

# 08-3291

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**and**

**LOCAL NO. 74B GLASS, MOLDERS, POTTERY, PLASTICS,  
and ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO-CLC**

**Intervenor**

**v.**

**WHITESELL CORPORATION**

**Respondent**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER  
OF THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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--------------------	----------

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---	-------

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER  
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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Decision and Order of the Board issued against Whitesell Corporation (“the Company”). The Board had subject matter

jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Court has jurisdiction over this proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices occurred in Washington, Iowa, where the Company does business, and because the Board’s Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). However, because the Company challenges the authority of the two-member Board quorum, that question is now presented for decision.

The Board’s Decision and Order issued on August 29, 2008, and is reported at 352 NLRB No. 138. (A880-96.)<sup>1</sup> The Board filed its application for enforcement on October 2, 2008. The Board’s application is timely as the Act places no time limit on filing for enforcement of Board orders.

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

1. Whether the Board is entitled to summary enforcement of the portions of its order remedying uncontested findings.

*NLRB v. MDI Commercial Services*, 175 F.3d 621, 624 (8th Cir. 1999).

2. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(5) and (1) of the Act by, without having reached an

impasse in its collective-bargaining negotiations, unilaterally implementing certain provisions of its final contract offer; by terminating its collective-bargaining agreement and changing terms and conditions of employment without giving proper notice to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act; and by refusing to supply the Union with information on its vacation proposal.

*Newcor Bay City Division*, 345 NLRB 1229, 1238-39 (2005), *enforced mem.*, 219 Fed. Appx. 390 (6th Cir. 2007).

3. Whether 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 within the full powers of the Board in issuing the Board's Order in this case.

*Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467 (7th Cir. 1980); *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996); *Michigan Department of Transportation v. ICC*, 698 F.2d 277 (6th Cir. 1983); *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983); *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982); *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335 (D.C. Cir. 1983).

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<sup>1</sup> "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Glass, Molders, Pottery, Plastics and Allied Workers International Union, Local 359 (“the Union”), the Board’s General Counsel issued a consolidated unfair labor practice complaint alleging that the Company committed several violations of the Act. (A884; 526-28.) After a hearing, an administrative law judge sustained some of the complaint’s allegations and issued a recommended order. (A884-96.) Reviewing the Company’s exceptions, the Board (Chairman Schaumber and Member Liebman) issued its Decision and Order affirming, as modified, the judge’s findings. (A880-84.)

## STATEMENT OF FACTS

### **A. Background; the Existing Contract Agreement; the Company’s Proposal for a New Agreement**

On approximately January 1, 2005, the Company purchased the assets of Fansteel Washington Manufacturing, Inc., a wire form manufacturer in Washington, Iowa, with approximately 90 production and maintenance employees. (A885; 7, 9, 20, 60-61, 529.) Upon the purchase, the Company recognized the Union that had represented the production and maintenance employees at the facility for over 40 years, and assumed the existing collective-bargaining agreement that ran through June 12, 2006. (A885; 9, 20-21, 60-62, 161, 379-80, 529, 532-64.) The Company also operates facilities in 16 other states. The 400 to

500 employees at those facilities do not have union representation. (A44-45, 81, 354, 379, 401-02.)

The expiring bargaining agreement provided for dues checkoff, required “just cause” for discipline, based layoff and recall on seniority, and based vacation on years of service. The agreement also included a 25 cent per-hour wage increase for each year of the contract, 10 paid holidays, a defined pension plan, medical coverage, group life insurance, and a voluntary supplemental accident fund. In addition, the workweek was defined as Monday to Friday, with overtime on Saturday and Sunday; new employees had a 60-day probationary period. (A888, 890; 84, 144-45, 533-49.)

On March 2, 2006, Cris Libera, the Company’s then human resources manager, by letter to the Union expressed the Company’s “intent to terminate” the parties’ collective-bargaining agreement upon its June 12 expiration. (A885, 887; 10, 21, 33-35, 62-63, 529, 565.) Attached to the letter was a copy of an undated F-7 form that the Company was statutorily required to file (Section 8(d)(3) of the Act; 29 U.S.C. § 158(d)(3)) with the Federal Mediation and Conciliation Service (“FMCS”) within 30 days of providing notice to the Union of its intent to terminate the contract. (A49, 566.)

By letter dated April 17, chief company negotiator Robert Janowitz informed the Union that “[w]hile the Company is willing to consider some

language from the current agreement, [it] intend[s] to negotiate a new agreement from start to finish.” (A885; 529, 583.) Additionally, the letter stated, “[t]he Company is not interested in extending negotiations past the expiration date of the current Agreement.” (A885; 75-76, 583.) In an April 25 letter, Janowitz reiterated that the Company had no intention of “extending the agreement beyond its expiration date.” (A586-87.)

On May 1, Janowitz provided chief union negotiator, Dale Jeter, with the Company’s initial proposal. (A59-60, 79-80, 529, 778-85.) Compared to the current agreement, the Company’s proposal:

- Eliminated clauses on dues checkoff, discrimination, picket line recognition, and union representation at disciplinary hearings;
- Changed language in clauses on recognition, limitation of agreement, no-strike/lockout, probationary period, and rules and regulations;
- Adopted, without explanation, existing companywide policies on a variety of terms and conditions such as overtime, holidays, vacation, bereavement pay, rest periods, sick leave, group insurance, jury duty, drug testing, safety glasses, and retirement benefits;
- Relied on factors other than seniority for layoff and recall, and placed the burden on the Union for establishing that the Company “acted arbitrarily”

when issuing discipline rather than requiring the Company to prove “just cause”;

- Left open wage rates and the night differential, and having a shop committee.

(A532-49, 778-85.)

The proposal also included a clause titled “Rules and Regulations” that set forth the Company’s right to modify policies or procedures to the same extent that the modifications affected other company employees. (A787.)

## **B. The Parties’ Negotiations for a Successor Agreement**

### **1. May 26 bargaining session**

During their first negotiating session on May 26, the parties discussed ground rules, but did not engage in substantive bargaining. The Union agreed with the Company’s desire to resolve non-economic issues first. (A85-87, 423-25, 466-67, 530.) During the session, company chief negotiator Janowitz stated that the Company:

- Was negotiating a new agreement in which it intended to have the same terms and conditions of employment for unit employees as for those employees at its other facilities;
- Intended to present a final offer by June 8 or June 9;

- Had no interest in bargaining past expiration of the agreement.

(A885, 893; 76-77, 81-82, 86, 162-63, 423-24, 465-66.)

The Union offered an initial proposal covering both economic and non-economic terms that was based on the expiring agreement. It proposed increased pay rates of \$1 per hour for each year of the contract, added 2 holidays, and increased other benefits involving the defined pension plan, and the weekly sickness and accident benefit. The proposal also added a new section to the discrimination clause, and lowered the probationary period from 60 to 30 days. (A87, 593-96.)

## **2. June 6 bargaining session**

At the beginning of the second bargaining session on June 6, the Union presented its second proposal, which essentially tracked its first proposal. The proposal also noted that the Union could not respond to the Company's intent to follow numerous companywide policies until it saw the specific language of those policies. (A88, 530, 597-600.) In response, the Company presented the specific economic and non-economic companywide policies that were referred to in its initial proposal. (A93, 601-53.)

Acceptance of the companywide policies that the Company was urging would have caused extensive changes to employees' existing terms and conditions of employment. For example, employees would have a 401(k) pension plan

instead of the existing defined pension; employees would move to medical coverage where the premiums for employees with fewer than 10 years seniority would increase by 4 or 5 times; there would be an increase in the number of years of service required for certain employees to earn their vacation benefits; and there would be a decrease in paid holidays from 10 to 8. (A84-85, 131, 534-64, 601-53.) In addition, instead of receiving overtime for weekend work, employees would receive overtime only if they worked over 40 hours during a work week defined from Sunday to Saturday. (A541-42, 602.) A company counterproposal revised language on its right to fill vacancies. (A809.)

The Union objected to the proposed increase in medical premium costs. (A892; 281-83.) The Union also informed the Company that it estimated that approximately one-third of the bargaining unit would lose vacation benefits under the Company's vacation proposal. The Company replied that the Union's estimate was not quite accurate, and it rejected a union proposal to grandfather those employees who would lose vacation. (A890; 96-98, 165-67, 295-96, 320-24.)

During the session, the parties also discussed the Company's opposition to dues checkoff. (A467-69.) In addition, the Company reiterated its desire to rely on factors other than seniority for layoff and recall. (A888; 94-96.)

### 3. June 7 bargaining session

At the third bargaining session on June 7, the Union made its third proposal. The Union adhered to some of its earlier positions, rejected imposition of some companywide policies, but indicated it was still considering accepting other companywide policies. (A98-99, 530, 654-58.) The Company, in turn, presented its first wage proposal, a merit-wage system in place at its other facilities. Under the system, employees would not, as set forth in the current agreement, receive annual set wage increases. Instead, each employee would receive an annual performance evaluation based on 15 traits, with each trait receiving a numerical rating from 1 to 4. (A889 & n.7; 550-53, 659-63.) The parties discussed the Company's wage and retirement plans. (A98-101, 106-07, 168-69, 382-84, 471-72.) The Company also gave the Union a copy of its drug-testing policy. (A102, 664-72.)

During the session, the parties tentatively agreed on clauses covering the scope of agreement, limitation of agreement, and safety. The Company dropped its opposition to the shop-committee, discrimination, and picket-line-recognition clauses. The parties also reached partial agreement on the preamble, recognition, no-strike/lockout, and discipline clauses. (A723-26, 735-36.)

#### 4. June 8 bargaining session

At the fourth bargaining session on June 8, both Jeter and Janowitz commented that it was unusual that neither of them had been contacted by the FMCS prior to the commencement of the negotiations. (A887; 115.) Janowitz also presented the Company's "Comprehensive Counter Proposal" that:

- Combined the proposals made on June 6 and June 7;
- Included the costs to employees for participation in the various company benefit programs;
- Renamed the "Rules and Regulations Clause" as the "Applicability of Personnel Policies";
- Added language to many of the specific clauses to make them subject to the "Applicability of Personnel Policies" clause.

(A108-09, 111-12, 677-89.)

The Union's counterproposal made some modification to its earlier proposals on the probationary period, bereavement leave, and safety policy.

(A112-13, 690.)

At the end of the session, Janowitz asked the Union to review the Company's offer, and to make a final offer. Janowitz also asked when the Union wanted the Company's final offer. The Union responded that it would not make a final offer, that the timing of the Company's final offer was up to the Company,

and that no impasse existed. (A114-15, 120, 172, 227, 471.) Janowitz agreed that no impasse existed. (A893; 114, 120, 172, 227, 471.)

### **5. June 9 bargaining session**

During the fifth bargaining session on June 9, the Company made its second comprehensive proposal. The proposal added a 25-cent wage increase for the first year of the contract, increased the shift differentials on the second and third shifts, and permitted union representation during employee evaluations. The proposal stated that, to pay for the wage increase, the Company would eliminate money given to employees for uniforms. (A115-16, 278-79, 530, 691-704.) During the session, the Company also made a counterproposal on vacation. (A833.)

In a written counterproposal, the Union requested information regarding the Company's vacation proposal; asked that the current bargaining agreement be extended until July 16 to provide the Union with more time to understand the Company's proposals, and stated that it would consider a mutual request for a federal mediator. (A890; 117-20, 705-06.) The Company declined to extend the current bargaining agreement past June 12. (A114.)

During the session, the parties agreed to adopt the Company's proposal to extend the probationary period from 60 to 90 days. They also reached agreement on rest periods, grievances, jury duty, military leave, tuition reimbursement, and

the term of the agreement, and on part of the recognition, discipline, and protective-equipment clauses. (A723-24, 726, 730-32, 735, 737, 739, 834-36.)

### **6. June 10 bargaining session**

During the parties' sixth session on June 10, the Company made a "Comprehensive Counter Proposal" that incorporated previously agreed upon language. (A530, 707-21.) In addition, Janowitz informed the Union that the proposed "Applicability of Rules and Regulations" clause was an extremely important part of the Company's proposal because the Company wanted to treat all of its employees the same and it did not want to lose that flexibility during the contract term. (A471-74.) The Union proposed lowering its wage demands to \$1 for the first year and 50 cents the next 2 years, and expressed a willingness to consider a merit-pay plan in conjunction with a base increase in wages. (A894; 277-79.) The Union also asked the Company to consider retaining a defined pension plan. (A275.)

During the session, the parties completed agreement on the contract's preamble, and protective-equipment clauses. They also reached agreement on the bereavement-pay, witness-duty, and credit-union clauses. (A723, 730, 732, 735, 737.)

## **7. June 11 bargaining session**

During the seventh bargaining session on June 11, the parties completed agreement on the recognition, no-strike/lockout, “Applicability of Personnel Policies,” holidays, vacation (absent grandfathering), drug-policy (as long as it complied with Iowa law), successor, and dues-checkoff clauses. (A894; 128-31, 139, 475-83, 487-90, 725-30, 733, 736, 738, 842-45, 847-52.) To reach agreement on this “package,” the Union made concessions on holiday, vacations, funeral leave, and successor language. (A128-30, 133, 139, 475-76.) The parties also reached two letters of understanding regarding bereavement and union leave, and the Union withdrew language it wanted regarding the Company’s neutrality as to whether new employees joined the Union. (A492-94, 600.) In addition, the Company made a counterproposal on seniority. (A894; 489, 851.)

### **C. After the June 12 Bargaining Session, the Company Declares Impasse and Stops Collecting Union Dues**

The parties met for the eighth and last time on June 12, the date the collective-bargaining agreement expired. After meeting from 8:30 a.m. to 8:45 a.m., the parties caucused until noon. They then met from noon until 12:30 p.m.. The Union agreed to use the Company’s group health insurance plans. (A139, 495-97, 530, 732.) At approximately 12:30 p.m., the Company presented its “Final Offer and Tentative Agreements.” (A892; 124-25, 497, 722-39.) The Union

replied that it would not present the offer to the union membership. The Company negotiators then left. (A134, 174.)

Around 3:00 p.m., Jeter held a union-membership meeting where he explained that the Union was dissatisfied with the Company's offer and would not hold a ratification vote. Jeter expressed his concern that the employees would reject the offer and go on strike. (A229, 318-19.) Around 9:00 p.m., the Union faxed the Company a letter stating that it had "advised our members to continue to work without a collective bargaining agreement. The Union wishes to continue to negotiate in an attempt to reach satisfactory agreement." (A134-35, 676.) In addition, the Union denied that impasse was reached, expressed its intent to "continue consideration of the Company's final offer" and offer counterproposals at the next bargaining meeting. (A676.)

At 10:00 p.m., the Company faxed a letter to the Union from its "[c]ontract [n]egotiation [t]eam." In the letter, the Company "rejected[ed]" the Union's "assertion that no impasse was reached," and "reject[ed]" continued negotiations. The Company also asserted that it had complied with all outstanding information requests. (A135-37, 741.) Around the same time, Robert Wiese, the Company's chief operating officer and who had attended most of the negotiating sessions, emailed Jeter stating the Company is "sorry you did not want to continue any effort at negotiations and have abandoned that effort at noon today." (A378, 381, 742.)

The email also criticized the Union for not submitting the Company's offer to the union membership for ratification. (A742.)

After June 12, the Company stopped collecting union dues. (A894 n.10; 141.)

**D. The Company Implements Portions of Its Final Offer and Ends the Supplemental Accident Fund; the Company Declines To Process Grievances**

By letter dated June 13, Janowitz acknowledged to the Union that the bargaining had resulted "in about 30 [t]entative [a]greements." (A885 n.3, 892; 140, 745.) Janowitz also stated that impasse existed, and that the Company intended to implement various provisions of its final offer. (A892; 745.)

In a June 20 letter, the Company informed employees who had contributed to the voluntary accident program that it was discontinuing the program and refunding the money that employees had contributed. (A892; 753). The Company's "final offer" had not mentioned the program. (A56-57, 146-47.) Thereafter, in a June 21 letter to the Company, Jeter again denied that impasse existed, and "state[d]" the Union's "intentions to present changes in its position relative to unresolved issues at the next bargaining meeting." (A754-55.)

On June 29, Union President Georgia Fort filed a series of grievances protesting the Company's failure to maintain the status quo since June 12 on a variety of terms of employment. (A893; 148-49, 181-83, 233-34, 766-71.) By

letter dated July 7 to Fort, Chief Operating Officer Wiese characterized the grievances as “complaints” and offered to discuss them if Fort wanted to pursue them further. (A893; 772.)

**E. The Company Files F-7 Form with the FMCS; the Union Requests Information and Files Additional Grievances; the Company Refuses To Allow the Union To Post Information on Company Bulletin Boards**

On July 10, Jeter contacted the FMCS to request a mediator. The FMCS informed Jeter that it had no knowledge of the dispute. (A887; 63-64, 66-68, 257-60, 567-69.)

On July 17, the Union submitted a six-page letter to the Company addressing concerns about the Company’s proposed evaluation system and asking for a variety of information about the proposal, including copies of evaluations of bargaining-unit employees and of employees at other facilities, so that it could make a counterproposal. (A889; 102-03, 667-73.)

On July 18, Union President Fort filed two additional grievances that Wiese subsequently characterized as complaints. (A150, 181-84, 773-75.)

On July 27, Fort asked Human Resources Manager Betsy Milam whether she could post a union notice about an upcoming union meeting on the Company’s bulletin boards. Milam subsequently informed Fort that she could not. Prior to that time, employees had unfettered access to the two bulletin boards and had

posted notices without seeking permission. (A886-87; 185-87, 190, 194, 249-52, 515-17.)

In July and August, the Company began moving employees to another facility. (A891; 154-55, 157-58, 199-200, 244-45.) In an August 9 letter, Jeter requested information about those assignments. (A891; 776.)

In an August 10 letter, Jeter informed the Company that the FMCS had told him that it had not received the required F-7 notice. Jeter asked the Company to provide proof that it had properly and timely filed the required notice with the FMCS. (A887; 68, 570.) On August 14, the Union received a letter from the FMCS stating that the Company had filed the F-7 notice (A576) on August 11 (A578) and that the FMCS had assigned a mediator (A576.) By letter dated August 17, David Tomlinson, the Company's general counsel, informed Jeter that the Company had provided the required notice to the Union on March 2, and had simultaneously filed the notice with the FMCS by depositing it in the United States mail. Tomlinson further apprised Jeter that on August 10, the Company had sent a courtesy copy of the March 2 letter and notice to the FMCS. (A887; 571.) In a fax dated August 22, Tomlinson sent the FMCS another copy of its August 10 letter, and the F-7 notice. (A887; 805-07.) On August 28, Jeter sent a letter to Janowitz requesting bargaining. (A71, 577.)

By letter dated September 21, the FMCS notified the Board that it had no record of receiving an F-7 notice from the Company on or about March 2006. The FMCS also informed the Board that it had received two F-7 notices from the Company dated August 11 and 22. (A887; 578.)

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

Based on the foregoing facts, the Board found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by terminating its collective-bargaining agreement with the Union and making unilateral changes in terms and conditions of employment without giving the proper notice required by Section 8(d)(3) of the Act, and by implementing certain provisions of its final contract without having first bargained with the Union until a good-faith impasse was reached. The Board also found that the Company violated Section 8(a)(5) by unilaterally discontinuing its supplemental accident insurance fund, refusing to accept and process grievances filed by the Union in accordance with the procedures set forth in the expired 2006 bargaining agreement, and by refusing to provide necessary and relevant information to the Union concerning vacation, merit pay, and assignment of unit employees to the Company's new facility. In addition, the Board found that the Company violated Section 8(a)(1) by prohibiting employees from distributing union-meeting notices in the plant during the breaktime, and by implementing a

policy prohibiting the employees from posting union materials on the facility's bulletin boards. (A880-83, 887, 891, 893-94.)

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 the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A883.)

Affirmatively, the Board ordered the Company, on request, to bargain in good faith with the Union; rescind the unlawful changes it made in terms and conditions of employment since June 13, 2006, until the parties sign a new agreement or until good-faith bargaining leads to a valid impasse; make employees whole for any loss of earnings and other benefits; reimburse the Union, with interest, the membership dues that the Company failed to withhold and transmit to the Union prior to September 10, 2006; process, on request, the grievances filed by the Union; and supply the Union with the information it had requested. The Board also ordered the Company to post and mail to employees copies of a remedial notice. (A884.)

### **SUMMARY OF ARGUMENT**

The Company bought a unionized facility and, in its first collective-bargaining negotiations after purchase, sought to drastically change the current terms and conditions of employment. Even though those negotiations made steady

progress, the Company had set an arbitrary deadline that allowed for only a limited number of bargaining sessions once the bargaining began. When that deadline was reached, even though the parties had continued to agree to numerous provisions right up until the end of negotiations and even though the Union had clearly requested that bargaining continue, the Company broke off negotiations and unilaterally implemented many of the terms of its final offer. The Board applied settled principles that required the Company to bargain with the Union until the parties either reached a new agreement or a genuine impasse. Here, substantial evidence supports the Board's finding that the Company failed to carry its burden of establishing that the parties were at a genuine impasse when the Company broke off negotiations.

The Board separately found that the Company failed to give notice of the labor dispute to the FMCS, as required by Section 8(d)(3) of the Act, before terminating the provisions of the preexisting contract, and ordered the Company to adhere to those provisions until September 10, 2006, 30 days after the Company did notify the FMCS. The practical effect of this remedy is to extend the life of the dues checkoff contractual provision—from June 12 to September 10—because the remedy the Board ordered for failing to bargain to a genuine impasse had the effect of extending the other provisions of the contract because they all qualify, unlike

dues checkoff in the Board's view, as terms and conditions of employment under Section 8(d) of the Act.

Finally, the Company's contention that the Board's Order 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 that the statute governing federal appellate panels, which has no application to the NLRA.

## **ARGUMENT**

### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER REMEDYING THE UNCONTESTED FINDINGS**

The Company's brief fails to contest the Board's finding that that the Company violated Section 8(a)(1) of the Act by prohibiting an employee from distributing union-meeting notices in the plant during the employee's breaktime, and by promulgating a policy that prohibited employees from posting union

materials on the facility's bulletin boards. The Company's brief also fails to contest the Board's finding that that the Company violated Section 8(a)(5) and (1) of the Act by refusing to accept and process grievances, and by refusing to furnish information about merit pay and the assignment of employees to a new facility. Accordingly, the Board is entitled to summary affirmance of these findings and summary enforcement of the corresponding portions of its remedial order. *See NLRB v. MDI Commercial Services*, 175 F.3d 621, 624 (8th Cir. 1999).

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY COMMITTED VIOLATIONS OF SECTION 8(a)(5) AND (1) OF THE ACT**

### **A. By Not Having Bargained To Impasse, the Company Violated Section 8(a)(5) and (1) of the Act by Unilaterally Implementing Certain Provisions of Its Final Contract Offer**

#### **1. Applicable principles and standard of review**

An employer commits an unfair labor practice under Section 8(a)(5) of the Act when, without having negotiated to impasse, it makes unilateral changes in wages, hours, and other mandatory subjects of collective bargaining. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S.

736, 743 (1962). *Accord United Paperworkers Int'l v. Champion Int'l Corp*, 81 F.3d 798, 801-02 (8th Cir. 1996).<sup>2</sup>

The Supreme Court has observed that a stalemate in negotiations is deemed a good-faith impasse only when “the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless . . . .” *Laborers Health and Welfare Trust Fund v. Advanced Light Weight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (citation omitted). *Accord American Fed'n of Television and Radio Artists, Kansas City Local v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968), *affirming Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967) (“*Taft*”) (genuine impasse in negotiations exists when “there [is] no realistic possibility that continuation of discussion at that time would have been fruitful.”) The burden of establishing an impasse rests with the party asserting it, here the Company. *See Grinnell Fire Protection Sys. Co. v. NLRB*, 236 F.2d 187, 196 (4th Cir. 2000); *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 180 (3d Cir. 1980).

There is no “mechanical definition” for determining whether a valid impasse exists. *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1173 (8th Cir. 1972).

Instead, the Board considers a number of factors, including “[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations,

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<sup>2</sup> A violation of Section 8(a)(5) of the Act produces a “derivative” violation of Section 8(a)(1). *See St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006).

the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations . . . .”

*Taft*, 163 NLRB at 478.

The Board does not require that all the *Taft* factors militate in favor of a finding of impasse. “[O]f central importance” is “the parties’ perception regarding the progress of the negotiations.” *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). Hence, there can be no impasse unless “[b]oth parties believe that they are at the end of their [bargaining] rope.” *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enforced* 836 F.2d 289 (7th Cir. 1987). *Accord Teamsters Local Union No. 639*, 924 F.2d at 1084; *Huck Mfg. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982). Further, impasse must be reached not as to one or more discrete contractual items, but on the agreement as a whole. *See Duffy Tool & Stamping v. NLRB*, 233 F.3d 995, 997-99 (7th Cir. 2000).

The determination of whether an impasse exists is a question of fact, and “because of the subjectivity involved in deciding when an impasse has occurred, its existence is an inquiry ‘particularly amenable to the experience of the Board as a fact finder.’” *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990) (citation omitted). *Accord Teamsters Local Union No. 639*, 924 F.2d at 1083.

The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole (29 U.S.C. § 160(e)); a reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord NLRB v. Rockline Ind., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005).

**2. Substantial evidence supports the Board's finding that the parties were not at impasse when the Company refused to continue bargaining and unilaterally implemented portions of its final offer**

The Company does not dispute that, upon expiration of the bargaining agreement, it unilaterally implemented certain provisions of its final offer. Accordingly, the Company violated Section 8(a)(5) and (1) of the Act unless it demonstrates that the parties were at a genuine impasse at the time. Here, the bargaining history—the Company's imposition of an arbitrary deadline on reaching its first agreement with the Union, seeking substantial changes in the existing terms and conditions of employment in a very short span of negotiations, and declaring impasse on the date of that arbitrary deadline despite exchanging proposals and reaching agreement with the Union on numerous issues right up until the very end of their negotiations—provides substantial evidence to support the Board's finding (A881-82, 893-94) that the Company failed to prove that the parties were at a genuine impasse.

As an initial matter, the Company, as the Board found (A881), placed an “arbitrary deadline on negotiations.” Thus, although negotiations did not begin until May 26, company chief negotiator Janowitz emphasized in two letters that the Company had no intention of extending negotiations beyond the June 12 expiration of the existing bargaining agreement. Thereafter, during the negotiations, Janowitz repeatedly reiterated that position. (A464.) In addition, Janowitz acted to preclude any negotiations past the agreement’s June 12 expiration by stating that the Company intended to present a final offer by the third or fourth negotiation sessions held on June 8 or June 9, and by seeking the Union’s final offer as early as the third session on June 8. The Company’s arbitrary deadline on ending negotiations suggests that the Company was determined to implement changes upon expiration of the agreement regardless of the status of the negotiations. *See Dust-Tex Serv., Inc.*, 214 NLRB 398, 405 (1974), *enforced mem.*, 521 F.2d 1404 (8th Cir. 1975).

Contributing to the finding that the Company failed to prove the existence of a genuine impasse was the fact that, as the Board explained (A894), the Company “never gave any reasons to the Union” for rejecting its request to temporarily extend the contract until July 16, and “never revealed any economic exigencies that required it to complete negotiations on or before June 12.” *Cf. Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000) (absent impasse “an

employer may act unilaterally if faced with an economic exigency justifying the change.”)<sup>3</sup> Instead, as chief negotiator Janowitz acknowledged (A424-25), the arbitrary deadline was a negotiating ploy “[t]o make sure the Union put its best efforts at negotiating a new agreement in a timely manner.”

Moreover, the Company set the arbitrary deadline even though it is undisputed that, as the Board found (A881, 894), the Company was negotiating its first agreement with the Union and was seeking substantial changes from the Union’s existing agreement. Thus, the Company, as the new owner of the facility and negotiating with its only unionized facility, sought an entirely new agreement under which employees would share the same terms and conditions of employment as employees at the Company’s nonunion facilities. Agreeing to those terms and conditions of employment would have meant significant concessions from the Union because employees would lose many benefits accumulated over the previous 40 years. Thus, the Company sought to eliminate regular wage increases, two paid holidays, dues checkoff, overtime pay for weekend work, “just cause” protection from discipline, seniority rights for layoff and recall, and a defined pension plan, and it sought to extend the probationary period. In such circumstances, the Company’s arbitrary deadline flew in the face of the reasonable

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<sup>3</sup> An employer can also act unilaterally absent impasse “if a union engages in dilatory tactics to delay bargaining.” *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000). No such claim was made here.

expectation that reaching agreement on such sweeping changes might take a bit more than 2 weeks of negotiations.

Nevertheless, the Company held to its arbitrary deadline even though, as the Board explained (A881), it “engaged in only a limited number of bargaining sessions [8,] before declaring impasse[.]” Moreover, the first and last negotiation sessions were not substantive, leaving only six sessions to reach an agreement that was essentially being written from scratch.

During those six sessions, it is undisputed that the parties spent much of the time caucusing (A894; 180-81), something that Janowitz acknowledged (A448-49) was typical in negotiations and “extremely important.” In addition, consistent with the Company’s desire to first resolve non-economic matters, the Company did not provide complete details of the various companywide policies that it was urging until the second session on June 6. Indeed, it did not offer a wage proposal until the third bargaining session on June 7, or offer a full comprehensive proposal until the fourth session on June 8. Accordingly, the Company left only a few bargaining sessions to reach an agreement on its entire contract before its arbitrary June 12 deadline. In these circumstances, the Company is in no position (Br 41) to characterize the Union’s bargaining request that the agreement be extended until July 16 as “not a reasonable request” that was “proposed simply to create delay.” Rather, the Company’s rejection of the Union’s offer, with no explanation or

counteroffer, demonstrates that the Company planned to hold steadfastly to its arbitrary deadline regardless of the status of the negotiations.

Finally, notwithstanding the Company's arbitrary deadline and the major contractual changes that it sought, the parties made steady progress toward negotiating a new agreement. Indeed, when the Company declared impasse, the parties were continuing to reach agreement on various provisions. Overall, the parties, as Janowitz acknowledged (A892; 745), reached agreement on about 30 items.

Thus, on June 7, the parties reached tentative agreement on clauses covering the scope of agreement, limitation of agreement, shop committee, discrimination, picket-line recognition, and safety. They also reached partial agreement on the preamble, recognition, no-strike/lockout, and discipline clauses. Thereafter, on June 8, the parties agreed they were not at impasse. Then, on June 9 the parties reached agreement on clauses concerning the probationary period, rest periods, grievances, jury duty, military leave, tuition reimbursement, and the term of the agreement. They also reached agreement on part of the recognition, discipline, and protective-equipment clauses. The next day, June 10, the parties completed agreement on the preamble and protective-equipment clauses. They also reached agreement on the bereavement-pay, witness-duty, and credit-union clauses.

Substantial progress continued on June 11, the last day of bargaining. The Company made counterproposals on overtime and seniority. Significantly, the Union acquiesced to the Company's "Applicability of Personnel Policies" clause, which Janowitz had earlier characterized as a very important part of the Company's proposal. In addition, the parties completed agreement on the recognition, no-strike/lockout, holidays, vacation (absent grandfathering), drug-policy (as long as it complied with Iowa law), successor, and dues-checkoff clauses, and reached two letters of understanding. In sum, on June 11, Janowitz acknowledged (A475) that the parties had agreed to a "significant package proposal" on "significant" issues that, up until that point, were in dispute.

The next day, June 12, the parties resolved what Janowitz acknowledged (A496-97) were "important" issues regarding the Company's benefit plans. Yet, as the Board explained (A881-82), "the [Company] declared impasse even though the parties exchanged proposals and reached agreements the day before and the day of the impasse declaration." As the Board concluded (A882), "[u]nder similar circumstances, the Board [with court approval] has declined to find that a lawful impasse existed." *See Newcor Bay City Division*, 345 NLRB 1229, 1238-39 (2005), *enforced mem.*, 219 Fed. Appx. 390 (6th Cir. 2007) (no impasse where the employer sought drastic changes, yet imposed the contract-expiration date as an artificial deadline for negotiations, bargained for only a short period, and declared

impasse at a time when the parties were reaching agreement on bargaining issues); *Ead Motors Eastern Air Devices*, 346 NLRB 1060, 1063-64 (2006) (no impasse where employer sought changes that “far exceeded” those sought in prior negotiations, yet imposed an arbitrary deadline and declared impasse, despite the fact that the parties were making progress toward reaching an agreement).

### **3. The Company’s contentions are without merit**

As an initial matter, the Board did not, as the Company suggests (Br 38-43), find no impasse based on any single factor, such as the number of bargaining sessions. Although the Board considered the number of sessions, it did so in the context of the Company’s imposition of an arbitrary deadline on negotiations, despite the fact that in that short period of time the Company was seeking major contractual concessions and the parties were continuing to make progress.<sup>4</sup>

The evidence also does not support the Company’s position (Br 32-38) that the parties were at the end of their rope on June 12, or had a contemporaneous understanding that they were at impasse. As shown, both parties agreed that they

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<sup>4</sup> As the Company concedes (Br 23), the number of bargaining sessions is a factor to consider. Although the number of meetings is not controlling, the likelihood of a valid impasse increases with more meetings. *NLRB v. Powell Elec. Mfg.*, 906 F.2d 1007, 1011-12 and n.2 (5th Cir. 1990). Numerous cases exist in which impasse was not reached despite significantly more sessions than in the instant case. See, e.g., *Teamsters Union Local No. 639*, 924 F.2d at 1083 (12 meetings in 1 month); *Beverly Farm Found. v. NLRB*, 144 F.3d 1048, 1051-52 (7th Cir. 1998) (19 meetings over 1 year); *Intermountain Rural Elec. Ass’n v. NLRB*, 984 F.2d 1562, 1564 (10th Cir. 1993) (13 sessions over 6 months).

were not at impasse on June 8. Thereafter, they continued to reach agreement on numerous clauses. Consistent with such progress, the Company even sought, and the Union agreed, to bargain over the weekend of June 10 and 11. (A448.) In fact, as shown above, on June 11, the parties reached agreement on significant clauses. Yet, the next day, the day of its arbitrary deadline, the Company rejected the Union's desire for continued negotiations, declared impasse, and accused the Union of abandoning negotiations.

The fact that the parties continued to make revisions and reach agreement on various provisions also undermines the Company's claim of a contemporaneous understanding that impasse existed. *See Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991) (union disagreed that impasse had been reached and stated it had "more movement to make"); *NLRB v. WPIX, Inc.*, 906 F.2d 898, 901 (2d Cir. 1990) (that "changes were being made, revisions were being offered" indicated that negotiations were not "static" and that parties, therefore, were not at impasse); *Powell Elec. Mfg.*, 906 F.2d at 1012-13 (union made counteroffers just prior to employer's declaration of impasse and was willing to negotiate). Therefore, the fact that the parties had not yet reached an overall agreement by June 12 does not demonstrate that further negotiations would have been futile.

That finding is not undermined by the fact that the parties had, as the Company states (Br 29-31), unresolved issues, particularly those that were economic in nature. As noted, consistent with the Company's ground rules, the parties first turned to resolving non-economic matters, and they had just resolved such major non-economic issues as drug testing and dues checkoff when the Company declared impasse. Although the Company may have wanted the negotiations to proceed more rapidly, the Company was seeking major economic concessions from a union that was attempting to defend the benefits it had secured.

For instance, the Company's healthcare proposal would have meant, as the Company acknowledged (Br 12), a "substantial cost increase for the less senior employees." Similarly, with respect to wages, the Company offered a merit pay plan that would not provide automatic wage increases, and that Janowitz characterized as "unique" (A509), and "fairly extensive and new to the Union" (A470). That "unique" proposal led, as Janowitz acknowledged (A470-71), to the Union caucusing a lot and having a lot of questions in an effort to try to understand the proposal. Indeed, after the Company declared impasse, the Union submitted a six-page information request—which the Company admits it unlawfully failed to respond to—seeking information about how the Company administered the merit-pay program at its other facilities. Likewise, the Company's shift from a defined pension plan to a 401(k) plan led to union questions about rollover and the status of

loans under the defined benefit plan. The Board found (A881) that the Company had also not answered these questions until long after it had declared impasse.

Moreover, even when the parties are not yet close to agreement, an employer is not relieved of its duty to bargain even where only a “little hope exist[s] for an agreement . . . .” *NLRB v. Plymouth Stamping Div., Eltec Corp.*, 870 F.2d 1112, 1117 n.2 (6th Cir. 1989). *See also WPIX, Inc.*, 906 F.2d at 901-02 (fact that parties were far apart did not justify declaration of impasse); *NLRB v. Big Three Indus., Inc.*, 497 F.2d 43, 48 (5th Cir. 1974) (employer required to continue bargaining even if it considers union’s proposals “ridiculous”).

Accordingly, the Company’s attempt to prove impasse (Br 36-37) is not aided by the fact that the Union initially reacted negatively to its final offer. *See NLRB v. Plymouth Stamping*, 870 F.2d at 1117 n.2. Though collective bargaining often involves zealous, passionate advocacy, including vociferous protests as to the unacceptability of proposals, impasse is not proved by such words alone. *NLRB v. Beverly Enter.-Massachusetts*, 174 F.3d 13, 27 (1st Cir. 1999); *NLRB v. WPIX, Inc.*, 906 F.2d at 902 (no impasse despite union dismissal of employer proposals as “ridiculous” and a “slap in the face.”) The fact remains that the Union expressed a desire to continue bargaining and to make a counteroffer.

Nor, as the Company suggests (Br 37-38), was the Union required to offer some specific concession, or immediate change in position, in response to the

Company's declaration of impasse. In the first place, union negotiator Jeter preferred (A77-78) to exchange proposals in person, as evidenced (A265) by his waiting until the first negotiation session to submit a proposal. Moreover, in *Colfor, Inc. v. NLRB*, 838 F.2d 164, 166, 167 (6th Cir. 1988), the Sixth Circuit agreed with the Board that the parties were *not* at impasse even though the union representative, in response to the employer's declaration of impasse, said: "[I]t looks like we're at impasse. I guess we'll have to meet again." Likewise, in *Grinnell Fire Protection*, 236 F.3d at 199, the Fourth Circuit upheld the Board's finding that the parties were *not* at impasse where, in response to the employer's declaration of impasse, the union sought further bargaining without offering any specific concessions. The court stated that "we can hardly conceive of better evidence of a party's willingness to satisfactorily negotiate further than its clear statement to that effect." *Id.* at n.15. And in *Grinnell*, the union did not indicate that, in future bargaining, it would compromise further. Instead, the union told the employer that it hoped to convince the *employer* to alter its position on wages. *Id.* at 199.

Moreover, "final offers"—even when presented as incapable of modification—often are followed by further bargaining. *See Chicago Typographical Union No. 16 v. Chicago Sun-Times*, 935 F.2d 1501, 1508 (7th Cir. 1991) ("final offer was followed . . . by bargaining followed by another final offer

followed by more bargaining,” continuing for a year and a half). Thus, even though an employer may characterize an offer as its “final offer,” such a characterization sheds little light on whether a genuine impasse exists. *See Lapham-Hickey Steel*, 904 F.2d at 1185 (despite the employer’s “take-it-or-leave-it” ultimatum and refusal to discuss further modifications or tradeoffs, there was no impasse); *Teamsters Local No. 175 v. NLRB*, 788 F.2d 27, 31 (D.C. Cir. 1986).

The Company’s heavy reliance (Br 24-28, 38-39) on *TruServ Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), where the D.C. Circuit found impasse, is misplaced, because that case is not, as the Company contends (Br 24), “remarkably similar” to the present case. As an initial matter, the court there recognized that “merely labeling an offer as ‘final’ is not dispositive.” *Id.* at 1115. Moreover, the court found impasse based on four factors not present here. First, the employer “was facing economic exigencies,” a claim never made here. *Id.* Second, the employer had made “substantial concessions.” *Id.* Here, by contrast, the Company held steadfastly to its opening position of implementing companywide terms and conditions of employment. Third, the employer had earlier “advised the [u]nion that when it had reached the limits of its bargaining, it would call its final proposal its ‘last, best, and final’ offer.” *Id.* at 1115-16. Here, at a time when the negotiations had barely started, the Company sought to have the Union make a final offer and for the Union to evaluate a final offer from the Company, and for no

apparent reason other than to meet its arbitrary deadline for reaching an agreement. Finally, the court noted that, because the relationship between the union and the employer had “spanned more than a decade,” it was reluctant to second guess the employer’s declaration of impasse. *Id.* at 1116. That long-term relationship stands in sharp contrast to this case where, not only was the Company negotiating its first collective-bargaining agreement with the Union, but it was seeking to dramatically alter the benefits the Union had acquired over a span of 40 years.

The other cases where impasse was found, and that the Company relies on (Br 2, 37-38, 41-42), have similar distinguishing characteristics, such as an economic exigency, or lengthier negotiations. *See NLRB v. H&H Pretzel Co.*, 831 F.2d 650, 651 (6th Cir. 1987) (employer faced economic exigency); *ACF Industries, LLC*, 347 NLRB No. 99, slip op. at 1-4 (2006), 2006 WL2515545\*1-4 (employer faced economic exigency and had bargained for well over 2 months, continuing to bargain after contract expiration, after employees had rejected the employer’s final offer, and after meeting with a mediator); *E.I. Du Pont De Nemours & Co.*, 268 NLRB 1075, 1075-76 (1984) (“long, hard” negotiations over 14 months and 47 sessions between parties who had a 30-year relationship); *George Banta Co.*, 256 NLRB 1197, 1211-12 (1981) (parties engaged in 23 bargaining sessions over 2 months); *J.D. Lunsford Plumbing*, 254 NLRB 1360, 1361-66 (1981) (faced with employer’s economic exigency, union refused to alter

its offer and expressed indifference to the employer's bankruptcy); *Bi-Rite Foods, Inc.*, 147 NLRB 59, 60, 63 (1964) (parties engaged in over 20 bargaining sessions during a 4-month period).<sup>5</sup>

**B. By Not Giving Proper Notice to the Federal Mediation and Conciliation Service until August 11, as Required by Section 8(d)(3) of the Act, the Company Violated Section 8(a)(5) and (1) of the Act by Terminating Its Collective-Bargaining Agreement Before September 10**

**1. Applicable principles and standard of review**

Section 8(d) of the Act (29 U.S.C. § 158(d)), which defines the duty to bargain, provides that no party to an existing collective-bargaining contract “shall terminate or modify such contract, unless the party desiring such termination or modification-

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof . . . . ;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute . . . . ;

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<sup>5</sup> After reaching a good faith impasse, an employer can make unilateral changes that are reasonably contemplated by the employer's final offer. *See United Paperworkers Int'l Union v. Champion Int'l Corp.*, 81 F.3d 798, 802 (8th Cir. 1996); *NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320,1326 (6th Cir. 1995). Here, the Company offers no evidence that elimination of the supplemental accident fund was part of the Company's final offer. To the contrary, Human Resources Manager Libera admitted that it was not. (A56-57.) Accordingly, even if impasse was reached, the Company's unilateral elimination of that program was, as the Board found (A892), unlawful.

4) continues in full force and effect . . . all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . .”

The notice requirements of Section 8(d)(3) ensure the participation of qualified mediation services in labor disputes before the terms of a collective-bargaining agreement are modified. That participation constitutes “an important and principal policy interest embodied in Section 8(d) . . . .” *United Artists Communications, Inc.*, 274 NLRB 75, 76 (1985), *affirmed sub nom. IATSE v. NLRB*, 779 F.2d 552 (9th Cir. 1985). *Accord United Furniture Workers of America, Local 270 v. NLRB*, 336 F.2d 738, 740 (D.C. Cir. 1964). To serve that interest, the “initiating party who gives untimely Section 8(d)(3) notice to the Federal Mediation and Conciliation Service commits an unfair labor practice by resorting to . . . [a] unilateral modification within thirty days of such notice even when the action occurs more than 60 days after notice to the other party.” *See NLRB v. Weathercraft Co. of Topeka, Inc.*, 832 F.2d 1229, 1232 (10th Cir. 1987) and cases cited. *Accord NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964, 968 (8th Cir. 1967).

## **2. The Company’s untimely Section 8(d)(3) notice**

Here, the Company sent a letter to the Union on March 2, 2006 to terminate the existing collective-bargaining agreement. As the initiating party, the Company was required by Section 8(d)(3) of the Act to notify the FMCS within 30 days of

the March 2 letter to the Union. The FMCS, however, did not receive notification of the labor dispute within the 30 day time frame. Instead, as set forth in a letter from the FMCS to the Board, it received its earliest notice from the Company on August 11. Having failed to timely comply with Section 8(d)(3) of the Act, the Company was required, as the Board explained (A880, 882 & n.10, 888), to continue in full force and effect the terms of the parties' existing collective-bargaining agreement until September 10, 30 days after the FMCS received notice from the Company.<sup>6</sup>

In this case, the practical effect of requiring the Company to continue the terms of the contract until September 10 is limited. Because the Company is already obligated to restore the status quo in terms and conditions of employment as the remedy for having changed them before bargaining to a genuine impasse, the only additional feature of the remedy for the Section 8(d)(3) violation is requiring the Company to reimburse the Union, until September 10, for dues it should have withheld from employees if it had continued to honor the contractual dues-checkoff provision. (See A882 n.10.) This is because the Board views the right to dues checkoff as being a creature of contract that is not also a term and

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<sup>6</sup> Contrary to the Company's suggestion (Br 50-51) the Board did not find that the Company's failure to provide timely 8(d)(3) notice precluded the Company from terminating the contract; it only found (A882 n.10) that the Company was required to maintain the terms of the contract until that notice was provided. *See Petroleum Maintenance Co.*, 290 NLRB 462, 464 n.3 (1988).

condition of employment. *See Hacienda Hotel Inc.*, 351 NLRB No. 32 (2007), 2007 WL 2899736, *remanded sub nom. Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008).

The Company asserts (Br 44-47) that it mailed the FMCS letter on March 2, the same day that it notified the Union that it intended to terminate the bargaining agreement, and that it was entitled to a presumption that the notice was timely received. The Board, however, as it noted here (A888), “has held . . . that to be effective such notice must actually be received.” *See Freeman Decorating Co.*, 336 NLRB 1, 3-4, 39 n.26 (2001), *enforcement denied on other grounds, Int’l Alliance of Theatrical Employees v. NLRB*, 334 F.3d 27, 31-36 (D.C. Cir. 2003); *Ohio Oil Co.*, 91 NLRB 759, 761 (1950). *See also NLRB v. Vapor Recovery Sys. Co.*, 311 F.2d 782, 785 (4th Cir. 1962). Therefore, as the Board explained (A881), even assuming that the letter to the FMCS was mailed on March 2, the FMCS stated in its letter to the Union that no notice was received until August 11 and this “rebutts any presumption that the [FMCS] timely received the notice.” Moreover, as the Board found (A881), the Company “did not produce any probative evidence establishing actual delivery of the notice to the FMCS.” To the contrary, it is undisputed that, as the Board found (A887-88), the Company did not send the notice by certified or registered mail, or by return receipt requested.

In these circumstances, the Company's claim (Br 48) that the weight of the evidence establishes that the FMCS received timely notice in March rings hollow. As the Board explained in *Chauffeurs Local 572 (Dar San Commissary)*, 223 NLRB 1003, 1007 (1976), even assuming that notice was timely sent, an FMCS letter that such notice was not on file, "coupled with [the employer's] inability to produce probative evidence of actual delivery of the notice, whether by means of a signed return receipt or by other reliable means . . . reasonably warrant[s the inference] that the notice was not received."

Although the Board has excused some untimely Section 8(d) notices, the examples the Company relies on (Br 44-46) have, unlike here, probative evidence that the original mailing was received, albeit untimely. For example, in *Bio-Medical Applications of New Orleans, Inc.*, 240 NLRB 432, 433 (1979) (Br 45), and *United Electronics Institute of Iowa*, 222 NLRB 814, 815 (1976) (Br 45), there was probative evidence of timely mailing by certified or registered mail, and evidence that the Post Office erred by failing to timely deliver the notice. Here, there is simply no probative evidence that the FMCS received the March 2 notice, albeit untimely.<sup>7</sup>

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<sup>7</sup> Any presumption that something mailed was delivered (Br 47) is overcome by a "credible and unequivocal denial of receipt." *See U.S. Serv. Ind., Inc.*, 315 NLRB 285, 292 (1994). Here, in sharp contrast to the Company's cited cases (Br 47), the FMCS' letter to the Board constituted a credible denial that the FMCS had received the original notice.

Finally, there is no merit to the Company's claim (Br 48-49, 51) that notice to the FMCS occurred on July 10—making the 30-day period end August 9—when the Union sought clarification from the FMCS as to whether it had received notice of the labor dispute. In the first place, the Union informed the FMCS that any inquiry was for informational purposes only and did not constitute Section 8(d)(3) notification by the Union. (A567-69.) Moreover, the case law unambiguously places the burden of providing Section 8(d) notice on the party who reopens negotiations, a burden that does not shift. *See Weathercraft Co.*, 832 F.2d at 1232. Accordingly, although the FMCS may have learned of the dispute through the Union, that does satisfy the Company's obligation, as the initiating party, to notify the FMCS. *See Mar-Len Cabinets, Inc.*, 262 NLRB 1398, 1398-99 (1982) (mistaken reliance on the union's supplying the Section 8(d)(3) notice was not a defense to the employer's failing to notify the FMCS as the initiating party); *Amax Coal Co. v. NLRB*, 614 F.2d 872, 877, 889 (3rd Cir. 1980), *reversed on other grounds*, 453 U.S. 322 (1981) (the fact that FMCS had knowledge of dispute did not relieve the union, as the initiating party, of its obligation to notify the FMCS).

**C. By Not Supplying the Union With Information It Requested on the Company's Vacation Proposal, the Company Violated Section 8(a)(5) and (1) of the Act**

**1. Applicable principles and standard of review**

An employer's statutory duty to bargain in good faith under Section 8(a)(5) of the Act includes the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967). *Accord WCCO Radio, Inc. v. NLRB*, 844 F.2d 511, 514 (8th Cir. 1988). The employer's duty to provide information includes both information requested in order to administer an existing collective-bargaining agreement and information requested to facilitate the negotiation of a new collective-bargaining agreement. *See WCCO Radio*, 844 F.2d at 514; *Acme Indus. Co.*, 385 U.S. at 435-36. The failure to provide relevant information upon request is a breach of an employer's duty to bargain in good faith, and therefore violates Section 8(a)(5) of the Act. *See Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979).

The Supreme Court has adopted a liberal, "discovery-type" standard by which the relevance of requested information is to be judged. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437 & n.6. *Accord Supervalu, Inc.-Pittsburgh Div. v. NLRB*, 184 F.3d 949, 952 (8th Cir. 1999). Under that standard, it need not be shown that the requested information would resolve any dispute between the

parties. *Procter & Gamble Mfg.*, 603 F.2d at 1315. Instead, the employer must provide the union the information if there is a “probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *Acme Industrial Co.*, 385 U.S. at 437. *Accord Procter & Gamble Mfg.*, 603 F.2d at 1315 (employer must provide information “unless it is clearly irrelevant”). An employer may rebut the presumption that information is relevant if it demonstrates that the information is irrelevant or that it was requested in bad faith. *See WCCO Radio, Inc.*, 844 F.2d at 514.

The duty to furnish information ultimately “depends on the particular facts in each case.” *Procter & Gamble Mfg.*, 603 F.2d at 1315. Accordingly, the scope of review “is very narrow,” and the Court “must affirm the Board’s decision if it is substantially supported by the evidence and reasonably based in law.” *WCCO Radio, Inc.*, 844 F.2d at 514.

**2. Substantial evidence supports the Board’s finding that the Company failed to provide the Union with information relevant and necessary to its collective-bargaining obligation**

The Company does not dispute that it proposed a vacation policy that would cause some employees to lose 1 week of vacation. Nor does the Company dispute that it characterized, as not accurate, the Union’s estimate that one-third of the bargaining unit would suffer an adverse impact. In these circumstances, the

Union's request for a list of employees who would lose vacation time so that it could have an accurate list was relevant to its bargaining duties. As union negotiator Jeter testified (A324), and as the Board found (A890), being told by the Company that its estimate was wrong "was the predicate that caused the Union to request accurate information so Jeter could independently respond to each member of the bargaining unit who might inquire about their individual entitlement under the [Company's] vacation proposal." Accordingly, the Board reasonably found (A891) that the Company's failure to provide that information violated Section 8(a)(5) and (1) of the Act.

Contrary to the Company's claim (Br 51), the Board's finding is not undermined by the fact that the Company had supplied the Union with a seniority list. The Union had used that list to make the very estimate that the Company had deemed inaccurate. Therefore, the Union was entitled to the list that the Company was asserting was accurate. Nor, given that the Union twice requested a list from the Company after being told that its estimate was not accurate, would the Company have any reason to "reasonably conclude[]" that the Union was satisfied with the Company's initial response (Br 51), or that the Union's request (Br 52) was "casual."

### **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 NLRA.

#### **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 group of three members, Members Liebman, Schaumber and Kirsanow.<sup>8</sup> When, three days later, Member Kirsanow's recess appointment expired, the two remaining members, Members Liebman and Schaumber, continued to exercise the delegated powers they held jointly with Member Kirsanow, consistent with the express language of Section 3(b) that "two members shall constitute a quorum" of any group of three members delegated the Board's powers. Since January 1, 2008, this two-member quorum has issued over 200 published decisions in unfair labor practice and representation 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

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<sup>8</sup> Member Walsh's recess appointment expired on December 31, 2007.

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.

In combination, these provisions authorized the Board's action here. The Board first delegated all of its powers to a group of three members, as authorized by the delegation provision. As provided by the vacancy provision, the departure of Member Kirsanow after his recess appointment expired on December 31 did not impair the right of the remaining Board members to continue to exercise the full powers of the Board which they held jointly with Member Kirsanow pursuant to the delegation. And because of the express exception to the three-member quorum requirement when the Board has delegated its powers to a group of three members, the two remaining members constituted a quorum--the minimum number legally necessary to exercise the Board's powers.

Although no court has addressed this exact issue,<sup>9</sup> in a case where the Board had four members, the Ninth Circuit has held that Section 3(b)’s two-member

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<sup>9</sup> This issue was 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, and will be argued on January 5, 2009, before the First Circuit in *Northeastern Land Services, Ltd. v. NLRB*, No. 08-1878. This issue has also been fully briefed in *Snell Island SNF v. NLRB*, Second Circuit Nos. 08-3822 and 08-4336.

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, where the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b). *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

The Company, refusing to give full effect to Section 3(b)’s express terms, asserts that Section 3(b) “presupposes that the Board actually has three or more [sitting] members.” (Br 53.) Essentially, the Company asks this Court to read into Section 3(b) an implicitly-required minimum number of three sitting members necessary for issuing decisions. Neither the statutory language nor the legislative history supports the imposition of such a requirement, as we now show.

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

A brief history of the Board’s operations and of the legislation that ultimately became Section 3(b) of the Act confirms that Congress intended for the Board to have the option of adjudicating cases with a two-member quorum. As originally enacted in 1935, the NLRA created a three-member Board and provided

in Section 3(b) that a vacancy would not impair the quorum of the two remaining members from exercising all powers.<sup>10</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>11</sup>

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.<sup>12</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

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<sup>10</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>11</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.

<sup>12</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).

House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.<sup>13</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>14</sup> The Senate bill's preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity of viewpoint in deciding cases, contrary to the suggestion of one Senator.<sup>15</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>16</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

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<sup>13</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>14</sup> S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

<sup>15</sup> Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

<sup>16</sup> S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much.”<sup>17</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>18</sup>

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>19</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

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<sup>17</sup> Remarks of Sen. Taft, 93 Cong. Rec. 3837 (Apr. 23, 1947), 2 *Leg. Hist. 1947*, at 1011. The three-member groups that the Senate proposed for the NLRB were similar to the three-member divisions that Congress had previously enacted for the Interstate Commerce Commission (“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>18</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.

<sup>19</sup> *See* 61 Stat. at 160, 1 *Leg. Hist. 1947*, at 27-28.

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>20</sup> In this way, the Board was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.<sup>21</sup>

In sum, by authorizing the Board to delegate its powers to a group of three members, two of whom constitute a quorum, Congress enabled the Board to increase its casehandling capacity by operating in groups identical to the original three-member Board. In practical terms, the Act's two-member quorum provision authorized the Board's new three-member groups to function as the original three-

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<sup>20</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.”).

<sup>21</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*”).

member Board had done, *i.e.*, to issue decisions and orders with only two of three seats filled.

**D. The Board Effectively Delegated Its Powers to a Group of Three Members**

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 this delegation as a "sham" (Br 53) on the grounds that the Board was aware that Member Kirsanow's departure was imminent and that the delegation would soon result in the Board's powers being exercised by a two-member quorum consisting of Members Liebman and Schaumber.

Contrary to the Company's argument, the Board's delegating all its powers to a group of three members in order to utilize the two-member quorum option that Congress made available 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 if it had only two members. *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. The statutory mechanism used by the Board is different but the result is the same.

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

To be sure, *Railroad Yardmasters* is distinguishable, as the Company argues (Br 54). What the Company overlooks is that the critical distinction points directly to the greater strength of the Board's case. In *Railroad Yardmasters*, the D.C. Circuit faced the question whether an agency that acted principally in a non-adjudicative capacity could continue to function when its membership fell short of the quorum required by its authorizing statute. See 721 F.2d at 1341-42. That problem is not presented here. Here, unlike *Railroad Yardmasters*, the statutory requirements for adjudication are satisfied, because Section 3(b) expressly provides that two members of a properly-constituted, three-member group is a quorum. In contrast to the one-member problem at issue in *Railroad Yardmasters*, the presence of the Board quorum that adjudicated this case “is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.” *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (quoting Robert's Rules of Order 3, p. 16 (1970)).

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

The Company also argues (Br 55-57) that the Board's December 28, 2007 delegation of powers ended, and the group ceased to exist, when Member Kirsanow's appointment expired. The Board's delegation survived, however, because it is a well-established principle of administrative law that “[i]nstitutional delegations of power are not affected by changes in personnel, but rather continue

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

The Company’s contention also fails to give effect to Section 3(b)’s vacancy provision. Indeed, the very effect that Congress intended to safeguard against—that a vacancy would impair the remaining members from exercising the Board’s powers—is exactly what would result if, as the Company argues, Member Kirsanow’s departure disabled the remaining two-member quorum from exercising the Board’s powers.

In arguing that Member Kirsanow’s departure caused the group to cease to exist, the Company improperly relies (Br. 55) on inapposite private law principles set forth in the *Restatement of Agency*. Where common law principles serve as guidance, it is the common law relating to administrative agency authority which is relevant, and not the law of corporations or agency law. A three-member group within the meaning of Section 3(b) is not a corporate body and does not act as the “agent” of the Board. Rather, a three-member Board group to whom *all* powers of

the Board have been delegated, acts as the Board and with *all* of the Board's powers. At common law, the power held by a public board was held "not individually but collectively" (*Commonwealth ex rel. Hall v. Canal Comm'rs*, 9 Watts 466, 471, 1840 WL 3788, at \*5 (Pa. 1840)), and "considered joint and several" among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at \*16 (W.Va. 1875). The majority view was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body (see *Ross v. Miller*, 178 A. 771 (N.J. Sup. Ct. 1935)), even where the remaining members represented only a minority of the full board. See, e.g., *People v. Wright*, 30 Colo. 439, 442-43, 71 P. 365 (Colo. 1902) (where city council was composed of 8 aldermen and 1 mayor, and the terms of 4 aldermen expired, and where two of the remaining aldermen and the mayor met and voted, vote was valid). Here, the Board's use of Section 3(b)'s two-member quorum provision is congruent with the common law quorum rule. See generally *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 185-86 (1967) (noting Congress' enactment of common-law quorum rules in administrative statutes, including NLRA).

The Company also relies (Br 56) on *KFC National Management Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974), but that case involves a very different kind of delegation. In *KFC*, the Second Circuit held that the Board members responsible for deciding whether a representation election had been conducted fairly were

required to make that decision themselves and could not, under the NLRA, delegate that responsibility to Board staff. As the court stated: “In view of the rather clear congressional distrust of staff assistants—who are, of course, neither appointed by the President nor approved by the Senate, as are Board members, 29 U.S.C. § 153(a)—we cannot say that Congress intended, or would have approved, the general proxies issued [to Board staff] here.” 497 F.2d at 303. Thus, *KFC* involved an improper delegation of authority to NLRB staff employees who did not have adjudicatory authority under the Act. In contrast, here, Section 3(b) expressly authorizes the Board to delegate its powers to a group of three Board members, all of whom are authorized by the Act to adjudicate cases.<sup>22</sup>

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

The Company contends (Br 57-59) that the federal law governing the composition of three-judge appellate panels (28 U.S.C. § 46) should be imported to the NLRA to control how the Board exercises its authority to delegate powers to three-member groups because, it claims, there “is no meaningful basis to

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<sup>22</sup> The *KFC* court further observed “that the ‘Board’s’ votes in this case fail to satisfy the two-member quorum and three-member panel requirements of the Act. 29 U.S.C. § 153(b).” Taking that quote out of context, the Company (Br 57) argues that the court “implicitly” decided that Section 3(b) means that three members must be serving on the Board in order to have a valid two-member quorum. That issue was not presented in *KFC*, and the court did not address that issue or make any such determination.

distinguish” the two provisions. To the contrary, the two statutes have sharp distinctions, and the application of the federal judicial statute to the Board would improperly override express congressional intent and interfere with the option Congress left open for the Board to operate and fulfill its agency mission through a properly-constituted two-member quorum.

The Company fails to grasp that Section 3(b) does not limit the Board’s delegation powers to case assignment. Under the express terms of Section 3(b), the Board may delegate “any or all of the powers which it may itself exercise” to a three-member group, which accordingly may act *as the Board itself*. Those powers are not simply adjudicative, but also administrative, and include such powers as the power to appoint regional directors and an executive secretary (see 29 U.S.C. § 154), and the power, in accordance with the Administrative Procedures Act, to promulgate the rules and regulations necessary to carry out the provisions of the NLRA (see 29 U.S.C. § 156).

By contrast, the judicial panel statute, in relevant part, is limited to adjudication of cases, providing that a federal appellate court must assign each case that comes before it to a three-judge panel. *See* 28 U.S.C. § 46(b) (requiring “the hearing and determination of cases and controversies by separate panels, each consisting of three judges”). *See also Murray v. Nat’l Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (recognizing that Congress expressly intended 28 U.S.C. §

46(b) to require that, “in the first instance, all cases would be assigned to [a] panel of at least three judges”) (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)).

Moreover, Section 3(b), unlike 28 U.S.C. § 46(b), does not contain an express requirement that particular cases be assigned to particular groups or panels of Board members. Therefore, a delegation of “all the Board’s powers” to a three-member group means that all cases that are pending or may come before the Board are before the group. Nor, contrary to the Company’s suggestion, is there any indication in the legislative history of Section 3(b) that Congress wanted the Board to act more like the Circuit Court of Appeals with regard to case assignment. Rather, as noted at p. 54 n. 17, the delegation provisions and case processing practices of the ICC and the FCC appear to be the model that Congress had in mind in crafting Section 3(b). Congress’ concern that the Board act more like a court was expressed in different provisions, such as Section 4 of the NLRA (29 U.S.C. § 154), which abolished the centralized “Review Section” that the Board had relied upon to review transcripts and prepare drafts and limited the individual Board members to using legal assistants employed on their staffs to perform those functions. *See* S. Rep. No. 80-105, at 8-10, *1 Leg. Hist. 1947*, at 414-16.

The Company’s position is not furthered by its reliance (Br 57, 59) on *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132 (1947), and *Nguyen v.*

*United States*, 539 U.S. 69 (2003). Instead, those cases call attention to additional reasons why construing Section 3(b) of the NLRA to incorporate restrictions found in federal judicial statutes would constitute legal error.

In *Ayrshire*, the Court held that the full complement of three judges was necessary to enjoin the enforcement of ICC orders because Congress, in the Urgent Deficiencies Act, had specifically directed that such cases “shall be heard and determined by three judges.” 331 U.S. at 137. The Court concluded that Congress “meant exactly what it said” (*id.*), finding it “significant that this Act makes no provision for a quorum of less than three judges.” *Id.* at 138. By contrast, in enacting Section 3(b) of the NLRA, Congress specifically provided for a quorum of less than three members, and did not provide that if the Board delegates all its powers to a three-member group, all three members must participate in decisionmaking.

The Supreme Court case of *Nguyen* further illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b) of the NLRA. In that case, the Court held that the judicial panel statute requires that a case must be assigned to three Article III judges, and if an Article IV judge is included on the panel, the panel is not properly constituted and cannot issue a decision, even though Section 46(d) provides that two Article III judges constitute a quorum. *See* 539 U.S. at 82-83. In

so holding, the Court took into consideration that Congress amended the judicial panel statute in 1982 “in part ‘to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels.’” 539 U.S. at 83 (quoting *Murray*, 35 F.3d at 47, citing Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9). No such history underlies Section 3(b). *See* pp. 51-55. Also distinct is the *Nguyen* Court’s concern that the deliberations of the two-judge quorum were tainted by the participation of a judge not qualified to hear the case (see 539 U.S. at 82-83), a consideration wholly inapplicable here.

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

The Company asserts (Br 56-57) that the Board cannot operate with less than three sitting members. As discussed, that argument denies full effect to express statutory language of Section 3(b) that provides that vacancies on the Board do not impair the right of the remaining members “to exercise all the powers of the Board,” and that if the Board delegates all its powers to a group of three members, “two members shall constitute a quorum.” But the Company’s argument also fails to acknowledge that Congress’ providing the Board with an option to continue operating and deciding cases with fewer than three members is consistent with Congress’ treatment of other federal agencies. In a variety of statutory contexts, courts have recognized that decisionmaking by a minority of an agency’s total membership is allowable under that agency’s authorizing statute.

For example, in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996), the D.C. Circuit held that, in the absence of any countermanding provision in its authorizing statute, the SEC could promulgate a new two-member quorum rule that would enable the SEC validly to issue decisions and orders at a time when only two of its five authorized seats were filled. Similarly, in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), the D.C. Circuit recognized that the ICC's enabling statute not only permitted that agency to "carry out its duties in [d]ivisions consisting of three [c]ommissioners," but also provided that "a majority of a [d]ivision is a quorum for the transaction of business." *Id.* at 367 n.7. Based on that provision (which is analogous to the two-member quorum provision in the NLRA's Section 3(b), see p. 54, note 17), the D.C. Circuit held that an ICC decision participated in and issued by only two of the three commissioners in a division was valid. *Id.*

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

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

The Company's claim (Br 59-60) that there is a danger of abuse if two members of the Board are allowed to make decisions is nothing more than an attack on the policy choice that the Taft-Hartley Congress made in 1947 when it authorized the Board to delegate its powers to a three-member group, two of whom shall be a quorum. The Company relies on (Br 59) the Supreme Court's discussion in *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 139 (1947), which indicates that a decision issued by two, rather than three, judges, might well have been altered by the views of a third judge, if one had been present. However, as shown at pp. 63-64, the statute at issue in *Ayrshire* differs from NLRA Section 3(b) precisely because it did not provide for a quorum of less than three judges. *See* 331 U.S. at 138.

Moreover, in relying on the policy considerations discussed in *Ayrshire*, the Company overlooks that for the first 12 years of its administration of the NLRA, the Board issued hundreds of decisions in cases decided by two-member quorums at times when only two of the Board's three seats were filled. *See* pp. 51-52 & n.11. If Congress were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have eliminated that quorum provision. Instead, in amending the Act after comprehensive review, the 1947 Congress preserved the Board's option to adjudicate labor disputes with a two-

member quorum where it had purposefully exercised its delegation authority. That is the determinative policy consideration that controls this case.

Equally misdirected is the Company's policy concern (Br 59-60) that permitting a two-member Board quorum to decide cases could lead to abuses if there were a political imbalance among the two remaining Board members. The D.C. Circuit rejected a similar policy argument in the ICC context. In *Nicholson v. ICC*, 711 F.2d at 367 n.7, the petitioner complained that a large number of vacancies on the ICC had caused a political imbalance that rendered it inappropriate for the agency to decide cases. In response, the D.C. Circuit simply pointed out that "nothing in the Interstate Commerce Act requires a [d]ivision of the [ICC] to be politically balanced." *Id.* The NLRA also contains no such political balance requirement.

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

The Company appears to claim (Br 54) that Chairman Schaumber and Member Liebman lack the authority to issue decisions because, historically, the Board had not exercised its delegation authority to empower a two-member quorum for that purpose. Earlier Board inaction, however, is of no consequence because it is simply that—inaction—rather than a prior Board determination that the Board lacked the authority it exercised here. Moreover, in an analogous situation, where one Board member of a three-member group was recused from

participating in a decision, the Board has frequently invoked its two-member quorum authority under Section 3(b). In those situations, the two remaining members issue the Board's decision as a quorum of the three-member group. *See, e.g., Pacific Bell Tel. Co.*, 344 NLRB 243, 243 & n.1 (2005); *Bricklayers & Allied Craftworkers, Local #5-New Jersey*, 337 NLRB 168, 168 & n.4 (2001); *G. Heileman Brewing Co.*, 290 NLRB 991, 991 & n.1 (1988), *enforced*, 879 F.2d 1526 (7th Cir. 1989).

Furthermore, even though the Board has been circumspect in exercising the authority argued for here, recent trends made it reasonable for the Board to expand the use of the two-member quorum option that Congress provided. In 2002, when it became clear that the slowing nomination and confirmation processes were likely to result in an increase in the number and length of vacancies, the Board sought an opinion from the Justice Department's Office of Legal Counsel, which in 2003 concluded that a properly-constituted, two-member quorum had the authority to issue decisions. *See Quorum Requirements*, 2003 WL 24166831, \*4 n.1. The Board first relied on that OLC opinion on August 26, 2005, when, at a time it consisted of three members, the Board delegated to itself as a three-member group all the Board's powers in anticipation of the expiration of Member Schaumber's term on August 27, 2005. *See BNA, Daily Labor Report*, No. 166, at p. A-1 (Aug.

29, 2005).<sup>23</sup> Subsequently, in late December 2007, when it appeared that the Board might be faced with an extended period—possibly stretching over an entire year—with only two members, the Board acted to continue to fulfill its statutorily-mandated mission and avoid the shutdown of day-to-day decisionmaking. The fact that the Board has acted cautiously in exercising its delegation authority only when necessary is no basis for questioning that the Board has that authority.

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<sup>23</sup> Four days later, Member Schaumber received a recess appointment. Accordingly, only one published ruling on a procedural motion (*Bon Harbor Nursing & Rehabilitation Center*, 345 NLRB 905 (2005)), and a few unpublished orders, issued during that period.

**CONCLUSION**

For the foregoing reasons, the Board respectfully submits that judgment should enter enforcing the Board's order in full.

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NATIONAL LABOR RELATIONS BOARD

DECEMBER 2008



UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD )  
)  
Petitioner )  
)  
and )  
)  
LOCAL NO. 74B GLASS, MOLDERS, )  
POTTERY, PLASTICS, and ALLIED ) No. 08-3291  
WORKERS INTERNATIONAL UNION, )  
AFL-CIO-CLC )  
)  
Intervenor )  
)  
v. )  
)  
WHITESELL CORPORATION )  
)  
Respondent )

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 16,499 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC  
this 22<sup>nd</sup> day of December, 2008

UNITED STATES COURT OF APPEALS  
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WHITESELL CORPORATION )  
)  
Respondent )

**CERTIFICATE OF SERVICE**

I hereby certify that on December 22, 2008, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

I further certify that all of the participants in the case are not CM/ECF users. I have mailed the foregoing document by FEDEX, overnight mail, to the following non-CM/ECF participants:

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