

Oral Argument Requested

**Nos. 08-9568, 08-9577**

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

**TEAMSTERS LOCAL UNION NO. 523, AFFILIATED WITH THE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**KIRK RAMMAGE**

**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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**ROBERT J. ENGLEHART**  
*Supervisory Attorney*

**DAVID A. FLEISCHER**  
*Senior Attorney*

*National Labor Relations Board*  
1099 14th Street, N.W.  
Washington, DC 20570  
(202) 273-2978  
(202) 273-2987

**RONALD MEISBURG**  
*General Counsel*

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

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

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

*National Labor Relations Board*

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## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of jurisdiction .....	1
Statement of the issues presented .....	3
Statement of the case.....	3
Statement of facts.....	5
I. The Board’s findings of fact.....	5
II. The Board’s conclusions and order.....	8
Statement of standard of review .....	9
Summary of argument.....	10
Argument.....	12
I. Chairman Schaumber and Member Liebman acted with the full powers of the Board in issuing the Board’s order in this case .....	12
A. Background.....	13
B. Section 3(b) of the Act, by its terms, provides that a two-member quorum may exercise the Board’s powers .....	14
C. Section 3(b)’s history also supports the authority of a two-member quorum to issue Board decisions and orders.....	18
D. Construing Section 3(b) in accord with its plain meaning furthers the Act’s purpose .....	23
E. 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 .....	25

**Headings-Cont'd**

**Page(s)**

F. Section 3(b) grants the Board authority that Congress did not provide in statues governing appellate judicial panels .....30

II. Substantial evidence supports the Board’s finding that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the company to reduce the seniority of employee Kirk Rammage, thereby resulting in Rammage’s being bumped from his job and transferred to a job at a distant facility, because he was not previously a member of represented by the union.....34

    A. Applicable principles .....34

    B. The Union caused the Company to discriminate against Rammage .....36

Conclusion .....44

## TABLE OF AUTHORITIES

<i>Allentown Mack Sales and Service, Inc. v. NLRB</i> , 522 U.S. 359 (1998) .....	9,10
<i>Allied Trades Council</i> , 342 NLRB 1010 (2004) .....	43
<i>Assure Competitive Transport, Inc. v. United States</i> , 629 F.2d 467 (7th Cir. 1980) .....	17,25,29
<i>Ayrshire Collieries Corp. v. United States</i> , 331 U.S. 132 (1947) .....	34
<i>Board of Commissioners of Town of Salem v. Wachovia Loan &amp; Trust Co.</i> , 143 N.C. 110, 55 S.E. 442 (1906).....	28
<i>Chevron U.S.A. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984) .....	10,14
<i>Commonwealth ex rel. Hall v. Canal Comm’rs</i> , 9 Watts 466, 1840 WL 3788 (Pa. 1840) .....	27
<i>Deal v. United States</i> , 508 U.S. 129 (1993) .....	14
<i>Donovan v. National Bank of Alaska</i> , 696 F.2d 678 (9th Cir. 1983) .....	26
<i>Eastland Co. v. FCC</i> , 92 F.2d 467 (D.C. Cir. 1937).....	20
<i>FTC v. Flotill Products, Inc.</i> , 389 U.S. 179 (1967) .....	26,27
<i>Facet Enterprises, Inc. v. NLRB</i> , 907 F.2d 963 (10th Cir. 1990) .....	42

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Falcon Trading Group, Ltd. v. SEC</i> , 102 F.3d 579 (D.C. Cir. 1996).....	23,24,28
<i>Ford Motor Co. v. Huffman</i> , 345 U.S. 330 (1953) .....	42
<i>Four B Corp. v. NLRB</i> , 163 F.3d 1177 (10th Cir. 1998).....	10,37
<i>Gustafson v. Alloyd Co., Inc.</i> , 513 U.S. 561 (1995) .....	18
<i>Hall-Brooke Hospital v. NLRB</i> , 645 F.2d 158 (2d Cir. 1981) .....	20-21
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996) .....	10
<i>Lee v. Board of Educ. of the City of Bristol</i> , 181 Conn. 69, 434 A.2d 333 (1980).....	28
<i>Lone Star Steel Co. v. NLRB</i> , 639 F.2d 545 (10th Cir. 1980) .....	43
<i>Michigan Department of Transportation v. ICC</i> , 698 F.2d 277 (6th Cir. 1983).....	29
<i>Murray v. National Broadcasting Co.</i> , 35 F.3d 45 (2d Cir. 1994) .....	31,33
<i>NLRB v. American Can Co.</i> , 658 F.2d 746 (10th Cir. 1981) .....	35,37
<i>NLRB v. Southern Bell Telegraph &amp; Telegraph Co.</i> , 319 U.S. 50 (1943) .....	19
<i>NLRB v. Teamsters Local 480</i> , 409 F.2d 610 (6th Cir. 1969).....	39

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>NLRB v. Whiting Milk Corp.</i> , 342 F.2d 8 (1st Cir. 1965).....	39,40,41,42
<i>Nguyen v. United States</i> , 539 U.S. 69 (2003) .....	32,33
<i>Nicholson v. ICC</i> , 711 F.2d 364 (D.C. Cir. 1983).....	29
<i>Northeastern Land Services, Ltd. v. NLRB</i> , ___ F.3d ___, 2009 WL. 638248 (1st Cir. Mar. 13, 2009) .....	12,15,16,23
<i>People v. Wright</i> , 30 Colo. 439, 71 P. 365 (1902) .....	27
<i>Peterson v. Hoppe</i> , 194 Minn. 186, 260 N.W. 215 (1935).....	28
<i>Photo-Sonics, Inc. v. NLRB</i> , 678 F.2d 121 (9th Cir. 1982) .....	16
<i>Radio Officers v. NLRB</i> , 347 U.S. 17 (1954) .....	35,36,37
<i>Railroad Yardmasters of America v. Harris</i> , 721 F.2d 1332 (D.C. Cir. 1983).....	24,25,26
<i>Riser Foods, Inc.</i> , 309 NLRB 635 (1992).....	42,43
<i>Ross v. Miller</i> , 178 A. 771 (N.J. Sup. Ct. 1935).....	27
<i>Stage Employees Local 659 (MPO-TV)</i> , 197 NLRB 1187 (1972), <i>enforced mem.</i> , 479 F.2d 450 (D.C. Cir. 1973).....	38,39,40

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>State v. Orr</i> , 61 Ohio St. 384, 56 N.E. 14 (1899) .....	28
<i>Teamsters Local 480 (Hilton D. Wall)</i> , 167 NLRB 920 (1967), enforced, 409 F.2d 610 (6th Cir. 1969) .....	39,40
<i>Teamsters Local 729</i> , 185 NLRB 631 (1970) .....	38
<i>United States v. Ballin</i> , 144 U.S. 1 (1892) .....	27
<i>United States v. Desimone</i> , 140 F.3d 457 (2d Cir. 1998) .....	33
<i>United States v. Nordic Village, Inc.</i> , 503 U.S. 30 (1992) .....	15
<i>United States v. Wyder</i> , 674 F.2d 224 (4th Cir. 1982) .....	26
<i>Webco Industries, Inc. v. NLRB</i> , 217 F.3d 1306 (10th Cir. 2000) .....	9-10
<i>Wheeling Gas Co. v. City of Wheeling</i> , 8 W.Va. 320, 1875 WL 3418 (1875) .....	27
<i>Whiting Milk Corp.</i> , 145 NLRB 1035 (1964) .....	41
<i>Woodlawn Farm Dairy Co.</i> , 162 NLRB 48 (1966) .....	40

## TABLE OF AUTHORITIES

### Statutes

#### **National Labor Relations Act, as amended**

(29 U.S.C. § 151 et seq.)

Section 3(a)(29 U.S.C. § 153(a)) .....	13,21
Section 3(b)(29 U.S.C. § 153(b)).....	2,3,10,11,12,13,14,15,16,17,18,23,25
Section 3(b)(29 U.S.C. § 153(b)).....	29,30,31,32,33,34
Section 4(29 U.S.C. § 154) .....	31,32
Section 6(29 U.S.C. § 156) .....	31
Section 7(29 U.S.C. § 157) .....	35,39
Section 8(a)(1)(29 U.S.C. § 158(a)(1)).....	4,8
Section 8(a)(3)(29 U.S.C. § 158(a)(3)).....	4,8,35
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) .....	3,8,11,34,39
Section 8(b)(2)(29 U.S.C. § 158(b)(2)) .....	3,8,11,35,43
Section 8(d)(29 U.S.C. § 158(d)).....	42
Section 10(a)(29 U.S.C. § 160 (a)) .....	2
Section 10(e)(29 U.S.C. § 160(e)) .....	2,9
Section 10(f) (29 U.S.C. § 160(f)) .....	2

#### **Other Statutes:**

Act to Provide for the Termination of Federal Control of Railroads (41 Stat. 492).....	20
Communications Act of 1934 (48 Stat. 1068) .....	20
28 U.S.C § 46.....	30,31,32,33
Urgent Deficiencies Act (38 Stat. 220).....	34

#### **Other Authorities:**

<i>Quorum Requirements</i> , Department of Justice, OLC, 2003 WL. 24166831 (O.L.C., Mar. 4, 2003).....	16
---	----

<b>Authorities-Cont'd</b>	<b>Page(s)</b>
<b>Legislative History Materials:</b>	
<i>NLRB, Legislative History of the National Labor Relations Act, 1935 (1935) Act of July 5, 1935 (49 Stat. 449)</i> .....	18
<i>NLRB, Legislative History of the Labor Management Relations Act, 1947</i>	
H.R. 3020, 80th Cong. § 3 (1947) .....	19
H.R. Conf. Rep. No. 80-510 .....	21
H.R. Rep. No. 80-3020 .....	19
S. 1126, 80th Cong. § 3.....	20
Remarks of Sen. Taft, 93 Cong. Rec. 3837 (Apr. 23, 1947) .....	20
Remarks of Sen. Ball, 93 Cong Rec. 4433 ( May 2, 1947) .....	20
S. Rep. No. 80-105.....	20,32
61 Stat. 136 .....	21
 <b>Miscellaneous:</b>	
<i>Labor-Management Relations: Hearings Before J. Comm. on Labor- Management Relations, 80th Cong. Pt. 2</i> .....	22
Staff of J. Comm. on Labor-Management Relations, 80th Cong., <i>Report on Labor-Management Relations</i> (J. Comm. Print. 1948) .....	22
Sen. Rep. No. 97-275, 97th Cong., 2d Sess.....	31,33
<i>1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations, 100th Cong. (1988)</i> .....	22

**Miscellaneous-Cont'd** **Page(s)**

**Board Annual Reports:**

*Second Annual Report of the NLRB (1936)*..... 19  
*Sixth Annual Report of the NLRB (1941)*..... 19  
*Seventh Annual Report of the NLRB (1942)* ..... 19  
*Thirteenth Annual Report of the NLRB (1948)*..... 22

**Publications:**

BNA, *Daily Labor Report*,  
No. 13, at p. A-8 (Jan. 23, 2009)..... 12  
No. 49, at p. AA-1 (Mar. 17, 2009) ..... 14  
No. 53, at p. A-11 (Mar. 19, 2008) ..... 12

James A. Gross, *The Reshaping of the NLRB: National Labor Policy in  
Transition, 1937-1947* (1981)..... 19

Harry A. Millis and Emily Clark Brown, *From the Wagner Act to  
Taft-Hartley: A Study of National Labor Policy and Labor  
Relations* (1950)..... 19

Robert’s Rules of Order 3 (1970) ..... 25

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

No. 08-9568 is before the Court on the petition of Teamsters Local Union  
No. 523, affiliated with the International Brotherhood of Teamsters (“the Union”),

for review of an order issued against it by the National Labor Relations Board (“the Board”). No. 08-9577 is before the Court on the Board’s cross-application for enforcement of its Order. The Board’s Decision and Order was issued on September 25, 2008, and is reported at 353 NLRB No. 14. (A 1- 7.)<sup>1</sup>

The Board had jurisdiction 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 empowers the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the unfair labor practices having occurred in Oklahoma. The Board’s Order is a final order within the meaning of Section 10(e) and (f) of the Act and, as shown below, pp. 12-34, was validly issued by a two-member quorum of a properly constituted three-member group within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).

The Union filed its petition for review on October 21, 2008. The Board filed its cross-application for enforcement on November 21, 2008. Section 10(e) and (f)

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<sup>1</sup> “A” references are to the appendix attached to the Union’s brief. “Tr” references are to the transcript of the hearing before the administrative law judge. “GCX” and “Co Exh.” refer, respectively, to exhibits introduced at the hearing by the General Counsel and Interstate Bakeries Corporation (“the Company”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

of the Act place no time limits on the filing of petitions for review or cross-applications for enforcement of Board orders.

### **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 substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the Company to reduce the seniority of employee Kirk Rammage, thereby resulting in Rammage's being bumped from his job and transferred to a job at a distant facility, because he was not previously a member of, or represented by, the Union.

### **STATEMENT OF THE CASE**

On charges filed by Kirk Rammage (GCX 1(c), 1(g)), the Board's General Counsel issued a consolidated unfair labor practice complaint alleging, *inter alia*, that the Union had violated Section 8(b)(2) and (1)(A) of the Act (29 U.S.C. § 158(b)(2) and (1)(A)) by demanding that Rammage be "endtailed" on the employee seniority list, whereas all other employees newly added to the bargaining unit were "dovetailed" on the seniority list, thereby causing Rammage to be

bumped from his existing job and transferred to a job at a distant facility, all because he had not been a member of, or represented by, the Union. (GCX 1(i), 2.) On October 31, 2006, after a hearing, Administrative Law Judge Gerald A. Wacknov issued his decision, recommending that the foregoing complaint allegations be dismissed. (A 7-12.)

On November 27, 2006, the General Counsel and Rammage filed separate exceptions to the judge's decision. On December 28, 2007, the Board delegated all of its powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow. On September 25, 2008, Chairman Schaumber and Member Liebman, acting as a quorum of the group, issued the Board's decision, reversing the administrative law judge, finding that the Union had violated the Act as alleged in the complaint, and ordering it to cease and desist from the unlawful conduct and take affirmative remedial action.<sup>2</sup> The Union filed a petition for review, and the Board filed a cross-application for enforcement.

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<sup>2</sup> The Board also found that the Company had violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by its treatment of Rammage and ordered it to cease and desist from the violations and to take affirmative remedial action. The Board filed an application for enforcement of its order against the Company. *NLRB v. Interstate Bakeries Corp.*, No. 08-9578 (10th Cir.). That application has been dismissed without prejudice on the Board's motion because the Company is complying with the order to the satisfaction of the Board.

## STATEMENT OF FACTS

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

The Company manufactures and distributes bakery products under various names, including Dolly Madison, Hostess, and Wonder Bread. Prior to late 2005, some of the Company's sales representatives sold and delivered only Dolly Madison products, while others sold and delivered only Hostess and Wonder Bread products. The two groups of employees were historically in separate bargaining units covered by separate contracts between the Company and the Union. The Dolly Madison contract, covering employees in Tulsa and Muskogee, Oklahoma, was effective from July 7, 2002, through November 5, 2005, while the Hostess/Wonder Bread contract covered sales representatives in six Oklahoma cities, including Ponca City, and was effective from August 19, 2001, through August 19, 2006. (A 1; Tr 43-44, 135-36, GCX 3, 4.)

Kirk Rammage worked for the Company as a Dolly Madison sales representative for nearly 15 years. He worked alone in a Ponca City warehouse until 1996 or 1997, when the Company acquired Wonder Bread and Hostess. Thereafter, he worked in the same warehouse as the Hostess/Wonder Bread sales representatives in Ponca City, but continued to sell and deliver only Dolly Madison products. He was not included in either of the bargaining units represented by the

Union; the Company treated him as an unrepresented employee and did not pay him contractual benefits. (A 1; Tr 42-43, 111, 142.)

Shortly before the Dolly Madison contract was due to expire, the Company decided to consolidate routes and have all sales representatives sell and deliver all of its products. In early November, representatives of the Company and the Union met and agreed that the two bargaining units would be merged; that the Dolly Madison contract would not be renewed; that all bargaining unit employees (except those in Muskogee, who would become part of a bargaining unit represented by another Teamsters local) would be covered by the existing Hostess/Wonder Bread contract; that the seniority of both groups of employees would be “dovetailed,” that is, calculated on the basis of total length of employment with the Company; and that one Ponca City route would be eliminated. (A 1-2; Tr 32-36, 135, 137, GCX 5.)

During the discussions between the parties, the Company informed the Union of Rammage’s employment at Ponca City. The Union had previously been unaware of Rammage’s existence. The parties agreed that he should be included in the merged bargaining unit. Because Rammage was the most senior and, in the Company’s view, the best Ponca City sales representative, the Company proposed that his seniority, like that of other former Dolly Madison sales representatives, be “dovetailed” with that of the former Hostess/Wonder Bread sales representatives.

The Union refused, asserting that such an arrangement would breach its duty of fair representation to the employees it had previously represented. It demanded that Rammage's seniority begin on the date he first became part of the bargaining unit, and the Company ultimately agreed. (A 2; Tr 137-38.)

Division Manager Rodney Roberts, Rammage's supervisor, told him that "union seniority" would be used in route bidding and vacation scheduling. In mid-December, Roberts told Rammage that the Ponca City sales representative whose route was being eliminated had exercised his option to bump Rammage in accordance with "union seniority."<sup>3</sup> Rammage asked Roberts to put that in writing. Roberts did so, attributing the bumping of Rammage to an agreement between the Company and the Union to use "Union Seniority for Route Bidding." Rammage asked why they were doing this to him. Roberts replied that it was because Rammage "was not in the Union." (A 2; Tr 54-55, 61-63, GGX 11.)

Rammage continued to work in Ponca City until January 12, 2006, when Sales Manager Kirk Summers told him that if he wanted a job, he would have to work as a sales representative out of the Bartlesville, Oklahoma, terminal. Summers said he did not want to lose Rammage, who was one of his best men. He also said several times that Rammage "would have to join the Union" and, when

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<sup>3</sup> The Hostess/Wonder Bread contract permitted a sales representative whose route was eliminated to bump the least senior sales representative. (GCX 3, p. 5, par. B1.)

Rammage asked why this was happening to him, replied that it was because Rammage was not in the Union. Rammage accepted the position at Bartlesville, which required a daily commute of more than 70 miles each way from his home. (A 2; Tr 64-66.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman) found, contrary to the administrative law judge, that the Union, when it insisted that Rammage's seniority be "endtailed" while the seniority of other former Dolly Madison employees, who differed from Rammage only in having been previously represented by the Union, was "dovetailed," had violated Section 8(b)(2) and (1)(A) of the Act (29 U.S.C. § 158(b)(2) and (1)(A)) by causing the Company to reduce Rammage's seniority, bump him from his job in Ponca City, and transfer him to Bartlesville, all because he had not been previously represented by the Union. (A 3-4.)<sup>4</sup>

The Board ordered the Union to cease and desist from the conduct found unlawful and from in any like or related manner restraining or coercing employees

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<sup>4</sup> The Board also found, contrary to the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act by engaging in the foregoing conduct, and adopted, in the absence of exceptions, the judge's finding that the Company violated Section 8(a)(1) by telling Rammage that he would have to join the Union as a condition of continued employment and that he had lost his seniority because he had not previously been represented by the Union. (A 3-4, 11.) As indicated above, p. 4 n. 2, those findings are not in issue before the Court.

in the exercise of their statutory rights; to credit Rammage with unit seniority based on the length of his employment with the Company and grant him any other rights and privileges to which he would have been entitled absent the discrimination against him; to notify the Company and Rammage in writing that it has no objection to the “dovetailing” of Rammage’s seniority or to allowing him to bid on a route, and awarding him the route to which he would have been entitled, on the basis of such “dovetailed” seniority; to make Rammage whole, jointly and severally with the Company, for any losses suffered as a result of the discrimination against him; to post copies of appropriate remedial notices at its business offices and meeting halls; and to sign and return to the Board’s Regional Office additional copies of such notices for posting by the Company. (A 5-7.)

### **STATEMENT OF STANDARD OF REVIEW**

Section 10(e) of the Act (29 U.S.C. § 160(e)) makes the Board’s factual findings conclusive if supported by substantial evidence on the record as a whole. This standard is satisfied if “it would have been possible for a reasonable jury to reach the Board’s conclusion.” *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998). Thus, “it requires not the degree of evidence which satisfies the [reviewing] *court* that the requisite fact exists, but merely the degree that *could* satisfy a reasonable fact finder.” *Webco Industries, Inc. v. NLRB*, 217

F.3d 1306, 1311 (10th Cir. 2000) (quoting *Allentown Mack*, 522 U.S. at 377; emphasis in Supreme Court’s opinion, but omitted by this Court.)

Questions of statutory interpretation are reviewed under a two-part test set forth in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). If “Congress has directly spoken to the precise question at issue,” then the Board, as well as any reviewing court, “must give effect to the unambiguously expressed intent of Congress.” 467 U.S. at 842-43. However, if “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [Board’s] answer is based on a permissible construction of the statute.” *Id.* at 843. “For the Board to prevail, it need not show that its construction is the *best* way to read the statute; rather, courts must respect the Board’s judgment so long as its reading is a reasonable one.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996). *Accord Four B Corp. v. NLRB*, 163 F.3d 1177, 1182 (10th Cir. 1998).

### **SUMMARY OF ARGUMENT**

1. 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 has been upheld by the First Circuit and is provided for in the express terms of Section 3(b) and supported by Section 3(b)’s legislative history,

cases involving comparable situations under other federal administrative agency statutes, and general principles of common and administrative law. The Union's contrary argument is based on an incorrect reading of Section 3(b) and a misunderstanding of the statute governing panels of federal appellate courts, which has no application to the NLRA.

2. The Union violated Section 8(b)(2) and (1)(A) of the Act by insisting that the Company "endtail" the seniority of employee Kirk Rammage while "dovetailing" the seniority of other former Dolly Madison sales representatives. Both Rammage and the other former Dolly Madison sales representatives were employees who had been outside the bargaining unit, but became part of the unit at the same time. The only difference was that Rammage, unlike the others, had not previously been represented by the Union. Thus, the different treatment of Rammage was based, not on his current or prior exclusion from the bargaining unit, but solely on his having exercised his statutory right to refrain from union representation. This Court should follow the decisions of two courts of appeals that have upheld Board findings that different and unfavorable treatment on that ground constitutes unlawful discrimination, rather than the contrary holding of the First Circuit.

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

Chairman Schaumber<sup>5</sup> and Member Liebman, 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. *Northeastern Land Servs., Ltd. v. NLRB*, \_\_\_ F.3d. \_\_\_, 2009 WL 638248 (1st Cir. Mar. 13, 2009).<sup>6</sup> As we now show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. The Union's contrary argument must be rejected because it is

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<sup>5</sup> On March 18, 2008, President Bush announced the designation of Member Schaumber as Chairman of the Board. *See* BNA, *Daily Labor Report*, No. 53, at p. A-11 (Mar. 19, 2008). 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>6</sup> In addition to the recent *Northeastern Land Services* decision by the First Circuit, this issue was also argued before the D.C. Circuit on December 4, 2008, in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162 and 08-1214. This issue has also been fully briefed in the Second Circuit in *Snell Island SNF v. NLRB*, Nos. 08-3822 and 08-4336, in the Eighth Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291, and in the Seventh Circuit in *New Process Steel v. NLRB*, Nos. 08-3517, et al. Oral argument is scheduled for April 10, 2009, in *New Process*, and for April 15, 2009, in *Snell Island*.

based on an incorrect reading of Section 3(b), and a misunderstanding of the statute governing federal appellate panels, which has no application to the NLRA.

### **A. Background**

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

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

Pursuant to this provision, the four members of the 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>7</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

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<sup>7</sup> Member Walsh's recess appointment also expired on December 31, 2007.

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 250 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.<sup>8</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 Section 3(b) of the Act expresses Congress’ clear intent to grant the Board the option of operating the agency through a two-member quorum of a properly-delegated, three-member group, the Court should apply “traditional principles of statutory construction,” and this process begins with looking to the plain meaning of the statutory terms. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n. 9 (1984). The meaning of a term, however, “cannot be determined in isolation, but must be drawn from the context in which it is used.” *Deal v. United States*, 508 U.S. 129, 132 (1993). Moreover, “a statute must, if possible, be construed in such a fashion

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<sup>8</sup> On March 17, 2009, it was reported that the two-member Board quorum had issued a total of 356 decisions, published and unpublished. See BNA, *Daily Labor Report*, No. 49, at p. AA-1 (Mar. 17, 2009). The published decisions include all decisions in Volume 352 NLRB (146 decisions) and Volume 353 NLRB (110 decisions as of March 9, 2009).

that every word has some operative effect.” *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 the First Circuit concluded, “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).” *Northeastern Land Servs.*, 2009 WL 638248, at \*4-5. As the court’s decision recognizes, 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.

As the First Circuit found, 2009 WL 638248, at \*5, two additional authorities support this reading of the statute’s plain text. First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), a case 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. In addition, the United States Department of Justice’s Office of Legal Counsel (“the OLC”) has directly addressed the issue in a formal legal opinion. The OLC concluded that the Board possessed the authority to issue decisions when only two of its five seats were filled, where the two remaining members 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 (O.L.C., Mar. 4, 2003).

The Union, refusing to give full effect to all of Section 3(b)’s express terms, asks this Court to read into Section 3(b) an implicit minimum number of three sitting members necessary for issuing decisions. Thus, the Union asserts (Br. 6-7) that, because Section 3(b) only authorizes the Board to delegate its powers to “a group of three or more members,” that section precludes the remaining two

members from issuing decisions after the third member leaves the Board. That argument, however, interprets the delegation provision in isolation, and gives no effect to Section 3(b)'s vacancy and two-member quorum provisions, which appear in the same sentence. Indeed, the very effect that Congress intended to safeguard against—that a vacancy would preclude the remaining members from exercising the Board's powers—would result if, as the Union suggests, Member Kirsanow's departure disabled the remaining two-member quorum from exercising the Board's powers.<sup>9</sup> In contrast, the Board's reading of Section 3(b) gives effect to *each* of those three provisions as they act in combination. That reading supports the conclusion that the Board properly delegated “all of its powers” to a three-member group consisting of Members Liebman, Schaumber and Kirsanow, and that the “vacancy” provision, in combination with the two-member quorum provision for a three-member group, operates to authorize Members Liebman and Schaumber to act for the Board and issue decisions.

For these reasons, it is the Union, not the Board, that has failed to give meaning to all of the statute's relevant provisions. In addition, as we now show, giving effect to the statute's plain meaning is consistent with the statute's legislative history and confirms that Congress intended that a two-member quorum

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<sup>9</sup> *Cf. Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (vacancy provision in Interstate Commerce Act vested the full power of the ICC in fewer than the full complement of commissioners).

of a properly-established, three-member group would be authorized, upon the departure of the third member, to continue issuing decisions and exercise all of the other powers of the Board delegated to that group.

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

As shown above, 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). Thus, ascertaining that meaning often requires resort to historical materials, including the legislative history. *Id.* at 578.

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. As originally enacted in 1935, the NLRA created a three-member Board and provided in Section 3(b) that two members would constitute a quorum and that a vacancy would not prevent the two remaining members from exercising all of the Board's powers.<sup>10</sup> Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued 464 published

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<sup>10</sup> *See* Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 449, reprinted in 2 *NLRB, Legislative History of the National Labor Relations Act, 1935* (hereinafter "*Leg. Hist. 1935*"), at 3272 (1935).

decisions with only two of its three seats filled.<sup>11</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>12</sup> In 1947, however, when Congress was considering the Taft-Hartley amendments, the original two-member quorum provision was not a matter of concern. Indeed, the House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.<sup>13</sup>

The Senate bill, while proposing to enlarge the Board and amend the quorum requirement, was careful to do so in a manner that explicitly preserved the Board's authority to exercise its powers through a two-member quorum. Thus, the Senate

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<sup>11</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*, at 7; *6<sup>th</sup> Annual Report*, at 7 n.1; *7<sup>th</sup> Annual Report*, 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>12</sup> *See* James A. Gross, *The Reshaping of the NLRB: National Labor Policy in Transition, 1937-1947* (1981); Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (1950).

<sup>13</sup> *See* H.R. 3020, 80th Cong. § 3 (1947), reprinted in *1 NLRB, Legislative History of the Labor Management Relations Act, 1947* (hereinafter "*Leg. Hist. 1947*"), at 171-72 (1948); H.R. Rep. No. 80-3020, at 6, *1 Leg. Hist. 1947*, at 297.

bill would have expanded the Board to seven members, four of whom would be a quorum. However, that same bill authorized the larger Board to delegate its powers “to any group of three or more members,” two of whom would be a quorum.<sup>14</sup> The Senate bill’s preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity of viewpoint in deciding cases, contrary to the suggestion of one Senator.<sup>15</sup> Rather, as the Senate Committee on Labor explained, the proposed expansion of the Board was designed to “permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage.”<sup>16</sup> Senator Taft similarly stated that the Senate bill was designed to “increase[] the number of the members of the Board from 3 to 7, in order that they may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much.”<sup>17</sup> See *Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162

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

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

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

<sup>17</sup> Remarks of Sen. Taft, 93 Cong. Rec. 3837 (Apr. 23, 1947), *2 Leg. Hist. 1947*, at 1011. The three-member groups that the Senate proposed for the NLRB were similar to the three-member divisions that Congress had previously enacted for the Interstate Commerce Commission (“the ICC”) and the Federal Communications Commission (“the FCC”). Both the FCC and ICC statutes identically provided that “[t]he Commission is . . . authorized . . . to divide [its] members . . . into . . . divisions, each to consist of not less than three members. . . .” 48 Stat. 1068; Act To Provide for the Termination of Federal Control of Railroads, ch. 91, § 431, 41 Stat. 492. See *Eastland Co. v. FCC*, 92 F.2d 467, 469 (D.C. Cir. 1937).

n.6 (2d Cir. 1981) (recognizing Congress' purpose "to enable the Board to handle an increasing caseload more efficiently"). The Conference Committee accepted, without change, the Senate bill's delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members.<sup>18</sup>

Despite having only two additional members, rather than four as proposed by the Senate, the new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee created by Title IV of the Taft-Hartley Act to study labor relations issues<sup>19</sup> reported to Congress the following year:

Section 3(a) of the [A]ct increased the membership of the Board from three to five members, and authorized it to delegate its powers to any three of such 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.

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<sup>18</sup> 61 Stat. 136, 139 (1947), *1 Leg. Hist. 1947*, at 4-5; H.R. Conf. Rep. No. 80-510, at 36-37 (1947), *1 Leg. Hist. 1947*, at 540-41.

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

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948).<sup>20</sup> In this way, the Board was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.<sup>21</sup>

In sum, by authorizing the Board to delegate its powers to a group of three members, two of whom constitute a quorum, Congress enabled the Board to increase its casehandling capacity by operating in groups identical to the original three-member Board. In practical terms, the Act's two-member quorum provision authorized the Board's new three-member groups to function as the original three-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 eliminated that quorum provision in 1947, when it enacted comprehensive amendments to the Act.

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<sup>20</sup> See also *Labor-Management Relations: Hearings Before J. Comm. on Labor-Management Relations*, 80th Cong. Pt. 2 at 1123 (statement of Paul M. Herzog, Chairman, NLRB) (reporting that “[o]ver 85 percent of the cases decided by the Board in the past 3 months have been handled by rotating panels of 3 Board members” and that the panel system “has added greatly to the Board’s productivity”).

<sup>21</sup> The Board continues to decide the overwhelming majority of its cases by means of these three-member panels. See *Thirteenth Annual Report of the NLRB (1948)*, at 8-9; *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the H. Comm. on Gov’t Operations*, 100th Cong. 45-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman James M. Stephens’ statement) (“*1988 Oversight Hearings*”).

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. Construing Section 3(b) in Accord with Its Plain Meaning Furthers the Act's Purpose**

As shown, in anticipation of the expiration of the recess appointments of Members Kirsanow and Walsh, the Board delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers. In so doing, the Board acted to ensure that it could continue to issue decisions and fulfill its agency mission through the use of the two-member quorum. The NLRA was designed to avoid "industrial strife," 29 U.S.C. § 151, and an interpretation of Section 3(b) that would allow the Board to continue functioning under the present circumstances would give effect both to the plain language of the Act and its purpose.

As the First Circuit observed, courts have upheld similar actions taken by federal agencies to permit the agency to continue to function despite vacancies. *See Northeastern Land Servs.*, 2009 WL 638248, at \*5. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996), after the five-member Securities and Exchange Commission ("the SEC") had suffered two vacancies, the remaining three sitting members promulgated a new quorum rule so the agency could continue to function if it had only two members. *Id.* at 582 & n.3. In upholding

both the rule and a subsequent decision issued by a two-member quorum of the SEC, the D.C. Circuit declared the rule “prudent,” because “at the time it was promulgated the [SEC] consisted of only three members and was contemplating the prospect it might be reduced to two.” *Id.* at 582 n.3. The statutory mechanism used by the Board is different, but the result is the same.

Likewise, in *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335 (D.C. Cir. 1983), the D.C. Circuit upheld the delegation of powers by the two sitting members of the three-member National Mediation Board (“the NMB”) to one member, despite the fact that one of the two delegating members resigned “later that day,” leaving a single member to conduct agency business. The court reasoned that if the NMB “can use its authority to delegate in order to operate more efficiently, then *a fortiori* [it] can use [that] authority in order to continue to operate when it otherwise would be disabled.” *Id.* at 1340 n.26. Similarly, the Board properly relied on the combination of its delegation, vacancy, and quorum provisions to ensure that it would continue to operate despite upcoming vacancies.

To be sure, *Railroad Yardmasters* is distinguishable, but the critical distinction points directly to the greater strength of the Board’s case. In *Railroad Yardmasters*, the D.C. Circuit faced the question whether an agency that acted principally in a non-adjudicative capacity could continue to function when its membership fell short of the quorum required by its authorizing statute. *See* 721

F.2d at 1341-42. That problem is not presented here. Here, unlike *Railroad Yardmasters*, the statutory requirements for adjudication are satisfied, because Section 3(b) expressly provides that two members of a properly-constituted, three-member group is a quorum. In contrast to the one-member problem at issue in *Railroad Yardmasters*, the presence of the Board quorum that adjudicated this case “is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.” *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (quoting Robert’s Rules of Order 3, p. 16 (1970)).

**E. 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.

Contrary to the Union’s contention (Br 6), Member Kirsanow’s departure did not render the three-member group “defunct.” Under well-settled principles of administrative law, the delegation to the group of Members Liebman, Schaumber, and Kirsanow survived Member Kirsanow’s departure. “Institutional delegations of power are not affected by changes in personnel, but rather continue in effect as

long as the institution remains in existence and the delegation is not revoked or altered.” *Railroad Yardmasters*, 721 F.2d at 1343. Indeed, as courts have agreed, “[a]ny other general rule would impose an undue burden on the administrative process.” *Donovan v. National Bank of Alaska*, 696 F.2d 678, 682-83 (9th Cir. 1983) (quoting *United States v. Wyder*, 674 F.2d 224, 227 (4th Cir. 1982), and applying the rule that administrative acts continue in effect until revoked or altered). Thus, the Board’s December 28, 2007 delegation of powers continued in full force.

Further, the conclusion that a vacancy in the three-member group does not disable the remaining members from acting as the Board, as long as the statutory two-member quorum requirement is met, is congruent with common-law quorum rules applicable to public administrative entities. There is no doubt that such common-law principles are relevant to construing the Act’s quorum and vacancy provisions. Thus, in *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183-86 (1967), the Supreme Court recognized that Congress enacted statutes creating administrative agencies against the backdrop of common-law quorum rules applicable to public bodies, and indeed, wrote common-law rules into the enabling statutes of several

agencies, including the Board. *Id.* at 186 (also identifying the Interstate Commerce Commission).<sup>22</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 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

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<sup>22</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. *See also United States v. Ballin*, 144 U.S. 1, 6 (1892) (“the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body”).

quorum of the five remaining members). *See also Lee v. Board of Educ. of the City of Bristol*, 181 Conn. 69, 83-84, 434 A.2d 333, 341 (1980) (where 1 vacancy existed on 6-member board, 3 members could hold hearing as a quorum because they were a majority of the 5 seated members); *State v. Orr*, 61 Ohio St. 384, 56 N.E. 14 (1899) (where 1 vacancy existed on 10-member city council, and statute defined quorum as a majority of all the members, 5 members constituted a quorum because they were a majority of the 9 seated members).<sup>23</sup>

That principle is reflected in several court decisions involving federal agencies, which recognize, in a variety of statutory contexts, that decisionmaking by a minority of an agency's total membership is allowable under that agency's authorizing statute. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 n. 2 (D.C. Cir. 1996), the court observed that the underlying common-law rule likely permits "a quorum made up of a majority of those members of a body *in office* at the time." With this common-law principle as a backdrop, the court held that, in the absence of any countermanding provision in its authorizing statute, the SEC lawfully promulgated a two-member quorum rule that would enable the

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<sup>23</sup> A related common-law rule is the principle that when the law requires that a measure can be passed only by the vote of a certain proportion of the body, that proportion is measured against the number of members of the body who are seated at the time the measure is passed, unless a statutory provision indicates otherwise. *See Peterson v. Hoppe*, 194 Minn. 186, 191, 260 N.W. 215, 218 (1935); *Board of Commissioners of Town of Salem v. Wachovia Loan & Trust Co.*, 143 N.C. 110, 55 S.E. 442, 443-44 (1906).

commission to issue decisions and orders when only two of its five authorized seats were filled. *Id.* at 582.

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 decisionmaking. There, the court held that when only 6 of the 11 seats on the Interstate Commerce Commission were filled, 5 commissioners—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.

Finally, in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), the D.C. Circuit recognized that the enabling statute of the ICC not only permitted that agency to “carry out its duties in [d]ivisions consisting of three [c]ommissioners,” but also provided that “a majority of a [d]ivision is a quorum for the transaction of business.” *Id.* at 367 n.7. Based on that provision (which is analogous to the two-member quorum provision in the NLRA’s Section 3(b) (see above, p. 20 n.17)), the D.C. Circuit held that an ICC decision participated in and issued by only two of the three commissioners in a division was valid. *Id.*

Construing Section 3(b) of the NLRA to permit the two-member quorum to continue to exercise the Board’s powers that were properly delegated to the three-

member group is consistent with the common law and court decisions reflecting that common law in the context of federal administrative agencies. The plain language of Section 3(b)—which provides for a two-member quorum as an exception to the three-member quorum provision where the Board’s powers have been delegated to a three-member group—expresses the same common law principle reflected in the above SEC and ICC cases that, when faced with vacancies, public bodies can function through quorums that are less than a majority of the authorized membership of the public body. Accordingly, Section 3(b) should be read in the same manner as the statutes in issue in those cases.

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

The Union primarily contends (Br 7-8) that the federal law governing the composition of three-judge appellate panels (28 U.S.C. § 46) should be imported to the NLRA to control the Board’s exercise of its authority to delegate powers to three-member groups. It claims (Br 7) that 28 U.S.C. § 46(b) and Section 3(b) of the Act are “substantially similar” in structure and intent. To the contrary, the two statutes have sharp distinctions, and application of the federal judicial statute to the Board would improperly override express congressional intent and interfere with the option Congress provided for the Board to fulfill its agency mission through a properly-constituted two-member quorum.

The Union fails to grasp that Section 3(b) does not limit the Board's delegation powers to case assignment. Under the express terms of Section 3(b), the Board may delegate "any or all of the powers which it may itself exercise" to a 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. § 156).

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

Moreover, Section 3(b), unlike 28 U.S.C. § 46(b), does not contain an express requirement that particular cases be assigned to particular groups or panels

of Board members. Therefore, a delegation of “all the Board’s powers” to a three-member group means that all cases that are pending or may come before the Board are before the group. Thus, the two-member quorum retains the authority to consider and decide those cases, including the authority to issue the decision in this case.<sup>24</sup>

The Union’s position is not furthered by its reliance (Br 7) on *Nguyen v. United States*, 539 U.S. 69 (2003). Instead, that case calls attention to additional reasons why construing Section 3(b) of the NLRA to incorporate restrictions found in federal judicial statutes would constitute legal error. *Nguyen* illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b) of the NLRA. In that case, the Court held that the judicial panel statute requires that a case must be assigned to three Article III judges, 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

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<sup>24</sup> There is no indication in the legislative history of Section 3(b) that Congress wanted the Board to act more like the Courts of Appeals with regard to case assignment. Rather, as noted above, at p. 20 n.17, the delegation provisions and case processing practices of the ICC and the FCC appear to be the model that Congress had in mind in crafting Section 3(b). Congress’ concern that the Board act more like a court was expressed in different provisions, such as Section 4 of the NLRA (29 U.S.C. § 154), which abolished the centralized “Review Section” that the Board had relied upon to review transcripts and prepare drafts and limited the individual Board members to using legal assistants employed on their staffs to perform those functions. *See* S. Rep. No. 80-105, at 8-10, *1 Leg. Hist. 1947*, at 414-16.

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. In so holding, the Court took into consideration that Congress amended the judicial panel statute in 1982 “in part ‘to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels.’” 539 U.S. at 83 (quoting *Murray*, 35 F.3d at 47, citing Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9). No such history underlies Section 3(b). *See* above, pp. 19-23. Moreover, the three-member group of Board members to which the Board delegated all of its powers *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. 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. That is the situation here. *Cf. United States v. Desimone*, 140 F.3d 457, 458-59 (2d Cir. 1998) (decision by two judges, as quorum of panel properly constituted at its inception, after death of third panel member held valid).<sup>25</sup>

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<sup>25</sup> Also distinct is the *Nguyen* Court’s concern that the deliberations of the two-judge quorum were tainted by the participation of a judge not qualified to hear the case (see 539 U.S. at 82-83), a consideration wholly inapplicable here.

*Ayrshire Collieries Corp. v. United States*, 331 U.S. 132 (1947), also cited by the Union (Br 6), undermines its argument that the Board should be subject to federal law governing the composition of three-judge appellate panels. In *Ayrshire*, the Court held that a full complement of three judges was necessary to enjoin the enforcement of ICC orders because Congress, in the Urgent Deficiencies Act, had specifically directed that such cases “shall be heard and determined by three judges.” 331 U.S. at 137. The Court concluded that Congress “meant exactly what it said” (*id.*), finding it “significant that this Act makes no provision for a quorum of less than three judges.” *Id.* at 138. By contrast, in enacting Section 3(b) of the NLRA, Congress specifically provided for a quorum of two members, and did not provide that if the Board delegates all its powers to a three-member group, all three members must participate in a decision.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE UNION VIOLATED SECTION 8(b)(2) AND (1)(A) OF THE ACT BY CAUSING THE COMPANY TO REDUCE THE SENIORITY OF EMPLOYEE KIRK RAMMAGE, THEREBY RESULTING IN RAMMAGE’S BEING BUMPED FROM HIS JOB AND TRANSFERRED TO A JOB AT A DISTANT FACILITY, BECAUSE HE WAS NOT PREVIOUSLY A MEMBER OF OR REPRESENTED BY THE UNION**

**A. Applicable Principles**

Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) makes it an unfair labor practice for a union to “restrain or coerce” employees in the exercise of rights

guaranteed by Section 7 (29 U.S.C. § 157), including the right to refrain from union membership or representation. Section 8(b)(2) (29 U.S.C. § 158(b)(2)) makes it unlawful for a union to “cause or attempt to cause” an employer to discriminate against an employee in violation of Section 8(a)(3) (29 U.S.C. § 158(a)(3)), which in turn prohibits discrimination “in regard to hire or tenure of employment or any term or condition of employment” that encourages or discourages union membership.

Section 8(a)(3) does permit a union and an employer to agree to require, as a condition of continued employment after 30 days, to maintain union “membership” to the extent of paying required dues and initiation fees.<sup>26</sup> They cannot, however, permit nonmembers to remain employed and discriminate against them with respect to other terms and condition of employment, such as seniority. *See Radio Officers v. NLRB*, 347 U.S. 17, 26-27, 42 (1954) (reduction of employee’s seniority because he was late in paying union dues); *cf. NLRB v. American Can Co.*, 658 F.2d 746, 753-57 (10th Cir. 1981) (granting superseniority to union

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<sup>26</sup> The Hostess/Wonder Bread contract had a union-security clause. (GCX 3, p.1, Article 1.) However, the Board noted (A 2 n.7) that the clause only required employees who were members of the Union on the effective date of the contract to maintain such membership, and that those who were not already members, including Rammage, were therefore under no obligation to join the Union.

Oklahoma voters subsequently added a “right-to-work” provision to the state constitution. However, the Board’s decision was not in any way based on that provision.

officers). Because encouragement of union membership is a natural and foreseeable consequence of such discrimination, both the union and the employer must be presumed to have intended such encouragement. *See Radio Officers v. NLRB*, 347 U.S. at 52.

### **B. The Union Caused the Company To Discriminate Against Rammage**

The facts in this case are both undisputed and uncomplicated. When the Company decided to have all of its sales representatives sell and deliver all of its products, all of the former Dolly Madison sales representatives were added to the existing bargaining unit of Hostess/Wonder Bread sales representatives. The Company proposed the same treatment for all of the new unit employees: calculating their seniority on the basis of time previously worked for the Company. (Tr 137.) However, the Union successfully insisted that such “dovetailing” of seniority be limited to the Dolly Madison sales representatives it had previously represented, and that Kirk Rammage, the one Dolly Madison sales representative it had not previously represented, but otherwise indistinguishable from the others, be treated as a newly hired employee for seniority purposes. (Tr 137-138.) As a result, Rammage, who had worked for the Company for nearly 15 years (Tr 42) and was its best Ponca City sales representative (Tr 99, 144), was bumped from his job by an employee with 5 years less service with the Company. (GCX 17.) These facts fit the classic definition of discrimination: treating like cases differently. *See*

*Four B Corp. v. NLRB*, 163 F.3d 1177, 1183 (10th Cir. 1998). The tying of seniority to union status plainly encourages union membership. *See Radio Officers v. NLRB*, 347 U.S. 17, 26-27, 42 (1954) (discrimination against Boston); *NLRB v. American Can Co.*, 658 F. 2d 746, 754-57 (10th Cir. 1981).

Contrary to the Union's contention (Br 5), the Board's decision does not hold that the Union was obligated to favor Rammage over the former Dolly Madison workers, but only that it was obligated to treat him the same way--that is, to calculate his seniority in the same manner. That such "dovetailing" would have made Rammage the most senior unit employee is coincidental. What the Act requires is the use of union-neutral criteria in determining terms and conditions of employment, including seniority. Instead, as the Board found (A 3), the Union "treated Rammage differently and unfavorably because he was not previously represented." This it could not lawfully do.

Also contrary to the Union's contention (Br 5, 8-9), this is not a case of its preferring employees within a bargaining unit over those outside the unit. Prior to the Union's insistence on "end tailing" Rammage, it had already agreed with the Company that *all* former Dolly Madison sales representatives, including Rammage, would henceforth be included in the Hostess/Wonder Bread bargaining unit. (Tr 34, 151.) Thus, as the Board found (A 3), there was no difference between Rammage and the other former Dolly Madison sales representatives. All

were now in the same bargaining unit, and the Union had the same obligation to represent all of them, without discriminating against any on the basis of prior union status.

The Board, with the approval of two courts of appeals, has consistently reached the same conclusion. In *Stage Employees Local 659 (MPO-TV)*, 197 NLRB 1187, 1188-91 (1972), *enforced mem.*, 479 F.2d 450 (D.C. Cir. 1973) (“*MPO*”), the union referred cameramen for employment from a roster it maintained. In determining whether an employee was eligible for placement on the roster, only his work experience with employers having a contract with the union was considered. The union refused to allow two employers with which it had contracts to hire cameramen who had extensive experience, but with employers who did not have contracts with the union. The Board found that the union’s actions were unlawful, as they “penalize[d] employees for having exercised their statutory right to refrain from bargaining collectively through [the union] in the past, while rewarding those employees who have chosen to work in units represented by [the union].” 197 NLRB at 1189.<sup>27</sup> The Board also

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<sup>27</sup> The Board distinguished *Teamsters Local 729*, 185 NLRB 631 (1970), upholding the “end tailing” of seniority of employees newly transferred into a bargaining unit, on the ground that the affected employees in *MPO* were denied employment altogether. 197 NLRB at 1189. We note, in addition, that *all* the transferred employees in *Teamsters Local 729* had previously been represented by the same local; no distinction was made between previously represented and previously unrepresented employees.

concluded that, since the union made other employees aware of its discriminatory conduct, that conduct “created an impact on other employees, the natural consequence of which was to restrain and coerce them in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act.” *Id.* at 1191. The D.C. Circuit enforced the Board’s order in an unpublished opinion.

In *MPO*, 197 NLRB at 1189 n.8, the Board cited *Teamsters Local 480 (Hilton D. Wall)*, 167 NLRB 920 (1967), *enforced*, 409 F.2d 610 (6th Cir. 1969). The union there “endtailed” the seniority of an employee who had previously worked for a newly-acquired employer that had no union contract, but indicated that it would have “dovetailed” his seniority if he had possessed seniority rights under a collective-bargaining contract. The Board found this unlawful, noting that “the existence of a collective-bargaining contract connotes representation by a labor organization” (167 NLRB at 923) and concluding that the “end tailing” was therefore motivated by the employee’s lack of prior union representation. 167 NLRB at 920 n.1, 923-24. The Sixth Circuit upheld the Board’s findings as supported by substantial evidence. *NLRB v. Teamsters Local 480*, 409 F.2d 610, 610-11 (6th Cir. 1969).

The Union relies (Br 3, 8-9) on *NLRB v. Whiting Milk Corp.*, 342 F.2d 8 (1st Cir. 1965). The employer there acquired a competitor that had five facilities. Four of them were covered by the same multiemployer contract applicable to the

acquiring employer, and, by the terms of that contract, the seniority of their employees was “dovetailed.” However, the fifth plant had been nonunion, and its employees were given seniority only from the date of acquisition and were subsequently laid off because of this “end tailing.” A divided court reversed the Board’s finding of a violation. The majority held that seniority was not a statutorily protected term and condition of employment of the formerly unrepresented employees, who could obtain seniority rights only by contract; that they were free to bargain individually with their new employer for seniority rights; and that it was not unlawful discrimination for the union to bargain for benefits for all employees in the bargaining unit it represented, while declining to bargain for similar benefits for employees outside the unit. 342 F.2d at 10-11. The dissent viewed the difference in seniority, not as a permissible distinction based on membership in the bargaining unit, but as an impermissible distinction among unit employees based on prior union membership. *Id.* at 11-12.

As the Board noted here (A 3 & nn. 9-11), it has consistently declined to follow the First Circuit’s holding in *Whiting*. See *MPO*, 197 NLRB at 1189 n.8; *Teamsters Local 480*, 167 NLRB at 924 n.12; *Woodlawn Farm Dairy Co.*, 162 NLRB 48, 50 n.2 (1966). For the following reasons, this Court should do likewise.

The distinction the Union drew in this case was not between unit and nonunit employees. As representatives of both the Company and the Union

testified (Tr 125-27, 132, 141-42, 151-53), once the separate bargaining units were merged, Rammage was part of the combined unit and was covered by the collective-bargaining agreement.<sup>28</sup> He was no different in this respect from the other former Dolly Madison sales representatives. Nor is this a case where a union distinguishes between employees who have always been part of a particular bargaining unit and employees joining that unit for the first time. All of the former Dolly Madison sales representatives fell into the latter category. Rammage differed from the others only in not having previously been a member of, or represented by, the Union. Contrary to the First Circuit's view, it does not follow that because a union is free to distinguish between unit and nonunit employees, or between old and new unit employees, it is also free to pick and choose among new unit employees on the basis of their prior union status. Even if the Union could lawfully have "endtailed" the seniority of all former Dolly Madison sales representatives, it does not follow that it was entitled to single out one of them for "endtailing" on that basis.

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<sup>28</sup> This was also the case in *Whiting*. As the Board's opinion there makes clear, after the acquisition of one employer by another, the formerly unrepresented employees of the acquired company were treated as an accretion to the existing unit of employees of the acquiring company. *See Whiting Milk Corp.*, 145 NLRB 1035, 1036 (1964). The First Circuit was therefore wrong in viewing them as nonunit employees.

In addition, contrary to the First Circuit's assumption in *Whiting*, it is settled that seniority is a term and condition of employment and is therefore a mandatory subject of bargaining within the meaning of Section 8(d) of the Act (29 U.S.C. § 158(d)). See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir. 1990). Thus, once Rammage was included in the combined bargaining unit, the Union was his exclusive bargaining representative, and the Company could not deal directly with him concerning seniority. See *Facet Enterprises, Inc. v. NLRB*, 907 F.2d at 969. Accordingly, the First Circuit's suggested alternative to a requirement that employees in Rammage's position receive nondiscriminatory treatment is itself inconsistent with the Act.

The Union also relies (Br 3, 8) on *Riser Foods, Inc.*, 309 NLRB 635 (1992). As the Board here noted (A 3), its opinion in *Riser* did not mention or purport to overrule its prior decision in *Whiting*. In *Riser*, the General Counsel conceded that "a union may lawfully insist on the endtailing of new bargaining unit employees' seniority when it is based on unit rather than union considerations." (309 NLRB at 636.) However, he alleged that the union, by "dovetailing" the seniority of new unit employees whom it had previously represented but insisting on "endtailing" the seniority of other new unit employees previously represented by another local, had breached its duty of fair representation towards the latter. The Board found

that the union's insistence on "end tailing" commenced prior to the inclusion of the "endtailed" employees in the bargaining unit. Accordingly, the Board found, the union "refused to dovetail the . . . employees' seniority at a time when '[it] owed no statutory collective bargaining duty of fair representation to any of [them].'" 309 NLRB at 636.<sup>29</sup>

The rationale of *Riser* is inapplicable here, since, as shown above, Ramage was already in the bargaining unit when the Union insisted that his seniority be "endtailed." Moreover, as the Board pointed out (A 3), this case, unlike *Riser*, does not involve an allegation of a breach of the duty of fair representation. Rather, the General Counsel alleged discrimination, pure and simple. The obligation not to discriminate on the basis of union status, unlike the duty of fair representation, is owed to all employees, whether or not they are in a particular bargaining unit. *See, e.g., Allied Trades Council*, 342 NLRB 1010, 1012-13 (2004) (attempt to apply contract with union-security clause to nonunit employees constitutes attempted causation of discrimination in violation of Section 8(b)(2)).

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<sup>29</sup> The Board in *Riser* relied heavily on the fact that the "dovetailed" employees had previously been covered by contracts with "successorship" clauses (*cf. Lone Star Steel Co. v. NLRB*, 639 F.2d 545, 553-56 (10th Cir. 1980)), requiring any successor employer to "dovetail" their seniority, while the "endtailed" employees had no such provisions in their prior contracts. 309 NLRB at 636. Here, nothing in the Dolly Madison or Hostess/Wonder Bread contracts (GCX 3, 4) required the "dovetailing" of seniority in the event of a merger of bargaining units.

**CONCLUSION**

For the foregoing reasons, the Board respectfully submits that the Union's petition for review should be denied and that the Board's Order against the Union should be enforced in full.

s/Robert J. Englehart  
ROBERT J. ENGLEHART  
*Supervisory Attorney*

s/David A. Fleischer  
DAVID A. FLEISCHER  
*Senior Attorney*

National Labor Relations Board  
1099 14th Street, N.W.  
Washington, DC 20570  
(202) 273-2978  
(202) 273-2987

RONALD MEISBURG  
*General Counsel*

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

JOHN H. FERGUSON  
*Associate General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

*National Labor Relations Board*  
April 2009

h:TeamstersLocalUnion523(InterstateBakeries)-brief-redf

## STATEMENT OF RELATED CASES

This case has not previously been before this Court or any other court. In addition to the Union's petition for review and the Board's cross-application for enforcement, the Board's application for enforcement of its order in this case against Interstate Bakeries Corporation was before this Court as No. 08-9578. That proceeding was dismissed without prejudice on the Board's motion.

One issue presented in this case--the power of a two-member quorum of a properly constituted three-member group to issue Board decisions--has been raised in other courts in the cases listed below.

1. *Northeastern Land Services, Ltd. v. NLRB*, No. 08-1878 (1st Cir.)

Opinion upholding Board's authority issued March 13, 2009.

2. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162, 08-1214 (D.C. Cir.) Oral argument held December 4, 2008.

3. *Snell Island SNF v. NLRB*, Nos. 08-3822, 08-4336 (2d Cir.) Brief filed; oral argument scheduled for April 15, 2009.

4. *New Process Steel v. NLRB*, Nos. 08-3517 et al. (7th Cir.) Briefs filed; oral argument scheduled for April 10, 2009.

5. *NLRB v. Whitesell Corp.*, No. 08-3291 (8th Cir.) Briefs filed.

**STATEMENT REGARDING ORAL ARGUMENT**

The Board requests oral argument because this case involves two significant legal issues of first impression in this Court. The Union's challenge to the propriety of the issuance of the Board's decision by a two-member quorum of a properly constituted three-member group calls into question the validity of more than 350 decisions issued by the Board during the past 15 months. The Union's challenge to the merits of the Board's decision raises a legal issue on which decisions of other courts of appeals are in conflict.

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

TEAMSTERS LOCAL UNION NO. 523,	:	
AFFILIATED WITH THE INTERNATIONAL	:	
BROTHERHOOD OF TEAMSTERS	:	
	:	
Petitioner/Cross-Respondent	:	Nos. 08-9568
	:	08-9577
	:	
v.	:	Board Case No.
	:	17-CB-6146
NATIONAL LABOR RELATIONS BOARD	:	
	:	
Respondent/Cross-Petitioner	:	
	:	
and	:	
	:	
KIRK RAMMAGE	:	
	:	
Intervenor	:	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,171 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

**COMPLIANCE WITH CONTENT AND  
VIRUS SCAN REQUIREMENTS**

Pursuant to Local Rule 28A (d), the Board certifies that the diskette containing its brief in the above-captioned case that was sent by first-class mail to the Court is identical to the hard copy of the Board's brief filed with the Court and served on petitioner, and was scanned for viruses using Symantec Antivirus

Corporate Edition, program version 10.0.2.2000 (1/21/2009 rev. 3), and according to that program, is free of viruses.

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 1st day of April 2009

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

TEAMSTERS LOCAL UNION NO. 523,	)	
AFFILIATED WITH THE INTERNATIONAL	)	
BROTHERHOOD OF TEAMSTERS	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 08-9568
	)	08-9577
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	17-CB-6146
	)	
and	)	
	)	
KIRK RAMMAGE	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on April 1, 2009, I electronically filed the foregoing brief with the clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Steven R. Hickman, Esq.  
Frasier, Frasier & Hickman, LLP  
1700 Southwest Boulevard  
Tulsa, OK 74107

John C. Scully, Esq.  
National Right to Work Legal  
Defense Foundation  
8001 Braddock Road, Suite 600  
Springfield, VA 22160

Gregory D. Ballew, Esq.  
Fisher & Phillips, LLP  
104 West 9th Street, Suite 400  
Kansas City, MO 64105

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 1st day of April, 2009