No. 12-5250

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Plaintiffs-Appellees

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
C.A. No. 11-cv-02262-JEB

BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Board
November 16, 2012

Certificate as to Parties, Rulings, and Related Cases

1. The appellant (defendant below) is the National Labor Relations Board. The appellees (plaintiffs below) are the Chamber of Commerce of the United States of America, and the Coalition for a Democratic Workplace. Appearing as amici in the district court on behalf of the plaintiffs were the American Hospital Association, the American Society for Healthcare Human Resources Administration, the American Organization of Nurse Executives, the HR Policy Association, and the Society for Human Resource Management.

2. The rulings under review are the entry of summary judgment against the Board on May 14, 2012, JA 300, 2012 WL 1664028, and the denial of reconsideration on July 27, 2012, JA 374, (no official citation available). Deciding the case in district court was the Honorable Judge James E. Boasberg of the United States District Court for the District of Columbia

3. This case has not previously been before this or any other court, and there are no related cases at this time.

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Chamber — Plaintiffs/Appellees Chamber of Commerce of the United States and Coalition for a Democratic Workplace

NLRB or "the Board" — Defendant/Appellant National Labor Relations Board

JA — Citations to the Joint Appendix

Text of Pertinent Statute

National Labor Relations Act, Section 3(b), 29 U.S.C. § 153(b).

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. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filling of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. 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. The Board shall have an official seal which shall be judicially noticed.

Jurisdiction

This is an appeal from a decision of the United States District Court for the District of Columbia, over which this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court had jurisdiction under 28 U.S.C. § 1331. The Chamber alleged that the final rule issued by the Board with respect to election procedures violated the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, the Administrative Procedure Act, 5 U.S.C. § 702, and the Regulatory Flexibility Act. 5 U.S.C. § 611. This appeal was timely filed from a final order or judgment that disposes of all parties' claims. On May 14, 2012, the district court entered summary judgment in favor of appellees. JA 5-6. On June 11, 2012, the Board timely moved for reconsideration under Rule 59(e). *Id.* On July 27, 2012, the district court denied reconsideration, and on August 7, 2012, the Board timely appealed. *Id.*

Issue Presented

Whether a three-member quorum of the National Labor Relations Board issued the final rule.

Statement of the Case

The final rule was published on December 22, 2011, 76 Fed. Reg. 80138, JA 155 *et seq.*, and the Chamber sued. JA 121. Among a host of other procedural and substantive issues raised in its motion for summary judgment, the Chamber argued

that the rule was issued without a quorum because, while two members of the Board voted in favor of the rule, the third member did not. JA 231-38; *see* JA 215. In response, the Board provided an affidavit from the third member, Member Brian E. Hayes, which attested that Member Hayes had advised his colleagues on December 15, 2011, the day before the rule was sent for publication, that he would not attach a dissenting statement to the final rule but would add a dissent later. JA 247-9, ¶ 9; *see* JA 239-45. The sole dispute presented here is whether Member Hayes's participation was sufficient to satisfy the three-member quorum requirement of Section 3(b) of the NLRA, 29 U.S.C. § 153(b).

On May 14, 2012, the district court issued a decision setting aside the Board's rule on the ground that a quorum had not voted on the rule. JA 300-318. The court acknowledged that abstaining voters count in the quorum, but concluded that Member Hayes had been "absent" on December 16, 2011, and that the events of December 15, 2011, did not matter in this determination. JA 313.

On June 11, 2012, the Board timely moved for reconsideration under Rule 59(e) because, even under the district court's own analysis, there was a quorum. JA 320-333. In support, the Board provided a further affidavit establishing that all three members, including Member Hayes, were present in the electronic voting room at the time the vote was held on the final text of the rule. JA 334-342.

On July 27, 2012 the district court denied reconsideration, and on August 7, 2012, the Board timely appealed. JA 374-384; 386-87.

Statement of Facts

On June 22, 2011, the Board issued a Notice of Proposed Rulemaking by a 3-1 vote, with Member Hayes dissenting. 76 Fed. Reg. 36812; JA 21 *et seq*. The proposal concerned the NLRB's investigatory procedures under Section 9, which provides for employee union representation elections. The Board proposed twenty changes to improve the efficiency and timeliness of these investigations. *See* 76 Fed. Reg. 80139-40; JA 156-157. Among other things, these proposals would focus the investigation on the relevant issues, and limit interlocutory review to extraordinary cases.

The Board received 65,958 written comments, tens of thousands supporting the proposals and tens of thousands opposing them. JA 159. All four sitting Board members attended two full days of hearings and asked questions of the approximately 66 people who testified, resulting in 438 transcript pages of oral testimony. JA 160-61.

During the Board's deliberations, Chairman Wilma Liebman's term expired, and the Board was reduced to three members: Mark Gaston Pearce, who was named Chairman, and Members Brian E. Hayes and Craig Becker. *See* JA 163-64. Member Becker was a recess appointee whose appointment would expire at the

end of the 1st session of the 112th Congress—the precise time could not be known in advance.[1] *Id.* The departure of Member Becker would leave the Board with only two members, a number insufficient for the Board to exercise its full powers. *See New Process Steel v. NLRB*, 130 S.Ct. 2635, 2640 (2010). Accordingly, if the three-member Board was to complete the rulemaking process commenced in June 2011, it would have to do so before the end of the 1st session of the 112th Congress. 76 Fed. Reg. at 80146 n.23; JA 163.

On November 30, 2011, the Board held a public meeting for deliberations. JA 63-115. At the meeting, the Board voted on a resolution expressly spelling out eight specific amendments that would be made by the final rule.[2] JA 61-62. Member Hayes attended this meeting and voted against the resolution. JA 102. He explained that "[s]o strong is my belief and concern about proceeding on a final rule in the absence of three affirmative votes, and in the wake of what I continue to

[1] Consistent with section 2 of the Twentieth Amendment to the United States Constitution, a session of Congress ends by operation of law at noon of January 3 of each year unless Congress adjourns *sine die* at an earlier date. *See* General Accounting Office, *Matter of Commodities Futures Trading Commission*, B-288581, at 2–3 (Nov. 19, 2001) *available at* http://www.gao.gov/decisions/appro/288581.pdf. Such early adjournments are not uncommon. For example, the 2d Session of the 109th Congress ended December 9, 2006 and the 2d Session of the 111th Congress ended on December 22. 2010. *See Congressional Directory, Sessions of Congress, 1st to 112th Congresses, 1789-2011* at 536-38, *available at* http://www.senate.gov/reference/resources/pdf/congresses112.pdf.

[2] The Board continued deliberations on the 12 other proposals. At this time, the Board remains in deliberation on those proposals.

believe is an inadequate and flawed process, that I considered resigning in an effort to render such concerns moot." JA 91. But he rejected that resignation option, stating:

> First, it is not in my nature to be obstructionist. Since I arrived on the Board, I participated in the expeditious processing of cases in which I strongly opposed the majority's position. . . . Most importantly, I believe resignation would cause the very same harm and collateral damage to the reputation of this agency, and to the interests of its constituents, as would the issuance of a controversial rule without three affirmative votes and in the wake of a flawed decisional process. I cannot be credibly critical of the latter, and myself engage in the former. . . .
>
> To the extent [there are court challenges,] I believe the focus must be on the substance and procedure of this rulemaking and not on [such] other matters.

JA 91-92.

The full text of the preamble and final rule was then drafted and circulated on Friday, December 9. JA 247 ¶ 4. Because of concern that the three-member Board act before the end of the 1st session of the 112th Congress reduced the Board to only two members, the Chairman specified that he intended to request a Board vote on the document as soon as it was placed in final form, which he anticipated would be the next week, no later than Friday, December 16. *Id.*

On December 13, the Chairman uploaded the rule into the Board's electronic voting software. JA 247 ¶ 6. This action calls for a vote. JA 247 ¶ 11.

On December 14, the Chairman circulated by email a draft order directing the Solicitor to publish the final rule in the Federal Register "immediately upon approval of a final rule by a majority of the Board." JA 247-8 ¶ 7; JA 117-18. The Order would "constitute the final action of the Board in this matter." JA 118. The Order also provided that any dissenting statements could also be published "provided, that no dissent shall be published that has not been circulated in draft at least 30 days before the effective date of the final rule." JA 117-18. The effective date of the rule was April 30, 2012. JA 155.

All three members voted on this Order by email on December 14 or 15, with Chairman Pearce and Member Becker voting for it and Member Hayes voting against it. JA 248 ¶ 8. Member Hayes explained that he opposed "proceeding on a divided 2-1 basis" with any rule at that time. *Id.*

In the late afternoon on December 15, Chairman Pearce's staff asked Member Hayes whether he wished to include a dissenting statement in the final rule. JA 248 ¶ 9. Member Hayes responded: "I would not attach any statement to the Final Rule and that, as long as I had the assurance of adding a dissent [later], I could say whatever I needed to say in one document." *Id.* Member Hayes explained "[a]fter I . . . indicated that I would not attach a personal statement to the Final Rule, I gave no thought to whether further action was required of me." JA 248 ¶ 11.

Shortly thereafter, on December 16, the draft rule was updated and approved in the electronic voting system by Member Becker and Chairman Pearce. JA 248 ¶ 10. It was sent to the Federal Register later that day. *Id.* The rule stated that Member Becker and Chairman Pearce voted in favor of the rule, and that Member Hayes "effectively indicated his opposition" to the final rule. The Board explained:

> Although Member Hayes has not yet supplied a dissent or similar statement in connection with the final rule itself, the Board has authorized the publication of such a document in the Federal Register, together with any separate concurring opinion, when they are made available. The Board has delayed the effective date of the final rule so that Member Hayes will have over 90 days after he received a final draft of this final rule to write a dissent and have it published prior to the effective date of the rule. The Board believes that this procedure will provide Member Hayes with a reasonable period of time to express his views in a timely, formal, and public manner. . . . At the same time, under the circumstances involved under this rulemaking, the Board does not believe that it is required, either by law or agency practice, to delay the adoption and publication of a final rule in order to accommodate a dissenting Member.

JA 163-64.[3]

[3] About four months later Member Hayes published his dissent, with a responsive separate statement by Chairman Pearce. JA 272-299.

Summary of Argument

All three members were present and participating in this rulemaking. Member Hayes made his final decision in the late afternoon on December 15, the day before the rule was sent for publication. By email, he informed the other Members that he had decided that he would not attach a dissenting statement to the rule at that time, on the understanding that he could add a dissent after the Rule was published. JA 248 ¶ 9.

This was enough to establish that Member Hayes was present and participated in the issuance of the rule by a three-member quorum of the Board. There was no need for Member Hayes to dissent or vote at that time, because abstainers are also in the quorum. Here, the email on December 15 demonstrates that Member Hayes was abstaining—and abstaining continuously from December 15 until after publication—because he intended to issue his dissenting opinion at a later date. JA 248 ¶ 9.

In these circumstances, the district court erred in holding that Member Hayes is not in the quorum. Though it correctly noted that abstainers count in the quorum, the district court nonetheless held that Member Hayes was not abstaining because he did not cast a vote on December 16 while the other Board Members were voting. This is error.

Member Hayes decided to abstain on December 15. There was no need for him to reaffirm this decision on the following morning when the draft rule was updated and approved by the majority. Nothing in Section 3(b) forbids the Board from identifying abstaining voters by asking them shortly before the vote, rather than during the vote, whether they are abstaining. And, in practical effect, issuing a decision where the dissenter abstains for the present and issues a dissent later is consistent with the practice of courts and other administrative agencies to issue the majority decision while the dissent is in preparation.

Unlike *New Process Steel, LP v. NLRB,* 130 S.Ct. 2635, 2640-41 (2010), three minds were brought to bear on this final rule. Member Hayes effectively indicated that he opposed the rule, explaining his reasons to his colleagues on December 15 and on numerous prior occasions. Given Member Hayes's manifest opposition to any rule's issuing "on a divided 2-1 basis," and his expressed intention to file a dissent later, it is empty formalism to insist that, unless Member Hayes took some further action on December 16 he did not participate in issuing the Rule. JA 248 ¶¶ 8-9.

Moreover, the court erred in denying reconsideration because, even under the district court's erroneous interpretation of the law, a quorum was in fact simultaneously present and participating on December 16 in the electronic voting room. The district court must be reversed.

Argument

A THREE-MEMBER QUORUM OF THE NATIONAL LABOR RELATIONS BOARD ISSUED THE FINAL RULE

Section 3(b) of the NLRA states, in relevant part, that "three members of the Board shall, at all times, constitute a quorum of the Board." The question presented is whether the final rule here was issued by a quorum of the Board. There is no dispute that a majority of the three-member Board affirmatively voted for the rule. There is also no dispute that Member Hayes did not cast a vote before the rule was sent to the Federal Register for publication, but instead notified his colleagues that he would issue a dissenting statement at a later time. As demonstrated below, when Member Hayes actions are considered in context, and in light of the deference owed to the Board's devising procedures for satisfying the three-member quorum requirement, Member Hayes sufficiently participated in the issuance of the final rule. The district court's finding to the contrary was error.

I. Standard of Review

Summary judgment is reviewed de novo. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918-19 (D.C. Cir. 2008). Thus, this Court on review applies the same deference that should have applied in the district court. *Id.* The district court's denial of a motion for reconsideration is reviewed for abuse of discretion. *Id.*

II. The Board is entitled to deference in devising the procedures for satisfying the quorum requirement.

In determining whether the final rule was issued by a quorum of the Board, the starting point is that the Board is entitled to deference in designing appropriate procedures for ensuring that its members participate in its decisions in accordance with Section 3(b)'s three member quorum requirement.

As a general matter, as the district court recognized, JA 310, the Board is owed deference in crafting its internal procedures because "the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments," *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), and "courts are not free to impose upon agencies specific procedural requirements that have no basis in the [law]." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990); *see Nat'l Classification Committee v. United States*, 765 F.2d 1146 (D.C. Cir. 1985); *cf. Chevron USA Inc. v. Nat'l Resources Def. Council, Inc.*, 467 U.S. 837 (1984); 5 U.S.C. § 706(b)(2) (reviewing action "not in accordance with law," or "without observance of procedure required by law").

With respect to the particular issue of the Board's devising procedures adequate to satisfy the Section 3(b)'s three-member quorum requirement, deference is appropriate because Section 3(b) says nothing about the specific

procedures that the Board must follow to ensure that its rules or decisions are issued by a three-member quorum. The details are for the Board to work out, subject to the general requirement that three members must participate in the issuance of the rule or decision. See Black's Law Dictionary 1370 (9th ed.2009) (defining "quorum" as the "minimum number of members ... who must be present for a deliberative assembly to legally transact business"). The Supreme Court has long held that the courts must defer to the decision-making body regarding its method for counting the quorum. *United States v. Ballin*, 144 U.S. 1, 3-6 (1892) (deferring to the House).

These established principles were not applied in the district court's decision, which did not defer to the Board.[4] In taking what it concedes may seem an "unduly technical" approach to analyzing the deliberative process here, JA 301, the district court failed to respect the Board's authority to devise procedures appropriate to the particular situation, where the Board was about to lose a quorum. Instead, the district court imposed voting procedures on the Board which are not required by law.

The district court also failed to give proper deference to the Board Members' own understanding of how the procedures that the Board adopted operated in fact

[4] In a footnote, the district court claimed that the Board had not sought deference under *Chevron USA Inc. v. Nat'l Resources Def. Council, Inc.*, 467 U.S. 837 (1984). JA 311 n.2. The district court overlooked the Board's clear reliance upon *Vermont Yankee* and *Ballin*, which require at least as much deference as *Chevron*.

to ensure that the judgment of all three members was brought to bear on the rule. The procedure used by the Board gave all three members the opportunity to participate, and all three members in fact did participate. That is sufficient under Section 3(b), *Vermont Yankee*, and *Ballin*.

III. Member Hayes participated in the quorum issuing the rule.

"A quorum is the number of members of a larger body that must participate for the valid transaction of business." *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635, 2642 (2010). The district court erred in failing to recognize that Member Hayes participated with the other two Members in this rulemaking. The salient facts, as demonstrated below, are that, although Member Hayes repeatedly expressed his opposition to the rule, he informed the other Board Members by email the day before the final rule was sent for publication that he had decided that he would not attach a dissenting statement to the rule at that time, on the understanding that he could add a dissent after the Rule was published. JA 248 ¶ 9. In the parlance of quorum law, he *abstained* for the present, and dissented later. He therefore was part of the three-member quorum that issued the final rule

A. Member Hayes participated by informing the majority that he would not dissent until after the rule was published.

On November 30, 2011, by a 2-1 vote with Member Hayes dissenting, the Board committed itself to issuing a rule making eight specific changes to its election procedures. JA 61-62, 102, 247 ¶ 3. Over the next few weeks, the majority

engaged in the process of working out the final details of the text. Drafts of the final rule were circulated among all three members on December 9, 12, 13, and 15. JA 247-248. All members knew the rule would be sent for publication the next day, December 16. JA 247-48 ¶¶ 3, 4, 10.

In the late afternoon on December 15, Member Hayes was asked whether he would be issuing a dissenting statement at that time. JA 248 ¶ 9. He responded that he decided that he would not dissent until after the Rule was published. JA 248 ¶ 9. Member Hayes had "notice and the opportunity to act," and abstained for the time being. 2 Am. Jur. 2d Admin. Law § 82. Although he did not vote and circulate a dissent in the Board's electronic voting system, Member Hayes nonetheless participated in the final decision on the rule and effectively communicated to his colleagues that he opposed the rule and would issue a dissent later.

These facts are sufficient to establish that Member Hayes was present and participated in the decision to issue the final rule and is therefore properly counted as part of the three-member quorum legally authorized to act in the Board's name. His decision not to issue a dissenting statement until after the final rule was sent for publication is, by definition, a decision to abstain. *See* Black's Law Dictionary (defining "Abstain" as "To voluntarily refrain from doing something, such as voting in a deliberative assembly."). And persons who abstain are counted in

determining the presence of a quorum. *Ballin*, 144 U.S. at 5-6.[5] On these facts and in light of the deference owed to the Board in determining its own deliberative procedures, the quorum requirements of Section 3(b) of the NLRA were satisfied when the three-member Board issued the final rule.

B. Member Hayes did not have to repeat on December 16th what he had just said on December 15th.

In the district court's view, December 16 is the only date that matters for determining whether Member Hayes participated. This is not correct.

Notational voting does not require all voters to make their final decisions on the same day. "[T]he quorum acting on a matter need not be physically present together at any particular time." *Braniff Airways, Inc. v. CAB*, 379 F. 2d 453, 460 - 62 (D.C. Cir. 1967). The quorum can "proceed with its members acting separately, in their various offices, rather than jointly in conference." *Id.* And abstainers can be identified shortly before the other members cast their votes; indeed, "[i]t is better to count the quorum before voting, if there is any doubt." 5 Fletcher's Cyc. Corps. § 2013. Absent some specific procedural instruction in the law otherwise, the courts must defer to the Board on such questions of voting procedure.

[5] *See also* 2 Am. Jur. 2d Admin Law § 82 ("Vacancies in membership caused by . . . abstention . . . do not affect the legality of acts of a public body so long as they are authorized by a majority of its membership constituting a quorum."); 59 Am. Jur. 2d Parliamentary Law § 15 ("The abstaining voter is counted in determining the presence of a quorum while the absent voter is not included.").

Contrary to the district court, it is immaterial that the rule was updated and approved by the majority on December 16. These changes had no bearing either on Member Hayes's decision to abstain---which was final on December 15---nor on his opposition to the rule, because, by his own account, he was opposed to any rule's issuing "on a divided 2-1 basis" when the nomination of additional Board members was pending. JA 247-48. In these circumstances, at least, there is no warrant for the district court's assumption that a further action was required by Member Hayes if the rule was to be effective. As a general matter, moreover, it lies within the discretion of the agency whether textual changes require a re-vote. The Federal Communication Commission, for example, commonly holds a final vote to adopt new rules, and then publishes those final rules in the ensuing months without holding a second vote.[6]

[6] For example, in one proceeding the FCC announced that it had voted to adopt a new rule on July 8, 2004, see http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-249414A1.doc (last visited November 16, 2012), but the text of that rule was only issued November 22, 2004. *See* 69 Fed. Reg. 67823. That rule was later upheld by this Court. *Mobile Relay Associates v. FCC*, 457 F.3d 1 (2006). *See generally Joint Statement of Chairman Powell and Commissioner Abernathy on Northpoint*, 17 FCC Rcd at 9807 n.705 ("There is nothing procedurally inappropriate in making changes, substantive or non-substantive, after adoption to further elucidate the rationale for the Commission's decision. Such revisions are permissible when *all non-dissenting Commissioners concur* in the changes. Here, all of the Commissioners who supported the relevant sections agreed to the post-adoption edits." (emphasis added)); Statement of Chairman William E. Kennard, *1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM

In this case, as shown, Member Hayes had already made his final decision, and told the majority that he was abstaining. JA 248 ¶ 9. He did not need to repeat himself the following morning. There was no need for him to "give any thought to whether further action was required of him" on December 16, because, in fact, no further action was required. JA 248 ¶ 11.

In sum, three members participated in the issuance of the final rule. In the late afternoon on December 15, Member Hayes communicated by email his decision to abstain from dissenting until after the rule was published. JA 248 ¶ 9. The remaining two members voted their approval of the final rule in the electronic voting room on the next day. JA 248 ¶ 10. No more is necessary to satisfy the three-member quorum requirement in Section 3(b) of the NLRA, 29 U.S.C. §§ 153(b).

C. This procedure is consistent with *New Process*.

The primary authority relied upon by the district court was *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). But *New Process* involved a two-member Board. The minds of only two Board Members were brought to bear on the policy issues at play in *New Process*. Here, by contrast, three members were deeply involved in the decision on this rulemaking, with a majority in favor of the rule and a minority opposing it.

Docket No. 98-35, Biennial Review Report, 15 FCC Rcd 11058, 11126 n.6 (2000); Amendment of Subpart H, 2 FCC Rcd 3011 at para 76; (1987).

The Board's final rule correctly states that Member Hayes "effectively indicated his opposition" to this rule. 76 Fed. Reg. at 80146; JA 163-64. On December 15, Member Hayes made abundantly clear to his colleagues that—though formally abstaining from voting at that particular time—he opposed the rule and was ultimately going to dissent. The opposition that he expressed at the time was consistent with the opposition he expressed throughout the Board's deliberations. Not only had Member Hayes voted against the resolution defining the substance of the rule, and against the order outlining the procedure for issuing the rule, he also stated by email on December 15 that he opposed publishing any rule at time with "the prospect of a full Board to address these proposed rule changes" if new members were ultimately appointed. JA 248 ¶ 8. And he informed the majority that he had decided to publish a dissenting statement to that effect only after the final rule was published because "he could say what he needed to say in one statement." JA 248 ¶ 9. In practical effect, the procedure he followed for manifesting his views at the time of the rule's issuance is similar to that followed by both courts and agencies in circumstances where, because of the pressure of time and circumstance, the majority issues its decision before the dissent has been prepared.[7]

[7] *See, e.g., SEC v. Chenery Corp.*, 322 U.S. 194, 209 (1947) (majority issued first with dissent later). The Nuclear Regulatory Commission, *In re Pacific Gas & Elect. Co.*, 20 N.R.C. 838, 842 (1984), used a procedure identical to this case, and

For these reasons, the district court should have recognized that Member Hayes participated fully in the issuance of the final rule. The undisputed facts and the mutual understandings of the three Board members establish that the final rule was issued by a three-member Board that divided 2-1, with that one member abstaining for the present and dissenting later. By nonetheless relying upon the barest technicality to exclude Member Hayes from the quorum, the district court would mandate a formal simultaneous voting system nowhere countenanced by Section 3(b), and contrary to *Braniff* and *Vermont Yankee*. Since Member Hayes explained his opposition to the rule—and his plan to defer dissenting until after the rule was published—it is empty formalism to insist that Member Hayes must then do "something more" during the eleven minute window the following day when

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for the very same reason. The two member majority issued a final decision one day before the retirement of a member of the majority. The majority explained: "Because Dr. Buck's full retirement from the Appeal Panel becomes effective September 7, 1984, the majority opinion is being issued today without the separate opinion of Mr. Moore. That opinion will issue subsequently." The dissent was issued six months later with a further separate statement by the remaining member of the majority. *See S. Cal. Edison Co.*, 124 FERC ¶ 61308, 2008 WL 4416776 at *8 (2008); *In re Kirk*, 376 F.2d 936, 946 (C.C.P.A. 1967) (Smith J., dissenting) (final decision made and published---over Smith's opposition---before the dissent was prepared); *Drummond v. Fulton County Dept. of Family and Children's Servs.*, 547 F. 2d 835 (5th Cir. 1977) (dissent issued after majority because "the press of court business prevented the preparation of this dissent in time for distribution with the majority opinion."); *Jeffers v. Clinton*, 730 F.Supp. 196, 199 (E.D.Ark. 1989). *See generally* Breger & Edles, "Established in Practice: the Theory and Operation of Independent Federal Agencies," 52 Admin. L. Rev. 1111, 1248-49 (2000) (stating that the Farm Credit Administration, the Federal Energy Regulatory Commission, the Federal Maritime Commission, and the Surface Transportation Board all allow this practice).

the majority was resolving some the last textual suggestions on the draft. *Compare* JA 381-82 (finding that any time after 12:05 p.m. on December 16, when Member Becker approved the draft, was too late) *and* JA 378 (anything before "the final decision"—i.e., the circulation of Chairman Pearce's revised draft at 11:54 a.m.—is too early).

For these reasons, the district court erred in holding that there was no quorum, and granting summary judgment to the Chamber. The Board, like other administrative agencies, is entitled to devise appropriate deliberative procedures that, as here, encourage timely decisions while ensuring that a quorum of the membership is present and participates in the issuance of the rule or decision. JA 163-64.

IV. Alternatively, because Member Hayes, through his staff, was present in the voting room during the vote on December 16 and abstained, he must be counted in the quorum.

The district court also abused its discretion in refusing to reconsider its decision. None of the reasons given by the district court, either substantive or procedural, support its adherence to a clearly erroneous decision. This is because even assuming that the district court were correct in holding that more was required of Member Hayes on December 16, the evidence submitted in support of the Board's motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure showed that Member Hayes, through his agents, was

present and participating in Board decision making on December 16. JA 334-342. Specifically, Member Hayes's staff was logged into the voting room casting votes on his behalf throughout the day and received and opened the call for his vote on the final rule. JA 337-38 ¶¶ 26-31; JA 340. Thus, he should have been counted in the quorum. *Ballin*, 144 U.S. 5-6.

Members can be counted in the quorum who "having heard their names called in their presence . . . did not answer when thus called." 4 Hinds, *Precedents of the House of Representatives*, §§ 2895-2904, at 66 (GPO, available at http://tinyurl.com/9rkuxx3). *Ballin*, 144 U.S. at 5-6 (emphasis added); *see also King v. New Jersey Racing Comm'n*, 511 A.2d 615, 618-19 (N.J. 1986) ("Insofar as the presence of a legal quorum is in issue, all that matters is whether the physically present commissioners participated in agency deliberations and took purposeful action by joining, concurring in, dissenting from, *or even abstaining from the final decision*") (emphasis supplied); 2 Fletcher Cyc. Corp. § 425 ("If there are enough directors present to constitute a quorum, the fact that one refuses to vote is immaterial.").

The Board's electronic voting room mimics a physical meeting space. JA 334 ¶ 5. Whenever a user logs into the room, he or she can see when votes are taking place. JA 336 ¶¶ 13-15.

On December 16th all three Members, acting through their staffs, were in the electronic voting room almost continuously from 9 to 5. JA 337 ¶ 26; JA 340. Member Hayes directed eighteen votes to be cast in the room. JA 337 ¶ 27. The very voting task in this rule was opened by Member Hayes's staff in the room, but not acted upon, JA 338 ¶ 31, consistent with Member Hayes's authorization to his Chief Counsel the preceding day "to advise that [he] would not attach any statement to the Final Rule." JA 248 ¶ 9. Because Member Hayes, through his staff, was present and participating in the voting room when his vote was requested and he abstained from voting, he is properly counted in the quorum under *Ballin*. Accordingly, even under the district court's erroneous interpretation of Section 3(b)'s quorum requirements, the rule was issued by a quorum of the Board on December 16.[8]

[8] Member Hayes's participation was actually greater than that of the abstainers in *Ballin*. He was only abstaining temporarily until he later cast his vote and circulated his dissent. Although the district court considered Member Hayes's later dissent "inconsistent with abstention," JA 382, the Board has the discretion to fashion a procedure where Member Hayes abstains for now and dissents later. *See supra* n. 7. Under the voting construct used in the Board's electronic voting room during this rulemaking, Member Hayes's abstaining at the time the rule was sent to the Federal Register had the effect of preserving his opportunity to cast a vote and attach a dissenting statement later. JA 336 ¶ 19 ("The electronic room is designed to close the voting automatically once all Board Members vote on all documents circulated in a case. When this occurs, the third stage is closed and there is no further opportunity to vote or circulate drafts in this case in the electronic room. However, if a Board Member chooses not to cast a vote on each circulated document, the case stays in the third stage of processing and the Board Member can choose to cast his vote and circulate documents later.").

In denying the Board's FRCP Rule 59(e) motion to alter or amend the judgment, the district court found that the additional evidence regarding the Board's voting room procedures that was submitted with that motion was legally insufficient to alter the conclusion that Member Hayes did not "show up" as the district court thought was required on December 16. The reasons given for that conclusion do not bear scrutiny.

The district court acknowledged the evidence that Member Hayes was present for and participated in other votes on December 16, but sought to minimize that evidence on the ground that it did "not necessarily establish his presence for the vote in question." JA 381-82. Whatever force that point might have as a matter of abstract logic fails in light of the evidence that Member Hayes, through his staff, not only "showed up" on December 16 by logging in, and by voting on numerous other matters, but also received and opened the December 16 call for his vote on the final rule. JA 337-38 ¶¶ 26-31; JA 340.

The district court erroneously concluded that "there is no indication that [Member Hayes's staff was] authorized to vote or abstain on his behalf with respect to the decision to adopt the final rule." JA 381-82. That conclusion overlooks Member Hayes's testimony that he "authorized [his] Chief Counsel to advise that [he] would not attach any statement to the Final Rule." JA 248 ¶ 9. Member Hayes's Deputy Chief Counsel acted consistently with that direction

when he did nothing further after opening the voting task with respect to rule that was sent to Member Hayes on December 16. JA 337 ¶ 31. In short, contrary to the district court, Member Hayes's staff was authorized to abstain on his behalf and did so on December 16.[9]

Nor can the district court's refusal to consider further evidence be justified on the ground that "the final rule itself did not suggest that Hayes had abstained." JA 382. To the contrary, the final rule acknowledges Hayes's abstention by stating that "Member Hayes has not yet supplied a dissent or similar statement in connection with the final rule itself." 76 Fed. Reg. at 80146; JA 163. There is no conflict between this statement and the fact that Member Hayes "effectively indicated his opposition to the rule." As previously shown, Member Hayes did both—opposing the rule, but abstaining from attaching a dissent until after the rule was published. And the Board accommodated Member Hayes's manifest opposition by "delay[ing] the effective date of the final rule so that Member Hayes

[9] The district court further erred in attaching significance to evidence that the voting task may not have been opened by Member Hayes's staff until after the final rule had been approved by the majority and sent off for publication. JA 381-82. Such a result is entirely consistent with the decision Member Hayes announced not to issue his dissent at the time of publication but to submit his dissent at a later time. And as a general matter, voting after the majority has made its decision is not a meaningless act. *E.g.*, 4 Hinds, *Precedents of the House of Representatives* § 2907 ("a Member noted as present . . . may be permitted to vote after the calling of the roll is concluded.").

will have over 90 days after he received a final draft of this final rule to write a dissent and have it published prior to the effective date of the rule." JA 163.

Finally, the district court erred in finding that Member Hayes's testimony "is inconsistent with the agency's abstention theory." JA 382. Member Hayes's testimony was that he "gave no thought to whether further action was required of [him]" after he had advised the other Board members on December 15 "that [he] would not attach any statement to the Final Rule." JA 248 ¶ 11. This is perfectly consistent with abstention. He decided to abstain on December 15, and, after the decision was made, no further thought was necessary on his part, because he advised his Chief Counsel of his decision to abstain on December 15, and his Deputy Chief Counsel acted consistently with that abstention decision when he opened the call for a vote on December 16 and did nothing further.

For these reasons, the district court lacks substantive justification for its refusal to accept the evidence submitted with the Board's Rule 59(e) motion that Member Hayes "showed up" on December 16. The district court's procedural justifications for refusing to consider this additional evidence fare no better.

The district court faulted the Board for not presenting the additional evidence prior to the issuance of the district court's decision. JA 379-80. It is true that the evidence is not typically elaborated after judgment has been entered, but there are times—and this is one of them—when the court should consider evidence

on reconsideration which explains how it misunderstood the prior evidence. *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997).

In *Lockheed*, the district court reconsidered a decision to deny enforcement of an EEOC subpoena in light of new affidavits submitted by the agency:

> The affidavits made it clear that the order denying enforcement was based on an erroneous understanding of the relevance of the information sought by the EEOC. In the context of a public agency attempting to fulfill its statutorily mandated purpose, manifest injustice would have been the result of allowing a ruling based on an erroneous and inadequate record to stand.

116 F.3d at 112. Under the new affidavits, the EEOC was clearly entitled to prevail. *Id.*

On review, the Fourth Circuit in *Lockheed* explicitly noted that the EEOC affidavits could have been introduced earlier, "at the time the Commission originally sought enforcement of the subpoena." *Id.* But the clear error of the district court's decision *required* reconsideration, and "the district court would likely have abused its discretion if it had *failed* to grant the Rule 59(e) motion." *Id.* (emphasis in original); *see Norman v. Arkansas*, 79 F.3d 748, 750 (8th Cir. 1996) (finding abuse of discretion where court refused to reconsider clear factual error); *see also Anyanwutaku v. Moore*, 151 F.3d 1053, 1058-59 (D.C. Cir. 1998) (finding abuse of discretion where court refused to reconsider clear legal error).

In the present case, the district court dealt with the *Lockheed* line of cases relied upon by the Board by simply ignoring the cases altogether, and so no reason was given for treating this case differently from *Lockheed*. JA 379-80.

Moreover, in this case it is not equitable to expect the Board to have introduced this evidence sooner. The district court's decision was based upon an argument first articulated in a special, last-minute brief filed by the Chamber on March 22, 2012. JA 265-271. The Chamber's initial briefing in this case, filed in January and February 2012, appeared to concede that Member Hayes had *abstained* from voting, and argued instead that members that "entirely abstained from voting [are] not counted towards [the] quorum requirement." JA 237 n.6. The Chamber's initial argument was that the Board "do[es] not demonstrate that Member Hayes *voted* on the final rule. *Thus, there was not a quorum . . . .*" *Id.*

The district court held that the Board "slice[s] the [Chamber's] opening brief too thin," and that the Board should have introduced this evidence merely because some kind of quorum argument was raised by the Chamber's brief. JA 380. But, where the Chamber had argued that an *actual vote* was required, and that abstaining *was not enough*, submitting further evidence that Member Hayes was present and abstained would not have been responsive to the Chamber's argument at that time.

The Board should not be penalized for failing to respond when the Chamber moved the goal-posts in its March 22 reply brief. In any event, arguments raised for the first time in reply are not typically used by the district court as the sole basis for an adverse decision—at least without *asking* for further briefing first. Indeed, even the Chamber's March 22 brief was remarkably sparsely supported. JA 268-69. No authority was cited for the remarkable argument that an *express statement* by Member Hayes—which was in the existing record at that time—that he was not going to dissent until after publication, was insufficient to establish abstention merely because it was made shortly before, rather than during, the vote.

In sum, where, as here, the undisputed facts presented in support of reconsideration demonstrate that the district court misunderstood the facts of the case, and entered a clearly erroneous decision, it is an abuse of discretion for the court to nonetheless refuse to reconsider its error—particularly when the grounds for the court's decision were presented to the court for the first time in a reply. Accordingly, if this Court finds it necessary to reach this issue, the Court should find the district court's denial of the Board's Rule 59(e) motion to alter or amend judgment is ground for reversal.

Conclusion

For the foregoing reasons, the Board respectfully requests that this Court find that there was a quorum for this rule, vacate the judgment of the district court, and remand for further proceedings on the remaining issues in dispute.

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November 16, 2012

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE, *et al.*, Plaintiffs-Appellees, v. NATIONAL LABOR RELATIONS BOARD, *et al.*, Defendant-Appellant.	))))))))	Case No. 12-5250

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, the foregoing Brief was filed with the Clerk of the Court for the United States Court of Appeals District of Columbia using the appellate CM/ECF system and served electronically on all counsel of record:

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