IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and COALITION FOR A DEMOCRATIC WORKPLACE, Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, Defendant	Case No. 11-cv-02262 Judge James E. Boasberg

MEMORANDUM IN REPLY
SUPPORTING DEFENDANT'S RULE 59(e) MOTION

The opposition filed by Plaintiffs Chamber of Commerce and Coalition for a Democratic Workplace ("Chamber") does not meaningfully dispute the most significant points in this case. The error in this case is quite clear, and the Board is entitled to prompt relief.

1. It was clear error to find that Member Hayes expressed no "intent to abstain." Mem. Op. at 17. As the Board has consistently asserted, on December 15, 2011, Member Hayes told the other Members that he had decided that he would not dissent until after the Rule was published. Hayes Aff., Docket 29-1, at ¶ 8-9; *see* NLRB Opp. MSJ, Docket 29, at 4 (arguing that Member Hayes was part of the quorum for this reason); *see also* NLRB Memo. Supp. MSJ, Docket 21-1, at 43 (no need for the dissenter to vote on the specific final text when he would be dissenting after publication). To "abstain" is to decide not to do something. *See* Black's Law Dictionary: "Abstain"; Webster's Third New International Dictionary ("Abstain: to withhold oneself from participation: to refrain voluntarily: withhold oneself deliberately from an action."). Dissenting, by contrast, requires doing something: specifically, *casting a vote* "accompanied by

circulation of a separate statement." Hayes Aff. at ¶ 11; *see* Burnett Aff., Docket 41-2, at ¶ 18 (in order to dissent, Board Members vote "noted with memo" and attach the dissent); NLRB Opp. MSJ at 6 n.4 ("[JCMS] contemplates the circulation of dissents contemporaneously with the vote."). Hence, Member Hayes's affidavit demonstrates that he abstained, and abstained continuously from December 15 *until after publication*—including on December 16, 2011—because he intended to issue his dissenting opinion at a later date. Accordingly, the finding that Member Hayes did not abstain is clearly erroneous.

2. Because, on December 15, Member Hayes effectively expressed his decision to abstain from voting on the Rule until a later date, there was no need for him to do anything further on December 16. In holding otherwise, the Court failed to respect the Board's broad discretion to craft lawful procedures to ensure the timely issuance of its rules. *See* NLRB Memo Supp. MSJ, at 34-35. 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. 29 U.S.C. § 153(b). And issuing a decision where the dissenter abstains for the present and issues a dissent later is routine practice in other administrative agencies. *See id.* at 41-42 (discussing the Board's policy, ES-01-01, and the practice of other agencies). Because it was clearly within the Board's power and discretion to adopt, on December 15, the alternative procedure that it followed in issuing this Rule, the Chamber's repeated complaint that Board did not follow its "normal procedure" is simply irrelevant. Chamber Opp. 59(e), Docket 42, at 2, 14.

And, given that Member Hayes disagreed with the Rule for reasons independent of the changes that the majority made in the final text on December 16,[1] it is empty formalism to insist

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[1] Among other things, Member Hayes reasoned that the Rule should not issue at all in view of the President's intent to nominate additional Board members, Hayes Aff. ¶ 8.

that, unless Member Hayes took some further action on December 16 he did not participate in issuing the Rule. Contrary to the Chamber, the Supreme Court's statement that the NLRA's three-member quorum requirement is not an "easily surmounted technical obstacle," *New Process Steel v. NLRB*, 130 S.Ct 2635, 2644 (2010), is not authority for refusing to acknowledge the reality that Member Hayes clearly expressed his judgment about the Rule, and abstained. Chamber Opp. 59(e) at 10; Mem. Op at 17..

In sum, the Board correctly found that Member Hayes effectively expressed his opposition to the Rule on December 15. In relentlessly attempting to make it appear that Member Hayes' effective action was somehow ineffective, the Chamber seeks to make something out of nothing. The Court's acceptance of the Chamber's argument was clear error.

3. But even if Member Hayes had been required to do something more on December 16, it was clear error to find that Member Hayes did not "show up" to the voting room on that day. Mem. Op. at 2, 15. Member Hayes specifically directed that votes be cast in 18 cases in the voting room on December 16. Burnett Aff. ¶ 27. The Chamber concedes that, at least when he *votes*, Member Hayes is present and participating in the voting room. Chamber Opp. 59(e) at 13 (attempting to distinguish voting, which they admit is the Member's own action, and other actions by staff). Thus, as a matter of undisputed and indisputable fact, Member Hayes showed up. And as this Court correctly held, showing up in the voting room is enough to constitute the quorum.[2]

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[2] This Court's analysis merges "presence" and "participation" by holding that "showing up" is sufficient participation. Mem. Op. at 13. This was, essentially, the Board's position. NLRB Opp. MSJ at 3-4. The problem is that the Court mistakenly held that Member Hayes did not "show up."

4. Moreover, Member Hayes's staff's actions concerning this Rule on December 16—monitoring the voting room and opening the voting task, while abstaining from doing anything more—are attributable to Member Hayes, and are still further proof that he was part of the quorum. The Chamber takes issue with this point, contending that his staff's actions cannot be attributed to Member Hayes because he "gave no thought" to the Rule on December 16. Chamber Opp. 59(e) at 10-12. The Chamber is incorrect for three reasons:

a. First, under basic agency principles, Member Hayes's staff was acting in Member Hayes's name and on his behalf on December 16. Burnett Aff. ¶ 8(E) & (F). They were Member Hayes's agents in the room: the Board Members typically act in the room only through their agents, both in voting and in monitoring events. *Id.* ¶ 8. Indeed, absent the authority given by Member Hayes, his Deputy could not have logged in with Member Hayes's name, nor done anything on his behalf. Thus, when his Deputy Chief Counsel "logs in," it is Member Hayes's own presence in the room; when his Deputy Chief Counsel opens a voting task, it is Member Hayes's own action in the room. This is clearly unlike Congress, where agents cannot be authorized to do anything on behalf of their Members—as the Plaintiff points out, a staffer listening in the hall is not authorized to act as the Member in the room, even at the Member's specific direction. Chamber Opp. 59(e) at 13, 14 n.8. The Board does not work that way. Votes are taken through agents at the Member's specific direction, and other actions are taken through agents in the voting room at either the Member's general or specific direction. All such actions, both specific and general, are fairly attributable to the Member under the common law of agency.

b. Second, the day before this vote was held, Member Hayes "authorized [his] Chief Counsel to advise that [he] would not attach any statement to the Final Rule."

Hayes Aff. ¶ 9. His Deputy Chief Counsel acted in accordance with that direction when he did nothing further after opening the voting task sent to Member Hayes. This response is appropriately attributable to Member Hayes and effectively implemented his decision to abstain from voting at that time.

c. Third, Member Hayes's subjective state of mind is wholly irrelevant; so long as he showed up in the room, he was part of the quorum. *United States v. Ballin*, 144 U.S. 1, 3-6 (1892). In *Ballin*, there was no evidence that the non-voting Members gave any thought to the vote being held—it is possible that, as here, they did not think about it because they too had already made up their mind to refrain from acting. Regardless, the Court forbade "parol evidence" on the issue when there was clear proof on the journal that the Members were in the voting room. *Id.* at 4. The quorum was present in the voting room: "[The] capacity to transact business is then established, created by the mere presence of a [quorum], and does not depend upon the disposition or assent or action of any single member or fraction of th[ose] present. All that the Constitution requires is the presence of a [quorum], and when that [quorum] are present the power of the house arises." *Id.* at 5-6. For this reason, it is also irrelevant that Member Hayes "gave no thought" to this Rule on December 16. Hayes Aff. ¶ 11.[3]

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[3] The Chamber also argues that when the task was opened at 12:24 it was already too late, because the Order provides that the decision was final "immediately" at 12:05, when Member Becker voted. Chamber Opp. 59(e) at n.9. Under the Chamber's reading, the Order was designed to cut Member Hayes out of the process. This reading is not a fair one, because the Order was designed to *facilitate* Member Hayes's participation, whether he wanted to vote now, or to abstain for the present and vote later. And 12:24 is not too late because, as described in the Burnett affidavit, the effect of sending Member Hayes the task and of his not acting upon it was to retain the case at the third stage of voting and preserve the opportunity for him cast a vote and circulate his dissent at a later time. The voting construct is designed to close automatically once all Board members vote on all documents circulated in a case. Burnett Aff. at ¶ 19.

5. Because the Court's holding was in clear error, the Board is entitled to relief under Rule 59(e).

a. The Chamber argues that clear error is not an appropriate basis for Rule 59(e) relief unless there is "newly discovered" evidence. Chamber Opp. 59(e) at 6-7. But, as the Board has already explained, this very argument was considered and rejected by the court in *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997). "Clear error" is an independent basis for relief, and cannot be conflated with "newly discovered evidence." *See also Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (listing four independent grounds). And in *Lockheed*, the court held that affidavits can be introduced—even if not newly discovered evidence—if necessary to point out the "clear error" of the court's decision. 116 F 3d at 112. The Chamber does not discuss the "clear error" line of cases.[4] The Chamber does not even cite *Lockheed*, or acknowledge its

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[4] The bulk of the cases cited by the Chamber are entirely unrelated to the "clear error" standard for reconsideration. Chamber Opp. 59(e) at 6-7; *see Ingle v. Yelton*, 439 F.3d 191, 195 (4th Cir. 2006) (movants claim only newly discovered evidence, not clear error, as grounds for reconsideration); *Fox v. Am. Airlines Inc.*, 389 F. 3d 1291, 1296 (D.C. Cir. 2004) (movants claim manifest injustice based upon failure of ECF service, not clear error); *Niedermeier v. Office of Baucus*, 153 F. Supp.2d 23, 29 (D.D.C. 2001) (movants claim only manifest injustice, not clear error, as a grounds for reconsideration); *Lostumbo v. Bethlehem Steel, Inc.*, 8 F.3d 569, 570 (7th Cir. 1993)(no clear error alleged); *Garner v. Arvin Industries Inc.*, 77 F.3d 255, 258 (8th Cir. 1996) (without discussing clear error, denying reconsideration on wholly new arguments). Those few that address clear error typically support the Board's position. *National Center for Mfg Sciences v. Dept. of Defense*, 199 F.3d 507, 509, 511-12 (D.C. Cir. 2000) (granting reconsideration where there was clear error); *Independent Petroleum Ass'n of America v. Babbitt*, 178 F.R.D. 323, 327 (D.D.C. 1998) (plaintiffs needed to "present any newly discovered evidence *or* cite any manifest error of law or fact" (emphasis added)); *Fund for Animals v. Norton,* 326 F. Supp 2d. 124, 126 (D.D.C. 2004) (clear error distinct from newly discovered evidence); *City of Moundridge v. Exxon Mobil Corp.,* 244 F.R.D. 10, 13-14 n.6 (D.D.C. 2007) (finding that the alleged newly discovered evidence was previously available, and, in any event, finding no clear error).

application to this case.

b. The Chamber also claims that the Board is raising new legal arguments. Chamber Opp. 59(e) at 1, 10. To the contrary, the Board is simply pointing out the errors that caused the Court to mistakenly reject the Board's argument that Member Hayes was present and abstaining, *see* NLRB Opp. MSJ, at 3-4 ("the question was called for a vote, a quorum was 'present' and in receipt of that call" and "abstaining voters are counted toward the quorum"); *see also id.* at 4 (arguing that Member Hayes was part of the quorum because of his emails on December 15); NLRB Memo. Supp. MSJ, at 43 (no need for the dissenter to vote on the specific final text when he would be dissenting after publication), and responding to the *Chamber's* new legal arguments in its last-minute reply. Prior to the Chamber's reply,[5] the only argument for the Board to respond to was

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Finally, the Chamber cites a district court decision which "did not credit" a new affidavit because it directly contradicted prior testimony by the affiant. *Artis v. Bernanke*, 256 F.R.D. 4, 5-6 (D.D.C. 2009). In passing, and with little analysis, the court also repeated the same analytical error the Chamber makes in this case, conflating clear error with newly discovered evidence. The D.C. Circuit ultimately *reversed* the District Court's underlying dismissal, reinstating the complaint. *Artis v. Bernanke*, 630 F.3d 1031, 1034, 1037-38, n.6 (D.C. Cir. 2011). Though the Court of Appeals noted that it was not an abuse of discretion to discredit the affidavit, the motion for reconsideration "directed the district court's attention" to other evidence in the record which compelled reinstating the complaint. *Id.*

In the present case, by contrast, the Burnett Affidavit does not conflict with the evidence, and unequivocally demonstrates this Court's clear error, like the affidavit in *Lockheed*. The motion for reconsideration also cites evidence in the existing record which similarly compels reconsideration. For both of these reasons, Rule 59(e) relief is appropriate.

[5] Chamber Reply MSJ, Docket 33-1, at 4-5. Indeed, even in the Chamber's reply, the primary support cited for the Chamber's argument that Member Hayes was "entirely absent" was a state court decision involving a *recused* voter, which is clearly inapposite. *Id.* (discussing *King v. New Jersey Racing Comm'n*, 511 A.2d 615, 618-19 (N.J. 1986)). No authority is cited for the remarkable argument that an express statement by Member Hayes that he was not going to dissent until after publication was insufficient to establish abstention, merely because it was

that raised in the Chamber's opening brief. The relevant portion of that brief was in a lengthy Footnote 6:

> More importantly, even if these documents are part of the administrative record, they do not *demonstrate that Member Hayes voted* on the final rule. *Thus, there was not a quorum* for the Board to approve the final rule and the Board lacks authority to modify, by order, the Act's quorum requirement. The December 15, 2011 Order, like the November 30, 2011 Resolution, states only that the Final Rule will be published upon approval in a subsequent vote. *The undisputed evidence is that Member Hayes did not vote* on whether to approve the text of the Final Rule. Approving the Final Rule is a collective act by the Board and thus requires a decision by a congressionally mandated quorum. *See, e.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 861 (D.C. Cir. 1970) (*Commissioners that entirely abstained from voting not counted towards quorum requirement*); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007) ("The votes were actions of the individual Commissioners, not the Commission.").

Chamber Memo. Supp. MSJ, Docket 22-1, at 14 n.6 (emphases added and omitted). The Chamber repeatedly equated "participating" with "voting" and argued that the failure to "vote" *proved* that there was no quorum. They argued that a voter that "abstained from voting [was] not counted towards [the] quorum." *Id.* The Chamber now contends that the Board read "too much" into this footnote, and appears to argue that *Greater Boston* does not support the proposition that the Chamber attributed to it in the parenthetical. Chamber Opp. 59(e) at 9. While it is true that the Chamber misstated the holding of *Greater Boston*, this fact does not alter the argument the Chamber made.[6]

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made the day before the vote.

[6] Also in that footnote, the Chamber stated that—even though the administrative record was not yet ready—it "requested evidence, if any, that the Board had delegated its authority or that Member Hayes had voted on the final rule." Chamber Memo Supp. MSJ at 13 n.6. Those were the two things that the Board understood had been requested, and the Board complied by giving the Chamber an Order delegating authority to the Solicitor to publish the Rule upon approval by a majority of the Board, and by frankly acknowledging that Member Hayes did not vote on the precise text of the Final Rule. Without more information about the alleged problem

6. Because there is clear error in this case, the Board should be promptly relieved from the judgment. Nothing in Rule 59 forbids this Court from reversing its summary judgment, and entering at least *partial* summary judgment in favor of the Board. As the other subsections of Rule 59 demonstrate, it is very often contemplated that post-judgment relief will result in immediately vacating the erroneous judgment, with sometimes substantial further proceedings prior to the entry of a new final judgment. *See* Rule 59(a). Thus, the Court can and should immediately enter at least partial summary judgment in favor of the Board. Because this judgment was entered in error, the remedy should restore the Board as nearly as possible to the status quo. But for this error, the Rule would be in effect right now—unless the Chamber would be entitled to a preliminary injunction. Otherwise, on what authority should the Chamber continue to reap the benefit of the clear error in this case, and the consequent delay in this Court's ruling on the merits? The Chamber does not even attempt to respond to the fatal flaws identified by the Board in the Chamber's argument for a preliminary injunction. Though there is no way to undo the harm the Board and the public have already suffered, the Court can and should act now to stop the further harm that is caused by this ruling each day.

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with the Board's procedure, the Board was unable to anticipate that the Chamber would argue that Member Hayes was not in the voting room on December 16, casting votes on other cases and monitoring events. Simply put, the Chamber argued that *it did not matter* whether he was present in the voting room or not, because *only an actual vote* could satisfy the quorum.

CONCLUSION

For the foregoing reasons and those in the Board's prior memorandum, the Board's motion for reconsideration should be granted and the judgment entered on May 14 should be vacated.

RESPECTFULLY SUBMITTED,

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