

# Nos. 09-1741, 09-1764

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

HARTFORD HEAD START AGENCY, INC.

Respondent/Cross-Petitioner

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

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce its Order against Hartford Head Start Agency, Inc. (“Hartford”). Hartford filed a cross-petition to review that Order.

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C.

§§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) of the Act, because the unfair labor practices occurred in Detroit, Michigan, and 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 Hartford challenges the authority of the two-member Board quorum, that question is now presented for decision.

The Board's Decision and Order issued on April 30, 2009, and is reported at 354 NLRB No. 15. The Board filed its application for enforcement on June 8, 2009. On June 12, 2009, Hartford filed its cross-petition for review of the Board's Order. Both filings were timely because the Act imposes no time limitation on such filings.

### **ORAL ARGUMENT STATEMENT**

The Board believes that oral argument would materially assist the Court in considering the issue of the authority of the two-member Board quorum, (Issue One), an issue this Court has not yet decided. The Board notes, however, that the violations found by the Board (Issue Three) involve the application of well-settled law to established facts.

## **STATEMENT OF THE ISSUES PRESENTED**

1. Whether Chairman Liebman and Member Schaumber, 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.

2. Whether the Board is entitled to summary enforcement of its uncontested unfair labor practice findings.

3. Whether substantial evidence supports the Board's findings that Hartford violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union regarding changes to employees' work schedules and pay, and by unilaterally implementing those changes.

## **STATEMENT OF THE CASE**

Acting on a charge filed by Local 517M, Service Employees International Union ("the Union"), the Board's General Counsel issued a complaint against Hartford, alleging that it violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally changing unit employees' work schedules and reducing their pay; by unilaterally changing unit employees' health insurance prescription plan; by being dilatory in providing certain requested information, and failing to provide other requested information to the Union; and by bypassing the Union by

announcing to unit employees that they would not be eligible for unemployment compensation as a result of its implementation of the schedule and pay changes. Hartford filed an answer denying the complaint's allegations. The case was tried before an administrative law judge, who found merit to the allegations and issued a decision and recommended order. (A 7-33, D&O 1-27.)<sup>1</sup> Hartford filed a limited number of exceptions to the judge's decision and order, and the Board (Chairman Liebman and Member Schaumber) issued a Decision and Order affirming the judge's rulings, findings, and conclusions, and adopting his recommended order, with modification to the remedy. (A 7, D&O 1.)

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<sup>1</sup> "A" refers to the pages of the Appendix that accompanies Hartford brief as supplemented by the Supplemental Appendix filed with the Board's brief. "D&O" refers to the Board's Decision and Order. "Tr" refers to the transcript of proceedings before the administrative law judge; "GCX" and "RX" refer to the exhibits of the General Counsel and Hartford, respectively, that were admitted in that proceeding. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## I. THE BOARD'S FINDINGS OF FACT

### A. Background

#### 1. The Union becomes the employees' collective-bargaining representative; Hartford's contracting process with the City

Hartford has operated Federal Head Start preschool programs at a number of facilities in the Detroit metropolitan area for more than 13 years. (A 14, 109, D&O 8; Tr 151.) On September 6, 2005, pursuant to the results of a Board-conducted election, the Union was certified as the exclusive collective-bargaining representative of a unit of Hartford's center administrators, teachers, assistant teachers, family service workers, and special needs assistants employees. (A 8, 85, D&O 2; GCX 2.)

Hartford supplies these services pursuant to an annual contract that it enters with the City of Detroit ("the City"), the Federal Head Start grantee, specifying the number of children served and classrooms operated, the sites covered, the qualifications of the staff, their number, and the range of pay for each position. The City receives funds for Hartford from the Federal Government on a per-child basis, from year to year, pursuant to a budget that Hartford submits to the City each April for the next fiscal year, which runs from November 1 until the following October 31.

Before Hartford submits its budget to the City, it must be approved by Hartford's Board of Directors and its Parent Committee. Hartford's budget may undergo several drafts before the City signs off and that budget is submitted to the Federal Government for approval by the August 11 deadline. (A 10, 14, 210-11, 212, 215-16, 223-25, D&O 4, 8; Tr 674-75, 684, 697-98, 709-11.)

In August 2006, the City informed Hartford that it had not sustained its budgeted enrollment and would receive a funding cut effective upon commencement of the 2006-07 fiscal year. (A 14, 103, D&O 8; RX 7.)

**2. Hartford's initial bargaining history with the Union; Hartford announces that it is reducing employees' work schedules from 12 to 10 months**

Sometime in 2006, Hartford and the Union commenced negotiations for an initial collective-bargaining agreement. (A 9, 110, D&O 3; Tr 152.) Attorney Jason Harrison served as chief negotiator for Hartford, while SEIU employee William Tucker served as chief negotiator for the Union. The parties took up noneconomic issues first, and initially met several times a month until about October 2006. (A 9, 248, 141, D&O 3; Tr 172, 391.)

In October, negotiations came to a halt. The Union filed a charge with the Board, which resulted in a non-Board settlement. After the Board's Regional Office issued a complaint, Hartford returned to the bargaining table

in about May 2007. The parties resumed discussing noneconomic issues and, thereafter, pursuant to the terms of their settlement, met several times a month. They reached tentative agreement on some noneconomic issues. (A 9, 110, 131, 150, 173 , 196-97, 288-93, D&O 3; Tr 153, 373, 471, 544, 592-93 GCX 14.)

**B. Hartford Notifies the Union of Its Decision to Reduce Employee Work Schedules and to Pay Unit Employees a 10-Month Salary Over a 12-Month Period Because of Health Care Costs; the Union Asks Hartford for a Copy of the Contract It Has With the City and for Documentation of Its Claimed Increase In Health Care Costs**

On May 18, 2007, Hartford held a staff meeting with all employees at its New Genesis facility. Interim Program Director Alfredine Wiley announced that, effective November 1, 2007 and ending on October 31, 2008, Hartford would implement a reduced work schedule for unit employees requiring them to work 10 instead of 12 months of the year. (A 9-10, 12, 13, 131, 135, 153, 174-76, 197-200, D&O 3-4, 6, 7; Tr 373, 377, 474, 545-47, 593-96.) She also stated that affected employees would not work 2 months during the summer of the 2007-08 fiscal year, but they would be eligible for unemployment compensation for those 2 months. (A 12, 135, 155, 176, 200, D&O 6; Tr 376-78, 476, 547, 596.) At that time, all employees in the bargaining unit were working 12 months of the year. (A 10, 135, 176, 201, D&O 4; Tr 377, 547, 597.)

On May 25, 2007, the parties held a bargaining session. Hartford's bargaining team, led by Attorney Harrison, presented the Union with a memorandum that said, among other things, that during the 2007-08 program year, unit employees would work 10 instead of 12 months, and that the affected employees would receive unemployment compensation during the 2 months that they did not work. (A 11, 112, 113, 159, 86-88, D&O 5; Tr 186, 389-90, 480, GCX 3.) Because the parties were otherwise discussing noneconomic issues at the meeting, they had only a limited discussion about the memorandum. (A 11, 112, 159, D&O 5; Tr 186, 480.)

From May until about October 2007, the parties continued to hold collective-bargaining meetings. (A 11, 113, 143, 162-63, 181, 252, D&O 5; Tr 393, 190-91, 483-84, 552, 599.) Again, noneconomic issues such as seniority, non-discrimination policies, performance evaluations, and union representation were the topics of discussion. Some tentative agreements were reached. (A 11, 248, 141, D&O 5, 7; Tr 172, 391.)

At a collective-bargaining session in mid-October 2007, Hartford raised the issue of reducing employee work schedules. (A 12, 14, 114, 183-84, 256, D&O 6, 8; Tr 193, 312, 485, 554-55, 599.) Specifically, Attorney Harrison told the Union that Hartford would reduce the number of months that unit employees would work and spread those employees' 10

month wages over 12 months. (A 14, 114, 165, 173-75, 204, D&O 8; Tr 194-95, 491, 544-55, 602.) Hartford also told the Union that, contrary to its prior announcement, the affected employees would not be eligible for unemployment compensation during the 2-month layoff. (A 14, 115, 165, 184, 204-05, D&O 8; Tr 196, 491, 555, 602-03.) In addition, Hartford advised the Union that it needed to implement the 10-month work schedule and wage reduction because it failed to budget enough money for health care insurance, and it had to absorb an additional \$100,000 in health care costs. (A 14-15, 115, 164, 184, 207, D&O 8-9, 10; Tr 197, 490, 555, 610.)

At this same meeting, Hartford notified the Union that Hartford's contract with the City precluded unit employees from receiving an annual salary based on the previous 12-month wage rate. (A 15, 115, D&O 9; Tr 199.) Union negotiator Tucker replied that Hartford should not "piggy back" off workers due to Hartford's failure to budget properly, and that Hartford could not make unilateral changes while the parties were still bargaining. (A 15, 115, 257, 258, D&O 9; Tr 197, 556, 606.) Harrison responded that the changes were going to happen anyway and the Union could not do anything about it. (A 15, 114, 116, 185, 208, 259, D&O 9; Tr 195, 201-02, 558, 611-12.)

Tucker then requested a copy of the contract between Hartford and the City for the 2007-08 fiscal year that showed that the City had cut its funding for Hartford's preschool services and documentation from Hartford to support its claim of increased health care insurance costs. (A 15, 115, 260, 257, 204, D&O 9; Tr 198, 199, 493, 556, 602.) Harrison said that Hartford would provide the information Tucker requested. (A 15, 116, 261, D&O 9; Tr 200, 605.)

Hartford and the Union held another meeting on November 1, 2007. (A 16, 186, D&O 10; Tr 559.) Hartford again told the Union that certain unit employees' work schedules would be reduced from 12 to 10 months and that Hartford would spread 10 months' wages over 12 months. Hartford repeated that the change was necessary due to health insurance costs. (A 16, 188, D&O 10; Tr 561.)

Hartford and the Union held another bargaining session on November 27. Hartford again repeated that it would reduce the number of months that bargaining unit employees worked, and spread 10 months' wages over 12 months, and that there was nothing the Union could do about it. (A 16, 117, 207, D&O 10; Tr 204-05, 610.) Hartford did not tell the Union or the bargaining committee when it would implement this change. (A 16, 167, D&O 10; Tr 496.)

During that session, Tucker renewed the Union's request for a copy of the 2007-08 contract Hartford had with the City and for information to support Hartford's claim that its health care insurance costs increased by \$100,000. Hartford did not respond to Tucker's request. (A 16, 118, 207, D&O 10; Tr 208-09, 610.)

The next day, Tucker telephoned Harrison. Tucker told Harrison that Hartford could not reduce the months that employees worked or their wages because it would constitute an unlawful unilateral change. Tucker then read to Harrison portions of a labor law book regarding unlawful unilateral changes. Harrison was unyielding regarding Hartford's proposed changes. (A 16, 117, D&O 10; Tr 207.)

### **C. Hartford Unilaterally Changes the Prescription Drug Coverage for Bargaining Unit Employees**

On January 18, 2008, Hartford held a meeting where bargaining unit employees and nonbargaining unit employees were present. (A 17, 262-64, D&O 11; Tr 411, 500, 579, 618 GCX 19(b).) Program Director Olive Grosse announced that, effective February 1, 2008, the employees' prescription drug coverage would change from Blue Care Network to Employee Health Insurance Management. (A 17, 265-67, D&O 11; Tr 412, 500, 579.) Employees also received a document that stated that their prescription drug coverage would change. (A 17, 279-85, D&O 11;

GCX 6.) As of February 1, 2008, Hartford changed the prescription drug coverage. In many instances, employees' cost for prescription drugs increased. (A 17, 279-85, D&O 11; GCX 6.) Before January 18, 2008, Hartford never notified the Union that it intended to change prescription drug coverage, nor had the parties bargained about health care coverage during bargaining sessions. (A 17, 119, 268, 269, 270, D&O 11; Tr. 213, 422, 505, 582.)

**D. Hartford Unilaterally Reduces Some Bargaining Unit Employees' Work Schedules and Wages and Bypasses the Union By Informing Employees Directly that They Will Not Receive Unemployment Compensation**

On February 5, 2008, the parties held another bargaining session. Hartford presented the Union with a document headed "HNSA and SEIU Bargaining February 5, 2008 Wages." (A 18, 118, 144, 191-92, 271, 90, D&O 12; Tr 211, 399, 572-73, 614, GCX 7.) The document stated that in November 2007, Hartford had informed the Union that a 10-month payroll scale would be used. (A 18, 286, D&O 12; GCX 7.)

The document also provided the Union with two "options" — Plan A and Plan B. Under Plan A, employees would receive a 10-month salary spread over 12 months. Under Plan B, employees would receive a 10-month salary over 10 months. Next to the words "Plan B" were the words "NOT POSSIBLE." The document stated that Plan B was impossible for three

reasons: 1) “unexpected health care costs,” 2) Hartford’s “running a deficit for payroll,” and 3) Hartford’s “obligation to City to honor budget that includes 10 month salaries (over 12 months)[.]” (D&O 12, 90; GCX 7.) Harrison again repeated that the Union had no other choice but to accept Plan A. (A 18, 272, D&O 12; Tr 615.)

The Union replied that it would not agree to Plan A. (A 18-19, 119, 191-92, 271, D&O 12-13; Tr 213, 405, 572-73, 614.) Sonja Rogers, a member of the Union’s bargaining committee, told Harrison that Hartford was not bargaining fairly. (A 18-19, 194, D&O 12-13; Tr 575.) Harrison replied: “We have an agency to run. We do not have time to bargain with you . . . . We have an agency to run, and we’re not going to always have time to sit down with the union and bargain over some matters that are going on with this agency.” (A 18-19, 194, D&O 12-13; Tr 575.)

On February 29, 2008, bargaining unit employees received their paychecks for the pay period ending February 23, 2008. The employees’ earning statements noted that their hourly rates had been reduced. (A 19, 91, D&O 13; GCX 9.) In some cases, employees’ wages were reduced by as much as 17 percent to 20 percent. (A 19, 273, D&O 13; Tr 586.) Along with the reduced pay, bargaining unit employees received a letter from

Program Director Gloria Lewis that stated (A 19-20, 89, D&O 13-14; GCX 5):

I am writing this letter to inform you that HHSA is beginning the ten (10) month salary as discussed with employees in May, 2007, by Chairman Allen, Program Director Wiley, and Ms. Deborah Thomas, Fiscal Officer. The ten (10) month payroll will be paid until the end of HHSA's Fiscal year on October 31, 2008.

Employees will not be allowed to collect unemployment compensation because the HHSA is paying a \$100,000 increase for all HHSA Employees' Health Care benefits.

Beginning in about June 2008, Hartford laid off unit employees, including administrators, teachers, assistant teachers, and special needs assistants for 2 months. (A 189.)

**F. Hartford Belatedly Provides the Union With a Copy of Its 2007-08 Contract With the City**

On April 15 and 24, 2008, the Union and Hartford held bargaining sessions. (A 25, 274, D&O 19; Tr 657.) Attorney Howard Gordon was then the chief negotiator for the Union. (A 25, 275, D&O 19; Tr 631.) In one of those meetings, Gordon again renewed the Union's request for a copy of the 2007-08 contract between Hartford and the City and the information regarding Hartford's claim that its health insurance costs had increased. (A 25, 274, D&O 19; Tr 657.) During an April 29, 2008 bargaining session, Hartford finally provided the Union with a copy of the contract that the

Union had requested in October 2007. (A 25, 26, 276-78, D&O 19, 20; Tr 659-61.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

The Board (Chairman Liebman and Member Schaumber) found that Hartford violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by implementing, without prior notice to the Union and without affording the Union a meaningful opportunity to bargain, its proposal to reduce work schedules of unit employees from 12 months to 10 months and pay unit employees 10 months' wages over a 12-month period; by unilaterally changing its employees' health insurance prescription plan; by being dilatory in responding to the information request for the existing contract between Hartford and the City regarding providing preschool services for the City; by failing and refusing to supply the Union with requested information relating to Hartford's claim of a \$100,000 increase in health insurance costs; and by bypassing the Union by announcing to unit employees that they would not be eligible for unemployment compensation as a result of its implementation of the schedule and pay changes. (A 7, 31, D&O 1, 25.)

The Board's Order requires Hartford to cease and desist from the unfair labor practices found and from, in any like or related manner,

interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's Order requires that Hartford rescind the changes in terms and conditions of employment described above, and restore the status quo ante; to make employees whole for any loss of earnings and other benefits suffered; and on request, to bargain with the Union as the exclusive representative of its employees in the specified unit. The Order also requires the posting of a remedial notice. (A 7, 32, D&O 1, 26.)

### **SUMMARY OF ARGUMENT**

1. Chairman Liebman and Member Schaumber, 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. Their authority to issue Board decisions and orders under such circumstances is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable situations under other federal administrative agency statutes, and administrative-law and common-law principles. Hartford's contrary argument must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant

provisions, and a misunderstanding of the statute governing federal appellate panels, which has no application to the Act.

2. The Board reasonably found that Hartford committed several violations of Section 8(a)(5) and (1) of the Act. First, it is uncontested that Hartford violated Section the Act by unilaterally changing its employees' health insurance prescription plan; by being dilatory in responding to the information request for the existing contract between Hartford and the City regarding providing preschool services for the City; by failing and refusing to supply the Union with requested information relating to Hartford's claim of a \$100,000 increase in health insurance costs; and by bypassing the Union by announcing to unit employees that they would not be eligible for unemployment compensation as a result of its implementation of the schedule and pay changes. Accordingly, the Board is entitled to summary enforcement of the portions of its Order which are based on those uncontested findings.

3. Substantial evidence supports the Board's finding that Hartford further violated Section 8(a)(5) and (1) of the Act by implementing, without prior notice to the Union and without affording the Union a meaningful opportunity to bargain, its decision to reduce unit employees' work schedules from 12 months to 10 months and to pay them 10 months' wages

over a 12-month period. Hartford admittedly refused to bargain with the Union about the proposed changes to the employee schedules and pay rates, but claims that its conduct was excused because of exigent circumstances.

The Board, however, reasonably rejected Hartford's exigent circumstances defense, because Hartford failed to show that the funding cuts it suffered were unforeseen and required prompt action. Indeed, Hartford had known, since at least April 2007, that its funding would be cut. Thus, by Hartford's own admission, it had faced a steady decline in enrollment, and consequent funding reductions, since August 2006 and had budgeted for those cuts. There is no dispute that Hartford did not in April, nor any time prior thereto, raise its financial predicament with the Union.

Finally, Hartford never sought to bargain in good faith with the Union about changes in employee schedules or pay. Hartford developed a budget in April 2007—almost a year before implementation of the intended changes--without notice to the Union of its intentions. Hartford never afforded the Union an opportunity to bargain, even if it informed the Union of its intentions, because it already had made a firm decision to implement the changes regardless of any position that the Union might take. Indeed, in more than one bargaining session, Hartford told the Union that considering any alternative was “impossible.”

## STANDARD OF REVIEW

The Court will uphold the Board's decision where there is "substantial evidence on the record considered as a whole to support the Board's findings." *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 295 (6th Cir. 1985). *Accord NLRB v. Gary's Elec. Serv. Co.*, 227 F.3d 646, 652 (6th Cir. 2000). "Evidence is considered substantial if it is adequate, in a reasonable mind, to uphold the decision." *Turnbull Cone*, 778 F.2d at 295. *Accord Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 752 (6th Cir. 2003). This Court also reviews the Board's application of the law to particular facts under the substantial evidence standard, and "the Board's reasonable inferences may not be displaced on review even though the court might justifiably have reached a different conclusion had the matter been before it *de novo*." *Turnbull Cone*, 778 F.2d at 295. *Accord Gratiot Comm. Hosp. v. NLRB*, 51 F.3d 1255, 1259 (6th Cir. 1995).

Where the decision of a case turns on construction of a provision of the Act, a two-step approach is required. If "Congress has directly spoken to the precise question at issue," then "the court, as well as the [Board], must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). But, "if the [Act] is silent or ambiguous with respect to the specific issue,"

then “a court may not substitute its own construction . . . for a reasonable interpretation made by the [Board].” *Id.* at 843, 844. *Accord Quick v. NLRB*, 245 F.3d 231, 241 n.7 (3d Cir. 2001).

## ARGUMENT

### I. CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER ACTED WITH THE FULL POWERS OF THE BOARD IN ISSUING THE BOARD’S ORDER

Chairman Liebman<sup>2</sup> and Member Schaumber, 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. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-0213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328).<sup>3</sup> *But see Laurel Baye Healthcare of Lake Lanier, Inc. v.*

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<sup>2</sup> On January 20, 2009, President Obama designated Member Liebman as Chairman of the Board. *See* BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

<sup>3</sup> The issue was argued before the Eighth Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291, on June 9, 2009, and the Fourth Circuit in *Narricot Industries, L.P. v. NLRB*, Nos. 09-1164 and 09-1280, on September 23, 2009. It has also been briefed in the Third Circuit in *J.S. Carambola, LLP*

*NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, \_\_\_U.S.L.W.\_\_(U.S. Sept. 29, 2009) (No. 09-377) (discussed below). As we now show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), is consistent with Section 3(b)'s legislative history, and is supported by cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. Hartford's contrary argument (Br 16-27) must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and a misunderstanding of the statute governing federal appellate panels, which has no application to the Act.

### **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. §

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*v. NLRB*, Nos. 08-4729 and 09-1035, *St. George Warehouse, Inc. v. NLRB*, Nos. 08-4875, 09-1269, and *Racetrack Food Services, Inc. v. NLRB*, Nos. 09-1090, 09-1509; the Fourth Circuit in *McElroy Coal Company v. NLRB*, Nos. 09-1332, 09-1427; the Fifth Circuit in *Bentonite Performance Mineral LLC v. NLRB*, No. 09-60034, and *NLRB v. Coastal Cargo Co.*, No. 09-60156; the Eighth Circuit in *NLRB v. American Directional Boring, Inc.*, No. 09-1194; the Ninth Circuit in *NLRB v. UFCW Local 4*, No. 09-70922, and *NLRB v. Barstow Community Hosp.*, No. 09-70771; and the Tenth Circuit in *Teamsters, Local 523 v. NLRB*, Nos. 08-9568 and 08-9577. It has been briefed to this Court in *SPE Utility Contractors, LLC v. NLRB*, Nos. 09-1692 and 09-1730.

153(a). The delegation, vacancy, and quorum provisions that govern the Board are contained in Section 3(b) of the Act (29 U.S.C. § 153(b)), which provides in pertinent part:

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.

Pursuant to these provisions, the four members of the Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a group of three members: Liebman, Schaumber and Kirsanow. After the recess appointments of Members Kirsanow and Walsh expired three days later, the two remaining members, Liebman and Schaumber, continued to exercise the delegated powers they held jointly with Member Kirsanow, consistent with the express language of Section 3(b) that a vacancy "shall not impair the right of the remaining members to exercise all of the powers of the Board," and that "two members shall constitute a quorum" of any group of three members to which the Board has delegated its powers. Since January 1, 2008, this two-member quorum has issued over 350

published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.<sup>4</sup>

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

In determining whether Section 3(b) expresses Congress' clear intent to grant the Board the option of operating the agency through a two-member quorum of a properly delegated, three-member group, the Court should apply "traditional principles of statutory construction." *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 123 (1987); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984). This process begins with looking to the plain meaning of the statutory terms. *Terrell v. United States*, 564 F.3d 442, 449-51 (6th Cir. 2009). The meaning of a term, however, "cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see Terrell*, 564 F.3d. at 451. Moreover, "a statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic*

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<sup>4</sup> On May 19, 2009, it was reported that the two-member quorum had issued approximately 409 decisions, published and unpublished. *See BNA, Daily Labor Report*, No. 94, at p. A-7 (May 19, 2009). The published decisions include all of Volumes 352 NLRB (146 decisions), 353 NLRB (132 decisions), and 354 NLRB (91 decisions as of October 7, 2009).

*Village, Inc.*, 503 U.S. 30, 36 (1992); see *United States v. Perry*, 360 F.3d 519, 537 (6th Cir. 2004) (“any interpretation of [the statute] that makes one of its provisions irrelevant is presumptively incorrect”); *United States v. Caldwell*, 49 F.3d 251, 251 (6th Cir. 1995) (“The statute is read as a whole and construed to give each word operative effect.”)

As relevant to this case, Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate “any or all of the powers which it may itself exercise” to a group of three or more members; (2) a declaration that a vacancy in the Board “shall not impair” the authority of the remaining members to exercise the Board’s powers; and (3) a provision stating that three members shall constitute a quorum of the Board, but with an express exception stating that two members shall constitute a quorum of any group designated pursuant to the Board’s delegation authority.

As both the First and Seventh Circuits have concluded, the plain meaning of Section 3(b) authorizes a two-member quorum of a properly-constituted, three-member group to issue decisions, even when, as here, the Board has only two sitting members. See *New Process*, 564 F.3d at 845 (“As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the

text.”); *Northeastern*, 560 F.3d at 41 (“the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of [S]ection 3(b)”).

As those decisions recognize, the three provisions of Section 3(b), in combination, authorized the Board’s action here. When the then-four-member Board delegated all of its authority to a three-member group of the Board in December 2007, it did so pursuant to the first provision. When the term of one of those members (as well as that of the fourth sitting Board member) expired on December 31, 2007, the remaining two members constituted a quorum of the group to which the Board’s powers had been lawfully delegated. Consistent with Section 3(b)’s second and third relevant provisions identified above, those “two members” then continued to exercise the previously delegated powers, and their authority to do so was “not impair[ed]” by a vacancy in the other positions on the Board. 29 U.S.C. 153(b). The validity of the Board’s actions thus follows from a straightforward reading of the Act.<sup>5</sup>

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<sup>5</sup> In our view, Congress’ intention is clear, and “that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43. However, in *Snell Island*, 568 F.3d at 424, the Second Circuit found that Section 3(b)

Moreover, as both the Seventh Circuit (*New Process*, 564 F.3d at 846) and the First Circuit (*Northeastern*, 560 F.3d at 41-42) noted, two persuasive authorities provide additional support for this reading of Section 3(b). First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), where the Board had four sitting members, the Ninth Circuit held that Section 3(b)'s two-member quorum provision authorized a three-member group to issue a decision even after one panel member had resigned. The court held that it was not legally determinative whether the resigning Board member participated in the decision, because “the decision would nonetheless be

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does not have a plain meaning, but that the Board’s reasonable interpretation of Section 3(b) is entitled to deference. If this Court, like the Second Circuit, should find that Section 3(b) is susceptible to different reasonable interpretations, then the Court should find, in agreement with the Second Circuit, that the Board’s view is entitled to deference. *See Barnhart v. Walton*, 535 U.S. 212, 214-15 (2002) (If statute is ambiguous, agency’s interpretation must be sustained unless it “exceeds the bounds of the permissible.”) (citing *Chevron*, 467 U.S. at 843, and *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

The Board delegation at issue here, at a minimum, reflects a reasonable construction of Section 3(b) that is consistent with its legislative history, and furthers the overall purpose of the Act to avoid “industrial strife.” 29 U.S.C. § 151. The fundamental point is that courts should prefer a permissible construction that permits an agency to continue to carry out its public function. *See Snell Island*, 568 F.3d at 424 (commending the Board for its “conscientious efforts to stay ‘open for business’”). *Accord Falcon Trading Group, Ltd. v. NLRB*, 102 F.3d 579, 582 n.3 (1996); *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335, 1340 n.26 (D.C. Cir. 1983). Thus, under any standard of deference, the Board’s reasonable interpretation should be respected by this Court.

valid because a ‘quorum’ of two panel members supported the decision.” *Id.* at 123. Second, the United States Department of Justice’s Office of Legal Counsel (“OLC”), in a formal opinion, has concluded that the Board possesses the authority to issue decisions with only two of its five seats filled, where the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b). *See* QUORUM REQUIREMENTS, Department of Justice, OLC, 2003 WL 24166831 (Mar. 4, 2003).

Hartford relies (Br. 26-27) on the D.C. Circuit’s decision in *Laurel Baye*. That decision, however, is based on a strained reading of Section 3(b) that does not give operative meaning to all of its relevant provisions. *Laurel Baye*, 564 F.3d at 472-73, held that Section 3(b)’s provision—that “three members of the Board shall, *at all times*, constitute a quorum of the Board” (29 U.S.C. § 153(b), *emphasis added*)—prohibits the Board from acting when it has fewer than three sitting members, despite Section 3(b)’s express exception that provides for a quorum of two members when the Board has delegated its powers to a three-member group. The court concluded that the two-member quorum provision is not in fact an exception to the three-member quorum requirement, because Congress’ use of the two different object nouns, “Board” and “group,” indicates that each quorum provision is

independent of the other, and the two-member quorum provision does not eliminate the requirement that there be a three-member quorum present “at all times.” *Id.* at 473.

The D.C. Circuit’s interpretation fails to give the critical terms of Section 3(b) their ordinary meaning, thereby violating the cardinal canon of statutory construction “that courts must presume a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); see *Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1890-91 (2009) (applying “ordinary English” to determine statutory meaning). The ordinary meaning of the word “except,” where, as here, it is used as a conjunction attaching a subordinate clause modifying a main clause, is “[e]xcepting; if it be not that; unless.” *Webster’s New International Dictionary* 608 (2d ed. 1945). Thus, in ordinary English usage, the statement in Section 3(b)—that “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” (emphasis added)—denotes that the three-member quorum rule applies at all times unless the Board has delegated its powers to a three-member group, in which case two members constitutes a quorum.

In other words, the full Board must have three or more participating members in order to take any action, including to delegate any of its powers to a group of three of its members. And that delegee group in turn must have at least two participating members in order to exercise any of the powers delegated to it. But where, as here, the Board previously delegated all of its powers to a three-member group, any two members of that group constitute a quorum and may continue to exercise the delegated powers. The legality of such actions does not depend on whether the Board as a whole also has a quorum, because the Board has already delegated its full authority to the delegee group, which appropriately acts through a quorum of two members.

Although the D.C. Circuit in *Laurel Baye* purported to apply the rule that a statute should be construed so that “no provision is rendered inoperative or superfluous, void or insignificant,” 564 F.3d at 472, the court in fact treated the statute as though it did not contain the word “except.” The court reasoned that “the word ‘except’ is . . . present in the statute only to indicate that the delegee group’s ability to act is measured by a different numerical value” than the larger Board’s ability to act. *Id.* But Congress could have accomplished that result by leaving out the word “except” altogether and instead setting forth two independent clauses or

sentences, the first stating that “three members of the Board shall, at all times, constitute a quorum of the Board,” and the second stating that “two members shall constitute a quorum of any group designated pursuant to [the delegation clause].” 29 U.S.C. 153(b). Rather than doing that, Congress linked the two clauses with a comma and the word “except,” which means that the special quorum rule in the second clause constitutes an exception to the general quorum rule in the first. Indeed, Congress has used the construction “at all times . . . except” in other statutes to accomplish exactly what it did here—to provide that a general rule should apply at all times except in the instances specified in the statute. *See, e.g.*, 20 U.S.C. § 1099c-1(b)(8) (Secretary of Education shall “maintain and preserve *at all times* the confidentiality of any program review report . . . *except that* the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review”) (emphasis added).

The D.C. Circuit also failed to give the word “quorum” its ordinary meaning. By definition, “quorum” means “[s]uch a number of officers or members of any body or association as is competent by law or constitution to transact business.” *Webster’s New International Dictionary* 1394 (2d ed. 1945). *See Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332,

1341 (D.C. Cir. 1983) (“quorum” means “the 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)); *see also Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2d 1196, 1202 (7th Cir. 1980) (“A ‘quorum’ is ‘[s]uch a number of the officers or members of any body as is, when duly assembled, legally competent to transact business.’”) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2046 (2d ed. 1937)). Section 3(b)’s establishment of two members as a quorum of a delegee group denotes that the group may legally transact business with two of its members. Under the reasoning of the *Laurel Baye* decision, however, the presence of a two-member quorum of a delegee group possessed of all the Board’s powers is never in itself sufficient to permit the legal transaction of business by that group unless there also happens to be a third sitting Board member.<sup>6</sup> That reading untethers the quorum requirement for the full Board from the purpose of a quorum provision—namely, to set the minimum *participation*

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<sup>6</sup> The D.C. Circuit’s construction, as the Seventh Circuit aptly noted, appears to sap the quorum provision of meaning, “because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.” *New Process*, 564 F.3d at 846 n.2.

level required before a body may take action. Under the D.C. Circuit’s reading, the full Board quorum provision in Section 3(b) establishes a minimum *membership* level for the full Board that must be satisfied in order for a delegee group to act, even though the non-group members of the full Board would not participate in the delegee group’s action.

The *Laurel Baye* court also misconstrued the delegation provision and the related two-member quorum provision by distinguishing “the Board” from “any group,” so that no group may act unless the Board itself has three members. *Laurel Baye*, 564 F.3d at 473. That conclusion ignores that Congress did not use the nouns “group” and “Board” to signify that a group could not function if there were fewer than three sitting Board members. Rather, Section 3(b) authorizes the Board to delegate all its powers to a three-member group in a manner that the group, possessing all the Board’s powers, is empowered to bind the Board as an institution through a two-member quorum comprised of the only two sitting Board members. *See Northeastern*, 560 F.3d at 41 (upholding “the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum” (emphasis added)).

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

As shown, the meaning of statutory language cannot be determined by considering particular terms in isolation, but must take into account the intent and design of the entire statute. *See Terrell v. United States*, 564 F.3d. 442, 451 (6th Cir. 2009). Thus, ascertaining that meaning often requires resort to historical materials, including legislative history. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 578 (1995).

A brief history of the Board's operations and of the legislation that ultimately became Section 3(b) confirms that Section 3(b) authorizes the Board to adjudicate cases with a two-member quorum. In the Wagner Act of 1935, which created a three-member Board, Section 3(b), in its entirety, provided: "A vacancy on the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and two members of the Board shall, at all times, constitute a quorum."<sup>7</sup> Pursuant to that two-member quorum provision, the original

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<sup>7</sup> *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).

Board, during its 12 years of administering federal labor policy, issued 464 published decisions with only two of its three seats filled.<sup>8</sup> *See, e.g., NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.<sup>9</sup> 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.<sup>10</sup>

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<sup>8</sup> The Board had only two members during three separate periods between 1935 and 1947: from September 1 until September 23, 1936; from August 27 until November 26, 1940; and from August 28 until October 11, 1941. *See 2d Annual Report, NLRB*, at 7; *6th Annual Report*, at 7 n.1; *7th Annual Report*, at 8 n.1. Those two-member Boards issued 3 published decisions in 1936 (2 NLRB 198-240); 237 published decisions in 1940 (all of 27 NLRB, and 28 NLRB 1-115); and 224 published decisions in 1941 (35 NLRB 24-1360 and 36 NLRB 1-45).

<sup>9</sup> *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).

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.<sup>11</sup> The Senate bill's preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity of viewpoint in deciding cases, contrary to the suggestion of one Senator.<sup>12</sup> 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."<sup>13</sup> Senator Taft similarly stated that the

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<sup>10</sup> 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.

<sup>11</sup> S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

<sup>12</sup> Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

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.”<sup>14</sup> *See Snell Island*, 568 F.3d at 421 (Congress added Section 3(b)’s delegation provision “to enable the Board to handle an increasing caseload more efficiently”) (quoting *Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981)). The Conference Committee accepted, 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.<sup>15</sup>

Despite having only two additional members, rather than four as proposed by the Senate, the new five-member Board was able to leverage

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<sup>13</sup> S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

<sup>14</sup> 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 (“ICC”) and the Federal Communications Commission (“FCC”). At that time, both the FCC and ICC statutes 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).

<sup>15</sup> 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 540-41.

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<sup>16</sup> 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). In this way, the Board implemented Congress' intent that the Board exercise its delegation authority to increase its casehandling efficiency.<sup>17</sup>

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<sup>16</sup> See 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

<sup>17</sup> 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's statement).

In sum, by authorizing the Board to delegate its powers to a group of three members, 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. As the Seventh Circuit concluded in rejecting the contention that Section 3(b) prohibits the Board from acting unless it has three sitting members:

To the extent that the legislative history points either way . . . , it establishes that Taft-Hartley created a Board that functioned as an adjudicative body that was allowed to operate in panels in order to work more efficiently. Forbidding the NLRB to sit with a quorum of two when there are two or more vacancies on the Board would thus frustrate the purposes of the [A]ct, not further it.

*New Process*, 564 F.3d at 847.

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 seats filled. If Congress were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have changed or eliminated that quorum provision in 1947, when it enacted comprehensive amendments to the Act. Instead, Congress preserved the Board's power to adjudicate labor disputes with a two-member quorum where it has exercised its delegation authority.

**D. Well-Established Administrative-Law and Common-Law Principles Support the Authority of the Two-Member Quorum To Exercise All the Powers Delegated to the Three-Member Group**

The conclusion that the two remaining members of a three-member group can continue to exercise the powers of the Board that were properly delegated to that three-member group is consistent with established principles of both administrative law and the common law of public entities.

As the Supreme Court explained in *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967), Congress enacted statutes creating administrative agencies against the backdrop of the common-law quorum rules applicable to public bodies, and these common-law rules were written into the enabling statutes of several agencies, including the Board. *Id.* at 183-86 (also identifying the ICC).<sup>18</sup>

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<sup>18</sup> In *Flotill*, the Supreme Court held that where only three commissioners of the five-member FTC participated in a decision, a 2-1 decision was valid, recognizing the common-law rule that “in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” 389 U.S. at 183 & n.6 (collecting cases). The Court concluded that “[w]here the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.” *Id.* at 183-84.

At common law, the power held by 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 (1875). Consistent with those principles, the majority view of common-law quorum rules was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body (*see Ross v. Miller*, 178 A. 771, 772 (N.J. Sup. Ct. 1935) (collecting cases)), even where that majority represented only a minority of the full board. *See, e.g., People v. Wright*, 71 P. 365 (Colo. 1902) (where city council was composed of 8 aldermen and 1 mayor, and the terms of 4 aldermen expired, vote of two of the remaining aldermen and the mayor was valid because they constituted a quorum of the five remaining members).<sup>19</sup> By providing for an express two-member-quorum exception to Section 3(b)’s three-member-quorum requirement where the Board has delegated its powers to a three-member group, Congress enabled the Board to continue to exercise its powers through a

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<sup>19</sup> Cases which appear to run counter to the common-law rules involve specific quorum rules dictated by statute or ordinance. *See, e.g., Gaston v. Ackerman*, 6 N.J. Misc. 694, 142 A. 545 (Sup. Ct. 1928) (three of five members were insufficient for a quorum because “the ordinance under which the meeting was held provided that a quorum shall consist of four members”).

quorum number identical to that called for under the common-law rule that a majority of remaining members constitute a quorum.

Giving effect to Section 3(b)'s plain language produces a result that is consistent with what Congress has authorized in similar statutes, enacted like the NLRA against the backdrop of common-law quorum rules applicable to public agencies. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), the D.C. Circuit, recognizing the relevance of these common-law principles, held that, in the absence of any countermanding provision in its authorizing statute, the Securities and Exchange Commission ("SEC") lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions when only two of its five authorized seats were filled. *Id.* at 582 and n.2

The common-law principles cited in *Falcon Trading* apply in interpreting the quorum provisions of the NLRA, even though, unlike the NLRA, the SEC's authorizing statute contained no quorum provision. The only real difference is that the SEC had to hand-tailor its solution to the imminent problem of being reduced to two members by amending its own quorum rules at a time when its rules still required a three-member quorum. The statutory mechanism Congress provided for the NLRB differs from the mechanism afforded the SEC, but the result—that two

members of a properly-delegated three-member group constitute a quorum that can issue agency decisions—is equally valid. *See New Process*, 564 F.3d at 848 (*Falcon Trading* supports the Board’s authority to issue decisions pursuant to Section 3(b)’s two-member quorum provision).

The common-law quorum rule is reflected in the authorizing statutes of other administrative agencies. *See Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980) (when only 6 of the 11 seats on the ICC were filled, a majority of the commissioners in office constituted a quorum and could issue decisions); *Michigan Dep’t of Transport. v. ICC*, 698 F.2d 277, 279 (6th Cir. 1983) (when 7 of the 11 seats on the ICC were vacant, a decision issued by the remaining 4 commissioners was valid); *cf. Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983) (based on provision permitting 11-member agency to “carry out its duties in [d]ivisions consisting of three [c]ommissioners,” but also providing that “a majority of a [d]ivision is a quorum for the transaction of business,” ICC decision participated in and issued by only two of the three division members was valid).

In *Laurel Baye*, the D.C. Circuit compounded its failure to interpret Section 3(b) in light of applicable common-law quorum principles by invoking instead private-law principles “of agency and corporation law” to

hold that the three-member group to which four Board members delegated all of the Board's powers was an "agent" of the Board, whose delegated authority terminated when the delegator's authority was suspended. 564 F.3d at 473 (citing RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006) for the proposition that "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended"). Hartford echoes this argument (Br. 21-22), citing the same agency principle in support of its contention that when Member Kirsanow left the Board, "the three-member group no longer existed and, therefore, was incapable of continuing to exercise the powers."

In so reasoning, both Hartford and the D.C. Circuit fail to heed the warning of the very treatises they cite—namely, that governmental bodies are often subject to special rules not applicable to private bodies.<sup>20</sup> *See Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1343, n.30 (D.C. Cir. 1983) (recognizing that the Railway Labor Act's delegation and

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<sup>20</sup> *See* FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2 (2008) (distinguishing between private and municipal corporations, stating that "the law of municipal corporations [is] its own unique topic," and concluding that "[a]ccordingly, this treatise does not cover municipal corporations"). Similarly, RESTATEMENT (THIRD) OF AGENCY (2006), in its introduction, states that it "deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government."

vacancies provisions incorporated principles different from those of the private law of agency and corporations). The delegation, vacancy, and quorum provisions in Section 3(b) of the NLRA on their face manifest Congress' intent that the Board continue to function in circumstances where a private body might be disabled. As the OLC recognized, Section 3(b)'s plain language is properly understood to permit the two-member quorum to continue to exercise the Board's powers that were delegated to the three-member group, because so construing Section 3(b) "would not confer power on a number of members smaller than the number for which Congress expressly provided in setting the quorum." 2003 WL 24166831, at \*3. Both Hartford and the *Laurel Baye* court err in failing to recognize that the two-member Board quorum that decided this case possesses all of the Board's institutional powers as a result of a valid delegation to a three-member group, and that Section 3(b) authorized them to exercise those powers, not as Board agents, but as Board principals acting for the Board itself.

#### **E. The Two-Member Quorum Has Authority To Decide All Cases Before The Board**

Hartford contends (Br. 22-23) that the federal law governing the composition of three-judge appellate panels (28 U.S.C. § 46) should be imported to the NLRA to control the Board's exercise of its delegation authority. It claims (Br. 24) that there is "no meaningful distinction"

between 28 U.S.C. § 46 and Section 3(b) of the Act. To the contrary, the two statutes have sharp distinctions, and application of the federal judicial statute to the Board would improperly override congressional intent and interfere with the option Congress provided for the Board to fulfill its agency mission through a two-member quorum.

Unlike the statutes governing the federal courts, Section 3(b) does not limit the Board's delegation powers to case assignment. Under the express terms of Section 3(b), the Board may delegate "any or all of the powers which it may itself exercise" to a group of three members, who accordingly may act *as the Board itself*. Those powers are not simply adjudicative, but also administrative, and include such powers as the power to appoint regional directors and an executive secretary (*see* 29 U.S.C. § 154), and the power, in accordance with the Administrative Procedure Act, to promulgate the rules and regulations necessary to carry out the provisions of the NLRA (*see* 29 U.S.C. § 156).

By contrast, the judicial panel statute, in relevant part, is limited to adjudication of cases, providing that a federal appellate court must assign each case that comes before it to a three-judge panel. *See* 28 U.S.C. § 46(b) (requiring "the hearing and determination of cases and controversies by separate panels, each consisting of three judges"). *See also Murray v. Nat'l*

*Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (relying on legislative history to find that Congress intended 28 U.S.C. § 46(b) to require that, ““in the first instance, all cases would be assigned to [a] panel of at least three judges””) (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)).

Moreover, Section 3(b), unlike 28 U.S.C. § 46(b), does not require that particular cases be assigned to panels of Board members. Therefore, a delegation of “all the Board’s powers” to a three-member group means that all cases that may come before the Board are before the group, and the two-member quorum has the authority to decide those cases.

Hartford’s position is not aided by its reliance (Br. 22-23) on *Nguyen v. United States*, 539 U.S. 69 (2003). Instead, that case further demonstrates why construing Section 3(b) to incorporate restrictions found in federal judicial statutes would constitute legal error. *Nguyen* illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b). *See New Process*, 564 F.3d at 847-48. In *Nguyen*, the Court held that the judicial panel statute requires that a case must be assigned to three Article III judges, that the presence of an Article IV judge on the panel meant that it was not properly constituted, and that the two Article III judges on the panel could not issue a valid decision, even though Section 46(d) provides that two

Article III judges constitute a quorum. *See* 539 U.S. at 82-83. However, the three-member group of Board members to which the Board delegated all of its powers *was* properly constituted pursuant to Section 3(b), and thus nothing in the Court’s *Nguyen* opinion—even if it were applicable—would prevent the two-member quorum from continuing to exercise those powers. *See Snell Island*, 568 F.3d at 419 (three-member panel that took effect on December 28, 2007, was properly constituted). Indeed, *Nguyen* specifically stated that two Article III judges “would have constituted a quorum if the original panel had been properly created . . . .” 539 U.S. at 83. That is analogous to the situation here.<sup>21</sup>

Hartford also argues (Br. 24) that three Board members must be assigned to a case in order to allow for “adequate discourse and review in the decision making process,” citing *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132 (1947). *Ayrshire*, however, is another case that illustrates the differences between the statutes authorizing the creation of judicial panels and Section 3(b). In *Ayrshire*, the Court held that a full complement of three judges was necessary to enjoin the enforcement of ICC orders because Congress, in the Urgent Deficiencies Act, had specifically

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<sup>21</sup> The *Nguyen* Court’s further concern that the deliberations of the two-judge quorum were tainted by the participation of a judge not qualified to hear the case (*see* 539 U.S. at 82-83) is wholly inapplicable here.

directed that such cases “shall be heard and determined by three judges,” and made “no provision for a quorum of less than three judges.” 331 U.S. at 137. By contrast, in enacting Section 3(b), Congress specifically provided for a quorum of two members, and did not provide that if the Board delegates all its powers to a three-member group, all three members must participate in a decision.

**F. Construing Section 3(b) in Accord with Its Plain Meaning Furthers the Act’s Purpose**

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. In so doing, the Board acted to ensure that it could continue to issue decisions and fulfill its agency mission through the use of the two-member quorum. The NLRA 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 give effect both to the plain language of the Act and its purpose.

Hartford attacks (Br. 18-19) the Board’s delegation of authority as “fictional” (Br. 23) on the ground 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.

Rejecting that argument, the Second Circuit aptly recognized that the anticipated departure of one member of the group “has no bearing on the fact that the panel was lawfully constituted in the first instance.” *Snell Island*, 568 F.3d at 419.

Indeed, as both the Seventh and the First Circuits observed, similar actions taken by federal agencies to permit the agency to continue to function despite vacancies have been upheld. *See New Process*, 564 F.3d at 848; *Northeastern*, 560 F.3d at 42. As noted, in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d at 582 & n.3, after the five-member SEC had suffered two vacancies, the remaining three sitting members promulgated a new quorum rule so the agency could continue to function with only two members. In upholding both the rule and a subsequent decision issued by a two-member SEC quorum, 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.*

Likewise, in *Yardmasters*, 721 F.2d at 1335, 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 Board properly relied on the combination of its delegation, vacancy, and quorum provisions to ensure that it would continue to operate despite upcoming vacancies.

In *Laurel Baye*, the D.C. Circuit noted that its *Yardmasters* decision was distinguishable because it involved only the issue of “whether the NMB was able to delegate its authority to a single NMB member.” *Laurel Baye*, 564 F.3d at 474. Hartford also advances (Br. 21) that same distinction. While it is true that the cases are distinguishable, the critical distinction noted by Hartford and the court in *Laurel Baye* actually points directly to the greater strength of the Board’s case. In *Yardmasters*, the court faced the question whether an agency that acts 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. Here, unlike *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. Therefore, in contrast to the one-member problem at issue in

*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)).

**G. Hartford’s Policy Attacks on the Board’s Authority Are Misdirected**

Hartford suggests (Br. 25) that allowing two Board members to decide cases would lead to an “undue concentration” of decisionmaking power. This 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. Hartford overlooks 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. *See* p. 27 n.10. If Congress were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have eliminated that quorum provision. Instead, in amending the Act 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.

Equally misdirected is Hartford's policy concern (Br. 25-26) 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.

## **II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED UNFAIR LABOR PRACTICE FINDINGS**

Before the Board, Hartford contested only one of the administrative law judge's unfair labor practice findings. As a result, the other violations cannot be challenged in this Court. Indeed, Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court . . . ." Accordingly, the Company has prudently chosen not to attempt to litigate those violations in its brief. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) ("the Court of Appeals lacks jurisdiction to

review . . . objections" that were not raised to the Board). *Accord Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 843 (6th Cir. 2003).

In particular, Hartford does not contest (Br. 16-41) the Board's findings that it violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally changing its employees' health insurance prescription plan; by being dilatory in responding to the information request for the existing contract between Hartford and the City regarding providing prekindergarten services for the City; by failing and refusing to supply the Union with requested information relating to Hartford's claim of a \$100,000 increase in health insurance costs; and by bypassing the Union by announcing to unit employees that they would not be eligible for unemployment compensation as a result of its implementation of the work schedule and pay changes. Accordingly, Hartford has waived any defense to those findings, and the Board is entitled to summary enforcement of those parts of its Order which remedy those unfair labor practices. *See Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 956 (6th Cir. 2006) ("When an employer fails to challenge certain adverse findings of the Board . . . the employer effectively admits the truth of those findings and loses the right to object to them.") *Accord Mt. Clemens Gen. Hosp.*, 328 F.3d at 843.

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT HARTFORD VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO BARGAIN WITH THE UNION REGARDING CHANGES TO EMPLOYEES' WORK SCHEDULES AND WAGES AND BY UNILATERALLY IMPLEMENTING THOSE CHANGES**

While the parties were in the midst of protracted negotiations for their first collective-bargaining agreement, Hartford concededly announced its intent to impose a 10-month work schedule on bargaining unit employees, while paying the affected employees their 10 months of wages over a 12-month period. Hartford then, admittedly (Br. 28), implemented those changes. As we show below, ample evidence supports the Board's finding that Hartford's unilateral implementation of those changes violated Section 8(a)(5) and (1) of the Act.

As Hartford concedes (Br. 28), under the general command of the law, such conduct is unlawful because “unilateral changes by an employer that modifies its employees’ wages, hours, working conditions and other mandatory subjects of bargaining violates Section 8(a)(5) . . . .”

*Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003) (“[i]f an employer changes wages or other terms without affording the Union an opportunity for adequate consultation, it minimizes the influence of organized bargaining and emphasizes to the employees that there is no necessity for a collective bargaining agent[.]”) (internal quotations omitted).

During contract negotiations, an employer's "obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." *RBE Elecs. of S.D., Inc.*, 320 NLRB 80, 81 (1995). *Accord Pleasantview*, 351 F.3d at 755.

The Board, however, recognizes an "economic exigency" exception to the general rule that an employer may not make unilateral changes. *Bottom Line Enters.*, 302 NLRB 373, 374 (1991). Under that exception, an employer may act unilaterally "when economic exigencies compel prompt action." *Id.* The Board limits its definition of "economic exigency" to "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the [employer] to take immediate action." *Ciabo Meat Products, Inc. v. NLRB*, 547 F.3d 336, 340 (2d Cir. 2008).

The Board also recognizes a second category of economic exigency when the parties, like here, are in contract negotiations. As the Board has explained, during bargaining "circumstances [may] arise that are not sufficiently compelling enough to excuse bargaining altogether, but require 'prompt action' and 'cannot await' final agreement or impasse on the collective-bargaining agreement as a whole." *Monroe Mfg. Inc.*, 323 NLRB

24, 24-25 (1997) (citations omitted). *Accord Pleasantview*, 351 F.3d at 755.

In such a situation, an employer “will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain” over the specific change requiring prompt action. *RBE Elecs.*, 320 NLRB at 82. If the employer does so, then it may unilaterally implement the proposed change “if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change,” even though the parties have not reached an overall impasse on the agreement as a whole. *Id.*

Hartford relies on the second type of economic exigency (Br. 28-31), but it fails to establish the requisite elements of that defense. As we show below, Hartford failed to prove that the federal funding reduction constituted circumstances that required prompt action. And even if prompt action was required, Hartford did not show that the Union waived its right to bargain or that the parties bargained to impasse on the schedule and wage changes.

Specifically, Hartford cannot show that the funding reduction required prompt action. After all, Hartford did not implement the changes in employee schedules and wages until February 2008, 3 months after the start of the fiscal year, which start Hartford claims necessitated the change. *See Pleasantview*, 351 F.3d at 756 (conclusion that employer “did not face an

economic exigency is supported by the two-month delay between the time it first requested the wage increase and the time it implemented it[ ]”).

Moreover, its budgetary problems were hardly unforeseen. By Hartford’s own admission (Br. 33-34), it had faced a steadily declining enrollment, and consequent funding reductions, since August 2006. Thus, not only did Hartford foresee the funding decrease, but also it planned for it. In April 2007, it submitted its initial budget proposal to the City for the 2007-08 fiscal year, which already provided for the schedule and pay changes.

Indeed, in its brief, Hartford does not even attempt to address the elements of the exigent circumstances exception. Rather, it simply notes its alleged dire financial circumstances--specifically, that previously it had run budget deficits as a result of underenrollment. However, as this Court has noted, such an argument is not sufficient. “A mere ‘business necessity is not the equivalent of compelling considerations which excuse bargaining’ . . . . For example, ‘loss of an account representing 14 percent of revenue’ is not an economic exigency.” *Pleasantview*, 351 F.3d at 755 (internal citation omitted). Nor does an employer’s showing of “chronic difficulties” in operating its business with the existing complement of employees justify a

layoff without bargaining to impasse. *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995).

Even if Hartford had shown exigent circumstances, it nevertheless was required to show that it provided the Union with adequate notice and an opportunity to bargain over the specific change, and that the Union waived its right to bargain or that the parties bargained to impasse over the matter. *See RBE Elecs.*, 320 NLRB at 82. Hartford made no such showing.

Any claims by Hartford (Br. 35-36, 40-41) that it gave the Union notice and an opportunity to bargain, and that the Union waived bargaining, are fatally undermined by the record evidence. As shown above (pp. 6-8 ), during ongoing negotiations Hartford first announced the schedule and wage reductions directly to unit employees, and then repeatedly informed the Union that the changes were going to happen. By the time Hartford told the Union of the changes, its decision was firm; it already had been approved by its Board of Directors, the Parent Committee, and was under consideration by the City. Moreover, Hartford told the Union that there was nothing it could do about the decision, and that paying employees for 10 months of work based on the same 12-month pay rate was impossible.

In short, Hartford presented the Union with a *fait accompli*. *See NLRB v. Centra, Inc.*, 954 F.2d 366, 372 (6th Cir. 1992) (if “an employer

has no intention of changing its mind, the notice constitutes nothing more than informing the union of a *fait accompli*”). As this Court has explained, because “[a]n employer must inform the union of its proposed actions under circumstances which at least afford a reasonable opportunity for counter arguments or proposals[] . . . a *fait accompli*[] is not the sort of timely notice upon which the waiver defense is predicated.” *Centra, Inc.*, 954 F.2d at 372 (internal quotation omitted). *Accord Gratiot Comm. Hosp. v. NLRB*, 51 F.3d 1255, 1260 (6th Cir. 1995).

*Nabors Trailers v. NLRB*, 910 F.2d 268 (5th Cir. 1990), cited by Hartford (Br. 41), does not support its claim that the Union waived its right to bargain by not responding to Hartford's announcement of unilateral changes. In that case, the court found, in disagreement with the Board, that the employer bargained in good faith in the face of exigent circumstances when it gave the union a genuine opportunity to bargain. In contrast, here, Hartford presented the Union with a *fait accompli*.

Finally, because Hartford never presented the Union with notice and an opportunity to bargain, the parties could not have reached impasse on the schedule and wage changes. *See Loral Defense Systems-Akron v. NLRB*, 200 F.3d 436, 451 (6th Cir. 1999); *Blue Grass Provision Co., Inc. v. NLRB*, 636 F.2d 1127, 1130 (6th Cir. 1980). Indeed, Hartford makes no claim that

impasse was reached. Therefore, the Board reasonably rejected (D&O 1, n.3, 25) Hartford's economic exigency defense and found that it violated Section 8(a)(5) and (1) of the Act by unilaterally changing unit employees' schedules and wages.

**CONCLUSION**

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

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October 2009

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FOR THE SIXTH CIRCUIT

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Petitioner/Cross-Respondent	*
	*
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	* 09-1764
	*
HARTFORD HEAD START AGENCY, INC.	* Board No.:
	* 07-CA-51106
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C),  
the Board certifies that its final brief contains 13,512 words in proportionally  
spaced, 14-point Times New Roman type, and that the word processing  
system used was Microsoft Word 2003.

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this 19th day of October, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2009, I electronically filed the foregoing Board's brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system on the following counsel at the address listed below:

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