

**No. 09-60034**

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

**BENTONITE PERFORMANCE MINERALS, LLC,  
A PRODUCT AND SERVICE LINE OF HALLIBURTON  
ENERGY SERVICES, INC.**

**Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL/UNITED  
FOOD AND COMMERCIAL WORKERS UNION, CLC, LOCAL 353C**

**Intervenor**

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**ON PETITION FOR REVIEW AND CROSS-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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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Bentonite Performance Minerals, LLC, a Product and Service Line of Halliburton Energy Services, Inc. (“the Company”) to review and set aside, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board order issued against the Company. The Board’s Decision and Order issued on December 31, 2008, and is reported at 353 NLRB No. 75.<sup>1</sup>

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act” or “the NLRA”), which authorizes the Board to prevent unfair labor practices affecting commerce. The Company filed its petition for review on January 21, 2009. The Board filed its cross-application for enforcement on February 27, 2009. Those filings were timely because the Act imposes no time limits on proceedings for the review or enforcement of Board decisions. International Chemical Workers Union Council/United Food and Commercial Workers Union, CLC, Local 353C (“the Union”) has intervened on the Board’s behalf.

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<sup>1</sup> “D&O” refers to the Board’s Decision and Order. “Tr” refers to the transcript of the hearing before the administrative law judge. “GCX” and “JTX” refer, respectively, to General Counsel and Joint exhibits introduced at the hearing. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), 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 Board's Order on that basis, that question is now presented for decision.

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

1. 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 with the full powers of the Board in issuing the Board's Order in this case.

2. Whether the Board is entitled to summary enforcement of its finding that the Company committed numerous unfair labor practices in violation of Section 8(a)(1) of the Act.

3. Whether substantial evidence supports the Board's finding that the Company unlawfully withdrew recognition of the Union in violation of Section 8(a)(5) and (1) of the Act.

### **STATEMENT OF THE CASE**

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a consolidated complaint alleging that the Company had

committed numerous unfair labor practices against its employees in an effort to unseat the Union as the employees bargaining representative, and then unlawfully withdrew recognition based on tainted petitions. (D&O 5; GCX 1(a), (d), (j), (q), (t), GCX 2.) A Board administrative law judge conducted a hearing and found the Company had committed the violations alleged in the complaint. (D&O 5-21.) The Company filed exceptions to the administrative law judge's decision and recommended order. The Board (Chairman Schaumber and Member Liebman) issued its Decision and Order affirming, as modified, the judge's rulings, findings and conclusions.

Before this Court, the Company does not contest any of the Board's findings that the Company acted unlawfully toward nine of its employees in an effort to unseat the Union.<sup>2</sup> Nor does the Company dispute that if it unlawfully withdrew recognition from the Union then its subsequent unilateral changes in terms and conditions of employment, and refusal to supply information, were also unlawful. Therefore, the only issue for this Court to decide is whether the Company unlawfully withdrew recognition from the Union because it relied on decertification petitions that were tainted by its unlawful actions in promoting the

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<sup>2</sup> The Company mistakenly claims (Br 2-3, 17) that the Board found unlawful action by the Company toward eight employees, not nine. The nine employees, as set forth below, are Preisner, McGinnis, Zupan, Davis, Callison, Dell, Bierema, Holdhusen, and DeKnikker.

petitions. Facts supporting the Board's findings are set forth below, followed by a summary of the Board's Conclusions and Order.

## **STATEMENT OF FACTS**

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

#### **A. Background; the Company's Operations**

In 1998, the Company, a Delaware corporation, acquired a facility near Colony, Wyoming, where it mines and processes bentonite, a mineral used in petroleum extraction. (D&O 5; Tr 11, 1226, GCX 1(q) par. 2, GCX 1(s) par. 2.) The Union was certified in 1948 as the exclusive collective-bargaining representative of the Colony employees in a production-and-maintenance bargaining unit, then operated by a predecessor. (D&O 5-6; GCX 1(q) par. 5, 6, GCX 1(s) par. 5, 6.) The most recent collective-bargaining contract was signed in October 2001, and was set to expire on October 21, 2007. (D&O 6; GCX 1(q) par. 14, GCX 1(s) par. 14.) As of the week of July 9, 2007 the Colony bargaining unit contained 69 employees. (D&O 6; JTX 3, 19.)

**B. On July 9: Company Officials Propose a Decertification Petition; Shift Supervisor Bergum Interrogates Employee Preisner About the Union, Proposes a Decertification Petition to Preisner, and Solicits Him To Sign and To Have Other Employees Sign a Petition; Production Manager Dell Proposes a Decertification Petition to Employee McGinnis and Solicits Him To Sign and To Have Other Employees Sign a Petition**

**1. Company Officials Propose a Decertification Petition**

On Monday, July 9, the Company held a meeting of its Colony management—Senior Plant Manager Mike Houston, Plant Manager Danny Oaks, and Production Manager Ray Dell, and some advisors from elsewhere within the Company’s system, including company attorney Howard Linzy, to prepare for upcoming negotiations. Monica Thurman participated by phone. (D&O 6; 7, 1243-45, 1269-70, 1277, 1365-69.)

During the meeting, a document was presented that compared employee benefits under the collective-bargaining agreement with the benefits of company employees who did not work under that agreement. (D&O 6; 1243-44, 1270-71, GCX 3, 4.) Dell commented that he was aware that three employees—Dan McGinnis, John Preisner, and Brad Kirksey—were unhappy with the Union and wanted to get rid of it. (D&O 6; Tr 1371-73.) Thurman explained that “the employees could pass a petition, and that the petition needed to say something as simple as ‘I don’t want a union’ or ‘I don’t want the Union,’ and that on the petition they needed to . . . sign their name, print their name, and mark the date.”

(D&O 6; Tr 1377.) As a result, the meeting participants changed focus from the upcoming negotiations to discussing the “time frame” in which decertification could happen, and concluding that the timing “was right.” (D&O 6; 1245-46, 1282, 1327-28.) Dell told the group that he “felt that McGinnis would be a good person to approach to see if his sentiments were still the same,” and volunteered to speak to McGinnis. (Tr 1331-32.)

At approximately 2 p.m., company officials at the meeting summoned Shift Supervisor Gerry Bergum, whose swing shift was scheduled to begin at 4 p.m. Plant Manager Oaks gave Bergum a copy of the benefit comparison chart. (D&O 6; Tr 1172, 1214-15, 1219-22, 1270-71, 1371-72.)

## **2. Shift Supervisor Bergum**

After Shift Supervisor Bergum started his 4 p.m. shift, he approached employee John Preisner who was unloading a truck. (D&O 6; Tr 70-71, 101-02, 1275.) Preisner was not a union member, and had mentioned that he did not want the Union to others, but not Bergum. (Tr 86-89.) Bergum asked Preisner “what [he] felt about the Union.” (D&O 6; Tr 71.) Preisner replied, “I d[o]n’t care if it stayed or went . . . .” (D&O 6; Tr 71.) Bergum then asked Preisner “if [he] would sign a petition to get the Union out.” (D&O 6; Tr 71.) After Preisner answered affirmatively, Bergum told him “to write on the paper, ‘I do not want the Union,’” and to “sign it, date it, and print [his] name on it.” (D&O 6; Tr 71-72, JTX 2 p.2.)

After Preisner signed, Bergum asked Preisner “if [he] could get anyone else to sign the [petition.]” (D&O 7; Tr 72.) After replying in the affirmative, Bergum told Preisner the names of four fellow employees not to speak to because they would probably not sign. (D&O 7; Tr 72, 82-83.) At some point, Bergum showed Preisner the benefit comparison chart and told Preisner that he wanted the employees “to have everything that [the Company] has to offer.” (D&O 6; Tr 72-73, 91, GCX 4.)

Thereafter, while walking with Preisner toward a training class, Bergum stopped to allow Preisner to solicit an employee, who proceeded to sign the petition. (D&O 7; Tr 72, 75-76.) After conducting the training class, Bergum told the two employees who were with Preisner that Preisner wanted to talk to them about something. Preisner proceeded to solicit those employees to sign the decertification petition and showed them the comparison chart. Both employees signed the petition after Bergum answered questions about benefits. (D&O 7; Tr 76-80, 116-18, 120-24, 130, 147-50, 153-59, 170-73.) Later during his shift, Preisner gave a petition signed by him and the three other employees to Bergum. (D&O 7; Tr 80.)

### 3. Production Manager Dell

Production Manager Dell left the company meeting at about 4 p.m. to meet employee Dan McGinnis, who was getting off shift. (D&O 6, 7 n.7; Tr 351-52, 1281-83.) At the parking lot, Dell called McGinnis over to his truck. (D&O 7; Tr 1282.) Dell said, “I know how [you] felt about the Union the past several years, . . . if you . . . still feel that way, now is the time that you can do something about this.” (D&O 7; Tr 1282-83.) When McGinnis asked what to do, Dell replied, “[you] could circulate a petition.” (D&O 7; Tr 1283.) McGinnis then asked what the petition should say, and Dell told him to put a heading on it saying he did not want the Union, to print his name, sign it and date it. (D&O 7; Tr 1283.) McGinnis said “he’d think about it.” (D&O 7; Tr 1283.) He also advised Dell that he was scheduled to work on a drill crew the next day in Kaycee, Wyoming, located 2 to 3 hours away from the plant. (D&O 7; Tr 388-89, 1284, 1381.)

Product Manager Dell returned to the Company’s meeting and reported the outcome of his conversation with McGinnis. (D&O 7; Tr 1246-47, 1269, 1284, 1378-79.) Plant Manager Oaks directed Dell to call McGinnis and tell him not to go to Kaycee, Wyoming the next day, but to meet with Dell at his office instead. Dell then notified McGinnis of the schedule change and meeting. (D&O 7; Tr 359-60, 443-44, 1285-86, 1379-80.)

**C. On July 10: Employee McGinnis Meets With Plant Manager Oaks and Production Manager Dell to Discuss a Decertification Petition and His Solicitation of Other Employees; Senior Plant Manager Houston Interrogates and Promises Benefits to Employees Bierema and Holdhusen**

**1. Plant Manager Oaks and Production Manager Dell**

As directed the night before, McGinnis reported to Dell's office at the Colony plant on Tuesday morning July 10, where Plant Manager Oaks was also present. (D&O 7; Tr 363, 366.) Referencing their conversation from the prior evening, McGinnis asked "if I was going to go and talk to the people about whether they wanted the Union or not, what did I have to sell them with? What was there? You know, why would somebody just listen to me and say, yeah, I don't want the Union anymore?" (D&O 7; Tr 367.) At that point either Dell or Oaks gave McGinnis a copy of the comparison chart. (D&O 7; Tr 368-70, 395-96, GCX 3.) In addition, while showing McGinnis a blank notebook, Dell told McGinnis that if he wanted to get rid of the Union he would "have to get signatures on this piece of paper saying that people—having them sign and date it, that they did not want the Union." (D&O 7; Tr 370, 397-98.)

**2. Senior Plant Manager Houston**

At about 1 p.m., employee Ivan Bierema, the appointed lead of the drill crew, was at the field shop some distance away from the main plant. There he encountered McGinnis who showed him the comparison chart. (D&O 8; Tr 449-

50, 452-54, 479-80.) About 1:30 p.m., Bierema and one of his crew members, Dick Holdhusen, drove to the plant in a pickup truck for a work-related errand. While sitting in the pickup, Senior Plant Manager Houston and Production Manager Dell approached Bierema on the driver's side. Dell then went to the passenger side where he spoke with Holdhusen at the same time Houston greeted Bierema. (D&O 8; Tr 461-62.)

Houston asked Bierema and Holdhusen "if they had signed the paper." (D&O 8, 17; Tr 463, 514.) When they responded that they had not, Houston asked why not. (D&O 8; Tr 463, 492.) Bierema said, "I need to know what the dollar amount raise was before I sign[] anything." (D&O 8; Tr 463.) Houston said that he could not say, but as a manager he had the "power to do stuff," and that "[i]t would be better around here," and "asked if [they] trusted him." (D&O 8; Tr 463-64, 491, 517-18.) Dell also mentioned a facility in Texas where employees received a wage increase after getting rid of their union. (D&O 8; Tr 517.)

**D. On July 11: Employee McGinnis, After Meeting with Plant Manager Oaks and Production Manager Dell, Solicits Employees To Sign a Decertification Petition; Plant Foreman Droppers Solicits Employees Zupan and Davis to Sign a Petition**

**1. Plant Manager Oaks and Production Manager Dell**

On Wednesday July 11, employee McGinnis met again with both Plant Manager Oaks and Production Manager Dell to discuss McGinnis' concerns with

current wages and benefits. (D&O 9; Tr 372.) McGinnis agreed to begin soliciting signatures for a decertification petition, and Dell gave him a blank notebook to use to obtain signatures. (D&O 9; Tr 397-99, 434-36.) McGinnis then spent 2 to 3 hours in the plant attempting to persuade employees to sign the petition. He showed them the comparison chart, let them review it, and pointed out the advantages of the nonunion benefits. (D&O 9; Tr 372-75, 377-80, 401-05, 436-39, 792-93.)

McGinnis then went back to the office and spoke with either Dell or Oaks who told him to go into the field, where some employees were about to take their break. As instructed, McGinnis went to the field to solicit those employees. (D&O 9; Tr 403, 439-40.) In addition to his signature, McGinnis collected four other signatures. (D&O 9; JTX 2 p.3.)

## **2. Plant Foreman Droppers**

At 4 p.m., at the end of a preshift meeting, employee Zackary Zupan asked Plant Foreman Lynn Droppers if there was a petition going around, as he had heard rumors from other employees. Droppers replied that he was aware that employee Jeff Westland was circulating such a petition and took Zupan to the warehouse where Droppers picked up a comparison chart sitting on a table and gave it to Zupan to read. (D&O 11; Tr 30, 253-57, 278-80, 283-84, 288, 315, 319, 1275.) As Zupan looked at the comparison chart, he asked Droppers what they would get

without the Union. Droppers said the employees would get a greater vacation benefit. (D&O 11; Tr 258, 280-81, 283-84.) Zupan also asked why the Company could not give employees the benefits on the chart through negotiations. (D&O 11; Tr 259.) Droppers answered, “Because it wasn’t offered to [u]nion plants.” When Zupan asked why not, Droppers replied: “They just don’t . . . .” (D&O 11; Tr 259, 269, 289.)

They then had a discussion concerning the number of union plants the Company operated as opposed to nonunion plants. (D&O 11; Tr 266-67, 269.) Droppers said that if the employees got rid of the Union at the Colony plant the employees “would most likely receive everything on the comparison sheet”; “this is what the Company [is] offering.” (D&O 11; Tr 270, 281-82.) Zupan declined Droppers’ request that he sign the petition. (D&O 11; Tr 260, 291, 293-94.)

About 2 hours after his conversation with Zupan, Droppers spoke to employee Thomas Davis. Droppers told Davis that the Company was “trying” to get rid of the Union. (D&O 11; Tr 297-99, 305, 309.) Davis asked Droppers what the Company would give the employees, and what was going to change if the employees got rid of the Union. Droppers replied that he needed to get a copy of the paper from employee Westland so he could show it to Davis. When Droppers returned with the comparison chart, he explained to Davis that the short-term disability benefit was far better than anything in the union contract. (D&O 11; Tr

299-302, 310, 313.) Shortly after Droppers left, Westland approached Davis and asked him to sign his petition. (D&O 11; Tr 302-03.) Davis signed the petition. (Tr 303-04.)

**E. On July 12: Production Manager Ray Dell Solicits Employee David Dell To Sign a Petition; Senior Plant Manager Houston Solicits Employee DeKnikker To Sign a Petition; Production Manager Dell and Plant Manager Oaks Solicit Employee Callison to Sign a Petition**

**1. Production Manager Dell**

During the week of July 9, employee David Dell, the brother of Production Manager Ray Dell, was on vacation in a remote area of Wyoming. On July 12, Ray Dell, knowing that his brother's sentiments concerning unions had been both pro and con regarding the union, but lately antiunion, "took the liberty" of finding out if his brother still felt the same way. In the middle of that morning, Ray reached David by phone and learned that he was willing to sign a disaffection petition. He instructed David "to get a piece of paper and put a header on it, print [his] name, sign it, date it, and get it back to [him]." David faxed a signed paper, as Ray suggested, to Ray at the Colony plant. The paper stated, "I agree with the idea of a non-union plant." (D&O 13; Tr 1321-24, JTX 2 p.6.)

**2. Senior Plant Manager Houston**

On July 12, employee Gregory DeKnikker was performing his work duties at the facility's landfill located near the plant when Senior Plant Manager Houston drove up in his personal pickup truck. (D&O 13; Tr 176-79.) Houston said he had

learned that DeKnikker was interested in looking at the comparison chart. Houston then placed the chart on the hood of his truck, allowing DeKnikker to look it over. Houston asked DeKnikker if any of the things on the chart interested him. The conversation turned to other matters, but later returned to the chart and DeKnikker told him that he was interested in signing. Houston obtained some paper from his truck and gave it to DeKnikker, who wrote on it, "I don't want the Union." DeKnikker then gave the paper back to Houston. (D&O 13-14; Tr 176-84, JTX 2 p.10.)

### **3. Production Manager Ray Dell and Plant Manager Oaks**

Employee Charles Callison was on vacation during the week of July 9. (D&O 13 and n.13; Tr 324-26, JTX 19.) On July 12, he received a phone call from Production Manager Ray Dell. This was the first time Dell had called him at home. Dell told Callison about the petition to get rid of the Union and asked if Callison would sign it. (D&O 13; Tr 326-27, 347.) After Callison agreed to sign, they discussed how he would get the petition to the plant (about 30 miles distant from his house) and what language he should use. They agreed that Callison would use his personal fax machine and write "I do not support the Union." (D&O 13; Tr 327-30, 332-33, JTX 2 p.5.)

Later that night, about 10:30 p.m., Callison received a call from Plant Manager Oaks. Oaks told Callison he wanted him to sign the petition again and

date it. Oaks then drove to Callison's home so he could acquire the re-signed version. (D&O 13; Tr 333-36, 344-45.)

**F. The Company Withdraws Recognition From the Union on July 13 and Unilaterally Changes Terms and Conditions of Employment and Tells Employees Not To Attend a Union Meeting**

On July 13, Plant Manager Oaks e-mailed and faxed a letter to the Union announcing that the Company was withdrawing recognition because the Union had lost majority status. (D&O 15-16; JTX 4.) The record shows a total of 42 signatures on the various petitions. The names included nine collected by Preisner and McGinnis, and three—Callison, Dave Dell, and DeKnikker, collected by company supervisors. In addition, petitions from employees Brad Kirksey, Jeffrey Westland, and Martin Brosnahan contained 5, 10, and 15 names, respectively. (D&O 10-13; JTX 2.)

On July 16, a notice from Senior Plant Manager Houston and Plant Manager Oaks announced an across-the-board wage increase of \$1.25 per hour, and stated that the Company “will have more good news for [employees] in the very near future.” (D&O 16; JTX 5.) On July 19, Houston and Oaks posted a memo regarding a scheduled union meeting. (D&O 16; JTX 7.) The memo advised the employees:

[T]he less you have to do with [union official Art Stevens] and the [U]nion, the better all of us are . . . . We are in the process of making good things happen. A wage increase announced Monday and more good things to

come. In our opinion, Mr. Stevens had his chance and now we ask you to give us and [the Company] a chance . . . . If [Stevens] stirs up trouble then everything could come to a halt—more union outsiders could bother us, [the Company] would have to get its corporate people, lawyers could come from everywhere. And, we could find ourselves stopped dead in our tracks . . . . If you go to the meeting, that is your right and choice. For our part, our advice is: don't go—that's the best way to tell Mr. Stevens not to get in the way of progress.

(D&O 16; JTX 7.)

By letter dated July 19, Union Representative Stevens wrote to the Company and asked questions about the wage increase. His letter concluded by asking for the reasoning behind the “welcomed, but unprecedented wage increase this close to our impending negotiations for a new collective bargaining agreement.” (D&O 16; GCX 1(s) par. 15(a), GCX 1(q) par. 15, JTX 6.) On July 23, Stevens asked for additional information about the Company's wages and benefits. (D&O 17; GCX 1(s) par. 15(b) and attachment A, GCX 1(q) par. 15, JTX 8.)

At the union meeting, Stevens was able to persuade about 18 employees to sign a petition in favor of continued union representation. Two more employees also signed separately on July 18. Over the next few weeks, 20 employees added their names, for a total of 40. Of these 40, 14, including Preisner, had signed the disaffection petitions. (D&O 16; Tr 223-26, 292-93, 305-06, GCX 5.)

In a July 25 letter to Stevens, Plant Manager Oaks reiterated that the Company no longer recognized the Union and stated that the Company would not

supply the requested information. (D&O 16; JTX 9.) Regarding Stevens' characterization of the wage increase as "unprecedented," Oaks wrote:

You are absolutely correct when you say that the \$1.25 per hour wage increase was UNPRECEDENTED! To my knowledge, the wage increase was about 100% LARGER than any increase your union has ever negotiated for our employees in any one year. We have also just announced an unprecedented increase in the men's vacation policy and will soon be meeting with them to explain that new benefit to each one of them. THESE ARE UNPRECEDENTED WAGE AND BENEFITS CHANGES WHICH OCCURRED DIRECTLY AS A RESULT OF THEIR DECISION TO GIVE US AND THEM A CHANCE TO SEE WHAT BEING UNION FREE COULD MEAN . . . . The men deserve a chance to see what we and they can do together to make more progress and improvements. Do not stand in the way.

(D&O 16; JTX 9.)

The Company then notified employees of improved vacation benefits that were consistent with the benefits described in the comparison chart. The notice also stated that the Company would stop withholding union dues when the contract expired in October, and advised employees that, because Wyoming is a right to work state, the employees could resign their membership earlier if they chose by sending a resignation letter to the Union with a copy to the Company. (D&O 16; JTX 10.)

On August 10, Stevens asserted by letter that the Union continued to enjoy majority status and offered to prove it through a signature check by a neutral person. Oaks responded by letter of August 15 rejecting Stevens' offer and

asserting that it had proven that the employees no longer wished representation by the Union. (D&O 16; GCX 1(s) par. 15(d), 1 (q) par. 15, JTX 12.)

The Company then made other changes including the termination of the 401(k) plan, which the Union had negotiated. The Company placed employees in a company retirement plan. (D&O 16-17; JTX 20-23.)

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

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman) issued its Decision and Order, finding in agreement with the administrative law judge, as modified, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively interrogating employees, coercively proposing the idea of a union decertification petition, soliciting employees to sign a petition, making promises of improved conditions if the Union was ousted, and interfering with the Union's right to communicate with the employees it represents. The Board also found, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union, unilaterally changing terms and conditions of employment without first bargaining with the Union, and refusing to supply the Union with requested information. (D&O 3.)

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

restraining, or coercing employees in the exercise of their statutory rights. (D&O 3.) Affirmatively, the Order requires the Company to, upon the Union's request: recognize and bargain with the Union, rescind the unilateral changes, and restore the previous terms and conditions of employment. The Order also requires the Company to make employees whole for any losses suffered by them as a result of those unilateral changes, to supply the Union with the requested information, and to post copies of a remedial notice. (D&O 3-4.)

### **SUMMARY OF ARGUMENT**

1. 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 administrative-law and common-law principles. In contrast, the Company's argument is based on an incorrect reading of Section 3(b) and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

2. Regarding the merits of the Board's decision, the Board is entitled to summary enforcement of its numerous uncontested findings that the Company violated Section 8(a)(1) of the Act. Those uncontested findings include the Company's unlawfully: proposing the idea of decertification petitions to employees and soliciting them to sign and to have other employees sign the petitions; soliciting employees to sign the petitions; and interrogating and promising benefits to employees to sign the petitions. The only substantive issue for the Court to decide is the Company's challenge to the Board's finding that it unlawfully withdrew recognition from the Union in violation of Section 8(a)(5) of the Act by relying on decertification petitions that the Company's active solicitation of employees directly tainted. It is well settled that such direct participation and unlawful assistance by an employer in a decertification campaign will taint the employer's reliance upon the resulting petitions. Contrary to the Company, under those circumstances, a decertification petition will be found tainted even if some employees that it approached were opposed to the Union prior to the Company's approach. Accordingly, this Court should enforce the Board's finding that the decertification petition was tainted by the Company's unlawful conduct, making the Company's subsequent withdrawal of recognition from the Union unlawful as well.

## ARGUMENT

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

Chairman Liebman<sup>3</sup> and Member Schaumber, as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board’s Order in this case. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009) (“*New Process*”), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009) (“*Northeastern*”), *reh’g denied* (May 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009) (“*Snell Island*”).<sup>4</sup> *But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) (“*Laurel Baye*”), *petition for reh’g denied* (July 1, 2009), Nos. 08-1162, 08-1214 (discussed below). As we now show, their authority to issue Board decisions and orders is provided

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<sup>3</sup> On January 20, 2009, President Obama designated Wilma B. Liebman as Chairman of the Board. *See* BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

<sup>4</sup> The issue was argued before the Eighth Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291 on June 9, 2009. This issue has also been fully briefed in the Third Circuit in *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729 and 09-1035, and *NLRB v. St. George Warehouse, Inc.*, Nos. 08-4875, 09-1269; in the Fourth Circuit in *Narricot Industries, L.P. v. NLRB*, Nos. 09-1164 and 09-1280, and *McElroy Coal Company v. NLRB*, Nos. 09-1332, 09-1427; the Eighth Circuit in *NLRB v. American Directional Boring, Inc.*, No. 09-1194; and the Tenth Circuit in *Teamsters, Local 523 v. NLRB*, Nos. 08-9568 and 08-9577.

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 and common law. The contrary argument must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

### **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 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. When, three days later, Member Kirsanow's recess appointment expired<sup>5</sup> 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 a vacancy shall not impair the powers of the remaining members and that "two members shall constitute a quorum" of any group of three members to which the Board had delegated its powers. Since January 1, 2008, this two-member quorum has issued over 300 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.<sup>6</sup>

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

In determining whether Congress expressed a clear intent to allow the Board to operate as a two-member quorum of a properly delegated three-member group, the court is required to apply "traditional principles of statutory construction," and

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<sup>5</sup> Member Walsh's recess appointment also expired on December 31, 2007.

<sup>6</sup> On May 4, 2009, it was reported that the two-member Board quorum had issued approximately 400 decisions, published and unpublished. *See* BNA, *Daily Labor Report*, No. 83, at p. AA-1 (May 4, 2009). The published decisions include all decisions in Volume 352 NLRB (146 decisions), Volume 353 NLRB (132 decisions), and Volume 354 NLRB (33 decisions as of June 17, 2009).

this process begins with looking to the plain meaning of the statutory terms. *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1195 (5th Cir. 1997), quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The meaning of a term, however, “cannot be determined in isolation, but must be drawn from the context in which it is used.” *Id.* at 1195-96, quoting *Deal v. United States*, 508 U.S. 129, 132 (1993). And of course, “a statute must, if possible, be construed in such a fashion that every word has some operative effect.” *Id.* at 1196, quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

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

As both the Seventh Circuit and the First Circuit have concluded, the plain meaning of the statute's text authorizes a two-member quorum of a properly constituted three-member group to issue decisions, even when, as here, the Board has only two sitting members. *See New Process*, 564 F.3d at 845 (“As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text.”); *Northeastern*, 560 F.3d at 41 (“the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)”). As those decisions recognize, the three provisions of Section 3(b), in combination, 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 authority 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.

Moreover, the Seventh Circuit (*New Process*, 564 F.3d at 846) and the First Circuit (*Northeastern*, 560 F.3d at 41-42), both noted that two persuasive authorities provide additional support for this reading of Section 3(b)'s plain text. First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), where the Board had four sitting members, the Ninth Circuit held that Section 3(b)'s two-member quorum provision authorized a three-member group to issue a decision even after one panel member had resigned. The court held that it was not legally determinative whether the resigning Board member participated in the decision, because “the decision would nonetheless be valid because a ‘quorum’ of two panel members supported the decision.” *Id.* at 123. Second, the United States Department of Justice’s Office of Legal Counsel (“OLC”), in a formal opinion, concluded that the Board possessed the authority to issue decisions with only two of its five seats filled, where the two remaining members constituted a quorum of a three-member group within the meaning of Section 3(b). *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (Mar. 4, 2003).

The D.C. Circuit’s contrary conclusion is based on a strained reading of Section 3(b) that does not give operative meaning to all of its relevant provisions. In *Laurel Baye*, 564 F.3d at 472-73, the D.C. Circuit held that Section 3(b)'s provision—that “three members of the Board shall, *at all times*, constitute a quorum of the Board” (29 U.S.C. § 153(b), emphasis added)—prohibits the Board

from acting in any capacity when it has fewer than three sitting members, despite Section 3(b)'s express exception that provides for a quorum of two members when the Board has delegated its powers to a three-member group. The court concluded that the two-member quorum provision that applies to a three-member "group" is not in fact an exception to the three-member quorum requirement for the "Board," because the former applies to a "group" and the latter applies to the "Board." *See id.* at 473. The court stated that Congress' use of the two different object nouns indicates that each quorum provision is independent from the other, and thus the two-member quorum provision does not eliminate the requirement that there be a three-member quorum present "at all times." *Id.*

The D.C. Circuit's interpretation fails to give the critical terms of Section 3(b) their ordinary and usual meaning, thereby violating the cardinal canon of statutory construction "that courts must presume a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1890-91 (2009) (applying "ordinary English" to determine the meaning of a statute). The ordinary meaning of the word "except" is "with the exclusion or exception of." *Webster's New World College Dictionary* (4th ed. 2008). Thus, in ordinary English usage, the statement in Section 3(b)—that "three members of the

Board shall, at all times, constitute a quorum of the Board, *except* that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof” (emphasis added)—denotes that the two-member quorum rule that applies when the Board has delegated its powers to a three-member group is an *exception* to the requirement of a three-member quorum “at all times.”

*Laurel Baye*’s refusal to give full effect to this express exception is based on an assumption that it would be anomalous for Congress to have used the statutory rubric “at all times . . . except” if Congress intended that there be some times when the general requirement of a three-member quorum would not apply. That assumption is erroneous. *Laurel Baye* ignores that, in other statutes, as in Section 3(b), Congress has used that same statutory rubric to state a true exception to a general rule. *See, e.g.*, 20 U.S.C. § 1099c-1(b)(8) (Secretary of Education shall “maintain and preserve *at all times* the confidentiality of any program review report . . . *except that* the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review”) (emphasis added).

*Laurel Baye* also fails to give the word “quorum” its ordinary meaning. “Quorum” means “the minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted.”

*Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983)

(“*Yardmasters*”) (quoting ROBERT'S RULES OF ORDER 16 (rev. ed. 1981)).

Under the court’s construction of Section 3(b), however, the actual presence of a two-member quorum, possessed of all the Board’s powers by a valid delegation, is *never* a sufficient number to transact business *unless* there is also a third sitting Board member.

The *Laurel Baye* court correctly states that Congress intended that “each quorum provision is independent from the other” (564 F.3d at 473), but then flouts that clear intent by denying Section 3(b)’s two-member quorum provision *any* truly independent role. Rather, under the court’s construction, whether a two-member quorum is ever a legally sufficient number to decide a case is wholly *dependent* on the presence of a three-member quorum.<sup>7</sup> In so holding, the court violated a cardinal principle of statutory construction that “‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

*Laurel Baye* also fails to read the words “except” and “quorum” in the context of Section 3(b)’s textually interrelated provisions authorizing three or more Board members to delegate “any or all” of the Board’s powers to a three-

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<sup>7</sup> See *New Process*, 564 F.3d at 846 n.2 (“[The employer’s] reading, on the other hand, appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.”).

member group, two members of which “shall constitute a quorum.” The court mistakenly distinguishes “the Board” and “any group” so that no “group” can continue to act if the membership of “the Board” falls below three. *Laurel Baye*, 564 F.3d at 473. That conclusion ignores that where, as here, the Board has delegated all its powers to a three-member group, that group, possessing all the Board’s powers, cannot logically be distinguished from the Board itself. *See Northeastern*, 560 F.3d at 41 (upholding “the Board’s delegation of *its institutional power* to a panel that ultimately consisted of a two-member quorum” (emphasis added)).

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

As shown, the meaning of statutory language cannot be determined by isolating particular terms, but must take into account the intent and design of the entire statute. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574, 578 (1995); *U.S. v. One Parcel of Land in Name of Mikell*, 33 F.3d 11, 12 (5th Cir. 1994). Thus, ascertaining that meaning often requires resort to historical materials, including legislative history. *Gustafson*, 513 U.S. at 578; *Mikell*, at 13-14.

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 power to adjudicate cases with a two-member quorum. In the Wagner Act of 1935, which created a three-member Board, Section 3(b), in its entirety, provided: “A vacancy on the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and two members of the Board shall, at all times, constitute a quorum.”<sup>8</sup> Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued 464 published decisions with only two of its three seats filled.<sup>9</sup> *See, e.g., NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.<sup>10</sup> In 1947,

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<sup>8</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>9</sup> The Board had only two members during three separate periods between 1935 and 1947: from August 31 until September 23, 1936; from August 27 until November 26, 1940; and from August 27 until October 11, 1941. *See 2d Annual Report, NLRB (1937)* at 7; *6th Annual Report (1942)* at 7 n.1; *7th Annual Report (1943)* at 8 n.1. Those two-member Boards issued 224 published decisions (reported at 35 NLRB 24-1360 and 36 NLRB 1-45) in 1941; 237 published decisions (including all decisions reported in 27 NLRB and those decisions reported at 28 NLRB 1-115) in 1940; and 3 published decisions (reported at 2 NLRB 198-240) in 1936.

<sup>10</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).

however, when Congress was considering the Taft-Hartley amendments, the original two-member quorum provision was not a matter of concern. Indeed, the House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.<sup>11</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>12</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>13</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

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<sup>11</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>12</sup> S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

<sup>13</sup> Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

expeditiously in the final stage.”<sup>14</sup> Senator Taft similarly stated that the Senate bill was designed to “increase[] the number of the members of the Board from 3 to 7, in order that they may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much.”<sup>15</sup> *See Snell Island*, 568 F.3d at 421 (Congress added Section 3(b)’s delegation provision “to enable the Board to handle an increasing caseload more efficiently”) (quoting *Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981)). The Conference Committee accepted, without change, the Senate bill’s delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members.<sup>16</sup> Despite having only two additional members, rather than four 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

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<sup>14</sup> S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

<sup>15</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>16</sup> 61 Stat. 136, 139 (1947), *1 Leg. Hist. 1947*, at 4-5; H.R. Conf. Rep. No. 80-510, at 36-37 (1947), *1 Leg. Hist. 1947*, at 540-41.

created by Title IV of the Taft-Hartley Act to study labor relations issues<sup>17</sup>

reported to Congress the following year:

Section 3(a) of the [A]ct increased the membership of the Board from three to five members, and authorized it to delegate its powers to any three of such members. Acting under this authority, the Board in January 1948, established five panels for consideration of cases. Each of the Board members acts as chairman of one panel, and serves on two additional panels. Decisions in complaint cases arising under the Taft-Hartley law, and in representation matters involving novel or complicated issues, are still made by the full Board. A large majority of the cases, however, are being determined by the three-member panels.

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948).<sup>18</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>19</sup>

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<sup>17</sup> See 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

<sup>18</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>19</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).

In sum, by authorizing the Board to delegate its powers to a group of three members, two of whom constitute a quorum, Congress enabled the Board to increase its casehandling capacity by operating in groups identical to the original three-member Board. As the Seventh Circuit concluded in rejecting the contention that Section 3(b) prohibits the Board from acting unless it has three members:

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

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

In practical terms, the Act's two-member quorum provision authorized the Board's new three-member groups to function as the original three-member Board had done, *i.e.*, to issue decisions and orders with only two seats filled. If Congress were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have changed or eliminated that quorum provision in 1947, when it enacted comprehensive amendments to the Act. Instead, Congress preserved the Board's power to adjudicate labor disputes with a two-member quorum where it had previously exercised its delegation authority. That clear expression of legislative intent controls the meaning of Section 3(b).

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

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

As the Supreme Court explained in *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967), Congress enacted statutes creating administrative agencies against the backdrop of the common-law quorum rules applicable to public bodies, and these common-law rules were written into the enabling statutes of several agencies, including the Board. *Id.* at 183-86 (also identifying the Interstate Commerce Commission (ICC)).<sup>20</sup>

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

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<sup>20</sup> In *Flotill*, the Supreme Court held that where only three commissioners of the five-member Federal Trade Commission participated in a decision, a 2-1 decision of those three commissioners was valid, recognizing the common-law rule that “in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” 389 U.S. at 183 & n.6 (collecting cases). The Court concluded that “[w]here the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.” *Id.* at 183-84.

several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at \*16 (W.Va. 1875). Consistent with those principles, the majority view of common-law quorum rules was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body (see *Ross v. Miller*, 178 A. 771, 772 (N.J. Sup. Ct. 1935) (collecting cases)), even where that majority represented only a minority of the full board. See, e.g., *People v. Wright*, 30 Colo. 439, 442-43, 71 P. 365 (1902) (where city council was composed of 8 aldermen and 1 mayor, and the terms of 4 aldermen expired, vote of two of the remaining aldermen and the mayor was valid because they constituted a quorum of the five remaining members).<sup>21</sup>

The D.C. Circuit recognized the relevance of these common-law quorum principles in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), when it observed that the common-law rule likely permits “a quorum made up of a majority of those members of a body *in office* at the time.” *Id.* at 582 n.2 (emphasis in original). With that common-law principle as a backdrop, the

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<sup>21</sup> Cases which, at first, may appear to run counter to the common-law rules are easily reconciled when it is recognized that their holdings are instead controlled by a specific quorum rule dictated by statute or ordinance. See, e.g., *Gaston v. Ackerman*, 6 N.J. Misc. 694, 142 A. 545 (Sup. Ct. 1928) (three of five members were insufficient for a quorum because “[t]he ordinance under which the meeting was held provided that a quorum shall consist of four members”); *Glass v. Hopkinsville*, 225 Ky. 428, 9 S.W.2d 117 (1928) (state statute required that a school board quorum was a majority of the full board, so five of nine members were needed for a quorum).

court held that, in the absence of any countermanding provision in its authorizing statute, the Securities and Exchange Commission (SEC) lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions and orders when only two of its five authorized seats were filled.

The common-law principles applied in *Falcon Trading* apply as well in interpreting the quorum provisions Congress enacted in the NLRA. Consistent with those principles, Section 3(b) authorizes the Board, when it has a quorum of at least three members, to delegate all its powers to a three-member group, two members of which “shall constitute a quorum.” The statutory mechanism Congress provided for the NLRB differs from the mechanism afforded the SEC, but the result—that two members of a properly-delegated three-member group constitute a quorum that can issue agency decisions—is equally valid. *See New Process*, 564 F.3d at 848 (*Falcon Trading* supports the Board’s authority to issue decisions pursuant to Section 3(b)’s two-member quorum provision). The *Laurel Baye* court incorrectly ignored those principles in deeming *Falcon Trading* inapplicable. 564 F.3d at 474-75.

The common-law quorum rule imbedded in Section 3(b)’s express exception for Board groups is also similar to the quorum rule upheld in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983). There, the court recognized that the ICC’s

enabling statute not only permitted that 11-member 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, the court held that an ICC decision participated in and issued by only two of the three division members was valid. *Id.* Section 3(b) is directly analogous to the ICC statute and similarly allows the Board to delegate its powers to groups, two members of which constitute a quorum.

The Seventh Circuit’s decision in *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980), similarly recognizes the principle of minority decision-making. There, the court held that when only 6 of the 11 seats on the Interstate Commerce Commission were filled, a majority of the commissioners in office constituted a quorum and could issue decisions. Similarly, in *Michigan Department of Transportation v. ICC*, 698 F.2d 277 (6th Cir. 1983), the Sixth Circuit held that, when 7 of the 11 seats on the ICC were vacant, a decision issued by the remaining 4 commissioners was valid. *Id.* at 279.

In *Laurel Baye*, the D.C. Circuit not only failed to interpret Section 3(b) in light of applicable common-law quorum principles, it erroneously cited “basic tenets of agency and corporation law” to hold that “the moment the Board’s membership dropped below its quorum requirement of three” all authority previously delegated by the Board to the group ceased. *Laurel Baye*,

564 F.3d at 473 (citing various legal treatises). In thus giving controlling weight to “basic tenets of agency and corporation law,” the *Laurel Baye* court failed to heed the warning of the treatises upon which it relied that governmental bodies are often subject to special rules not applicable to private bodies.<sup>22</sup>

Specifically, the court erroneously concluded that the three-member group to which a Board quorum delegated all of the Board’s powers was an “agent” of the Board. *See id.* (citing RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006) for the proposition that “an agent’s delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended”). “Agency” is defined as “the fiduciary relationship that arises when one person (“the principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests consent or otherwise consents so to act.” *Id.*, § 1.01. The delegation of institutional powers to the three-member group authorized by Section 3(b) does not create any kind of “fiduciary” relationship and does not involve the three-member

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<sup>22</sup> *See* FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2 (2008) (distinguishing between private and municipal corporations, stating that “the law of municipal corporations [is] its own unique topic,” and concluding that “[a]ccordingly, this treatise does not cover municipal corporations.”). Similarly, RESTATEMENT (THIRD) OF AGENCY (2006), in its introduction, states that it “deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government.”

group acting on “behalf” of the Board or under its “control.” Instead, the Board members in the group have been jointly delegated all of the Board’s institutional powers, and thus are fully empowered to exercise them, not as Board agents, but as the Board itself.

*Laurel Baye*’s misapprehension concerning the governing common-law principles also led it unwarrantedly to disregard the teaching of its *Yardmasters* decision. There, the D.C. Circuit properly rejected reliance on the principles of agency and private corporation law it erroneously invoked in *Laurel Baye*. The court in *Yardmasters* discerned that the delegation and vacancies provisions of the federal statute at issue there demonstrated that Congress intended that certain operations of a public agency should continue to function in circumstances where a private body might be disabled. 721 F.2d at 1343 n.30. Similarly, in this case, the plain meaning of Section 3(b)’s delegation, vacancy, and quorum provisions manifests Congress’ intent that three or more members of the Board should have the option to delegate the Board’s powers to a three-member group, knowing that an imminent vacancy “shall not impair the right of the remaining members to exercise all the powers of the Board” and that “two members shall constitute a quorum of any group” so designated. As the Office of Legal Counsel properly concluded, construing Section 3(b)’s plain language to permit the two-member quorum to continue to exercise the Board’s powers that were properly delegated

to the three-member group “would not confer power on a number of members smaller than the number for which Congress expressly provided in setting the quorum.” 2003 WL 24166831, at \*3.<sup>23</sup>

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

Nor is the two-member quorum provision of Section 3(b) limited to situations where a case was originally assigned to a panel consisting of three members. Under the express terms of Section 3(b), the Board may delegate “any or all of the powers which it may itself exercise” to a group of three members, who accordingly may act *as the Board itself*. Those powers are not simply adjudicative, but also administrative, and include such powers as the power to appoint regional directors and an executive secretary (see 29 U.S.C. § 154), and the power, in accordance with the Administrative Procedure Act, to promulgate the rules and regulations necessary to carry out the provisions of the NLRA (*see* 29 U.S.C. §

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<sup>23</sup> Although, as *Laurel Baye* noted (564 F.3d at 474), *Yardmasters* is distinguishable, the critical distinction actually points directly to the greater strength of the Board’s case. In *Yardmasters*, the D.C. Circuit was faced with 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. By contrast, here, the statutory requirements for adjudication are satisfied because Section 3(b) expressly provides that two members of a properly constituted, three-member group is a quorum. Therefore, 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)).

156). Thus, 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, and the two-member quorum retains the authority to consider and decide those cases, including the authority to issue the decision in this case.

Section 3(b)’s broad authority permitting the Board to delegate all of its powers to a group contrasts with statutes governing appellate judicial panels, which require the assignment of at least three judges in every case. The primary judicial panel statute, in relevant part, is limited to adjudication of cases, providing that a federal appellate court must assign each case that comes before it to a three-judge panel. *See* 28 U.S.C. § 46(b) (requiring “the hearing and determination of cases and controversies by separate panels, each consisting of three judges”). *See also Murray v. Nat’l Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (relying on legislative history to find that Congress intended 28 U.S.C. § 46(b) to require that, “in the first instance, all cases would be assigned to [a] panel of at least three judges”) (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)).

The Supreme Court’s decision in *Nguyen v. United States*, 539 U.S. 69 (2003), 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. *See New Process*, 564 F.3d at 847-48. In that case, the Court held that

the judicial panel statute requires that a case must be assigned to three Article III judges, that the presence of an Article IV judge on the panel meant that it was not properly constituted, and that the two Article III judges on the panel could not issue a valid decision, even though Section 46(d) provides that two Article III judges constitute a quorum. *See* 539 U.S. at 82-83. The three-member group of Board members to which the Board delegated all of its powers, however, *was* properly constituted pursuant to Section 3(b), and thus nothing in the Court’s *Nguyen* opinion—even if it were applicable—would prevent the two-member quorum from continuing to exercise those powers. *See Snell Island* 568 F.3d at 419 (three-member panel that took effect on December 28, 2007, was properly constituted). Indeed, *Nguyen* specifically stated that two Article III judges “would have constituted a quorum if the original panel had been properly created . . . .” 539 U.S. at 83.<sup>24</sup>

*KFC National Management Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974), 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

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<sup>24</sup> *See also Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137, 138, 144 (1947) (Urgent Deficiencies Act “require[d] strict adherence to the [statutory] command” that a case brought to enjoin an ICC order “shall be heard and determined by three judges,” where there was “no provision for a quorum of less than three judges.”).

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.

**II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY COMMITTED NUMEROUS UNFAIR LABOR PRACTICES IN VIOLATION OF SECTION 8(a)(1)**

This Court has made clear that when an employer does not challenge in its brief the Board’s findings regarding a violation of the Act, those unchallenged issues are waived on appeal, and the Board is entitled to summary enforcement. *See Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008); *California Gas Transport, Inc. v. NLRB*, 507 F.3d 847, 853 n.3 (5th Cir. 2007) and cases cited. *See generally* Fed R. App. P. 28(a)(9)(A) (A petitioner’s brief must contain “the [petitioner’s] contentions and the reasons for them, with citations to the authorities and parts of the record on which the [petitioner] relies.”).

Here, the Company's brief fails to mention, let alone challenge, the following unfair labor practice violations that the Board found. Therefore, the Board is entitled to summary enforcement of the portions of its Order that are based on the following findings:

- Senior Plant Manager Houston interrogated and promised benefits to employees Bierema and Holdhusen on July 10 when he asked if they had signed a petition and, upon learning that they had not, asked why they had not, assured them that as a manager he had the “power to do stuff” and that “[i]t would be better around here,” stated they should trust him, and mentioned another facility where employees received a wage increase after giving up their union (D&O 1 n.3, 8, 17);
- Plant Foreman Droppers solicited employee Zupan to sign a petition on July 11 when Droppers asked Zupan to sign a petition and told Zupan that employees could not receive the non-union benefits set forth in the comparison chart through negotiations (D&O 1 n.3, 11-12);
- Plant Foreman Droppers solicited employee Davis to sign a petition on July 11 when he told Davis that the Company “was trying to get rid of the Union,” proceeded to show him the comparison chart, and then arranged for an employee to directly solicit him (D&O 1 n.3, 11-12);

- Senior Plant Manager Houston solicited employee DeKnikker to sign a petition on July 12 when he drove to DeKnikker's work site, showed him the comparison chart and then got paper from his truck so that DeKnikker could sign something saying that he did not want the Union (D&O 1 n.3, 13-14);
- Production Manager Ray Dell solicited employees Callison and David Dell to sign a petition on July 12 when he called them during their vacations (D&O 1 n.3, 10, 13, 18).
- Plant Manager Oaks solicited employee Callison to sign a petition on July 12 when he drove to Callison's house and asked him to re-sign the petition that he had earlier faxed to Production Manager Dell (D&O 1 n.3, 13.)

The Board is also entitled to summary enforcement of the portion of its Order based on the finding that Production Manager Dell unlawfully proposed the idea of a petition to employee McGinnis and solicited McGinnis to sign and to have other employees sign a petition, and its finding that Shift Supervisor Bergum unlawfully interrogated employee Preisner, proposed the idea of a petition to employee Preisner, and solicited him to sign and to have other employees sign a

petition.<sup>25</sup> *See Sanderson Farms, Inc. v. NLRB*, 112 Fed Appx. 976, 980 (5th Cir. 2004) (summarily enforcing Board finding of violation where employer discussed evidence in context of a different violation found by the Board). *See also California Gas Transport*, 507 F.3d at 853 n.3 (“petitioner does not preserve an issue merely by mentioning it in the Statement of Issues section without developing its argument in the body of the brief” or “providing any legal argument that indicates the basis for that assertion”) (citations omitted).)

In any event, the evidence amply supports the Board’s findings regarding both McGinnis and Preisner. As for McGinnis, Production Manager Dell approached McGinnis after a company meeting in which its managers decided that the timing “was right” to start a petition based on the belief that a few employees, including McGinnis, opposed the Union. (D&O 6; Tr 1245-46, 1282, 1327-28, 1331-32.) Although McGinnis had previously expressed reservations to Dell about the Union, Dell, as the judge explained (D&O 17), “even admit[ed] that he didn’t know for sure what McGinnis’ then-current sentiments concerning the Union actually were.” Indeed, Dell told other company officials that he “felt that McGinnis would be a good person to approach to see if his sentiments were still

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<sup>25</sup> Although the Company mentions employees McGinnis and Preisner in its Statement of Facts (Br 6-11) and Argument (Br 34), it never addresses the violations found by the Board. Instead, the Company suggests (Br 6-11) that it did not unlawfully threaten McGinnis or Preisner, and argues (Br 34) that it did not promise benefits to them by showing them the comparison chart. But the Board did not find that the Company unlawfully threatened or promised benefits to them.

the same” (Tr 1332), and he proceeded to approach McGinnis by asking “if” he was still against the Union (D&O 7; Tr 1282-83). After McGinnis hesitated to proceed with a petition, Dell and Plant Manager Oaks changed McGinnis’ scheduled work assignment at a remote location and arranged for him to meet with them the next day at the Company’s facility to further discuss a petition. Then, after McGinnis finally relented during a third meeting and agreed to circulate a petition, the Company gave him several hours to solicit employees and told him where to solicit them. In light of these facts, the Board was fully warranted in finding, in agreement with the administrative law judge, that the Company unlawfully proposed the idea of a petition to McGinnis and solicited him to sign and to circulate one.

Similarly, the evidence amply supports the Board’s finding that the Company unlawfully interrogated Preisner, proposed the idea of a petition to him, and solicited him to sign and to circulate a petition. Shift Supervisor Bergum asked Preisner “what [he] felt about the Union.” (D&O 6; Tr 71.) After Preisner expressed indifference, not “car[ing] if it stayed or went . . . .” (D&O 6; Tr 71), Bergum proceeded to ask Preisner “if [he] would sign a petition to get the Union out” (D&O 6; Tr 71), and told him what to write on a paper (D&O 6; Tr 71-72, JTX 2 p.2.) In addition, Bergum asked Preisner if he could get other employees to sign, and cautioned him not to speak to several named employees because they

would not sign. (D&O 7; Tr 72.) Although the Company asserts in its Statement of Facts (Br 10) that Bergum credibly denied Preisner's version of events, the Company ignores the fact that the judge, as upheld by the Board (D&O 1 n.2), credited Preisner's testimony over Bergum's. As this Court has explained, it does "not make credibility determinations or reweigh the evidence." *NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007).

Finally, the Board is also entitled to summary enforcement of the Board's finding that, after the Company withdrew recognition from the Union, it unlawfully discouraged employees from attending a union meeting. There is no dispute that the Company did not raise this issue to the Board. (D&O 1 n.3) The Company's mention of that violation in its brief (Br 20 n.6) cannot cure the fact that the Company failed to raise this objection to the Board. Therefore, the Company is now jurisdictionally barred from obtaining review of this finding. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Catalytic Indus. Maintenance Co.*, 964 F.2d 513, 521 (5th Cir. 1992).

### **III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY UNLAWFULLY WITHDREW RECOGNITION FROM THE UNION IN VIOLATION OF SECTION 8(a)(5) AND (1) OF THE ACT**

#### **A. Introduction and Standard of Review**

The Company withdrew recognition from the Union based on the signatures of a majority of its employees—42 of 69—on petitions that repudiated the Union. Ordinarily, such petitions signed by a majority of employees, would afford the employer a reasonable basis for withdrawing recognition. *See Hearst Corp.*, 281 NLRB 764, 764 & n.7 (1986), *enforced mem.*, 837 F.2d 1088 (5th Cir. 1988). However, the Board found the withdrawal of recognition unlawful because the Company had engaged in conduct that tainted the petitions. Given the Company's waiver of its right to contest any of the violations it committed against individual employees, the only issue before this Court is whether the Company's unlawful conduct tainted the decertification petitions. If the Board reasonably found that the decertification petitions were tainted by the Company's unlawful conduct, then the Company's withdrawal of recognition violated Section 8(a)(5) and (1) of the Act. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); *Texaco, Inc. v. NLRB*, 722 F.2d 1226, 1235-36 (5th Cir. 1984).

Because “an actual loss of majority status [is] an ‘affirmative defense’ to an unlawful withdrawal-of-recognition claim, it is the [employer] that ‘has the burden

of establishing that defense” by demonstrating that the petition was valid. *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006) (quoting *Levitz Furniture Co.*, 333 NLRB 717, 725 (2001).) *Cf. NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (noting that an employer bears the burden of proving that it had sufficient justification for withdrawing recognition from the union). Whether the employer met its burden is a question of fact, and the Board’s finding must therefore be upheld if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *see Universal Camera Corp v. NLRB*, 340 U.S. 474, 488 (1951); *California Gas Transport v. NLRB*, 507 F.3d 847, 852 (5th Cir. 2007).

**B. An Employer May Not Lawfully Withdraw Recognition if the Employer Is Found To Have Directly Participated and Assisted in the Decertification Campaign**

The principles governing an employer’s withdrawal of recognition from an incumbent union are well settled. Section 8(a)(5) of the Act<sup>26</sup> (29 U.S.C. § 158(a)(5)) requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees. To promote the Act’s policies

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<sup>26</sup> Section 8(a)(5) makes it “an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees.” Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act],” which includes employees’ “right . . . to bargain collectively through representatives of their own choosing,” 29 U.S.C. § 157. A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *See Electrical Machinery Co. v. NLRB*, 653 F.2d 958, 960 (5th Cir. 1981).

of industrial stability and employee free choice, the Board will presume that, once chosen, a union retains its majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-87 (1996). The presumption of majority status is irrebuttable during the term of a collective-bargaining agreement, up to 3 years; after 3 years, or upon expiration of the collective-bargaining agreement, the presumption becomes rebuttable. *Id.* at 785-87.

Consistent with these principles, the Board, in *Levitz Furniture Co.*, 333 NLRB 717, 720 (2001), held that an employer may lawfully withdraw recognition from an incumbent union, and defeat the rebuttable presumption of majority support, by showing that the union, in fact, lacked majority support at the time recognition was withdrawn. *See NLRB v. Seaport Printing & Ad Specialties, Inc.*, 192 Fed. Appx 290, 290 (5th Cir. 2006) (approving the Board's *Levitz* standard).

Generally, a petition signed by a majority of the employees stating that they no longer wish to be represented by the union will suffice to meet an employer's burden, absent countervailing evidence. *See Levitz*, 333 NLRB at 725 n.49.

However, where an employer has engaged in unlawful conduct designed to cause employee disaffection—such as initiating a decertification petition, soliciting signatures for such a petition, or lending more than minimal support to the petition effort (*see NLRB v. United Union of Roofers, Waterproofers & Allied Workers Local No. 81*, 915 F.2d 508, 512 n.6 (9th Cir. 1990))—"the decertification petitions

will be found to have been tainted by the employer’s unfair labor practices and the [employer] will be precluded from relying on the tainted petitions as a basis for . . . withdrawing recognition.” *Hearst Corp.*, 281 NLRB at 764. *See also Hancock Fabrics*, 294 NLRB 189, 192 (1989) (same), *enforced mem.*, 902 F.2d 28 (4th Cir. 1990); *Manhattan Eye, Ear & Throat Hosp.*, 280 NLRB 113, 115 (1986) (same), *enforced mem.*, 814 F.2d 653 (2d Cir. 1987).<sup>27</sup>

It is not “necessary for an employer to threaten, coerce, or promise benefits to employees” for its conduct to taint a decertification petition. *NLRB v. Birmingham Publishing Co.*, 262 F.2d 2, 7 (5th Cir. 1958). “Interference’ . . . is enough.” *Id.* Indeed, as this Court has held, to avoid tainting a decertification petition, the employer “must maintain complete neutrality of action” with regard to its employees’ efforts to decertify their bargaining representative (*Texaco*, 722 F.2d at 1231), and must not go “beyond mere passive observance” (*id.* at 1234 (quoting *Birmingham Publishing Co.*, 262 F.2d at 8)).

An employer’s “withdrawal of recognition predicated on such a ‘tainted’ petition will be held unlawful because, under those circumstances, the petition does not represent ‘the free and uncoerced act of the employees concerned.’” *United*

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<sup>27</sup> *See also Weisser Optical Co.*, 274 NLRB 961, 961-62 (1985) (petition tainted by employer’s involvement in decertification drive which amounted to more than ministerial aid), *enforced mem.*, 787 F.2d 596 (7th Cir. 1986); *Crafttool Mfg. Co.*, 229 NLRB 634, 636-38 (1977) (employer’s participation in circulation of antiunion petitions tainted its withdrawal).

*Union of Roofers, Waterproofers & Allied Workers*, 915 F.2d at 512 n.6 (quoting *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985)). See also *V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 276-77 (6th Cir. 1999) (citing cases). Moreover, when the employer’s conduct taints the petition, the Board has explained that it is “unwilling to allow [an employer] to enjoy the fruits of its violations . . . , but rather shall hold it responsible for the predictable consequences of its misconduct, i.e., its employees’ rejection of [the union] as their bargaining representative.” *Hearst Corp.*, 281 NLRB at 765. Given those “predictable consequences,” the Board’s finding that an employer unlawfully participated or assisted in a decertification effort “is not predicated on a finding of actual coercive effect, but rather on the ‘tendency of such conduct to interfere with the free exercise of employee rights under the Act.’” *Id.* (quoting *Amason, Inc.*, 269 NLRB 750, 750 n.2 (1984), *enforced mem.*, 758 F.2d 648 (4th Cir. 1985)).

**C. The Board Reasonably Determined that the Antiunion Petitions Were Tainted by the Company’s Admitted Unlawful Solicitations of Employees To Circulate and To Sign the Petitions**

Based on the unfair labor practices found that the Company committed toward its employees, none of which the Company contests before this Court, the Board reasonably determined (D&O 1-3, 17-19) that the Company engaged in conduct that unlawfully assisted the decertification effort and tainted the disaffection petitions. Accordingly, the Board concluded (D&O 3, 19) that the

petitions could not provide a valid basis for the Company's withdrawal of recognition, which therefore violated Section 8(a)(5) of the Act. The Board's findings are amply supported by substantial evidence, and fully consistent with Board and this Court's precedent.

As shown, the Company, believing that a few employees opposed the Union, changed its focus from preparing for contract negotiations to proposing the idea of a decertification petition to employees. In furtherance of that objective, the Company solicited, interrogated, and made promises to employees to support a petition, all in violation of Section 8(a)(1) of the Act.

Specifically, Senior Plant Manager Houston interrogated and promised benefits to employees Bierema and Holdhusen, and solicited employee DeKnikker to sign a petition; Plant Manager Oaks solicited employee Callison to sign a petition; Production Manager Dell unlawfully proposed the idea of a petition to employee McGinnis and solicited him to sign and to have others sign a petition, and unlawfully solicited employees Callison and David Dell to sign a petition; Plant Foreman Droppers solicited employees Zupan and Davis to sign a petition; and Shift Supervisor Bergum unlawfully interrogated, proposed the idea of a petition to employee Preisner, and solicited employee Preisner to sign and to have other employees sign a petition. On these facts, the Board, consistent with this

Court, found that the Company's withdrawal of recognition was unlawful because it had directly participated and assisted in the decertification effort.

Indeed, as the judge explained (D&O 17), it is clear that Preisner and McGinnis would not have acted on their own, absent the Company's unlawful actions. The Company does not claim that employee Preisner asked a company official how to get rid to the Union. Nevertheless, the Company seized on its belief that Preisner opposed the Union and interrogated him about the Union, urged him to sign a petition, and urged him to solicit other employees to sign one. Then, once Preisner agreed to solicit signatures, the Company told certain employees that Preisner wanted to talk to them, whereupon Preisner solicited them to sign. The Company also instructed Preisner to avoid certain employees whom it believed were pronounion. Similarly, to get McGinnis in the fold, the Company held three meetings with him. The Company even went so far as to change his scheduled work at a remote location, so that company officials could meet with him about soliciting other employees and so that, if he were to agree to solicit signatures, he would be in a work location where he would have the opportunity to solicit other employees.

In sum, the Company's uncontested unlawful conduct demonstrates that it did not "maintain complete neutrality of action" with regard to its employees' efforts to decertify their bargaining representative (*Texaco, Inc. v. NLRB*, 722 F.2d

1226, 1231 (5th Cir. 1984), and instead went “beyond mere passive observance” (*id.* at 1234) (citation omitted).

The Company primarily contends (Br 20-36, 46) that the Board’s finding of taint is based largely on the Company’s promise of benefits to numerous employees through the Company’s creation and use of the comparison chart of union and non-union benefits. That claim is simply not true. Although the credited evidence shows that the Company did not, as it baldly asserts (Br 11, 14-15), “provide[] the chart to various employees only after their disaffection with the Union was known,” the Board (D&O 1 n.2) relied on the Company’s use of the chart only in connection with comments made by Senior Plant Manager Houston to employees Bierema and Holdhusen. The Company essentially ignores the fact that the Board’s finding of unlawful taint also relied on its direct participation and assistance in the decertification drive involving seven other employees. And none of this assistance involved a promise of benefits.<sup>28</sup>

The Company also argues (Br 38-47) that the Board’s finding of taint ignores the fact that some of the employees whom it solicited were previously dissatisfied with the Union. As this Court has held, however, an employer’s

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<sup>28</sup> The Board found (D&O 1 n.2) “it unnecessary to pass on the judge’s findings concerning additional promises of benefits to employees, as any such findings would be cumulative and would not affect the remedy.” The Board’s finding hardly demonstrates, as the Company claims (Br 36), that the judge was “biased” or “prejudiced” for having found those additional violations.

unlawful actions can taint a petition even if disaffection was not caused by an employer and even if it was the employees who requested the employer's aid. *Birmingham Publishing*, 262 F.2d at 5-6.

Moreover, as shown, the Company's actions here went beyond the Company's claim (Br 41-42) that it simply responded to an employee question about how to get rid of the Union. And the Company's reliance (Br 43-46) on *Bridgestone/Firestone Inc.*, 335 NLRB 941, 942 and n.1 (2001) is unavailing. There the employer simply suggested language for a petition to an employee whom it reasonably believed had asked how to decertify a union. In that context, the Board found that neither suggesting the language, nor committing an unrelated unfair labor practice over a month earlier, was sufficient to taint the subsequent petition.<sup>29</sup>

There is also no merit to the Company's suggestion (Br 47-48) that no taint should be found because there is no evidence that the Company's unlawful conduct extended beyond Preisner and McGinnis to the other employees who solicited signatures and there is no evidence that the employees, who were not unlawfully solicited, were aware of the Company's unlawful solicitations.

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<sup>29</sup> *Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1296-97 (2006) (Br 47), involves an issue that the Company itself recognizes (Br 41 n.9) has no bearing here—whether an employer's unfair labor practices, that occurred prior to the decertification petition and that do not involve the decertification petition itself, also can have the effect of tainting a decertification petition. *See Master Slack Corp.*, 271 NLRB 78 (1984).

But even if other solicitors and signers were unaware of the Company's unlawful actions, the Board, with this Court's approval, has found such evidence unpersuasive. *Hearst Corp.*, 281 NLRB 764, 765, 782-83 (1986), *enforced mem.*, 837 F.2d 1088 (5th Cir. 1988). There, the employer presented testimony, from a majority of the employees who had signed the decertification petition, that they were unaware of the employer's unlawful actions. The Board held that, given the foreseeable consequences of providing assistance and employee coercion to a decertification effort, "[a]n employer that has engaged in [such] unlawful conduct . . . cannot expect to take advantage of the chance occurrence that some of its employees may be unaware of its actions." *Hearst*, 281 NLRB at 765.

As the Board further noted there, the "[e]mployer did not need to conduct a widespread, antiunion campaign involving statements to every employee, or even to a majority of the employees, in that unit. Instead, it needed only to cultivate that dissatisfaction by adopting the rifle-like, rather than shotgun-like, approach of concentrating its efforts on a few of the employees—sufficient in number to ensure that employee dissatisfaction would continue to flourish." *Id.* at 782. Thus, it is hardly a mitigating factor that the Company here chose to target the employees it thought were opposed to the Union.<sup>30</sup>

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<sup>30</sup> Placing the Company's unlawful actions in context, it was hardly unreasonable, as the Company alleges (Br 36-38), for the judge to suggest that the Company was quickly acting on its stated desire to decertify the Union, and that the Company had

Finally, contrary to the Company's assertion (Br 48-49), the Company's actions here stand in sharp contrast to the employer's actions in *NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 179-83 (4th Cir. 2003), where the Court found the withdrawal of recognition was lawful. There, the employer committed a single unfair labor practice directed at one employee, and there was independent evidence that a majority of employees opposed the union. Here, there is simply no independent evidence that a majority of employees opposed the Union apart from the decertification petitions which were infected by the Company's taint.

**D. If the Court Affirms the Board's Finding that the Company Unlawfully Withdrew Recognition, the Board Is Entitled to Summary Enforcement of Its Remaining Unfair Labor Practice Findings and to Its Remedial Order, Which the Company Failed To Challenge in Its Opening Brief**

In its opening brief, the Company has failed to challenge the Board's finding that, if it unlawfully withdrew recognition from the Union, then it acted unlawfully by changing terms and conditions employment without bargaining with the Union, and by refusing to comply with Union's information requests. In addition, the Company does not contest the Board's remedy that, among other things, requires the Company to bargain, upon request, with the Union. If the Court affirms the Board's order that the Company unlawfully withdrew recognition from the Union,

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no interest in informing employees about lawful, but slower, ways, they could seek to decertify the Union.

the Company's failure to challenge in its opening brief either those subsequent unfair labor practices or the Board's remedy, means that the Company has waived such a challenge before the Court. Accordingly, the Board would also be entitled to summary enforcement of those portions of its Order.

## CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD

July 2009

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

BENTONITE PERFORMANCE MINERALS, LLC, A PRODUCT AND SERVICE LINE OF HALLIBURTON ENERGY SERVICES, INC.	:	
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Petitioner/Cross-Respondent	:	
	:	
	:	No. 09-60034
v.	:	
	:	
NATIONAL LABOR RELATIONS BOARD	:	Board Case No.
	:	27-CA-20596
Respondent/Cross-Petitioner	:	
	:	
and	:	
	:	
INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL/UNITED FOOD AND COMMERCIAL WORKERS UNION, CLC, LOCAL 353C	:	
	:	
	:	
Intervenor	:	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 15,425 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 14th day of July, 2009

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

BENTONITE PERFORMANCE MINERALS, LLC, A PRODUCT AND SERVICE LINE OF HALLIBURTON ENERGY SERVICE, INC.	:	
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Petitioner/Cross-Respondent	:	No. 09-60034
	:	
v.	:	
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NATIONAL LABOR RELATIONS BOARD	:	
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Respondent/Cross-Petitioner	:	
	:	Board Case No.
and	:	27-CA-20596
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INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL/UNITED FOOD AND COMMERICAL WORKERS UNION, CLC, LOCAL 353C	:	
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Intervenor	:	
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**CERTIFICATE OF SERVICE**

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

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Dated at Washington, DC  
this 14th day of July 2009