No. 10-72981

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION LOCAL 226, AND BARTENDERS UNION LOCAL 165

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of the Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union Local 165 ("the Union") to review a Board Decision and Order dismissing an unfair labor practice complaint issued against Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino and Sahara Nevada Corp. d/b/a Sahara

Hotel and Casino ("the Companies"). The Board's Order, which issued on August 27, 2010, and is reported at 355 NLRB No. 154, is final with respect to all parties under Section 10(f) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(f)) ("the Act"). (ER 1-9.)[1]

The Board issued the Order after accepting the Court's remand, which instructed the Board to either explain its existing rule exempting dues checkoff from the rule against unilateral changes even in the context of a right-to-work state, or adopt a different rule and present a reasoned explanation to support it. *Local Joint Executive Board of Las Vegas, Culinary Workers Local 226 v. NLRB,* 540 F.3d 1072, 1082 (9th Cir. 2008) ("*LJEB II*"). Because the Board was deadlocked 2-2 on the remanded issue, its own procedures required it to apply existing precedent and dismiss the complaint.

The Board had subject matter jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the Act (29 U.S.C. §160(a)), which authorizes the Board to prevent unfair labor practices. The Court has jurisdiction pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)) because the Union conducts business in Las Vegas, Nevada. The Union's petition for review, which

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[1] "ER" references are to the Excerpts of Record the Union filed with its brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

was filed on September 29, 2010, is timely because the Act places no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

The primary issue is whether the Board reasonably dismissed the complaint, which alleged that the Companies violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing deductions for union-membership dues from its employees' paychecks (known as "dues checkoff") after the expiration of their collective-bargaining agreements ("CBAs" or "the Agreements") with the Union. The Board, however, deadlocked 2-2 on the issue the Court remanded. (ER 2.) The Board unanimously agreed (*id.*) that, in these circumstances, it was bound to apply its existing precedent and dismiss the complaint. As the Board explained, its established decision-making practices provide that only a three-member Board majority may overturn its precedent, and that, absent such a majority, the Board must adhere to its existing law. It therefore lacked the necessary consensus either to offer a new rationale for the extant rule or to overturn it, as the Court requested. (ER 2, 5, 7.)

The Court's review of the Board's action is therefore governed by settled administrative-law principles requiring the Court to defer to the Board's decision-making traditions. Thus, the decisive issue on appeal is whether, in these

circumstances, the Court should respect the Board's adherence to its decision-making practices, which ultimately required it to dismiss the complaint.

STATEMENT OF THE FACTS AND OF THE CASE

I. The Record Evidence and the Board's Initial Decision and Order in *Hacienda I*

Upon charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint alleging that the Companies violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally ceasing deductions for union-membership dues from its employees' paychecks after the expiration of CBAs covering those employees. An administrative law judge held a hearing, during which the following record evidence was developed.

A. The Dues-Checkoff Clauses in the Parties' CBAs Provide that the Companies Will Deduct Union Dues for the Term of the CBAs

The Companies, operators of hotels and gambling casinos, were owned by Sahara Gaming Inc. ("Sahara") until they were sold in the fall of 1995. (ER 15.) The Union and the Companies or their predecessors had collective-bargaining relationships for over 30 years. Until May 31, 1994, the parties had separate but substantially identical CBAs, the most recent of which contained identical dues-checkoff provisions stating:

> The Check-off Agreement and system heretofore entered into and established by the Employer and the Union for the check-off of Union dues by voluntary authorization, as set forth in Exhibit 2, attached to

> and made part of this Agreement, shall be continued in effect for the term of this Agreement.

(ER 15; 67, 77.) "Exhibit 2," referenced in the checkoff provisions, further provided:

> Pursuant to the Union Security provision of the Agreement . . . the Employer, during the term of the Agreement, agrees to deduct each month Union membership dues . . . from the pay of those employees who have authorized such deductions in writing as provided in this Check-off Agreement.[2]

(ER 15; 68, 78.)

The state of Nevada, where the casinos are located, is a "right-to-work" state. As a result, under Section 14(b) of the Act (29 U.S.C. § 164(b)), the CBAs legally could not include a union-security provision requiring union membership as a condition of employment.[3] Accordingly, the CBAs instead provided that union-

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[2] Exhibit 2 also included a "Payroll Deduction Authorization" form, which stated in relevant part that the employee signing it agreed that the authorization would remain in effect, automatically renew from year to year, and be irrevocable unless revoked in writing:

> during a period of fifteen (15) days immediately succeeding any yearly period subsequent to the date of this authorization or subsequent to the date of termination of the applicable contract between [the Company] and the Union, whichever occurs sooner . . . .

(ER 15; 68, 78.)

[3] Section 14(b) of the Act permits states to enact what are commonly known as "right-to-work" laws prohibiting agreements requiring membership in a labor organization as a condition of employment. (29 U.S.C. § 164(b).) Nevada's right-

security clauses contained therein would be ineffective unless the state law changed to allow union security. (ER 10 n.3; 67, 77.)

B. The Companies Abide by the Dues-Checkoff Clauses For a Year After the CBAs Expired

After both CBAs expired on May 31, 1994, the parties negotiated unsuccessfully for successor agreements through the end of that year. (ER 15.) The Companies abided by the CBAs' checkoff provisions until June 1995, when they ceased checking off dues after notifying the Union that they intended to do so. (*Id*.) The Companies thereafter redirected amounts, which had previously been deducted and remitted to the Union, to the employees as part of their regular wages. (*Id*.)

C. The Board's Decision in *Hacienda I*

Based on the foregoing facts, the administrative law judge issued a recommended decision and order dismissing the complaint. (ER 22-26.) The General Counsel and the Union filed exceptions to the judge's decision, and amici AFL-CIO and the Council on Labor Law Equality filed briefs. On July 7, 2000, the Board (Chairman Truesdale and Members Hurtgen and Brame, with Members Fox and Liebman dissenting) issued a decision and order affirming the judge's dismissal of the complaint, and finding that the Companies acted lawfully by

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to-work law provides that "[n]o person shall be denied . . . employment because of nonmembership in a labor organization." (Nev.Rev.Stat. § 613.250 (2011).)

unilaterally ceasing union dues checkoff after the CBAs expired. *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000) ("*Hacienda I*"). (ER 15-22.) The Board's decision in *Hacienda I* relied on settled Board law that a dues-checkoff obligation expires with the agreement that created it even absent a contractual union-security clause. *Hacienda I*, 331 NLRB at 666-67 (ER 16-17) (citing *Bethlehem Steel Co*., 136 NLRB 1500, 1502 (1962), *aff'd in relevant part sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3rd Cir. 1963); *Tampa Sheet Metal*, 288 NLRB 322, 326 n.15 (1988)).

II. This Court's Decision in *LJEB I* and the Board's Action on Remand in *Hacienda II*

On the Union's petition for review, this Court could not discern the Board's rationale in *Hacienda I* for excluding dues checkoff from the usual rule against unilateral changes in the absence of a union-security clause. *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578, 580, 586 (9th Cir. 2002) ("*LJEB I*"). Accordingly, rather than reach the merits of that rule, the Court vacated the order in *Hacienda I* and remanded the case to the Board so that it could either "articulate a reasoned explanation for the rule it adopted, or adopt a different rule and present a reasoned explanation to support it." *Id.*

The Board accepted the Court's remand and findings as the law of the case. *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007) ("*Hacienda II*") (ER 10-14). The parties and amici filed statements of position with the Board. On September 29,

2007, in *Hacienda II*, the Board (Chairman Battista and Members Schaumber and Kirsanow; Members Liebman and Walsh dissenting) reaffirmed its original decision to dismiss the complaint, but "d[id] not rely on the rule articulated in [*Hacienda I*]." (ER 11.) Instead, following the Court's instruction that it may "adopt a different rule," the Board relied on "the particular circumstances of this case, in which the dues-checkoff clauses in the parties' collective-bargaining agreements contained explicit language limiting the [Companies'] dues-checkoff obligation to the duration of the agreements." (ER 10.)

III. The Court's Most Recent Decision in *LJEB II* and the Board's Conclusions and Order on Remand in *Hacienda III*

The Union petitioned this Court for review of the Board's decision in *Hacienda II*. The Court rejected the Board's waiver finding and again remanded the case for further proceedings consistent with the Court's opinion. *LJEB II*, 540 F.3d at 1082. The Court framed the remanded issue as "whether dues-checkoff in a right-to-work state is subject to unilateral change." *Id.* The Court concluded: "We again instruct the Board to explain the rule it adopted in *Hacienda I*, or abandon *Hacienda I* to adopt a different rule and present a reasoned explanation to support it." *Id.*

The Board (Chairman Liebman and Members Schaumber, Pearce and Hayes) accepted the Court's remand as the law of the case and the parties filed statements of

position. As noted, however, the four participating Board members[4] equally divided on the remanded issue and reached opposing views as reflected in the two separate concurring opinions. The Board did unanimously agree that, given its deadlock, it was bound in these circumstances to apply its existing precedent and dismiss the complaint. (ER 2.) As the Board explained (ER 2, 5, 7), its established decision-making practices provide that only a three-member Board majority may overturn its precedent, and that, absent such a majority, the Board must adhere to its existing law. (*See* ER 2 (agreeing to follow existing law in *Bethlehem Steel Co*. and *Tampa Sheet Metal*, *supra*).) Accordingly, as required by that precedent, the Board dismissed the complaint allegation that the Companies violated Section 8(a)(5) and (1) of the Act. (ER 2.)

SUMMARY OF ARGUMENT

On remand, the Board unanimously agreed that it was, because of its deadlock, bound by its established decision-making procedures to apply its extant precedent which, in turn, required it to dismiss the complaint. As the Board explained, those procedures provide that only a three-member Board majority may overturn its precedent, and that, absent such a majority, the Board must adhere to its existing law. It therefore lacked the necessary consensus either to offer a new

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[4] The Board's fifth member at the time, Member Becker, recused himself from participating in this case. (ER 2 n.8.)

rationale for the extant rule or to overturn it. The Court's review of the Board's action is therefore governed by settled administrative-law principles requiring judicial deference to the Board's decision-making procedures. Accordingly, the Court should affirm the Board's adherence to its procedures, which required it to dismiss the complaint.

In response, the Union does not challenge the Board's three-member practice, which is the sole basis for the Board decision before the Court. It neither disputes that the Board was deadlocked 2-2 and therefore bound by its practice to apply existing precedent, nor denies that existing precedent would, if applied, require the Board to dismiss the complaint. The Union has therefore waived the right to make any such claim. Instead, the Union attacks the theories put forth in the "Schaumber concurrence," where two Board members explained why they support extant Board law. Simply put, this non-majority concurrence is not the Board's rationale for dismissing the complaint that is currently before the Court. Finally, there is no merit to the Union's suggestion that the Court should order the Board to find a violation. So doing would effectively require the Board to ignore its internal procedures and depart from extant precedent even absent the requisite three votes. Such judicial intrusion into the Board's internal procedures is contrary to settled administrative law.

ARGUMENT

The Board Complied With Its Established Decision-Making Traditions When It Applied Its Existing Precedent and Dismissed the Complaint

A. Introduction

Due to unusual circumstances, the Board found itself stuck between the proverbial rock and a hard place, as it was caught between its duty to address the issue remanded by the Court and its duty to follow its decision-making procedures. The Court's remand required the Board to provide a new rationale for its decades-old rule exempting dues checkoff from the unilateral-change doctrine even absent a union-security clause, or to adopt a new rule and present a reasoned explanation for it. After careful consideration, however, the four Board members eligible to participate in the decision were deadlocked 2-2 on the remanded issue. (ER 2.) The Board's practice is that only a three-member majority of the Board can exercise the power to overturn precedent. And, pursuant to its practice, the Board must apply its existing precedent absent a three-vote majority to overturn it. The Board therefore lacked the consensus necessary to either offer a new explanation for its rule or overturn it.[5] Accordingly, the Board unanimously agreed, in these circumstances, to apply its existing precedent, which, in turn, required that it

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[5] As the concurring opinions indicate, two members disagree with the existing rule and would overturn it (ER 5-6) while the other two members attempted to provide a rationale for the rule (ER 7-9).

dismiss the complaint allegation that the Companies acted unlawfully when they discontinued dues checkoff after the parties' CBAs expired. *See* ER 2 (citing *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *aff'd in relevant part sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3rd Cir. 1963); *Tampa Sheet Metal*, 288 NLRB 322, 326 n.15 (1988)).

The Court's review of the Board's decision (ER 2) is governed by the fundamental principles of administrative law requiring deference to internal agency procedures. Moreover, because the sole basis for the Board's decision was that internal procedures mandated adherence to extant precedent, the substantive question regarding dues checkoff (on which the Board members were deadlocked) is not the issue on which the case turns.

B. The Board's Existing Precedent Permits an Employer To Unilaterally Cease Deducting Dues Upon Expiration of the Agreement Authorizing Such Deduction

The parties do not dispute the following basic duty-to-bargain principles. In particular, there is no dispute that existing Board precedent, if it were applied, would require dismissal of the instant complaint.

Sections 8(a)(5) and 8(d) of the Act (29 U.S.C. § 158(a)(5) and (d)) make it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees" with respect to "wages, hours, and other terms

and conditions of employment."[6] Section 8(a)(5) generally bars employers from unilaterally changing terms and conditions that involve mandatory bargaining subjects, unless the parties have bargained in good faith to impasse. *NLRB v. Katz*, 369 U.S. 736, 737 (1962). Moreover, this bar on unilateral changes applies to the terms and conditions of an expired contract. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

It has long been recognized, however, that the Board may determine that the general rule does not extend to certain contractually established terms and conditions. *See, e.g., Litton Financial*, 501 U.S. at 199 (noting that "the Board has identified some terms and conditions of employment . . . which do not survive expiration of an agreement," including union security and dues-checkoff provisions); *accord LJEB II*, 540 F.3d at 1079 n.9 (acknowledging this basic law); *see also* Br. 22 & n.5 (acknowledging the same). Indeed, "Congress has made a conscious decision" in Section 8(d) of the Act (29 U.S.C. § 158(d)) to delegate to the Board "the primary responsibility of marking out the scope . . . of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

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[6] Moreover, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7" of the Act (29 U.S.C. § 157). A Section 8(a)(5) violation results in a "derivative" violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Moreover, it is undisputed (*see* ER 2, 5, 7; Br. 22 n.5) that the Board has for decades held that an employer does not violate the Act by unilaterally discontinuing dues checkoff after the parties' CBA expires. *See Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962) (employer lawfully discontinued dues checkoff after the parties' CBA expired), *aff'd in relevant part sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3rd Cir. 1963); *Tampa Sheet Metal*, 288 NLRB 322, 326 n.15 (1988) (applying same rule in the context of a right-to-work state (Florida) where the CBA could not lawfully contain a union-security clause). *See generally Litton Financial*, 501 U.S. at 199 (noting that this is the Board's long-held view). Accordingly, there is no dispute that existing Board precedent, if applied, would require the Board to dismiss the complaint, which alleges that the Companies violated the Act by discontinuing dues checkoff after the parties' CBA expired.

C. The Court Should Defer to the Board's Established Decision-Making Traditions, Which, in the Current Circumstances, Required the Board to Apply Its Existing Precedent and Dismiss the Complaint

It is undisputed (ER 2, 5, 7; *see also* Br. 55-56) that the Board's well-established decision-making practices provide that the power to overturn precedent will be exercised only by a three-member majority of the Board. *See, e.g.*, *DaimlerChrysler Corp.*, 344 NLRB 1324, 1324 n.1 (2005) (Board declined to overrule precedent in the absence of a third vote); *Tradesmen Int'l*, 338 NLRB

460, 460 (2002) (same); *G.H. Bass Caribbean, Inc.*, 306 NLRB 823, 823 n.2 (1992) (same). Thus, in the absence of a three-member majority to overrule established precedent, the participating Board members must apply existing Board law, which, here, required dismissal of the instant complaint. *See, e.g., Tradesmen Int'l*, 338 NLRB at 460 (explaining that the Board was bound to apply its extant precedent absent three votes to overrule it); *accord DaimlerChrysler Corp.*, 344 NLRB at 1324 n.1. *See generally Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 552 (D.C. Cir. 2006) (recognizing the Board's practice of adhering to its precedent absent a three-vote majority to overrule it, and enforcing on other grounds a Board decision that followed the practice).

The Board's decision-making practice is consistent with that of other adjudicative tribunals. For example, that practice is similar to the practice of this Court (and the other courts of appeals) of not overturning its precedent unless a majority of its eligible judges have voted to do so *en banc*. *See In re Complaint of Ross Island Sand & Gravel*, 226 F.3d 1015, 1018 (9th Cir. 2000) ("[A]bsent a rehearing *en banc*, we are without authority to overrule [circuit precedent]."); *accord United States v. Lucas*, 963 F.2d 243, 247 (9th Cir. 1992). Thus, absent such a majority vote, the courts, much like the Board, are bound to apply their existing precedent. *See Ross Island Sand & Gravel*, 226 F.3d at 1018; *see also Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 1560 (7th Cir. 1990)

(holding that where the court's judges were equally divided 6-6 on the issue, the circuit precedent in question remained the law of the court because a majority of the court convened *en banc* did not vote to overrule it).

Moreover, settled administrative-law principles provide that an agency's decision-making practices—such as the Board's tradition that only a three-member Board majority may overturn its precedent—are entitled to significant judicial deference. Indeed, an agency's procedural rules for carrying out its statutory responsibilities are presumptively valid. *See Vermont Yankee Nuclear Corp. v. NRDC*, 435 U.S. 519, 524-25, 543-44, 549 (1978); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). The Supreme Court has, therefore, long "emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee*, 435 U.S. at 524.

Thus, in precedent tracing back decades, the Supreme Court has balanced the power of agencies to carry out their specialized statutory mandates and the jurisdiction of courts to review those agencies' actions. As the Supreme Court explained, courts and administrative agencies "are deemed to be collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." *United States v. Morgan*, 313 U.S. 409, 422 (1941) (internal quotation omitted).

Accordingly, in *Pottsville Broadcasting Co.*, 309 U.S. at 143, the Supreme Court held that administrative agencies "should be free to fashion their own rules of procedure and pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." Years later, the Supreme Court reiterated the independence of administrative agencies, and cautioned courts against "depart[ing] from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee*, 435 U.S. at 544. As the Supreme Court further observed, it is not the judiciary's function to determine whether an agency employed "perfectly tailored" procedures that bring about the "best" or "correct" result and, thus, the court should not "stray beyond the judicial province to explore the procedural format" employed by the agency. *Id.* at 549.[7]

As shown, this case turns on the Board's conclusion (ER 2) that, pursuant to its internal practice, it must dismiss the complaint because it lacked a majority vote to overturn existing precedent. Accordingly, the Court's review of that decision turns on the fundamental administrative-law principles just discussed, which require it to defer to the Board's internal practices.

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[7] Although the Supreme Court in *Vermont Yankee* was examining the procedural balance between the courts and agencies in the context of agency rulemaking, it subsequently extended this proposition to agency adjudication. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990).

The Court's remand instructions directed the Board to provide a new rationale for its decades-old rule exempting dues-checkoff from the unilateral change doctrine, or to adopt a new rule and present a reasoned explanation for it. The Board accepted the Court's remand as the law of the case (ER 2) and promptly[8] made diligent efforts[9] to answer the Court's question. Despite those efforts, however, the Board deadlocked 2-2 on the remanded issue. (ER 2.) Accordingly, in the absence of a third vote for either side, all four participating Board members found (ER 2) that they were required by longstanding Board practice to "follow existing precedent and affirm the administrative law judge's recommended Order dismissing the Complaint."

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[8] The Board responded as expeditiously as possible to this Court's August 2008 remand in *LJEB II*. At that time, the Board had only two members and was therefore unable to address whether to overturn its precedent. Indeed, the Supreme Court held in June of 2010 that the Board could not issue any decision absent a third Board member. *New Process Steel L.P. v. NLRB*, 130 S. Ct. 2635, 2640 (2010). Thus, the Board's first chance to address the remanded issue came in Spring 2010, when it finally regained a third member (as well as a fourth and a fifth). Shortly thereafter, the Board turned to the issue remanded by this Court and, finding itself deadlocked, it promptly issued the instant decision in August 2010.

[9] A brief review of the detailed views presented in the two opposing concurring opinions (ER 5-9) demonstrates the Board members' good-faith efforts to lay out their respective answers to the Court's questions on remand. Because of the deadlock, neither of those lengthy concurrences could carry the day.

Given these undisputed (as described below) findings, the Court should follow settled administrative-law principles and defer to the Board's unanimous[10] decision that its established decision-making procedures required it to dismiss the complaint.

D. The Union Does Not Challenge the Board's Decision-Making Procedure, Which Is the Only Basis for the Board Decision Now Before the Court; the Union's Remaining Contentions Do Not Warrant Reversal of the Board's Procedurally-Based Decision

In response, the Union does not contest the principles and findings (ER 2) that support the Board's decision to apply its existing precedent and dismiss the complaint. (*See* Br. 55-56 (acknowledging the Board's "adher[ence] to its traditional insistence on having three votes for any change in legal rules").)[11] Specifically, the Union does not dispute that: (1) the Board's decision-making traditions bar it from overturning precedent absent a three-vote majority; (2) absent such a majority, the Board is bound to apply its existing precedent; (3) as the

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[10] The Board made it abundantly clear (*see* ER 2, 5, 7) that its decision on this dispositive point was unanimous. The Union therefore errs in claiming (Br. 18) that the Board was "divided" and therefore entitled to less deference.

[11] The Union (Br. 8), however, misstates the Board's practice when it claims "that such a deadlock serves to reinstate the prior panel's decision." Rather, the Board's established practice is to apply its existing precedent (here, *Bethlehem Steel* and *Tampa Sheet Metal*) absent a three-vote majority to overturn it. Thus, the Board did not "reinstate the prior panel's decision" in *Hacienda II*, which turned instead on a distinct contract-interpretation rationale that is not now before the Court.

Board was deadlocked 2 to 2 and unable to muster a 3-vote majority, it was therefore required to apply existing precedent here; and (4) existing Board precedent, if applied, would require the Board to dismiss the complaint. The Union has therefore waived the right to challenge those points now.[12]

Rather than address the Board majority's rationale for dismissing the complaint, the Union instead attacks (Br. 14-16, 27-53) only the various legal theories that two Board members put forth in the "Schaumber concurrence" to describe why they support existing Board precedent. As is clear from the decision itself (ER 2, 5, 7), however, this concurrence only represents the distinct views of those two Board members and, therefore, is not the majority Board rationale for dismissing the complaint that is currently before the Court. *Cf. Mohawk Liqueur Co.*, 300 NLRB 1075, 1076 n.3 (1990) (explaining that although the Board's plurality opinion expressed disagreement with extant precedent, "there was no holding on the issue because the vote was split 2-2 on this point"), *enforced sub nom. General Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308 (D.C.

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[12] *See Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (party's failure to object to Board's conclusions in its opening brief constitutes abandonment of the right to object); *accord Dunkin' Donuts Mid-Atlantic Dist. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (Fed. R. App. P. 28(a)(9) requires that the argument portion of a party's opening brief contain the parties' contentions and the reasons for them, with citations to the authorities and portions of the record on which the party relies).

Cir. 1991). The Union thus errs to the extent that it assumes (*e.g.*, Br. 53) that the Schaumber concurrence constitutes "the Board's" rationale in this case. Moreover, because the Board's operative opinion—based on agency procedural grounds—and the Schaumber concurrence—discussing substantive dues checkoff law—constitute separate and distinct rationales, the Union's attack on the latter does not bear on the merits of the former.

Finally, the Court should reject the Union's suggestion (Br. 53-57) that it simply order the Board to find a violation. So doing would effectively require the Board to ignore its internal decision-making practices: after all, in order to find a violation, the Board would have to reverse existing precedent even absent the three votes it has traditionally required to overturn it. As such, the Union's request runs afoul of the Supreme Court's warning against "depart[ing] from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee*, 435 U.S. at 544.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court defer to the Board's adherence to its established decision-making procedures, which required dismissal of the complaint. Thus, the Union's petition for review should be denied.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

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Signature s/ Linda Dreeben

Attorney for National Labor Relations Board

Date February 1, 2011

9th Circuit Case Number(s) 10-72981

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Feb 1, 2011 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Linda Dreeben

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United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

January 6, 2010

Mr. Andrew J. Kahn
DAVIS, COWELL & BOWE, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105

RE: Extension of Time for Filing the Board's Brief in *Local Joint Executive Board v. NLRB.*, No. 10-72981 (9th Circuit)

Dear Mr. Kahn,

This letter is to inform you that the Court today granted the Board's telephonic request for a 14-day extension of time for filing its brief. Accordingly, the Board's brief is now due on February 1, 2011. This is in accord with our telephone conversation earlier this week, in which you stated that you did not object to this request.

Sincerely,

/s Gregory P. Lauro

_____

Gregory P. Lauro, Attorney
National Labor Relations Board
1099 14th St., NW
Washington, D.C. 20570
202.273.2965