order 3, p. 16 (1970).

E. The Board's Delegation of Powers Remained Effective After Member Kirsanow's Recess Appointment Expired

The Company also argues, relying solely on inapposite private law principles set forth in the *Restatement of Agency* (Br. 21-22), that a delegation of powers ends when a quorum of the body that made the delegation is no longer in office, and therefore the Board's December 28, 2007 delegation of powers ended when Member Kirsanow's appointment expired. The Board's delegation survived, however, because it is a well-established principle of *administrative law* that "[i]nstitutional delegations of power are not affected by changes in personnel, but rather continue in effect as long as the institution remains in existence and the

delegation is not revoked or altered." *Railroad Yardmasters*, 721 F.2d at 1343. Indeed, as courts have agreed, "'[a]ny other general rule would impose an undue burden on the administrative process.'" *Donovan v. National Bank of Alaska*, 696 F.2d 678, 682-83 (9th Cir. 1983) (quoting *United States v. Wyder*, 674 F.2d 224, 227 (4th Cir.1982), and applying the rule that administrative acts continue in effect until revoked or altered).

For similar reasons, when looking to the common law, it is the common law relating to administrative agency authority, not the law of corporations or agency law that is applicable. A three-member group within the meaning of Section 3(b) of the Act is not a corporate body and does not act as the "agent" of the Board. Rather, a three-member Board group acts as the Board and with all of the Board's powers. At common law, the power delegated to a public board was held "not individually but collectively" (*Commonwealth ex rel. Hall v. Canal Comm'rs*, 9 Watts 466, 471, 1840 WL 3788, at *5 (Pa. 1840)), and "considered joint and several" among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at *16 (W.Va. 1875). For this reason, the principle that a minority of the members of a public board or commission is not necessarily disabled from exercising its powers when suffering multiple vacancies is deeply rooted in common-law tradition. *See, e.g., People v. Wright*, 30 Colo. 439, 442-43, 71 P.

365 (Colo. 1902) (where city council was composed of 8 aldermen and 1 mayor, and the terms of 4 aldermen expired, and where the remaining 4 aldermen and the mayor met, only 3 of whom voted, vote was valid).

The Company also relies (Br. 23) on *KFC Nat. Mgmt. Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974), but that case involves a very different kind of delegation. In *KFC*, this Court held that the Board members responsible for deciding whether a representation election had been conducted fairly were required to make that decision themselves and could not, under the NLRA, delegate that responsibility to Board staff. As the Court stated: "In view of the rather clear congressional distrust of staff assistants—who are, of course, neither appointed by the President nor approved by the Senate, as are Board members, 29 U.S.C. § 153(a)—we cannot say that Congress intended, or would have approved, the general proxies issued [to Board staff] here." 497 F.2d at 303. Thus, *KFC* involved an improper delegation of authority to NLRB staff employees who did not have adjudicatory authority under the Act. In contrast, here, Section 3(b) expressly authorizes the Board to delegate its powers to a group of three Board members, and provides that

a quorum of that group shall consist of two Board members, all of whom are authorized by the Act to adjudicate matters of federal labor policy.[19] *Ibid.*

F. Section 3(b) Grants the Board Authority that Congress Did Not Provide in Statutes Governing Appellate Judicial Panels

The Company contends (Br. 12-14, 22-25) that the federal law governing the composition of three-judge appellate panels (28 U.S.C. § 46) should control how the Board exercises its authority to delegate powers to three-member groups. To the contrary, the two statutes have no common application, and Section 3(b)'s delegation and two-member quorum provisions grant the Board more discretionary authority than Congress granted the federal appellate courts. Section 3(b) authorizes delegation of "all of the powers" of the Board to a three-member group. The judiciary statute, on the other hand, requires "the hearing and determination of cases and controversies by separate panels, each consisting of three judges[.]" 28 U.S.C. § 46(b). As the courts have recognized, Congress expressly intended that provision to mandate that, "'in the first instance, all cases would be assigned to [a]

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[19] This Court further observed in *KFC* "that the 'Board's' votes in this case fail to satisfy the two-member quorum and three-member panel requirements of the Act. 29 U.S.C. § 153(b)." Taking that quote out of context, the Company (Br. 23) argues that the Court "implicitly" decided that Section 3(b) means that three members must be serving on the Board in order to have a valid two-member quorum. This Court, however, did not address that issue and made no such determination.

panel of at least three judges.'" *Murray v. National Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)). Although the statute provides an exception for when a judge "cannot sit because recused or disqualified," the Supreme Court has held that if the panel is not constituted with the proper combination of three Article III judges at the time of case assignment, notwithstanding that two judges constitute a quorum, the decision is to be vacated and the case remanded to be heard before a new panel. *Nguyen v. United States*, 539 U.S. 69, 82-83 (2003).[20]

In drafting the NLRA, Congress could similarly have expressly required that every Board case be decided by three participating members sitting at the time of case assignment. However, as shown, Congress did not so narrowly constrain the Board. The judicial panel statute, 28 U.S.C. § 46(b), requires *each case* to be assigned to a three-judge panel. Section 3(b) of the Act, on the other hand, broadly authorizes the Board, in its discretion, to delegate all its powers to standing three-member groups, of which "two members shall constitute a quorum." 29 U.S.C. §

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[20] *See also Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137, 138, 144 (1947) (Urgent Deficiencies Act "require[d] strict adherence to the [statutory] command" that a case brought to enjoin an ICC order "shall be heard and determined by three judges," where there was "no provision for a quorum of less than three judges.").

153(b). There was in fact a valid delegation of all the powers of the Board to a properly constituted group of three Board members on December 28, 2007; unlike *Nguyen*, 539 U.S. at 82-83, relied on by the Company (Br. 24), there is no issue of any member's being unqualified to sit on the panel. And because Congress expressly provided that two members of such a group constitute a quorum, the two-member Board had the authority to issue the Decision and Order in this case. *See Railroad Yardmasters*, 721 F.2d at 1341 ("A quorum is '[t]he minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted.'" (*quoting* Robert's Rules of Order 16 (rev. ed. 1981))).

G. Cases Interpreting the Statutes of Other Federal Agencies Provide Additional Support for the Board's Authority

The Company repeatedly asserts (Br. 13, 18-20, 22-23, 26-27) that the Board cannot operate with less than three sitting members. The potential for decisionmaking by a minority of an agency's total membership, however, not only is inherent in the 1947 Taft-Hartley Congress' decision to retain the NLRA's two-member quorum provision as a device to expedite case processing, but also is consistent with Congress' treatment of other federal agencies. Although each federal agency must follow its own statutory quorum and delegation requirements, several cases involving other agencies are informative on the issue of the Board's

authority to issue decisions under the delegation, vacancy, and two-member quorum provisions of Section 3(b) of the NLRA.

For example, in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996), the D.C. Circuit held, in interpreting the quorum rule promulgated by the SEC, that the SEC validly issued a decision at a time when only two of its five seats were filled. *Id.* at 582. Similarly, in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), the D.C. Circuit recognized that the ICC's enabling statute not only permitted that agency to "carry out its duties in [d]ivisions consisting of three [c]ommissioners," but also provided that "a majority of a [d]ivision is a quorum for the transaction of business." *Id. at* 367 n.7. Based on that provision (which is analogous to the two-member quorum provision in the NLRA's Section 3(b), as shown at p. 18 note 14), the D.C. Circuit held that an ICC decision participated in and issued by only two of the three commissioners in a division was valid. *Id.*

Other circuits have reached similar results in ICC cases. Thus, in *Michigan Department of Transportation v. ICC*, 698 F.2d 277 (6th Cir. 1983), the Sixth Circuit held that, at a time when the ICC consisted of 11 members and 7 of its seats were vacant, a decision issued by the remaining 4 commissioners was valid. *Id.* at 279. In *Assure Competitive Transportation, Inc. v. United States*, 629 F.2d 467

(7th Cir. 1980), the Seventh Circuit likewise concluded that an ICC decision issued by 5 of the 11 commissioners was valid. *Id.* at 472-73.

H. The Company's Policy Attacks on the Board's Authority Are Misdirected

The Company's claim (Br. 27-30) that there is a danger of abuse if two members of the Board are allowed to make decisions is nothing more than an attack on the policy choice that the Taft Hartley Congress made in 1947 when it authorized the Board to delegate its powers to a three-member group, two of whom shall be a quorum. The Company relies heavily (Br. 27) on the Supreme Court's discussion in *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 139 (1947), which indicates that a decision issued by two, rather that three, judges, might well have been altered by the views of a third judge, if one had been present. However, as shown at p. 27 note 20, the statute at issue in *Ayrshire* differs from NLRA Section 3(b) precisely because it did not provide for a quorum of less than three judges. *See* 331 U.S. at 138.

Moreover, in relying on the policy considerations discussed in *Ayrshire*, the Company overlooks the fact that for the first 12 years of its administration of the NLRA, the Board issued hundreds of decisions in cases decided by two-member quorums at times when only two of the Board's three seats were filled. As shown at pp. 16-20, in amending the NLRA after comprehensive review, the 1947

Congress preserved the Board's option to adjudicate labor disputes with a two-member quorum where it had purposefully exercised its delegation authority. In sum, if Congress believed that three Board members were the minimum necessary to fairly decide cases, it could have so specified in the Act's quorum requirements, but chose not to do so.

Equally misdirected is the Company's policy concern (Br. 27-29) that permitting a two-member Board quorum to decide cases could lead to abuses if there were a political imbalance among the two remaining Board members. The D.C. Circuit rejected a similar policy argument in the ICC context. In *Nicholson v. ICC*, 711 F.2d at 367 n.7, the petitioner complained that a large number of vacancies on the ICC had caused a political imbalance that rendered it inappropriate for the agency to decide cases. In response, the D.C. Circuit simply pointed out that "nothing in the Interstate Commerce Act requires a [d]ivision of the [ICC] to be politically balanced." *Id.* The NLRA also contains no such political balance requirement.

I. The Board's Caution in Exercising Its Two-Member Quorum Authority Is No Reason To Question that Authority

The Company appears to claim (Br. 20) that Chairman Schaumber and Member Liebman lack the authority to issue decisions because, historically, the Board had not exercised its delegation authority to empower a two-member

quorum for that purpose. Earlier Board inaction, however, is of no consequence because it is simply that—inaction—rather than a prior Board determination that the Board lacked the authority it exercised here. Moreover, in an analogous situation, where one Board member of a three-member group was recused from participating in a decision, the Board has frequently invoked its two-member quorum authority under Section 3(b). In those situations, the two remaining members issue the Board's decision as a quorum of the three-member group. *See, e.g., Pacific Bell Tel. Co.*, 344 NLRB 243, 243 & n.1 (2005); *Bricklayers & Allied Craftworkers, Local #5-New Jersey*, 337 NLRB 168, 168 & n.4 (2001); *G. Heileman Brewing Co.*, 290 NLRB 991, 991 & n.1 (1988), *enforced*, 879 F.2d 1526 (7th Cir. 1989).

Furthermore, even though the Board has been circumspect in exercising the authority argued for here, recent trends made it reasonable for the Board to expand the use of the two-member quorum option that Congress provided. In 2002, when it became clear that the slowing nomination and confirmation processes were likely to result in an increase in the number and length of vacancies, the Board sought an opinion from the Justice Department's Office of Legal Counsel, which in 2003 concluded that a properly-constituted, two-member quorum had the authority to issue decisions. *See Quorum Requirements*, 2003 WL 24166831, *4 n.1. The

Board first relied on that OLC opinion on August 26, 2005, when, at a time it consisted of three members, the Board delegated to itself as a three-member group all the Board's powers in anticipation of the expiration of Member Peter C. Schaumber's term on August 27, 2005. *See* BNA, *Daily Labor Report*, No. 166, at p. A-1 (Aug. 29, 2005).[21] Subsequently, in late December 2007, when faced with an upcoming extended period—possibly stretching over an entire year—with only two members, the Board acted to continue to fulfill its statutorily-mandated mission and avoid the shutdown of day-to-day decisionmaking. The fact that the Board has acted cautiously in exercising its delegation authority only when necessary is no basis for questioning that the Board has that authority.

In sum, despite three vacant seats on the Board, the delegation, vacancy, and quorum provisions of Section 3(b) of the Act provide the Board with the authority to issue decisions through a properly-constituted, two-member Board quorum. Accordingly, the Court has jurisdiction over this case because the Board's Order is a final order reviewable by the Court.

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[21] Four days later, Member Schaumber received a recess appointment. Accordingly, only one published ruling on a procedural motion (*Bon Harbor Nursing & Rehabilitation Center*, 345 NLRB 905 (2005)), and a few unpublished orders, issued during that period.

II. THE BOARD DID NOT ABUSE ITS DISCRETION BY OVERRULING, WITHOUT A HEARING OR INTERVIEWING WITNESSES, COMPANY ELECTION OBJECTIONS 1 AND 2, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AS THE BOARD-CERTIFIED REPRESENTATIVE OF A UNIT OF ITS EMPLOYEES

A. Applicable Principles

An employer violates Section 8(a)(5) and (1) of the Act[22] by refusing to recognize and bargain with the duly certified representative of its employees. *See NLRB v. HeartShare Human Servs. of New York, Inc.*, 108 F.3d 467, 470 (2d Cir. 1997). Since the Company concedes (Br. 2) that it has refused to bargain with the Union in order to test the validity of the Union's certification,[23] the Court must uphold the Board's conclusion that the Company violated Section 8(a)(5) and (1),

[22] Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," and Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." Section 7 of the Act (29 U.S.C. § 157), in turn, grants employees "the right to self-organization . . . [and] to bargain collectively through representatives of their own choosing . . . . " A violation of Section 8(a)(5) of the Act results in a "derivative" violation of Section 8(a)(1). *See Exxon Chemical Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004) and cases cited.

[23] Courts cannot directly review Board election cases. To obtain judicial review of a union's certification, an employer must refuse to bargain, prompting an unfair labor practice finding, which the Court may review. *See NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 556 n.5 (2d Cir. 1994).

unless, as the Company argues, the Union was improperly certified. *See id.*; *NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 556 (2d Cir. 1994).

When an employer seeks to set aside an election by raising allegations of objectionable conduct by a union or company agent, the Board, with judicial approval, will set aside the election only if the misconduct "'reasonably tended to interfere with the employees' free and uncoerced choice in the election.'" *Service Corp., Int'l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007) (citation omitted). *Accord NLRB v. Superior of Missouri, Inc*., 233 F.3d 547, 553 (8th Cir. 2000) . To meet this heavy burden, the employer is required to "come forward with evidence of actual prejudice resulting from the challenged circumstances," not simply evidence demonstrating "merely a 'possibility' that the election was unfair." *NLRB v. Black Bull Carting, Inc.*, 29 F.3d 44, 46 (2d Cir. 1994).

Parties objecting to the conduct of elections often argue, as here (Br. 33), that elections must occur under "laboratory conditions." Yet, this Court recognizes that "'clinical asepsis is an unattainable goal in the real world of union organizational efforts.'" *Arthur Sarnow Candy*, 40 F.3d at 559 (citation omitted)). Since "'it is probably not possible to completely achieve such ideal conditions . . . elections will not automatically be voided whenever they fall short of that standard.

Rather, the idea of laboratory conditions must be realistically applied.'" *Id.* (citation omitted).

The Court's role in reviewing the Board's decision to certify a union is limited to determining whether the Board acted within the "wide degree of discretion" entrusted to it by Congress in establishing the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). *Accord HeartShare Human Servs.*, 108 F.3d at 470. Accordingly, the party objecting to the election bears the heavy burden of showing that the Board "abuse[d] its discretion in certifying the election." *Arthur Sarnow Candy Co.*, 40 F.3d at 556 (citation omitted).

B. The Evidence the Company Proffered

In Objection 1, the Company alleged that employees or union representatives threatened employees with bodily harm and coerced employees. In Objection 2, the Company alleged that employees and third parties threatened employees with bodily harm. (A 50.) In support of those Objections, the Company relied on a two-page letter from its attorney, and a statement from Administrator Janet Keller. (A 60-64.)

In the attorney's letter, the Company asserted that maintenance employee Larry Reeve would testify that before the election several certified nursing

assistants, including Virginia Norman and Audrey Boucher, had "told him that supporters of the [U]nion told them 'that if they were going to vote "No" it would be best for them not to vote at all,'" and that Boucher, Norman, Reeve, and Administrator Keller could verify those statements. (A 63.) The letter also asserted that Housekeeping and Laundry Director Betsy Smith "would testify that [unit employee] Debra Smith told her that she felt intimidated by the campaign atmosphere and that if she were to have voted 'No' that the union and its supporters would physically harm her." (A 64.)

In Administrator Keller's statement, she asserted that "[d]uring the week leading up to the election . . . several employees [including Larry Reeve and Debra Smith] told me or their supervisors that union supporters had told them that if they were going to vote no then it would be better for them if they did not vote at all," and that both employees "felt the Union supporters were trying to discourage them from voting against the Union because they would be potentially harmed physically and otherwise retaliated against." (A 61.) Keller further asserted that unit employee Christina Winthrop told her that "she felt intimidated and threatened when she attended a [u]nion meeting in the week leading up to the election." (A 61.)

C. The Board Did Not Abuse Its Discretion by Overruling Objections 1 and 2 Without a Hearing or Interviewing the Company's Witnesses

As the Regional Director explained (A 41), the Company appears to be asserting that the employees had a reasonable fear of physical harm or retaliation when they were told that if they planned to vote against the Union, it would be "better" or "best" not to vote at all. And the Company claims that another employee felt threatened when she went to a union meeting. The Company does not argue, as it had before the Board (A 36, 59), that the alleged threatening conduct warranted overturning the election. Instead, the Company argues solely (Br. 30-40) that it proffered evidence sufficient to require a hearing or, at minimum, to require the Regional Director to interview its proposed witnesses. That argument misconstrues the burdens placed on the Company as the objecting party.

As shown above, an objecting "party is entitled to a hearing 'only if it demonstrates by *prima facie* evidence the existence of "substantial and material factual issues" which, if resolved in its favor, would require the setting aside of the representation election.'" *NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d 886, 891 (2d Cir. 1983) (citation omitted). *Accord Lipman Motors, Inc. v. NLRB*, 451 F.2d 822, 827 (2d Cir. 1971); *NLRB v. Whitney Museum of American Art*, 636 F.2d 19,

23 (2d Cir. 1980). As this Court has explained, such a policy is "'not only proper, but necessary to prevent dilatory tactics by employers or unions disappointed in the election returns.'" *Polymers, Inc. v. NLRB*, 414 F.2d 999, 1005 (2d Cir. 1969) (citation omitted). The Court reviews the Board's decision to grant a hearing under an abuse of discretion standard. *See Whitney Museum*, 636 F.2d at 23.

Here, the Regional Director provided the Company with the opportunity to present evidence in support of Objections 1 and 2. (A 28, 33, 38-39.) Since the Company no longer asserts, as it did before the Board, that the objectionable conduct warranted overturning the election, its "argument that it is entitled to an opportunity to provide further evidence in support of its objections at an evidentiary hearing is tantamount to an admission that the evidence it submitted to the Regional Director fell short of the *prima facie* proof required to invalidate the election or require a hearing. It is not the Board's responsibility to seek out evidence that would warrant setting aside the election." *NLRB v. Hood Furniture Mfg., Co.*, 941 F.2d 325, 332 (5th Cir. 1991). Accordingly, the Board did not abuse its discretion in overruling the objections without a hearing.

As for the allegation that employees were told that it would be "better" or "best" that they not vote in the election if they opposed the Union, the Company does not dispute the Regional Director's finding (A 40-41) that the evidence it

proffered constituted double or triple hearsay. The Company failed to include any evidence from an employee who had first-hand knowledge of the alleged statement. As the Regional Director explained (A 40-41), the reference in the attorney's letter to purported testimony from maintenance employee Reeve was double hearsay because the letter did not claim that Reeve would testify that the "better" or "best" statement was made to him, but only would assert that others had told him that the statement was made to them. Similarly, as the Regional Director explained (A 41), Administrator Keller's statement constituted double, or even triple, hearsay, because she asserted only that employees had spoken to her or their unidentified supervisors about such a statement made by unidentified union supporters. Such hearsay is insufficient to establish the truth of the allegation that the statement was made to any employee. *See NLRB v. Basic Wire Products, Inc*. 516 F.2d 261, 264 (6th Cir. 1975) (overruling election objections without a hearing where employer offered self serving hearsay evidence of alleged comments); *NLRB v. Saulk Valley Mfg. Co*., 486 F.2d 1127, 1131 (9th Cir. 1973) (overruling election objections without a hearing where employer proffered evidence that was "patently hearsay").

In addition to constituting hearsay, the Company does not dispute the Regional Director's finding (A 40-41) that neither the attorney's letter nor Keller's

statement proffered any evidence that the alleged statement was made by employees acting as union agents or union representatives.[24] Indeed, the Company's evidence failed to even identify who made the alleged statement. The "bare assertion" of agency status set forth in the Company's objections, without any supporting evidence, "hardly makes out a *prima facie* case of agency sufficient to require a hearing." *NLRB v. Semco Printing Ctr., Inc.*, 721 F.2d 886, 891 (2d Cir. 1983) (overruling, without a hearing, employer's objections that union agents coerced employees into signing authorization cards).

Yet a third reason supporting the Regional Director's decision not to hold a hearing was the fact that the Company's evidence relied totally on unquestioned acceptance of the subjective reactions by these unnamed employees. Instead, as the Company recognizes (Br. 38), the Board applies an objective test based on the tendency to coerce. *See Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 185 (2d

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[24] A distinction between union agents and third parties is significant, because "'[l]ess weight is accorded the comments and conduct of third parties than to those of the . . . union.'" *Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 186 (2d Cir. 1989) (citation omitted). Accordingly, "[w]hen the objectionable conduct is the act of rank-and-file employees rather than union agents," the employer must show that the "conduct created such an atmosphere of fear and reprisal that the rational, uncoerced selection of a bargaining representative was rendered impossible." *NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 801 (7th Cir. 2005). *Accord NLRB v. V&S Schuler Eng'g., Inc.*, 309 F.3d 362, 375 (6th Cir. 2002); *NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 337 (4th Cir. 1987).

Cir. 1989); *AOTOP, LLC v. NLRB*, 331 F.3d 100, 104 (D.C. Cir. 2003); *Molded Acoustical Products, Inc. v. NLRB*, 815 F.2d 934, 939-40 (3d Cir. 1987). Here, on its face, the alleged objectionable statement did not objectively "threaten physical harm, loss of employment, or lack of support from the [u]nion in matters of general representation" if the union won the election but then learned that an employee had voted against the union representation. *Semco Printing Ctr.*, 721 F.2d at 891. Nor did the Company, as the Regional Director explained (A 41), offer any context as to how the statement would objectively invoke fear of physical harm or retaliation to constitute a threat.

Accordingly, the Regional Director reasonably found (A 41) that the alleged objectionable statement, even if made by a union supporter or union agent, was "too vague and ambiguous" to engender fear in a reasonable person. That finding is consistent with numerous other cases where the Board, with Court approval, has declined to order a hearing because the alleged objectionable comments are ambiguous, conclusionary, innocuous, or isolated, and therefore facially fail to establish *prima facie* evidence of coercive conduct.[25]

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[25] *AOTOP, LLC. v. NLRB*, 331 F.3d 100, 104-05 (D.C. Cir. 2003) (union agent telling employees that they "'had to' vote for the union," and following employee around the plant was "innocuous conduct"); *NLRB v. Precision Indoor Comfort, Inc.*, 456 F.3d 636, 638, 639-40 (6th Cir. 2006) (employee who was told that if he voted against the union the "'guys are going to' want to do him physical harm"

The Regional Director (A 42), as affirmed by the Board (A 71), was also wholly warranted in finding that Laundry Director Smith's proposed testimony that an unidentified employee told her that she felt intimidated and afraid of physical harm if she voted no, and Administrative Keller's statement that employee Winthrop had told her that she "felt intimidated" at a union meeting, failed to establish *prima facie* evidence of objectionable conduct that warranted a hearing. As shown above, subjective reactions are irrelevant. Here, as the Regional Director explained (A 42), the Company has offered no objective evidence of conduct or statements that would support a finding that "even one employee reasonably felt intimidated or threatened by the Union's campaign." Indeed, the Company has not even proffered evidence of who engaged in such alleged misconduct.

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was isolated, and question by union representative to the same employee whether "he was 'feeling o.k.,'" was "without any context . . . . ambiguous and not threatening"); *NLRB v. O'Daniel Trucking Co.*, 23 F.3d 1144, 1150 (7th Cir. 1994) (remarks by employees that "'they are coming down hard on me,'" and that a union agent is "'leaning on me,'" do "not contain any specific threat, and at most are vague remarks subject to more than one interpretation, including legitimate campaign propaganda"); *NLRB v. Hood Furniture Mfg., Co.*, 941 F.2d 325, 329 (5th Cir. 1991) (statements to employees that they "know damn well the way you're supposed to vote" were "ambiguous at best"); *NLRB v. Basic Wire Products, Inc.*, 516 F.2d 261, 265 (6th Cir. 1975) (alleged statement to employee that "she was 'gonna be sorry' and would 'regret it' if she did not vote for the [u]nion" constituted a "conclusionary assertion.")

In sum, because the Company "could not have prevailed even if its allegations were assumed to be true," the Board "did not err in denying [the Company's] request for a hearing after the election" on Objections 1 and 2. *NLRB v. Davenport Lutheran Home*, 244 F.3d 660, 663 (8th Cir. 2001).

The Company's related argument (Br. 30-40) —that the Board's Regional Director erred by failing to conduct an adequate investigation of its Objections 1 and 2—is equally without merit. "While a Regional Director is obliged to carefully investigate any objective evidence offered by an objecting party to show demonstrable misconduct, he is not charged with independently ferreting possible misdeeds when presented with only speculation that improprieties *may* have occurred." *Georgia-Pacific Corp*., 197 NLRB 252, 252 n.1 (1972) (emphasis in original). *Accord Davenport Lutheran Home*, 244 F.3d at 663; *NLRB v. Dobbs House, Inc*., 613 F.2d 1254, 1260 (5th Cir. 1980).

Further, given the Board's need to resolve election issues expeditiously and with finality, the Board, in deciding whether the agency must undertake an investigation of election objections, reasonably applies standards similar to those that it applies in deciding whether to hold a hearing on objections. Thus the objecting party must present "specific evidence, tantamount to an offer of proof, which, *prima facie*, would warrant setting aside the election, before the Board will

require a Regional Director to pursue an investigation." *European Parts Exchange, Inc*., 264 NLRB 224, 224 (1982). *Accord Liquid Transporters, Inc.*, 336 NLRB 420, 420-21 (2001)*; Allen Tyler & Son*, 234 NLRB 212, 212 (1978); *Regency Electronics, Inc*., 198 NLRB 627, 627 (1972). *See also Dobbs House*, 613 F.2d at 1260 ("[S]pecific evidence requirement is . . . also properly applied to the question of whether an investigation is required.").

Here, for the reasons stated above, the Company did not submit evidence of a substantial and material fact that would require further investigation of Objections 1 and 2. Just as the Board can properly decline to hold a hearing when an employer's objections are based on hearsay or mere allegations of union agency, or do not allege material facts that would warrant setting aside the election, the Board's Regional Director can properly decline to further investigate the objections for those reasons. *See Georgia-Pacific Corp*., 197 NLRB at 252 n.1 (Regional Director had no duty to further investigate employer's objections where it offered evidence that constituted "double hearsay which in no case even identified any individual alleged to have made an improper statement"); *Liebman & Co*., 112 NLRB 88, 90 (1955) (Regional Director had no obligation to investigate employer's objections where employer offered no evidence of agency to support its objections).

The Board's certifying the results of the election here is not undermined by the Company's reliance (Br. 38-39) on *Contempora Fabrics, Inc.*, 344 NLRB 851, 852-53 (2005). That case analyzed a completely different question: whether an employee, who had received prior warnings for threatening behavior and who had a known history of domestic violence, could be lawfully warned again when he told another employee she had better vote against the union. In upholding the discipline of the employee there, the Board made no suggestion that the employee's conduct created such an atmosphere of fear and reprisal that the rational, uncoerced selection of a bargaining representative was rendered impossible. *See NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 801 (7th Cir. 2005).

The Company's reliance (Br. 33-37) on *NLRB v. Nixon Gear, Inc*., 649 F.2d 906 (2d Cir. 1981), *NLRB v. Hale Mfg. Co*., 602 F.2d 244 (2d Cir. 1979), and *Henderson Trumbull Supply Corp. v. NLRB*, 501 F.2d 1224 (2d Cir. 1974) is also unavailing. In those three cases, the character and quality of evidence presented by the employer in support of its objections was in sharp contrast to the vague hearsay evidence offered here. Thus, in *Nixon Gear*, unlike here, the employer presented *prima facie* evidence, which, if true would have required setting aside the election. 649 F.2d at 910-13. In *Hale*, unlike here, the employer showed the potential for

the requisite objective tendency to coerce that would affect the election result by presenting evidence that showed the intentional shattering of glass on an employee who had declined to express support for the union. 602 F.2d at 247-48. And in *Henderson Trumbull*, unlike here, the objections "were not 'nebulous and declamatory assertions, wholly unspecified,' . . . nor based on 'equivocal hearsay,' . . . but referred to specific events and listed specific people who were witnesses to these events." 501 F.2d at 1227-28 (citations and footnote omitted).[26]

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[26] Moreover, in each of these cases the Court was particularly concerned with the lack of a hearing where the election results were extremely close. Such concerns are inapplicable here, given that the Union won by a margin of over two-to-one. *See NLRB v. V&S Schuler Eng'g.*, 309 F.3d at 377 (rejecting employer's objections "especially given the fact that the [u]nion received two-thirds of the votes in the . . . election"); *Bridgeport Fittings*, 877 F.2d at 182, 186 (rejecting employer's election objection where union won by a two-to-one margin).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

NOVEMBER 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SNELL ISLAND SNF LLC d/b/a SHORE ACRES REHABILITATION AND NURSING CENTER, LLC AND HGOP, LLC d/b/a CAMBRIDGE QUALITY CARE, LLC	)	
Petitioner/Cross-Respondents	)	Nos. 08-3822-ag 08-4336-ag
v.	)	Board Case No. 12-CA-25854
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

As required under the Federal Rules of Appellate Procedure, combined with Local Rules 25, 28, and 32, Board counsel makes the following certifications:

COMPLIANCE WITH TYPE-VOLUME REQUIREMNENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its final brief contains 11,120 words of proportionally-

spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 3rd day of November, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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	)	
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v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent	)	12-CA-25854
	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by e-mail to agencycases@ca2.uscourts.gov, first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by overnight delivery upon the following counsel at the address[es] listed below:

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