

**No. 08-1878**

---

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

**NORTHEASTERN LAND SERVICES, LTD  
d/b/a THE NLS GROUP**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**MEREDITH L. JASON**  
*Supervisory Attorney*

**RUTH E. BURDICK**  
*Attorney*

**MILAKSHMI V. RAJAPAKSE**  
*Attorney*

*National Labor Relations Board*  
1099 14th Street, N.W.  
Washington, DC 20570  
(202) 273-2945  
(202) 273-7958  
(202) 273-1778

**RONALD MEISBURG**  
*General Counsel*

**JOHN E. HIGGINS, JR.**  
*Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

*National Labor Relations Board*

---

## TABLE OF CONTENTS

	<b>Page(s)</b>
Statement of jurisdiction .....	1
Statement of the issues presented .....	3
Statement of the case.....	4
Statement of facts.....	5
I. The Board’s findings of fact .....	5
A. Background; the Company and employee Dupuy enter into a temporary employment agreement, under which Dupuy is not to disclose the terms of his employment to “other parties” .....	5
B. Dupuy encounters compensation problems and discusses them with Company officials and with an official of client El Paso Energy .....	6
C. Dupuy is discharged for violating the confidentiality provision of his temporary employment agreement .....	9
II. The Board’s conclusions and order .....	10
Summary of argument.....	11
Standard of review .....	13
Argument.....	16
I. Substantial evidence supports the Board’s finding that the Company violated Section 8(a) (1) of the Act by maintaining, in its employment contracts, an overly broad confidentiality provision that employees would reasonably interpret as limiting statutorily protected employee activity.....	16

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
A. Section 7 of the Act gives employees the right to discuss their wages with union officials; a work rule that employees would reasonably understand to prohibit such discussion violates Section 8(a)(1).....	16
B. The Board properly found a violation of Section 8(a)(1) because employees would reasonably understand the Company’s temporary employment agreement, which forbids discussion of compensation with “other parties,” to prohibit wage discussion with union officials .....	20
C. The Company’s arguments lack merit .....	24
1. Contrary to the Company’s contentions, the confidentiality provision of the temporary employment agreement is not lawful “on its face” .....	25
2. The Board was not obliged to apply a balancing test in order to determine whether the confidentiality provision’s prohibition of Section 7 discussion violated Section 8(a)(1) .....	27
3. The Company’s argument that the Board “imperfectly applied” <i>Lutheran Heritage Village</i> by failing to recognize a balancing analysis therein is jurisdictionally barred and, in any event, without merit .....	31
II. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by discharging employee Dupuy for breaching the confidentiality provision.....	35
A. It is unlawful for an employer to discipline an employee pursuant to an unlawfully overbroad rule; the Company’s discharge of Dupuy pursuant to the confidentiality provision was therefore unlawful.....	35

## TABLE OF CONTENTS

<b>Headings – Cont’d</b>	<b>Page(s)</b>
B. The Company’s argument that Dupuy’s discharge was lawful is based on an inapplicable <i>Wright Line</i> analysis.....	36
III. Chairman Schaumber and Member Liebman acted with the full powers of the Board in issuing the valid order in this case .....	39
A. Background .....	40
B. Section 3(b) of the Act, by its terms, provides that a two-member quorum may exercise the Board’s powers .....	41
C. Section 3(b)’s history also supports the authority of a two-member quorum to issue Board Decisions and Orders....	43
D. The Board effectively delegated its adjudicatory powers to the three-member group.....	47
E. Section 3(b) grants the Board authority that Congress did not provide in statutes governing appellate judicial panels.....	50
F. Cases interpreting the statutes of other federal agencies provide additional support for the Board’s authority .....	52
Conclusion .....	54

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page(s)</b>
<i>A.T. &amp; S.F. Memorial Hosps.,</i> 234 NLRB 436 (1978).....	37, 38, 39
<i>Andino v. NLRB,</i> 619 F.2d 147 (1st Cir. 1980) .....	15
<i>Assure Competitive Transportation, Inc. v. United States,</i> 629 F.2d 467 (7th Cir. 1980).....	53
<i>Ayrshire Collieries Corp. v. United States,</i> 331 U.S. 132 (1947) .....	51
<i>Bigg's Foods,</i> 347 NLRB No. 39 (2006).....	19, 21, 22
<i>Brockton Hospital,</i> 333 NLRB 1367 (2001) <i>enforced in relevant part</i> 294 F.3d 100 (D.C. Cir. 2002) .....	19, 20
<i>Brockton Hosp. v. NLRB,</i> 294 F.3d 100 (D.C. Cir. 2002) .....	23
<i>C.E.K. Industrial Mech. Contractors, Inc. v. NLRB,</i> 921 F.2d 350 (1st Cir. 1990) .....	13, 14, 15
<i>Central Hardware Co. v. NLRB,</i> 407 U.S. 539 (1972) .....	16
<i>Cintas Corp.,</i> 344 NLRB 943 (2005) <i>enforced</i> 482 F.3d 463 (D.C. Cir. 2007) .....	19
<i>Cintas Corp., v. NLRB,</i> 482 F.3d 463 (D.C. Cir. 2007) .....	17, 23, 25, 34

## TABLE OF AUTHORITIES

<b>Cases – cont'd:</b>	<b>Page(s)</b>
<i>Double Eagle Hotel &amp; Casino</i> , 341 NLRB 112 (2004), <i>enforced</i> 414 F.3d 1249 (10th Cir. 2005).....	35, 37
<i>Double Eagle Hotel &amp; Casino v. NLRB</i> , 414 F.3d 1249 (10th Cir. 2005).....	23, 38
<i>Eastland Co. v. FCC</i> , 92 F.2d 467 (D.C. Cir. 1937).....	45
<i>Edward Street Daycare Center, Inc. v. NLRB</i> , 189 F.3d 40 (1st Cir. 1999).....	32
<i>Electronic Data Systems Corp.</i> , 1996 WL 33321516 (June 11, 1996).....	38
<i>Fabi Constr. Co. v. Secretary of Labor</i> , 370 F.3d 29 (D.C. Cir. 2004).....	39
<i>Falcon Trading Group, Ltd. v. SEC</i> , 102 F.3d 579 (D.C. Cir. 1996).....	48, 52
<i>Guardsmark, LLC v. NLRB</i> , 475 F.3d 369 (D.C. Cir. 2007).....	34
<i>Haas Electric, Inc. v. NLRB</i> , 299 F.3d 23 (1st Cir. 2002).....	14
<i>Hall-Brooke Hospital v. NLRB</i> , 645 F.2d 158 (2d Cir. 1981).....	45
<i>Jeannette Corp. v. NLRB</i> , 532 F.2d 916 (3d Cir. 1976).....	17, 38

## TABLE OF AUTHORITIES

<b>Cases – cont'd:</b>	<b>Page(s)</b>
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998) <i>enforced mem.</i> 203 F.3d 52 (D.C. Cir. 1999) .....	18, 19, 29
<i>Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB</i> , Nos. 08-1162 (D.C. Cir., Dec. 4, 2008) .....	42
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004) .....	11, 12, 18, 19, 20, 25, 32, 33, 34
<i>Michigan Department of Transportation v. ICC</i> , 698 F.2d 277 (6th Cir. 1983) .....	53
<i>Miller's Discount Department Stores</i> , 198 NLRB 281 (1972), <i>enforced</i> 496 F.2d 484 (6th Cir. 1974) .....	38
<i>Murray v. National Broadcasting Co.</i> , 35 F.3d 45 (2d Cir. 1994).....	50
<i>NLRB v. Auciello Iron Works, Inc.</i> , 980 F.2d 804 (1st Cir. 1992).....	13
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956).....	16
<i>NLRB v. Glover Bottled Gas Corp.</i> , 905 F.2d 681 (2d Cir. 1990).....	34
<i>NLRB v. Southern Bell Telegraph &amp; Telegraph Co.</i> , 319 U.S. 50 (1943), <i>enforcing</i> 35 NLRB 621 (Sept. 23, 1941).....	43
<i>Nguyen v. United States</i> , 539 U.S. 69 (2003).....	51

## TABLE OF AUTHORITIES

<b>Cases – cont'd:</b>	<b>Page(s)</b>
<i>Nicholson v. ICC</i> , 711 F.2d 364 (D.C. Cir. 1983) .....	52, 53
<i>Opryland Hotel</i> , 323 NLRB 723 (1997) .....	37, 38
<i>Photo-Sonics, Inc. v. NLRB</i> , 678 F.2d 121 (9th Cir. 1982) .....	42
<i>Posadas de Puerto Rico Associates, Inc. v. NLRB</i> , 243 F.3d 87 (1st Cir. 2001).....	14
<i>Railroad Yardmasters of America v. Harris</i> , 721 F.2d 1332 (D.C. Cir 1983) .....	48, 49, 51
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945).....	17, 28, 29, 35, 38
<i>Ryan Iron Works, Inc. v. NLRB</i> , 257 F.3d 1 (1st Cir. 2001).....	15
<i>Saia Motor Freight Line</i> , 333 NLRB 784 (2001) .....	35, 36, 37
<i>Stanford Hospital &amp; Clinics v. NLRB</i> , 325 F.3d 334 (D.C. Cir. 2003) .....	38, 39
<i>Tamari v. Bache Halsey Stuart, Inc.</i> , 619 F.2d 1196 (7th Cir. 1980) .....	49, 50
<i>Tecumseh Packaging Solutions</i> , 352 NLRB No. 87 (2008) .....	34
<i>Texas Instruments Inc. v. NLRB</i> , 599 F.2d 1067 (1st Cir. 1979).....	28, 29, 30, 31

## TABLE OF AUTHORITIES

<b>Cases – cont'd:</b>	<b>Page(s)</b>
<i>Texas Instruments Inc. v. NLRB</i> , 637 F.2d 822 (1st Cir. 1981).....	28, 29, 30, 31, 37
<i>Union Builders, Inc. v. NLRB</i> , 68 F.3d 520 (1st Cir. 1995).....	13
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	14, 15
<i>W.F. Bolin Co. v. NLRB</i> , 70 F.3d 863 (6th Cir. 1995) .....	39
<i>Woelke &amp; Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	32, 33
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enforced</i> 662 F.2d 899 (1st Cir. 1981).....	12, 36, 37, 38
<i>Yesterday's Children, Inc. v. NLRB</i> , 115 F.3d 36 (1st Cir. 1997).....	13
 <b>Statutes</b>	
* National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 3(a) (29 U.S.C. § 153(a)) .....	40
Section 3(b) (29 U.S.C. § 153(b)).....	passim
Section 7 (29 U.S.C. § 157) .....	passim
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	passim
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)).....	2, 32
Section 10(f) (29 U.S.C. § 160(f)).....	2

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Court of Appeals, Assignment of judges; panels; hearings; quorum.</b> (28 U.S.C. §46(b)).....	50, 51
 <b>Miscellaneous:</b>	
 <b>Other Authorities:</b>	
<i>Quorum Requirements</i> , Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).....	2, 3, 42
 <b>Board Annual Reports:</b>	
<i>Second Annual Report of the NLRB (1937)</i> .....	43
<i>Seventh Annual Report of the NLRB (1942)</i> .....	43
<i>Sixth Annual Report of the NLRB (1941)</i> .....	43
<i>Thirteenth Annual Report of the NLRB (1948)</i> .....	47
 <b>Publications:</b>	
James A. Gross, <i>The Reshaping of the NLRB: National Labor Policy In Transition, 1937-1947</i> (1981) .....	44
Harry A. Millis and Emily Clark Brown, <i>From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations</i> (1950).....	44
Robert’s Rules of Order 16 (rev. ed. 1981) .....	52

**TABLE OF AUTHORITIES**

<b>Miscellaneous – Cont’d:</b>	<b>Page(s)</b>
<b>Legislative History Materials:</b>	
<i>1 NLRB, Legislative History of the National Labor Relations Act, 1947 (1947)</i>	
61 Stat. 136 .....	45
61 Stat. 160 .....	46
H.R. 3020, 80th Cong. § 3 .....	44
H.R. Conf. Rep. No. 80-510 .....	45
H.R. Rep. No. 80-3020 .....	44
S. 1126, 80th Cong. § 3.....	44
S. Rep. No. 80-105.....	45
<i>2 NLRB, Legislative History of the National Labor Relations Act, 1935 (1935) .....</i>	
43	
93 Cong. Rec. 3837 (Apr. 23, 1947) (Remarks of Sen. Taft).....	45
Act of July 5, 1935, 49 Stat. 449 .....	43
93 Cong. Rec. 4433 (May 2, 1947) (Remarks of Sen. Ball).....	45
<i>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).....</i>	
47	
Act To Provide for the Termination of Federal Control of Railroads, 41 Stat. 492 .....	45
Communications Act of 1934, 48 Stat. 1068.....	45
<i>Labor-Management Relations: Hearings Before J. Comm. on Labor- Management Relations, 80th Cong. Pt 2 .....</i>	46
Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982) .....	50
Staff of J. Comm. on Labor-Management Relations, 80th Cong., Report on Labor-Management Relations (J. Comm. Print. 1948).....	46

H: Northeastern Land Svcs.lbrief mjmr TOA

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

---

**No. 08-1878**

---

**NORTHEASTERN LAND SERVICES, LTD  
d/b/a THE NLS GROUP**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF JURISDICTION**

This case is before the Court on a petition filed by Northeastern Land Services, Ltd. d/b/a The NLS Group (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company. The Board’s Decision and Order issued

on June 27, 2008, and is reported at 352 NLRB No. 89. (D&O 1.)<sup>1</sup> In its decision, the Board found that the Company violated Section 8(a)(1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(1)) (“the Act”), by maintaining an overly broad confidentiality provision in its employment contracts, and by discharging an employee pursuant to that provision. (D&O 2-3.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Board submits that this Court has jurisdiction under Section 10(e) and (f) (29 U.S.C. § 160(e) and (f)) of the Act, because the unfair labor practices occurred in Providence, Rhode Island. 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)).<sup>2</sup> (*See* D&O 1 n.2.)

---

<sup>1</sup> Record references are to documents in the volume of pleadings (“Vol. III”) filed by the Board; to the transcript (“Tr.”) and General Counsel’s exhibits (“GC Ex.”) filed by the Board, originating from the May 8, 2002 unfair-labor-practice hearing; and to the Board’s Decision and Order (“D&O”), which appears in an addendum to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

<sup>2</sup> In 2003, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to

However, because the Company, in part, challenges the Board's Order on that basis, that question is now presented for decision.

The Company filed its petition for review on July 18, 2008. The Board filed its cross-application for enforcement on August 7, 2008. Both of these filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by maintaining, in its employment contracts, an overly broad confidentiality provision that employees would reasonably interpret as limiting statutorily protected employee activity.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employee Jamison Dupuy for breaching the confidentiality provision.

3. Whether Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly-established, three-member group within the

---

issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

meaning of Section 3(b) of the Act, acted within the full powers of the Board in issuing the Board's Order in this case.

### **STATEMENT OF THE CASE**

Acting on a charge filed by Jamison Dupuy, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act by: 1) maintaining a confidentiality clause, in its employment contracts, that prohibited employees from disclosing the terms of their employment to "other parties;" and 2) terminating Dupuy's employment pursuant to this clause. (Vol. III-Complaint 1 and 2.) Following a hearing, an administrative law judge issued a decision and recommended order dismissing both of the Section 8(a)(1) allegations in the complaint. (D&O 9.) The General Counsel and Charging Party Dupuy filed timely exceptions. (D&O 1, Vol. III-General Counsel's Exceptions, Vol. III-Charging Party's Exceptions.) After considering those exceptions and the Company's answering brief, the Board issued a decision reversing the judge and finding that the Company violated Section 8(a)(1) of the Act in both respects alleged. (D&O 1.) The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. **Background; the Company and Employee Dupuy Enter Into a Temporary Employment Agreement, Under Which Dupuy is Not To Disclose the Terms of His Employment to "Other Parties"**

The Company is a labor supplier that provides temporary workers to client companies in the natural gas and telecommunications industries. (D&O 1; Tr. 101-02.) Among the workers that the Company provides are "right-of-way agents," who acquire land rights for clients where such rights are needed in order to lay, and maintain, natural gas pipelines or fiber optic cables. (D&O 1, 5; Tr. 16-17, 102.)

Dupuy was employed by the Company as a right-of-way agent from February to November 2000, and from July to October 2001. (D&O 1, 5; Tr. 18, 41, 74-75.) At the outset of each period of employment with the Company, Dupuy signed a "Temporary Employment Agreement." (D&O 1; GC Ex. 4, 8.) The agreement included a confidentiality clause that stated, in relevant part:

Employee also understands that the terms of this employment, including compensation, are confidential to the Employee and [the Company].

Disclosure of these terms to other parties may constitute grounds for dismissal.<sup>3</sup>

*(Id.)*

**B. Dupuy Encounters Compensation Problems and Discusses Them With Company Officials and With an Official of Client El Paso Energy**

For his second period of employment with the Company, in 2001, Dupuy was assigned to work on a project with client El Paso Energy (“El Paso”). (D&O 1, 5; Tr. 40-41.) Dupuy secured this particular assignment by directly contacting El Paso Project Manager Rick Lopez, whom Dupuy had come to know during his first period of employment with the Company in 2000.<sup>4</sup> *(Id.)* Lopez told Dupuy to contact the Company to be placed on the El Paso project, and Dupuy did so, gaining a position as a right-of-way agent in July 2001. (D&O 5; Tr. 40-41.)

In his first few months on the El Paso project, Dupuy repeatedly received his pay late.<sup>5</sup> (D&O 1, 5; Tr. 46-51, 57.) Dupuy brought the problem to the

---

<sup>3</sup> At the unfair-labor-practice hearing, the Company stipulated that this confidentiality clause, or a similar one, appears in all of its Temporary Employment Agreements for right-of-way agents. (D&O 1 n.4; Tr. 7.)

<sup>4</sup> Lopez was an employee of the Company in 2000. (D&O 1 n.5, 5; Tr. 25-26.)

<sup>5</sup> The delays apparently stemmed, in part, from errors in the routing information necessary to make direct deposit of Dupuy’s wages to his bank accounts. (Tr. 47-48, 51-54.)

attention of various company officials, including Executive Vice President and Chief Operating Officer Jesse Green. (D&O 1; Tr. 46-55, 57.) As the problem persisted, in mid-September, Dupuy explained to Green that the payment delays were creating a “cash flow problem,” because Dupuy had to pay for some project expenses (mainly his hotel bills) up front and then seek reimbursement later.

(D&O 5-6; Tr. 54, 113.) Dupuy asked if the Company could either make payment of his hotel bill directly to the hotel or provide a per diem that would cover both the hotel bill and his meals. (D&O 5-6; Tr. 54-55, 112-13.) Green replied that the Company could not agree to either of those arrangements. (D&O 6; Tr. 54-55, 112-13.)

Dupuy then stated that he would have “no choice but to call Rick Lopez and tell him I’m going to quit because I am not getting paid on time.” (D&O 1, 6; Tr. 55.) On hearing this, Green said that he would contact Lopez himself and ask if El Paso could pay for Dupuy’s hotel bill, or provide a per diem, to alleviate Dupuy’s cash flow problems. (D&O 1, 6; Tr. 55, 113.) A few days later, Green followed up with Dupuy and said that he had spoken to Lopez, and that Lopez was unwilling to undertake either of the suggested measures. (*Id.*)

In early October, Dupuy called Lopez to tell him that his cell phone was not working. (D&O 1, 6; Tr. 58.) In the course of the ensuing conversation, Dupuy

mentioned to Lopez that he was not being paid on time and asked if it would be possible to work on the El Paso project through a different labor services provider. (*Id.*) Lopez responded that this would not be possible. (*Id.*) Lopez then advised Dupuy to contact Norm Winters, an agent of the Company, to resolve the pay issue he was experiencing. (D&O 6; Tr. 58.)

A few days later, Dupuy called Winters. (D&O 6; Tr. 58.) Dupuy told Winters that he had spoken to Lopez, and that Lopez had suggested that he (Dupuy) should contact Winters about his pay problems. (*Id.*) Dupuy testified that Winters seemed upset that Dupuy had passed information about his pay problems on to Lopez. (D&O 6; Tr. 58-59.) According to Dupuy, Winters nonetheless advised him to contact another agent of the Company, Ann Ingham, to have his pay issue resolved. (D&O 6; Tr. 59.) Dupuy did so, and following a few further discussions with Ingham, Dupuy received the direct-deposit payments for which he had been waiting. (D&O 6; Tr. 59-62.)

In the same early-October time period as the events described above, Dupuy also experienced difficulties related to the reimbursement of his expenses. (D&O 1; GC Ex. 11.) Prior to October, the Company had been reimbursing Dupuy at the rate of \$15 per day for the use of his personal computer on work-related matters. (D&O 1; Tr. 65.) This reimbursement was the result of conversations between

Dupuy and Lopez regarding Dupuy's computer use on the El Paso project, and Lopez's approval of a \$15-per-day reimbursement for such computer use. (D&O 1; Tr. 62-65.) Notwithstanding this arrangement between Dupuy and Lopez, to which the Company had acceded, the Company decided, in early October, to reduce Dupuy's computer reimbursement to \$12 per day. (D&O 1; Tr. 65, GC Ex. 11.) The Company cited tax reasons for this change. (D&O 2; GC Ex. 11.) In an email to the Company dated October 3, Dupuy questioned the appropriateness of the change and copied Lopez on the email, with a request that El Paso "offset" the Company's tax-related reduction of his computer reimbursement. (D&O 1-2; GC Ex. 11.)

**C. Dupuy is Discharged for Violating the Confidentiality Provision of His Temporary Employment Agreement**

On October 11, Green told Dupuy that the Company had done its best to accommodate his various requests, but it seemed the Company could never make him happy, and therefore the Company thought it best to terminate his employment. (D&O 2; Tr. 116.) When Dupuy protested that the Company could not fire him, Green stated that the Company could indeed do so, because Dupuy had "not lived up to [his] end of the bargain with [the Company]." (D&O 2; Tr. 116-17.) The "bargain" to which Green referred was the confidentiality clause of

the Temporary Employment Agreement between Dupuy and the Company, which bound Dupuy to refrain from disclosing “the terms of [his] employment, including compensation,” to “other parties.” (D&O 2; Tr. 124-25, GC Ex. 4, 8.)

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

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman) found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining in its employment contracts an overly broad confidentiality provision and by terminating employee Dupuy for breaching that confidentiality provision. (D&O 1.)

The Board’s Order requires the Company 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. (D&O 3.) Affirmatively, the Board’s Order requires the Company to: rescind the overly broad confidentiality provision, and notify employees in writing that this has been done and that the provision is no longer in force; offer employee Dupuy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position; make Dupuy whole for lost earnings and other benefits; remove from the Company’s files any reference to the unlawful discharge of

Dupuy, and notify Dupuy that this has been done and that the discharge will not be used against him in any way; and post a remedial notice. (D&O 3-4.)

### **SUMMARY OF ARGUMENT**

Applying the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board properly found that the confidentiality provision in the Company's Temporary Employment Agreement violates Section 8(a)(1) because employees would reasonably understand it to prohibit activity protected by Section 7 of the Act (29 U.S.C. §157). Under Section 7, employees have a right to discuss their wages and other terms of employment with union representatives. The confidentiality provision unlawfully impinges on this right by prohibiting employees from discussing their compensation and other terms of employment with "other parties," a category necessarily including union representatives.

Contrary to the Company's contentions here, the confidentiality provision is not lawful "on its face" simply because it does not prohibit employee-to-employee conversations about wages and other terms of employment. Moreover, there is no merit in the Company's argument that the Board should have applied a balancing analysis in order to gauge whether the confidentiality provision's asserted impairment of Section 7 rights warranted the finding of a Section 8(a)(1) violation.

Although the Company claims that such a balancing analysis is, in fact, called for under the language of *Lutheran Heritage Village*, the Court does not have jurisdiction to consider that particular claim, as it was not first presented to the Board. In any event, *Lutheran Heritage Village* does not refer to any balancing analysis of the kind contemplated by the Company.

The Board also properly found that the Company violated Section 8(a)(1) of the Act by discharging employee Dupuy pursuant to the above unlawful confidentiality provision. In contesting this unlawful-discharge finding, the Company fundamentally misunderstands the law governing this case. Where an employee is discharged based on an unlawful employer rule, that discharge is, by definition, unlawfully motivated. Therefore, the Board does not analyze the discharge under the test for unlawful motivation set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981). Accordingly, the Company's arguments based on a *Wright Line* analysis of Dupuy's discharge are out of place.

Finally, the Company's contention that the Board's Order in this case was not issued by a quorum of the Board must be rejected. Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the

full powers of the Board in issuing the Board's Order. 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 general principles of administrative law. In contrast, the Company's argument is based on an incorrect reading of Section 3(b), and a misunderstanding of the statute governing federal appellate panels, which has no application to the Act, and is otherwise contrary to law.

### **STANDARD OF REVIEW**

This Court accords "considerable deference" to the Board's decisions, "[a]s the Board is primarily responsible for developing and applying a coherent national labor policy." *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36, 44 (1st Cir. 1997). *See also NLRB v. Auciello Iron Works, Inc.*, 980 F.2d 804, 808 (1st Cir. 1992) (observing that court "reviews the NLRB's orders with considerable deference" (citation omitted)). In keeping with the principle of considerable deference, this Court has stated that it "will enforce a Board order if the Board correctly applied the law and if substantial evidence on the record supports the Board's factual findings." *Union Builders, Inc. v. NLRB*, 68 F.3d 520, 522 (1st Cir. 1995). *See also C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d

350, 355 (1st Cir. 1990) (noting that, under Section 10(e) of the Act (29 U.S.C. § 160(e)), Board’s factual findings are “conclusive” if supported by substantial evidence).

“Substantial evidence,” for purposes of this Court’s review of factual findings, consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). *Accord Posadas de Puerto Rico Associates, Inc. v. NLRB*, 243 F.3d 87, 90 (1st Cir. 2001) (citation omitted). The Court must canvass “the whole record” to determine whether such substantial evidence exists. *Universal Camera*, 340 U.S. at 488. In that process, however, the Court may not displace the Board’s choice between fairly conflicting views of the evidence, even if the Court “would justifiably have made a different choice had the matter been before it de novo.” *Haas Elec., Inc. v. NLRB*, 299 F.3d 23, 28 (1st Cir. 2002) (internal quotation marks and citation omitted).

The Company contends (Br. 20) that the Court should show no deference to the Board’s Decision, in part because “the Board reached an opposite conclusion from the [administrative law judge].” The Board, in this case, reversed the administrative law judge’s underlying decision, but accepted his findings of fact and credibility determinations with regard to the witnesses who testified at the

unfair-labor-practice hearing. (D&O 1 & n.1.) It is well settled that “the substantial evidence standard is not modified in any way” in these circumstances. *Universal Camera*, 340 U.S. at 496 (internal quotation marks omitted). *Accord Andino v. NLRB*, 619 F.2d 147, 151 (1st Cir. 1980) (“The standard is not modified when the Board and its administrative law judge disagree.”). Rather, the administrative law judge’s decision is treated as another element of the record under review, and is weighed along with “whatever in the record fairly detracts from” the substantiality of the evidence supporting the Board’s findings. *Universal Camera*, 340 U.S. at 488, 493. *See also C.E.K. Indus. Mech. Contractors*, 921 F. 2d at 355 (citing *Universal Camera*, 340 U.S. at 488). The ultimate question for the Court remains, “whether on this record it would have been possible for a reasonable jury to reach the Board’s conclusion.” *Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 6 (1st Cir. 2001).

Similarly mistaken is the Company’s assertion (Br. 20) that the Board’s decision is owed less deference because Chairman Schaumber, in agreeing with the application of existing precedent in this case, noted (D&O 3 n.9) his potential disagreement with how that precedent might be applied to factual circumstances not present here. Such an advisory comment does not undermine the Board’s

sound application of existing law and has no implication for this Court's standard of review.

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING, IN ITS EMPLOYMENT CONTRACTS, AN OVERLY BROAD CONFIDENTIALITY PROVISION THAT EMPLOYEES WOULD REASONABLY INTERPRET AS LIMITING STATUTORILY PROTECTED EMPLOYEE ACTIVITY**

#### **A. Section 7 of the Act Gives Employees the Right To Discuss Their Wages with Union Officials; a Work Rule that Employees Would Reasonably Understand To Prohibit such Discussion Violates Section 8(a)(1)**

Section 7 of the Act (29 U.S.C. § 157) guarantees to employees “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . . .” As the Supreme Court has recognized, these rights “are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.” *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). *Accord NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). The Supreme Court has accordingly interpreted Section 7 to include “the right of union officials to discuss organization with employees.” *Central Hardware Co.*, 407 U.S. at 542.

The right to discuss organization, in turn, includes a right to discuss wages, because “[i]t is obvious that higher wages are a frequent objective of organizational activity, and discussions about wages are necessary to further that goal.” *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976). *See also Cintas Corp. v. NLRB*, 482 F.3d 463, 469 (D.C. Cir. 2007) (observing that Act protects “an employee’s right to discuss the terms and conditions of his employment” and affirming Board’s view that this right extends to discussions with union officials).

It is an unfair labor practice, under Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), for an employer “to interfere with, restrain, or coerce employees” in the exercise of any of the rights enumerated above.<sup>6</sup> Thus, an employer violates Section 8(a)(1) of the Act by flatly prohibiting employees from discussing their wages. *See Jeannette Corp.*, 532 F.2d at 918 (finding that “an employer’s unqualified rule barring [wage] discussions has the tendency to inhibit [Section 7] activity” and therefore violates Section 8(a)(1)).

Of course, Section 8(a)(1) of the Act does not itself identify any particular employer rule or policy as unlawful. *See Republic Aviation Corp. v. NLRB*, 324

---

<sup>6</sup> Section 8(a)(1) (29 U.S.C. § 158(a)(1)) states that “[i]t shall be an unfair labor practice for an employer. . .to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [29 U.S.C. § 157] . . . .”

U.S. 793, 798 (1945) (noting that Act does not specify “in precise and unmistakable language each incident which would constitute an unfair labor practice”). Rather, the Act leaves “to the Board the work of applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.” *Id.*

Acting on the authority thus left to it, the Board has stated that a Section 8(a)(1) violation is shown where an employer maintains a rule or policy that “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.* 203 F.3d 52 (D.C. Cir. 1999). In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board elaborated on this standard, setting forth a specific analytical framework for determining whether a given employer rule “would reasonably tend to chill” Section 7 activity. Under the *Lutheran Heritage Village* framework, the Board first considers whether an employer’s rule “explicitly restricts activities protected by Section 7.” *Lutheran Heritage Village*, 343 NLRB at 646. If the rule explicitly restricts such activities, the Board will find the maintenance of that rule violative of Section 8(a)(1). *Id.* If the rule does not explicitly restrict such activities, the Board proceeds to ask whether: “(1) employees would reasonably construe the language [of the rule] to prohibit Section 7 activity; (2) the rule was

promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647. An affirmative answer to any of these secondary questions will warrant the finding of a Section 8(a)(1) violation. *Id.*

Applying the standards set forth in *Lafayette Park* and *Lutheran Heritage Village*, the Board has consistently found that an employer violates Section 8(a)(1) of the Act by maintaining a confidentiality rule that employees would reasonably interpret as prohibiting their discussion of wages with one another or with union officials. *See, e.g., Bigg’s Foods*, 347 NLRB No. 39, slip op. at 1 n.4 (2006) (finding Section 8(a)(1) violation based on employer confidentiality rule that could reasonably be understood by employees “as prohibiting discussion of salaries with union representatives”); *Cintas Corp.*, 344 NLRB 943, 943 (2005) (finding Section 8(a)(1) violation based on employer confidentiality policy that “could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union”), *enforced* 482 F.3d 463, 468-69 (D.C. Cir. 2007); *Brockton Hospital*, 333 NLRB 1367, 1377 (2001) (finding Section 8(a)(1) violation based on employer confidentiality policy that “would prohibit [employees] from discussing hours, wages, and other terms and conditions of employment with each other or

their union representatives unless they are doing so ‘strictly in connection with hospital business’”), *enforced in relevant part* 294 F.3d 100, 107 (D.C. Cir. 2002).

**B. The Board Properly Found a Violation of Section 8(a)(1) Because Employees Would Reasonably Understand the Company’s Temporary Employment Agreement, Which Forbids Discussion of Compensation with “Other Parties,” To Prohibit Wage Discussion with Union Officials**

Substantial evidence fully supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by maintaining, in its employment contracts, an overly broad confidentiality provision that unlawfully prohibits employees from discussing their compensation with union representatives. The undisputed evidence (Tr. 7, GC Ex. 4, 8), recited above at pp. 5-6, establishes that all of the Company’s Temporary Employment Agreements for right-of-way agents contain substantially the same confidentiality provision, stating that “the terms of this employment, including compensation, are confidential to Employee and [Company],” and that “[d]isclosure of these terms to other parties may constitute grounds for dismissal.” Analyzing this confidentiality provision under the framework set forth in *Lutheran Heritage Village*, the Board found (D&O 2) that employees would reasonably understand its clear prohibition of compensation-related disclosures to “other parties” as prohibiting, among other things, protected

“discussions of [employee] compensation with union representatives.” The Board accordingly found (D&O 2) the confidentiality provision “unlawfully overbroad in at least this respect.”

In finding this unfair labor practice, the Board hewed closely to its own, well-established precedents. As noted above at pp. 15-16, the Board has consistently held that an employer violates Section 8(a)(1) of the Act by maintaining a confidentiality rule that employees would reasonably interpret as prohibiting their discussion of wages with one another or with union officials. The Board drew on this in the present case, specifically relying on the decision in *Bigg’s Foods*, 347 NLRB No. 39, slip op. at 1 n.4, 12-13 (2006), a case involving a written confidentiality policy similar to the confidentiality provision at issue.

In *Bigg’s Foods*, the employer’s policy classified “salaries” as confidential information. *Id.*, slip op. at 12. The policy warned that each employee could be asked to sign a “statement of non-disclosure,” promising that he or she would not “share any information such as that listed [including “salaries”] to [sic] anyone outside the company.” *Id.* The Board found that the reference to a non-disclosure agreement in this confidentiality policy effectively “suggest[ed] that an employee could be disciplined for divulging salary information to persons, not associated

with Bigg's.”<sup>7</sup> *Id.* Given all these circumstances, the Board concluded that the employer's confidentiality policy violated Section 8(a)(1), reasoning that “employees could reasonably understand the Respondent's confidentiality rule, which prohibits disclosure of, among other things, salaries to ‘anyone outside the company,’ as prohibiting discussion of salaries with union representatives.” *Id.*, slip op. at 1.

The Board applied the very same reasoning in analyzing the confidentiality provision in this case. Like the confidentiality policy at issue in *Bigg's Foods*, the confidentiality provision in this case explicitly classifies employee “compensation” (“salaries” in *Bigg's Foods*) as “confidential” and warns that such confidential information is not to be shared with “other parties” (“anyone outside the company” in *Bigg's Foods*). Moreover, the confidentiality provision in this case suggests, even more explicitly than the confidentiality policy in *Bigg's Foods*, the disciplinary consequences of divulging confidential information: “[d]isclosure of the[] terms [of employment] to other parties may constitute grounds for dismissal.” On these facts, as in *Bigg's Foods*, the Board found that employees would reasonably understand the Company's confidentiality language

---

<sup>7</sup> The evidence in *Bigg's Foods* reflected that new employees were, in fact, asked to sign a non-disclosure agreement similar to that described in the confidentiality policy. *Id.*

to prohibit, among other things, protected Section 7 discussions about their compensation with union officials. Accordingly, the Board found a violation of Section 8(a)(1) of the Act.

The Board's finding of this Section 8(a)(1) violation is all the more justified when considered against the larger background of Board and court decisions, in which similar or even less explicit employer prohibitions on Section 7 discussion have been found unlawful. In *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1259-60 (10th Cir. 2005), for example, the Tenth Circuit affirmed the Board's finding of a Section 8(a)(1) violation based on an employer's rule classifying "salary information" as confidential and forbidding disclosure of such confidential information to "those outside the Company" unless a "valid need to know" was shown. Similarly, in *Cintas Corp. v. NLRB*, 482 F.3d 463, 465, 468-69 (D.C. Cir. 2007), the D.C. Circuit affirmed the Board's finding of a Section 8(a)(1) violation based on an employer's rules classifying "any information concerning" employees as confidential and warning that employees may be sanctioned for "violating a confidence" or "unauthorized release of confidential information." And finally, in *Brockton Hosp. v. NLRB*, 294 F.3d 100, 106-07 (D.C. Cir. 2002), the D.C. Circuit affirmed the Board's finding of a Section 8(a)(1) violation based on an employer's rule that "[i]nformation concerning" employees

“should not be discussed either inside or outside the hospital, except strictly in connection with hospital business.”

Given the Board and court precedent, the Board acted entirely reasonably in finding that the confidentiality provision at issue violated Section 8(a)(1) of the Act. More specifically, substantial evidence supports the Board’s finding that employees would reasonably understand the confidentiality provision to prohibit employees’ protected Section 7 discussions about compensation with union representatives.

### **C. The Company’s Arguments Lack Merit**

The Company maintains that the Board erred in reversing the administrative law judge’s underlying decision and finding that the confidentiality provision at issue unlawfully prohibited Section 7 discussion. In support of its position, the Company points out (Br. 21-25, 37-39), first, that the confidentiality provision is lawful “on its face,” particularly as it does not prohibit employees from communicating with each other about their terms and conditions of employment. Moreover, the Company argues (Br. 23 n.4), “even if [the confidentiality provision] prohibited employees from discussing wages among themselves, the Board still must determine the legality of the prohibition by balancing the rule’s inhibition on employees’ Section 7 rights with the company’s legitimate,

substantial reasons for the rule.” According to the Company (Br. 26-32), such a balancing analysis is required under Board and court cases predating the Board’s decision in *Lutheran Heritage Village*. The Company further argues (Br. 32-33) that the Board misapplied *Lutheran Heritage Village* by failing to recognize and apply the balancing analysis that it claims the Board set forth in that case. As discussed below, none of these arguments warrants setting aside the Board’s Order.

**1. Contrary to the Company’s contentions, the confidentiality provision of the Temporary Employment Agreement is not lawful “on its face”**

The Company argues (Br. 21) that the confidentiality provision, “on its face, does not violate §7 of the Act because, it did not prohibit employees from discussing their terms of employment with each other or a labor organization.”<sup>8</sup>

The Company bases this argument (Br. 21) on purported findings to the same

---

<sup>8</sup> The Company also argues (Br. 25, 31) that its confidentiality provision was not applied, in any particular instance, to prohibit Section 7 activity. This argument is entirely superfluous, as there was no contention or finding in the proceedings below that the Company’s confidentiality provision was unlawful *as applied*. Equally out of place is the Company’s suggestion (Br. 39-42) that its confidentiality provision is affirmatively lawful because it was not applied in the context of union or concerted activity. *See Cintas Corp.*, 482 F.3d at 467-68 (“[M]ere maintenance of a rule likely to chill Section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice even absent evidence of enforcement.” (citations omitted)).

effect in the administrative law judge’s underlying decision. The judge, however, made no such findings. On the contrary, the judge acknowledged (D&O 9) that “[e]mployees have a protected right . . . to discuss their conditions of employment with outsiders [i.e., nonemployees]” and found (D&O 9) that, by prohibiting employees from discussing their employment terms with “other parties,” the Company’s confidentiality provision “reasonably tended to coerce its employees in the exercise of th[is] Section 7 right[.]”<sup>9</sup>

More importantly, however, in arguing that the confidentiality provision is lawful “on its face,” the Company fails to confront the Board’s actual findings. The Board specifically found (D&O 2) that the provision “is unlawful because employees would reasonably construe it to prohibit activities protected by Section 7. . . [namely,] discussions of [employee] compensation with union representatives.” Without addressing this finding or any of the cases cited in support of it, the Company insists (Br. 21-24, 38-39) that its confidentiality provision is lawful because it does not prohibit employees from discussing employment terms “among themselves.” As if to make its point, the Company

---

<sup>9</sup> The judge nonetheless went on (D&O 9) to characterize the Company’s confidentiality provision as a “less serious” infringement on employees’ Section 7 rights because it did not prohibit employees from discussing their employment terms among themselves. It is with this characterization and the judge’s ensuing analysis that the Board disagreed.

distinguishes (Br. 22-24, 38-39) the confidentiality provision here from a host of employer rules that have been found to unlawfully prohibit protected discussions among employees. The comparison to such rules, however, is neither here nor there.

In the present case, the Board based its unfair-labor-practice finding on the employer's prohibition of protected discussions between employees and *nonemployees*, such as union representatives. The Board specifically stated (D&O 2) that it did not pass on the question whether the confidentiality provision prohibited "inter-employee communications" about terms of employment. In these circumstances, the Company's insistence that its confidentiality provision "does not prohibit employees from discussing terms of employment among themselves" (Br. 21) is simply beside the point and provides no basis for overturning the Board's decision.

**2. The Board was not obliged to apply a balancing test in order to determine whether the confidentiality provision's prohibition of Section 7 discussion violated Section 8(a)(1)**

The Company argues (Br. 23 n.4, 27-32) that even if its confidentiality provision infringes on employees' Section 7 rights, the Board cannot find, on the basis of such infringement alone, that the Company has violated Section 8(a)(1) of

the Act. Rather, according to the Company (Br. 23 n.4, 28), the Board must balance any impairment of Section 7 rights against the Company's "legitimate, substantial reasons" for its confidentiality provision. The Company further suggests that the finding of a Section 8(a)(1) violation would be warranted only if the harm done to Section 7 rights by the confidentiality provision outweighed the Company's legitimate reasons for the provision. To anchor these arguments, the Company cites *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), which it claims requires application of a balancing analysis in this case. Moreover, the Company argues (Br. 29-32), the Board's failure to apply a balancing analysis is inconsistent with (Br. 29) this Court's decisions in *Texas Instruments Inc. v. NLRB*, 599 F.2d 1067 (1st Cir. 1979) ("*Texas Instruments I*"), and *Texas Instruments Inc. v. NLRB*, 637 F.2d 822 (1st Cir. 1981) ("*Texas Instruments II*").

Contrary to the Company's contentions, in *Republic Aviation* the Supreme Court did not require that the Board perform a balancing analysis in every case where a rule restricting Section 7 activity is at issue. The Supreme Court merely recognized that, where such rules are concerned, the Board's findings with regard to them reflect "an adjustment between the undisputed right of self-organization assured to employees under [Section 7] and the equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation*, 324

U.S. at 797-98. Far from stating that the necessary “adjustment” must take the form of a balancing test, the Court emphasized that it is for the Board to determine how to “apply the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.” *Id.* at 798.

Moreover, the Court in *Republic Aviation* stated that the Board “may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven.” *Id.* at 800. The Court thus left the Board free to make reasonable inferences regarding, for example, the tendency of a given work rule to unlawfully chill Section 7 activity. *See Lafayette Park Hotel*, 326 NLRB at 825. Nowhere did the Court state, as the Company suggests (Br. 23 n.4, 27-29), that such an inference must be made pursuant to a balancing analysis.

The Company’s reliance on the *Texas Instruments* decisions is equally unavailing. In *Texas Instruments I* and *Texas Instruments II*, this Court considered whether an employer unlawfully *applied* a facially valid confidentiality rule to discharge certain employees who were allegedly engaged in protected activity. The Court never engaged in a balancing analysis, as the Company here suggests (Br. 29-31), in assessing the lawfulness of the employer’s confidentiality rule or

the employer's conduct in applying the rule. Rather, in *Texas Instruments I*, the Court simply affirmed that, where it is alleged that an employer's *application* of a rule burdens protected employee activity, it is "the primary responsibility of the Board and not of the courts to strike the proper balance between the asserted business justifications [for application of the rule] and the invasion of employee rights in light of the Act and its policy." *Texas Instruments I*, 599 F.2d at 1073. The Court therefore remanded the case to the Board so that it could "strike the proper balance" between employer and employee interests. *Id.* at 1073-74. In *Texas Instruments II*, reviewing the Board's findings on remand, the Court declined to engage in a balancing analysis, stating, "we need not review the Board's balancing, in light of the Act and its policies, of [the employer's] proffered business justifications for application of the rule on these facts, against a supposed invasion of employee rights," because "no such invasion of employee rights existed." *Texas Instruments II*, 637 F.2d at 833. Thus, neither of the *Texas Instruments* decisions reflects a balancing analysis by this Court.

In any event, insofar as the *Texas Instruments* decisions refer to a balancing of employer and employee interests, they do so in discussing the employer's *application* of an otherwise valid confidentiality rule in the context of arguably protected employee activity. As indicated above at page 25 n.8, there is no

contention or finding in the present case that the Company unlawfully *applied* its confidentiality provision against an employee or employees engaged in protected activity. Rather, the Board found that the Company’s confidentiality provision itself was unlawfully overbroad. Thus, the legal question that purportedly required a balancing analysis in the *Texas Instruments* decisions is not presented in this case. Accordingly, even if the *Texas Instruments* decisions approved a balancing analysis, that analysis is not compelled here.

**3. The Company’s argument that the Board “imperfectly applied” *Lutheran Heritage Village* by failing to recognize a balancing analysis therein is jurisdictionally barred and, in any event, without merit**

While challenging the Board’s finding that the confidentiality provision at issue violates Section 8(a)(1), the Company does not question the Board’s decision to analyze the confidentiality provision under the analytical framework set forth in *Lutheran Heritage Village*. More broadly, the Company does not question the validity of the *Lutheran Heritage Village* framework itself. However, the Company makes a limited argument (Br. 32-33) that the Board “imperfectly applied the test” set forth in *Lutheran Heritage Village* because the Board failed to recognize a balancing analysis therein. The Company’s argument, however, is jurisdictionally barred and, in any event, without merit.

Because the Company did not first raise this argument to the Board, it is not properly before this Court. Section 10(e) of the Act (29 U.S.C. §160(e)) provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” As this Court has explained, the “plain language [of Section 10(e)] evinces an intent that the [Board] shall pass on issues arising under the Act, thereby bringing its expertise to bear on the resolution of those issues.” *Edward Street Daycare Center, Inc. v. NLRB*, 189 F.3d 40, 44 n.4 (1st Cir. 1999) (internal citation omitted).

Here, the Company could have alerted the Board to the asserted misapplication of *Lutheran Heritage Village* in a motion for reconsideration of the Board’s underlying decision. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (finding that employer “could have objected to the Board’s decision in a petition for reconsideration or rehearing”). By failing to file such a motion, the Company deprived the Board of the opportunity to register its informed opinion as to the proper interpretation and application of one of its own decisions. Having deprived the Board of this opportunity, the Company now does not attempt to explain, much less provide, “extraordinary circumstances” to excuse its omission. Accordingly, under Section 10(e) of the Act, this Court does not

have jurisdiction to consider the argument that the Board “imperfectly applied the test” (Br. 32) set forth in *Lutheran Heritage Village. Woelke & Romero*, 456 U.S. at 666 (finding that employer’s failure to raise objection before the Board, in a petition for reconsideration or rehearing, “prevents consideration of the question by the Courts”).

Even if the Company’s argument regarding the “imperfect application” of *Lutheran Heritage Village* were properly before this Court, that argument still would fail. As noted above, the Company essentially argues (Br. 32-33) that the Board misapplied *Lutheran Heritage Village* because, in the Company’s view, the Board failed to recognize a balancing analysis called for in that decision. Elaborating on this argument, the Company specifically charges (Br. 33) that the Board “failed to balance the employer’s right to protect a legitimate business interest with rights arguably protected by the Act.” However, *Lutheran Heritage Village* refers to no such overt balancing of employer versus employee rights. Rather, as the Company acknowledges, *Lutheran Heritage Village* only states that in assessing the lawfulness of an employer work rule, the Board must “give the rule a reasonable reading,” “refrain from reading particular phrases in isolation,” and “not presume improper interference with employee rights.” *Lutheran Heritage Village*, 343 NLRB at 646.

The Board’s caselaw applying *Lutheran Heritage Village*, which has met with approval in the D.C. Circuit, confirms that proper application of the *Lutheran Heritage Village* “test” does not entail the specific balancing analysis contemplated by the Company. *See, e.g., Cintas Corp.*, 482 F.3d at 468-70 (enforcing Board’s application of *Lutheran Heritage Village* to employer’s confidentiality rule and finding rule unlawful without weighing employer justification for rule); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374-77 (D.C. Cir. 2007) (enforcing Board’s application of *Lutheran Heritage Village* to employer’s “chain-of-command” rule and finding rule unlawful without weighing employer justification for rule); *Tecumseh Packaging Solutions*, 352 NLRB No. 87 (2008) (applying *Lutheran Heritage Village* and finding employer’s no-loitering rule unlawful without weighing employer justification for rule).

In short, the Company’s claim that the Board misinterpreted its own precedent should be rejected. After all, “[t]he Board is best suited to interpret its own precedent and to apply it to the facts of a particular case.” *NLRB v. Glover Bottled Gas Corp.*, 905 F.2d 681, 685 (2d Cir. 1990).

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEE DUPUY FOR BREACHING THE CONFIDENTIALITY PROVISION**

**A. It is Unlawful for an Employer To Discipline an Employee Pursuant to an Unlawfully Overbroad Rule; the Company's Discharge of Dupuy Pursuant to the Confidentiality Provision was Therefore Unlawful**

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) by discharging employee Dupuy. Under the credited testimony of the Company's main witness, Executive Vice President and Chief Operating Officer Green, Dupuy was discharged because he had failed to maintain his end of the "bargain" with the Company. Green confirmed that the "bargain" here was the confidentiality provision of the Company's Temporary Employment Agreement with Dupuy, which bound Dupuy to keep information related to his compensation confidential. As shown above, this confidentiality provision was unlawfully overbroad. And it is well settled that discipline imposed pursuant to an unlawfully overbroad rule is itself unlawful. *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enforced* 414 F.3d 1249 (10th Cir. 2005). *See also Republic Aviation*, 324 U.S. at 805 (finding discharge pursuant to unlawfully overbroad no-solicitation rule unlawful); *Saia Motor Freight Line*, 333 NLRB

784, 785 (2001) (collecting relevant Board cases). Accordingly, the Board properly found that the discharge of Dupuy pursuant to the unlawful confidentiality provision discussed above violated Section 8(a)(1).

**B. The Company’s Argument that Dupuy’s Discharge was Lawful is Based on an Inapplicable *Wright Line* Analysis**

The Company argues (Br. 34-37) that its conduct in discharging Dupuy was lawful, as it was not motivated by any desire to discourage union or protected concerted activity by Dupuy. Indeed, the Company points out (Br. 35-37, 39, 47), Dupuy was never engaged in any such activity. Moreover, the Company argues (Br. 48-50), even assuming that Dupuy was engaged in union or other protected activity and discharged partly because of that activity, the Company can show that Dupuy would have been lawfully discharged in any event, because the Company “could not make him happy” (Br. 49). Relying on the Board’s decision in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), the Company argues (Br. 49) that its ability to make this showing — that it would have lawfully discharged Dupuy in any event — releases it from unfair-labor-practice liability for the discharge.<sup>10</sup>

---

<sup>10</sup> In *Wright Line*, the Board set forth a test for analyzing violations of the Act — specifically, violations of Section 8(a)(3) or Section 8(a)(1) — that “turn[] on employer motivation.” *Wright Line*, 251 NLRB at 1089. Under this test, the

All of the Company's above arguments are predicated on a misunderstanding of the law governing this case. Where an employer rule or policy is found invalid under the Act, a discharge pursuant to that rule or policy is "necessarily" unlawful. *Texas Instruments*, 637 F.2d at 827. As this Court has explained, "[t]his is so because the employer's asserted motivation [for the discharge,] i.e., enforcement of a rule[,] must be in support of a rule not prohibited by labor law." *Id.* Accordingly, because a discharge based on an unlawful rule is, by definition, unlawfully motivated, the Board does not apply the *Wright Line* test of employer motivation in analyzing such a discharge. *See Saia Motor Freight*, 333 NLRB at 785 (finding that because employee was disciplined pursuant to unlawful rule, discipline constitutes a violation of the Act, "without consideration of *Wright Line*'s dual motivation analysis"). The Board's approach is well settled<sup>11</sup> and stands to reason: "[b]y adopting the rule that all disciplinary actions

---

Board first requires "that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" to take some action adverse to an employee. *Id.* If the General Counsel makes this showing of motivation underlying the adverse action, the burden of proof shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Id.* Where the employer carries its burden of proof under *Wright Line*, its adverse employment action is upheld as lawfully motivated. *See id.*

<sup>11</sup> *See, e.g., Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), enforced 414 F.3d 1249 (10th Cir. 2005); *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001); *Opryland Hotel*, 323 NLRB 723, 724 n.6, 729 (1997); *A.T. &*

imposed pursuant to an unlawful rule are unlawful, the Board reduces the chilling effect that results from imposition of overbroad rules.” *Double Eagle Hotel & Casino*, 414 F.3d at 1258.

Given these well-established principles, the Company’s arguments (Br. 34-37, 39-42, 46-50) based on a *Wright Line* analysis of Dupuy’s discharge are misguided. *See Saia Motor Freight*, 333 NLRB at 785. Thus, the Board did not err in failing to consider the alleged lack of protected activity motivating Dupuy’s discharge. *See Jeannette Corp.*, 532 F.2d 920 (observing that, where employee was discharged pursuant to a facially unlawful rule, court had “no occasion to discuss the Company’s contention that, entirely apart from the rule, [the discharged employee’s] wage discussions . . . did not constitute concerted activity within the protection of [S]ection 7”). Nor did the Board err in failing to consider the asserted lawful reason why Dupuy would have been discharged regardless of any protected activity on his part.<sup>12</sup> *See A.T. & S.F. Memorial Hosps.*, 234 NLRB

---

*S.F. Memorial Hosps.*, 234 NLRB 436, 436 (1978); *Miller’s Discount Dept. Stores*, 198 NLRB 281, 281 (1972), *enforced* 496 F.2d 484 (6th Cir. 1974). *See also Republic Aviation*, 324 U.S. at 805; *Texas Instruments II*, 637 F.2d at 827.

<sup>12</sup> In criticizing the Board’s non-*Wright Line* analysis of Dupuy’s discharge, the Company relies solely on an administrative law judge’s unreviewed decision in *Electronic Data Systems Corp.*, 1996 WL 33321516 (June 11, 1996) (“EDS”). It is well settled that such decisions are not binding on the Board. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003) (judge’s findings, to which no exceptions were filed with the Board, “are not . . . considered precedent

at 436 (finding reprimand pursuant to an unlawful rule itself unlawful, notwithstanding employer's additional lawful reason for reprimand).

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

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

---

for any other case" (citation omitted)); *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 873 (6th Cir. 1995) ("the ALJ's findings are not binding on the Board"). See also *Fabi Constr. Co. v. Secretary of Labor*, 370 F.3d 29, 35 n.7 (D.C. Cir. 2004) (finding that unreviewed ALJ decisions are "without precedential value"). The *EDS* decision therefore provides no authority for overturning the Board's findings.

## A. Background

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

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

Pursuant to this provision, the four members of the five-member Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a three-member group, consisting of Members Liebman, Schaumber and Kirsanow. When, three days later, Member Kirsanow's recess appointment expired, a two-member quorum of that group remained, consisting of Members Liebman and Schaumber.<sup>13</sup> Since January 1, 2008, this two-member quorum, consistent with the express terms of Section 3(b), has issued over 175 published decisions in unfair labor practice and representation

---

<sup>13</sup> Member Walsh's recess appointment also expired on December 31, 2007.

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

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

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

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

remaining two members from exercising all the authority that was delegated to them.

Although no court has previously addressed this exact issue,<sup>14</sup> in a case where the Board had four members, the Ninth Circuit has held that Section 3(b)'s two-member quorum provision authorized a three-member panel to issue decisions even if the decision issued after the resignation of one of the three panel members. *See Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121, 122 (9th Cir. 1982). In addition, the United States Department of Justice's Office of Legal Counsel ("the OLC") has directly addressed the issue presented in a formal legal opinion. The OLC concluded that the Board possessed the authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. *See Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

---

<sup>14</sup> This issue will be argued before the D.C. Circuit on December 4, 2008, in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162 and 08-1214.

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

A brief history of the Board's operations and of the legislation that ultimately became Section 3(b) of the Act confirms that Congress intended for the Board to have the option of adjudicating cases with a two-member quorum. As originally enacted in 1935, the Act created a three-member Board and provided in Section 3(b) of the Act that a vacancy would not impair the quorum of the two remaining members from exercising all powers.<sup>15</sup> Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued hundreds of decisions with only two of its three seats filled. *See, e.g., NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).<sup>16</sup>

---

<sup>15</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).

<sup>16</sup> From 1935 to 1947, the original Board issued 466 decisions during three discrete periods when it had only two seated members. First, from August 27 through October 11, 1941 (see *Seventh Annual Report of the NLRB* 8 n.1 (1942)), the two-member Board issued 224 decisions. *See* 35 NLRB Nos. 7-227; 36 NLRB Nos. 1-4. Second, from August 27 to November 26, 1940 (see *Sixth Annual Report of the NLRB* 7 n.1 (1941)), a two-member Board issued 239 decisions. *See* 27 NLRB Nos. 1-218; 28 NLRB Nos. 1-19. Third, from August 31 to September 23, 1936 (see *Second Annual Report of the NLRB* 7 (1937)), a two-member Board issued three decisions. *See* 2 NLRB 198; 2 NLRB 214; 2 NLRB 231.

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.<sup>17</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>18</sup>

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>19</sup> The Senate bill's preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity

---

<sup>17</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).

<sup>18</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>19</sup> S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

of viewpoint in deciding cases, contrary to the suggestion of one Senator.<sup>20</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>21</sup> Senator Taft similarly stated that the Senate bill was designed to “increase[] the number of the members of the Board from 3 to 7, in order that they may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much.”<sup>22</sup> *See Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981) (recognizing Congress’ purpose “to enable the Board to handle an increasing caseload more efficiently”). The Conference Committee accepted, 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>23</sup>

---

<sup>20</sup> Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

<sup>21</sup> S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

<sup>22</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 Board were similar to the three-member divisions that Congress had previously enacted for the Interstate Commerce Commission (“the ICC”) and the Federal Communications Commission (“the FCC”). Both the FCC and ICC statutes identically provided that “[t]he Commission is . . . authorized . . . to divide [its] members . . . into . . . divisions, each to consist of not less than three members. . . .” 48 Stat. 1068; Act To Provide for the Termination of Federal Control of Railroads, ch. 91, § 431, 41 Stat. 492. *See Eastland Co. v. FCC*, 92 F.2d 467, 469 (D.C. Cir. 1937).

<sup>23</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 540-541.

Despite having only two additional members, rather than four more as proposed by the Senate, the new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee created by Title IV of the Taft-Hartley Act to study labor relations issues<sup>24</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).<sup>25</sup> In this way, the

---

<sup>24</sup> See 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

<sup>25</sup> See also *Labor-Management Relations: Hearings Before J. Comm. on Labor-Management Relations*, 80th Cong. Pt. 2 at 1123 (statement of Paul M. Herzog, Chairman, NLRB) (reporting that “[o]ver 85 percent of the cases decided by the Board in the past 3 months have been handled by rotating panels of 3 Board members” and that the panel system “has added greatly to the Board’s productivity.”).

Board was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.<sup>26</sup>

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

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

As shown, in anticipation of the expiration of the recess appointments of Members Kirsanow and Walsh, the Board delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers. The Company attacks (Br 53) this delegation by claiming that it improperly gave a "blank check" to a three-member group which included Member Kirsanow at a

---

<sup>26</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 James M. Stephens' statement) ("1988 Oversight Hearings")*.

time when the Board was aware that Member Kirsanow's departure was imminent and that the delegation would soon result in the Board's powers being exercised by a two-member quorum consisting of Members Liebman and Schaumber.

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

Likewise, in *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1335 (D.C. Cir 1983), the D.C. Circuit upheld the delegation of powers by the two

sitting members of the three-member National Mediation Board (“the NMB”) to one member, despite the fact that one of the two delegating members resigned “later that day,” leaving a single member to conduct agency business. The court reasoned that if the NMB “can use its authority to delegate in order to operate more efficiently, then *a fortiori* [it] can use [that] authority in order to continue to operate when it otherwise would be disabled.” *Id.* at 1340 n.26.

Similarly, the NLRB’s December 28, 2007 delegation of its powers to a three-member group is not invalid because its purpose was to allow the Board to continue to operate. Indeed, unlike the *Yardmasters* case, where the NMB’s delegation of its powers to one member left that agency with less than the quorum required for adjudication (*see* 721 F.2d at 1341-42), here the Board’s delegation to a three-member group, in combination with the Act’s vacancy and quorum provisions, satisfied all Congress’ requirements for valid adjudication. By the express terms of Section 3(b), the authority of the two remaining Board members of the group is not impaired by the vacancies, and the “two members shall constitute a quorum of any [such] group.” 29 U.S.C. 153(b). *See 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 Int’l Dictionary 2046 (2d ed. 1937).)

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

The Company’s citation (Br. 53) to the federal statute governing the composition of three-judge appellate panels (28 U.S.C. § 46) seems to indicate that it believes that statute should control how the Board exercises its authority to delegate powers to three-member groups. To the contrary, the two statutes have no common application, and Section 3(b)’s delegation and two-member quorum provisions grant the Board more discretionary authority than Congress granted the federal appellate courts. Section 3(b) authorizes delegation of “all of the powers” of the Board to a three-member group. The judiciary statute, on the other hand, requires “the hearing and determination of cases and controversies by separate panels, each consisting of three judges[.]” 28 U.S.C. § 46(b). As the courts have recognized, Congress expressly intended that provision to mandate that, “‘in the first instance, all cases would be assigned to [a] panel of at least three judges.’” *Murray v. National Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)). Although the statute provides an exception for when a judge “cannot sit because recused or disqualified,” the

Supreme Court has held that if the panel is not constituted with the proper combination of three Article III judges at the time of case assignment, notwithstanding that two judges constitute a quorum, the decision is to be vacated and the case remanded to be heard before a new panel. *Nguyen v. United States*, 539 U.S. 69, 82-83 (2003).<sup>27</sup>

In drafting the Act, Congress could similarly have expressly required that every Board case be decided by three participating members sitting at the time of case assignment. However, as shown, Congress did not so narrowly constrain the Board. The judicial panel statute, 28 U.S.C. § 46(b), requires *each case* to be assigned to a three-judge panel. Section 3(b) of the Act, on the other hand, broadly authorizes the Board, in its discretion, to delegate all its powers to standing three-member groups, of which “two members shall constitute a quorum.” 29 U.S.C. § 153(b). And because Congress expressly provided that two members of a three-member group constitute a quorum, here, the two-member Board quorum had the authority to issue the Decision and Order in this case. *See Railroad Yardmasters*, 721 F.2d at 1341 (“A quorum is ‘[t]he minimum number of members who must be present at the meetings of a deliberative assembly for

---

<sup>27</sup> *See also Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137, 138, 144 (1947) (Urgent Deficiencies Act “require[d] strict adherence to the [statutory] command” that a case brought to enjoin an ICC order “shall be heard and

business to be legally transacted.’” (*quoting* Robert’s Rules of Order 16 (rev. ed. 1981))).

**F. Cases Interpreting the Statutes of Other Federal Agencies Provide Additional Support for the Board’s Authority**

The Company asserts (Br. 54) that it “has a right” to have its case heard by a Board of no less than three sitting members. The potential for decisionmaking by a minority of an agency’s total membership, however, is both inherent in the 1947 Taft-Hartley Congress’ decision to retain the Act’s two-member quorum provision as a device to expedite case processing, and consistent with Congress’ treatment of other federal agencies. Although each federal agency must follow its own statutory quorum and delegation requirements, several cases involving other agencies are informative on the issue of the Board’s authority to issue decisions under the delegation, vacancy, and two-member quorum provisions of Section 3(b) of the Act.

For example, in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996), the D.C. Circuit held, in interpreting the quorum rule promulgated by the SEC, that the SEC validly issued a decision at a time when only two of its five seats were filled. *Id.* at 582. Similarly, in *Nicholson v. ICC*, 711 F.2d 364 (D.C.

---

determined by three judges,” where there was “no provision for a quorum of less than three judges.”).

Cir. 1983), the D.C. Circuit recognized that the ICC's enabling statute not only permitted that agency to "carry out its duties in [d]ivisions consisting of three [c]ommissioners," but also provided that "a majority of a [d]ivision is a quorum for the transaction of business." *Id.* at 367 n.7. Based on that provision (which is analogous to the two-member quorum provision in the Act's Section 3(b), as shown at p. 18 note 14), the D.C. Circuit held that an ICC decision participated in and issued by only two of the three commissioners in a division was valid. *Id.*

Other circuits have reached similar results in ICC cases. Thus, in *Michigan Department of Transportation v. ICC*, 698 F.2d 277 (6th Cir. 1983), the Sixth Circuit held that, at a time when the ICC consisted of 11 members and 7 of its seats were vacant, a decision issued by the remaining 4 commissioners was valid. *Id.* at 279. In *Assure Competitive Transportation, Inc. v. United States*, 629 F.2d 467 (7th Cir. 1980), the Seventh Circuit likewise concluded that an ICC decision issued by 5 of the 11 commissioners was valid. *Id.* at 472-73.

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

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

s/Meredith L. Jason

MEREDITH L. JASON

*Supervisory Attorney*

s/Ruth E. Burdick

RUTH E. BURDICK

*Attorney*

s/Milakshmi V. Rajapakse

MILAKSHMI V. RAJAPAKSE

*Attorney*

*National Labor Relations Board*

1099 14th Street NW

Washington DC 20570

(202) 273-2945

(202) 273-7958

(202) 273-1778

RONALD MEISBURG

*General Counsel*

JOHN E. HIGGINS, JR.

*Deputy General Counsel*

JOHN H. FERGUSON

*Associate General Counsel*

LINDA DREEBEN

*Deputy Associate General Counsel*

National Labor Relations Board

November 2008

H:/FINAL/Northeastern Land-final brief-mjmr

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

NORTHEASTERN LAND SERVICES, LTD  
d/b/a THE NLS GROUP

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent /Cross-Petitioner

\*  
\*  
\*  
\*  
\* No.: 08-1878  
\*  
\* Board No.:  
\* 01-CA-39447  
\*  
\*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 12,064 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
Washington, D.C. 20570  
(202) 273-2960

Dated at Washington D.C.  
this 26th day of November, 2008

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

NORTHEASTERN LAND SERVICES, LTD	*
d/b/a THE NLS GROUP	*
	*
Petitioner/Cross-Respondent	*
	* No.: 08-1878
v.	*
	* Board No.:
NATIONAL LABOR RELATIONS BOARD	* 01-CA-39447
	*
Respondent /Cross-Petitioner	*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

Richard D. Wayne, Esq.  
HINCKLEY ALLEN SNYDER LLP  
28 State St.  
30th Floor  
Boston, MA 02109-1775

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
Washington, D.C. 20570  
(202) 273-2960

Dated at Washington D.C.  
this 26th day of November, 2008