

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

New York University

Employer

Case No. 2-RC-23481

and

GSOC/UAW

Petitioner

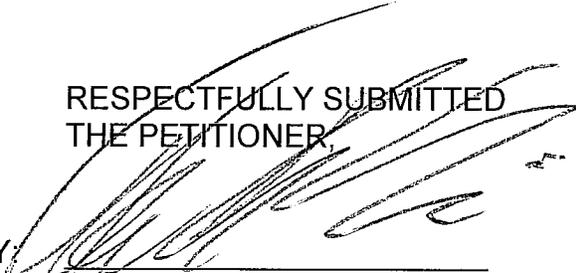
**PETITIONER'S REQUEST FOR LEAVE TO FILE
SUPPLEMENTAL MEMORANDUM OF LAW**

On June 16, 2011, the Acting Regional Director for Region 2 issued his Decision and Order in the above-captioned matter, dismissing this petition on the ground that the unit sought is composed of graduate assistants, whose legal right to organize was taken from them in Brown University, 342 NLRB 48 (2004). On June 30, 2011, the Petitioner filed a request for review, urging the Board to overrule Brown. Subsequently, Chairman Liebman's term expired before the Board had acted on this request for review. This raises the question of whether the Board should decide this case while the Board is composed of three members.

This is a new and significant issue which has not previously been addressed in this case. There are substantial legal issues and policy considerations involved with the question of whether the Board should decide important issues when its membership has dropped below a full complement. Therefore, the Petitioner respectfully requests leave to submit the attached memorandum to address this issue.

RESPECTFULLY SUBMITTED
THE PETITIONER.

BY



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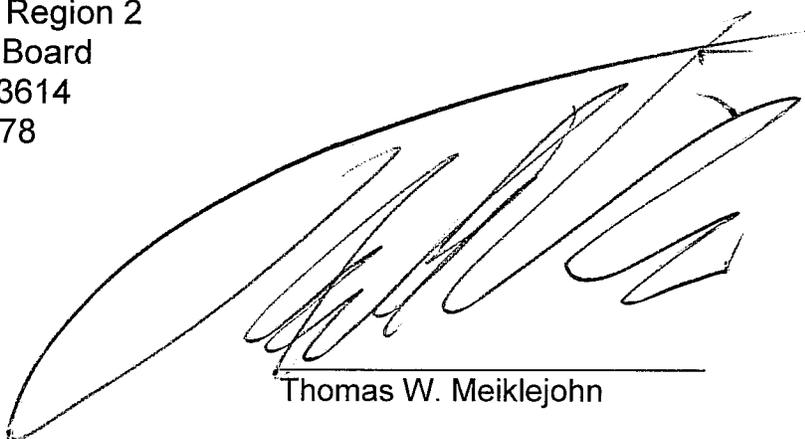
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CERTIFICATE OF SERVICE

This hereby certifies that the foregoing Petitioner's Request for Leave to File Supplemental Memorandum of Law with the attached Memorandum was electronically mailed, on this 21st day of October 2011 to all counsel of record as follows:

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Elbert F. Tellem
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A large, stylized handwritten signature in black ink, appearing to read 'T. Meiklejohn', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

Thomas W. Meiklejohn

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**PETITIONER'S SUPPLEMENTAL BRIEF IN
SUPPORT OF REQUEST FOR REVIEW**

I. STATUS OF CASE

This petition, which seeks a unit of graduate student employees at New York University ("the Employer" or "NYU"), was dismissed by the Regional Director on the authority of Brown University, 342 NLRB 483 (2004). For the past year and one-half, the Petitioner has been urging the Board to reconsider Brown and restore legal protections for graduate student employees. This petition was filed on May 3, 2010. It was initially dismissed by the Regional Director because the unit sought was comprised of graduate assistants. The Petitioner filed a request for review, and the Board reopened the case and remanded for a hearing. New York University, 356 NLRB No. 7 (NYU II). That hearing consumed 19 days of hearing spread over three and-one half months. Of those 19 hearing day, only 5 were devoted to the presentation of the Union's evidence.

The Acting Regional Decision issued his decision on June 16, 2011, finding that the unit sought would be appropriate were it not for the Brown decision. The Petitioner again filed a request for review, which has been pending before the Board since June 30, 2011. On August 11, 2011, in an effort to further delay the processing of this case, the Employer filed a Motion for Recusal of then Chairman Liebman from participation in this case. Unfortunately, Chairman Liebman's term expired without action on the request for review.

The same attorneys who are representing the Employer in this case have recently argued in another case that the Board is foreclosed from considering the validity of Brown because there are now only three members on the Board. Specifically, they have argued, "In light of the Board's well-established policy requiring a three-member majority to reverse precedent, Polytechnic further suggest that it would be inappropriate and serve no purpose for the Board to grant the Request for Review in this case seeking reversal of *Brown* if the current members of the Board are unable to do so." (Employer's Opposition to Petitioner's Request for Review in Polytechnic Institute of New York, Case No. 29-RC-12054, at 12-13). In light of recent developments, the Board should abandon that policy and decide all cases that come before it based upon its interpretation of the law.

The Supreme Court decision in New Process Steel v. NLRB, U.S. , 130 S.Ct. 2635 (2010), clearly establishes that that a three-member Board has the full, unfettered authority to exercise all powers granted by Congress, including the right to make labor relations policy. The Board's practice of refraining from overruling precedent in the absence of the votes of three members is therefore not statutorily mandated. It has now

become the norm for the Board to be forced to function at less than full membership. The Board should adapt to that reality and exercise its full, policy-making authority even when it lacks a full complement of members.

I. ARGUMENT

The Supreme Court in New Process Steel unambiguously held that Congress intended the Board to have full authority to act through a majority vote by a three-member complement. The Court analyzed §3(b) of the Act at length in reaching its conclusion that the Board must have at least three members in order to decide cases. The portions of §3(b) relevant to the Court's decision read:

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). The Court labeled the portion of the statute highlighted above the "vacancy clause." The vacancy clause clearly gives a three-member Board the authority to decide cases, including the authority to overrule precedent.

The plain language of the vacancy clause could not be more explicit. Vacancies do not "impair the right of the remaining members to exercise **all of the powers** of the Board." This right is limited only by the quorum clause, which requires at least three members in order for the Board to act. Thus, as long as the Board has at least three members, it enjoys the right to exercise all of its powers.

The Court repeatedly emphasized this point in New Process. "The vacancy clause still operates to provide that vacancies do not impair the ability of the Board to

take action, so long as the quorum is satisfied.” 130 S.Ct. at 2640. The Court based its decision on what is characterized as “a straightforward understanding of the text, which requires that no fewer than three members be vested with the Board’s **full authority**.” 130 S.Ct. at 2642 (emphasis added). Thus, the law places no restrictions on the authority of a three member Board.

Accordingly, the Board’s practice of refraining from overruling precedent in the absence of three votes has no statutory basis. The Board has never explained the policy considerations underlying this practice. Presumably, this practice is designed at least in part to avoid issuing decisions that would be subject to being overruled in short order when the Board returned to full strength. That is, a 2-1 vote by a three-member Board might be reversed soon afterward when the Board had a full complement of members. This could result in exacerbating the swings in labor policy enunciated by the Board. In light of the paralysis in the appointment process which now prevents the President from filling vacancies and that leaves the Board operating below full strength on a nearly permanent basis, this is no longer a valid consideration.

A review of the history of appointments to the NLRB demonstrates the need to abandon the practice of declining to make policy with less than three votes. For more than 30 years after the Board was expanded to five members with passage of the Taft-Hartley Act, membership on the Board never fell below four members. Vacancies were generally filled within a matter of weeks or months. When Member Murphy’s seat remained open for nine months after her appointment expired in December 1979, this was the longest vacancy in the Board’s history to that point.¹ This stands in sharp contrast to the current practice, in which vacancies last for years. Since January 1981,

¹ See the chart “Board Members Since 1935” on the NLRB website at www.nlr.gov.

when Members Truesdale and Penello left the Board and were not replaced until August, there have been more than a dozen occasions on which the Board's membership has fallen to three or less. When the seats held by Members Meisberg, Walsh and Battista all expired in December 2007, they were not replaced for more than 28 months. The seat held by former Member Schaumber has now been vacant for more than a year. The Board should adopt practices which reflect the reality that it cannot anticipate the appointment of a full complement of Board members on a regular basis.

The long delays in filling positions on the Board reflect a fundamental change in the relationship between the President and the Senate which seems to have become a permanent feature of the political landscape. The Senate's traditional role in the appointment process is described by Terry Moe, "Interests, Institutions and Positive Theory: The Politics of the NLRB," 2 Studies in American Political Development, 250-51 (1987):

The primary rule is deference to the president: he has a right to build his own administration as he sees fit and thus to have his appointees confirmed as long as they are not clearly unqualified.... [T]herefore, as a legitimate reason for voting against confirmation ... the basic rule is that there must be a 'smoking gun' of some sort – a serious character flaw, criminal conduct, demonstrable bias, or obvious inability to carry out the duties of the job. A candidate's ideology is not a legitimate basis for voting no.

This description of the confirmation process sounds positively quaint in the current political climate. Today, a single member of the Senate, if willing, is able to block confirmation of several appointments to the Board because of a disagreement with one nominee's political and legal philosophy. "Mr. McCain, Republican of Arizona, has delayed confirmation of the three-person package for months by placing a hold on one

nominee.... Under Senate rules a single member's hold can prevent a full vote unless 60 members vote to overcome the hold.² McCain was able to prevent confirmation despite the fact that the Labor Committee had voted to confirm that one nominee, Craig Becker, with two Republicans joining committee Democrats in voting for confirmation.³

This situation stands in sharp contrast to the process followed with respect to the nomination of Albert Beeson to the Board by President Eisenhower. Organized labor vigorously opposed the nomination of Beeson, who was a long-time management representative. This was a departure from the NLRB members appointed by Presidents Roosevelt and Truman, who had been drawn from government service or other neutral backgrounds. Every Democratic member of the Senate Labor Committee voted against Beeson's confirmation. Nevertheless, the nomination proceeded to the full Senate, and he was confirmed by a vote of 45-42.⁴ A 60 vote majority was not required to confirm a highly controversial nominee, and a single Senator did not block confirmation. Similarly, the appointment of management lawyers Edward Miller by President Nixon; Donald Dotson, Patricia Diaz Dennis, Marshall Babson and Mary Miller Cracraft by President Reagan; and Clifford Oviatt and John Raudabaugh by President George W. Bush, were confirmed with little resistance from the Senate.⁵ It was not until President Clinton began to appoint attorneys with a Union-side background that the process became deadlocked and members of the Senate began to insist upon the right to select some members of the Board.⁶ Now, one Senator claims the right to block confirmation of any

² Steven Greenhouse, "Labor Panel is Stalled by Dispute on Nominee," New York Times, 1/14/10.
³ Ibid.

⁴ Joan Flynn, "A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000," 61 Ohio State Law Journal, 1361, 1369-76 (2000).

⁵ Ibid. at 1378 – 92.

⁶ Ibid., 1394-98; William Gould, Labored Relations, at 249-50 (MIT Press 2000).

nominee and vows to “cripple the board” because of a disagreement with a decision by the General Counsel to issue an unfair labor practice complaint.⁷

It is a commonplace that the Board has been entrusted with the responsibility to administer labor policy for the nation. E.g., NLRB v Wyman-Gordon, 394 U.S. 759, 767 (1969), San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) As head of the executive branch of government, the President has the right to make appointments that will influence and provide direction to the policies promulgated by one of those agencies. This understanding of the role of the president in making appointments to the Board has been recognized since at least the Eisenhower administration, when NLRB Chairman Farmer explained that, as a member of the Board, he felt an obligation to carry out “the philosophy that he thought his administration wanted him to project on the Board.”⁸ More recently, Chairman Battista elaborated, “[Critics of the Board] don’t seem to understand or neglect to mention that Congress established the Board’s structure anticipating that changing administrations would appoint persons who are free, within statutory limits, to reflect the labor policy of the administration making the appointments.”⁹ The right of the President, as head of the executive branch, to influence labor policy in this manner depends, of course, on his ability to actually make the appointments. When voters elect a president, they are selecting the individual who will have the power to make those appointments. Senators are not elected for that purpose. The ability of individual Senators to block appointments to the NLRB deprives the

⁷ Steven Greenhouse, “Labor Board’s Exiting Leader Responds to Critics,” New York Times, 8/29/11.

⁸ Ronald Turner, “Ideological Voting on the National Labor Relations Board,” 8 U.Pa. Journal of Labor and Employment Law 707 (2006) at 707, quoting Guy Farmer.

⁹ “Remarks of Robert J. Battista, Chairman, National Labor Relations Board *the NLRB at 70: Its Past Present and Future*” at the 58th NYU Annual Conference on Labor, New York NY 5/20/2005, still available on the Board’s website at <http://www.nlr.gov/news-media/news-releases/archive-news>.

President of his Constitutional and statutory right to make appointments to an executive branch agency.

The vacancies on the Board do not result from the Senate's legitimate exercise of its power to "advise and consent." The current stalemate does not arise out of conflicting actions of the President and the Senate in fulfilling their respective Constitutional roles in the appointment process. The stalemate is the result of the Senate's failure to perform its Constitutional function. The Senate has not advised the President to make other appointments or rejected the President's nominees. The Senate has failed to bring nominees to a vote. The Senate's failure to fulfill its responsibilities should not be used as an excuse to prevent the President from fulfilling his. Those members who survive the gauntlet and take seats on the Board should attempt to implement the President's labor relations philosophy.

Under current practices, even when a president's party controls a majority of seats in the Senate, the minority party retains the ability to prevent him from exercising the appointment power. This undermines any attempts by the president to exercise his authority to influence labor policy. This frustration of legitimate presidential authority is compounded by the practice at issue. If the Board is doomed to remain mired at partial strength, then years may pass without sufficient appointees to allow three votes in favor of a particular interpretation of the Act. Accordingly, the Board should fulfill its obligation to establish labor policy without regard to the number of Board members that the Senate has permitted the President to appoint.

Moreover, the failure to decide cases on the basis of a majority vote of 3 members will frustrate the policy of the Act of "encouraging the practice and procedure

of collective bargaining and ... protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment....” §1 of the NLRB, 29 U.S. C. §151. A president who is sympathetic to unions and employees can be expected to appoint Board members who will vigorously enforce the law and seek to implement these statutory policies. The current practices in the Senate can indefinitely prevent such a president from appointing a full Board. When a president who is less committed to the policies of the Act inhabits the White House, the opposition in the Senate would not, as a practical matter, have the same ability to block appointments indefinitely. Such a president would appoint members who would interpret the Act narrowly, but at least there would be some enforcement of the Act. And if the opposition in the Senate were to consider blocking those appointments, it would be faced with the prospect of a Board without a quorum required by §3(b), leaving it unable to protect employee rights at all. New Process Steel. Thus, Senators seeking to support employee rights and the meaningful enforcement of the Act would be faced with the dilemma of accepting appointees who favor a narrow interpretation of employee rights or rendering the Act unenforceable by blocking those appointees. Opponents of vigorous enforcement, on the other hand, can force a president to concede to their will with the threat of putting the Board out of business through the lack of a quorum.

Thus, a Board that seeks to enforce the Act in a meaningful fashion can anticipate a continuation of the present situation, in which a handful of Senators prevent it from reaching full membership. Accordingly, the Board should utilize all tools

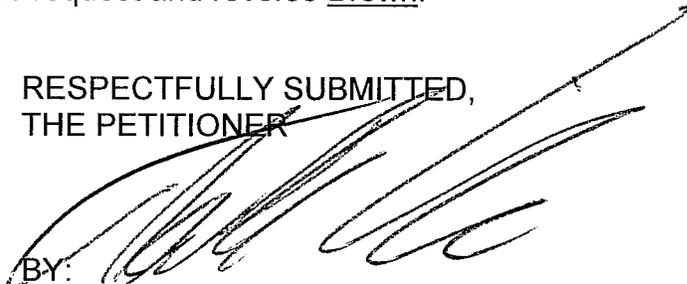
available in order to make the promises of the Act meaningful. If necessary, this should include overruling precedent by a vote of 2 to 1.

In summary, the Board should exercise its statutory responsibility to decide the cases that come before it based upon the considered judgment of the members of the Board selected for that purpose by the President of the United States. The practice of declining to issue definitive rulings in the absence of three votes is no longer necessary to avoid rapid reversals of precedent when the Board returns to full strength, as the appointment of a full complement of Board members appears unlikely in the foreseeable future. With an understaffed NLRB a chronic condition, those who are on the Board are obligated to implement labor policy, as they were appointed to do, whenever they have the opportunity to do so. Otherwise, those who favor strong enforcement of the Act may be permanently barred from making labor policy under the Act.

II. CONCLUSION

For the reasons stated herein and in our Request for Review, the Board should grant this request and reverse Brown.

RESPECTFULLY SUBMITTED,
THE PETITIONER

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