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

REPLY BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

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Section 3(b) of the NLRA provides, in relevant part, that "three members of the Board shall, at all times, constitute a quorum of the Board." 29 U.S.C. 153(b). The issue in this case is whether a Board Member who announces to his colleagues that he will not be issuing a dissent until after the Board publishes its final rule, JA 248 ¶ 9, can be counted in the quorum of three Board members necessary to issue the rule. The Board's central argument—before the district court and this Court—is that the answer is "yes." The district court decided otherwise, holding that "[m]ore was required." JA308. This was error, as the Board has shown. NLRB Br. 8-20. The Chamber attempts to respond in three ways.

First, it mischaracterizes the proceedings in district court, arguing that the Board's arguments are waived or subject to an abuse of discretion standard of review. The Board's position is not waived and is entitled to deference.

Second, it misreads Member Hayes' affidavit to contend that he did not abstain. Member Hayes clearly decided to refrain from dissenting—an abstention by definition—and nothing in his affidavit changes that fact.

Third, it asserts that it is impossible to abstain on December 15th, and so Member Hayes should be required to state his abstention again on December 16th. The Chamber's attempt to require Board members to repeat themselves has no basis in the statute.

We address these three issues below.

1. The Board's arguments are not waived.

A threshold question is whether the Board is entitled to deferential review with respect the procedures it followed for mustering a quorum in support of the rule. The Chamber contends (pp. 31-32) that the Board waived any claim for deference by not asserting it below, but that is not correct.

A. In district court, the Board sought and was erroneously denied deference.

The Board is entitled to deferential review with respect the procedures it followed for mustering a quorum in support of the rule. The courts have held that quorum statutes like Section 3(b) grant discretion under *Vermont Yankee* to adopt any rational procedure addressing that issue. *Idaho v. ICC*, 939 F.2d 784, 787-88, n.4 (9th Cir. 1991) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)).[1]

Contrary to the Chamber's claim, the Board urged this principle of deference in the proceeding below. As it did in its opening brief, pp. 11-13, 15, the Board argued that, like other agencies, it is entitled to deference in crafting its internal

[1] *See also Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 460 (D.C. Cir. 1967) (in a case pre-dating *Vermont Yankee*, finding that an agency's notational voting procedure was a "reasonable way" to proceed); *United States v. Ballin*, 144 U.S. 1, 5-6 (1892) (when the only term at issue is "quorum," the decision-making body may use any procedure "reasonably certain to ascertain the fact").

procedures, including its procedures for complying with quorum requirements.[2] The district court expressly recognized this principle of deference, JA 310, but failed to accord the Board any deference in its decision.

B. The Board's argument that Member Hayes' abstention constituted participation in the quorum is not a "post hoc" rationalization.

The Chamber unwarrantably claims (Chamber Br. 32-34) that deferential review is not appropriate for the further reason that the Board's argument that Member Hayes abstained is a post hoc rationalization. The Chamber asserts that the Board itself did not rely on Member Hayes having abstained in considering him part of the three member quorum that issued the rule. At various places in its brief, the Chamber claims that the Board relied instead on Member Hayes' mere membership on the Board at the time of the rule's issuance (pp. 8, 12-13, 18), or on Member Hayes' generalized opposition to the rule (p. 17), or on the exception to the three member quorum requirement that applies where the Board has delegated its powers of decision to a three member group (pp. 12-16). The Chamber's various claims in this regard are mistaken.

[2] NLRB Mot. Sum. Judg., Docket 21-1, at 34-35 (discussing *Vermont Yankee*, 435 U.S. 519, *Nat'l Classification Committee v. United States*, 765 F.2d 1146, 1149-52 (D.C. Cir. 1985), *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990), and *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), at length); *see id.*, at 39, 42 (relying on this discussion of *Vermont Yankee* deference in the quorum context); *see also* NLRB Opposition to Summary Judgment, JA240, 244-45 (invoking deference under *Vermont Yankee*, *LTV Corp.*, and *United States v. Ballin*, 144 U.S. 1 (1892)).

The Board did not rely on Member Hayes' mere membership on the three member Board to consider him part the quorum issuing the rule. In asserting otherwise, the Chamber quotes portions of the final rule without consideration of the relevant context. Chamber Br. 12-13. Opponents of the rule had argued that the rule could only be adopted if all three Board members voted *in favor* of the rule, and that a two-to-one vote was not enough. Final Rule, JA 162. To that argument, the majority responded that a three member quorum possessed the Board's full powers and is not required to "act unanimously—as opposed to acting by majority vote." To illustrate that point, the majority noted examples where Board precedent had been overruled by a 2-1 vote. *Id*. at n.23.

When the Board turned to the question whether there was a quorum for the issuance of the rule, it referred back to its prior discussion of the precedent for the Board's making important decisions with a three member quorum. JA 163. The Board did not claim that it could issue a decision with a two member quorum instead of a three member quorum. And, though it noted that Member Hayes "had effectively indicated his opposition to the final rule," the Board never claimed that this generalized opposition to the rule obviated the need for him to take any action formally to express his position. *Id.*

Instead the Board emphasized that, in the exigent circumstances presented by the imminent loss of a Board quorum, the Board had adopted a procedure on

December 14 that allowed the rule to issue as soon as approved by a two member majority, with provision for the third member to issue a dissent either at that time or within a reasonable period after the rule was published. *Id.* The majority noted that Member Hayes had not yet issued his dissent, as the December 14 procedure permitted, but still had the opportunity to do so before the final rule became effective. *Id.*

Therefore, because Member Hayes had the opportunity to issue a dissent at the time the rule issued, but had voluntarily refrained from doing so, the rule's depiction of his participation in the rule's issuance is consistent with Board's argument that Member Hayes abstained. *See* Black's Law Dictionary (defining "Abstain" as "To voluntarily refrain from doing something, such as voting in a deliberative assembly.").

If there were any doubt about the Board's reliance on Member Hayes' voluntary decision to abstain in considering him part of the quorum, that doubt was removed at the outset of this litigation when the Chamber questioned the sufficiency of rule's account of Member Hayes' participation. As noted by the district court, the Chamber requested evidence "that Member Hayes voted *or otherwise participated* in issuing the Final Rule." JA 380 (emphasis supplied). In response, the Board submitted the affidavit of Member Hayes that clarified that on December 15, Member Hayes was specifically asked whether he intended to issue

his dissent at the time the rule was sent to the Federal Register. He responded that he did not so intend on the assurance that he could file his dissent later. Hayes Affidavit, JA 248 ¶ 9.

C. The district court's erroneous judgment, finding that Member Hayes did not abstain, is subject to de novo review.

The Chamber claims (p. 19) that the Board's argument that Member Hayes abstained was "raised for the first time in its motion to reconsider" and is therefore subject to review for an abuse of discretion. To the contrary, in its decision on summary judgment, the district court correctly understood the Board as urging abstention, and it held that Member Hayes did not abstain. *See* JA312-314. The portion of the Board's reconsideration motion dealing with this point was described by the district court as merely an "expanded and refined form [of the argument presented] in the first go-round." JA375; JA378 (the Board has "refined this argument" to make a "more nuanced point"). Under any fair reading, the Board's argument in opposition to the Chamber's motion for summary judgment makes the same central point about abstention that the Board urges here. For example, the Chamber is not correct in claiming that the Board's quotation of the Supreme Court's decision in *Ballin*—that the quorum is created by "the mere presence" of three Members—was the equivalent of arguing "that the quorum is the same as Board membership." Chamber Br. 18. In fact, the Board expressly argued that three members were present for the quorum because "all three

Members were specifically called upon to cast their votes," and that "Member Hayes indicated that he did not [wish to dissent at that time] because he could add a dissent at a later date." NLRB Opposition, JA 240-45.[3]

2. Member Hayes abstained.

A. The Board changed its procedure to provide an option to abstain.

There is no dispute that the Board followed a different procedure in this case than it does in the usual case. In the usual case, a rule or decision does not issue until the final text has been voted on by three members. Hayes Affidavit, JA 247-248 ¶ 6. In this case, as explained in the Board's opening brief, pp. 3-7, in an effort to expedite the issuance of the rule before the Board was reduced to two members at the end of the 1st Session of the 112th Congress, the three member Board adopted a procedure whereby the rule would be submitted for publication when approved by a majority and the third member could publish a dissent either at that time or by a later deadline. Hayes Affidavit, JA 247-8 ¶ 7; Procedural Order, JA 117-18. That procedure was adopted on December 15, 2011, after several drafts of the rule favored by the majority had been circulated to Member Hayes on

[3] The Chamber is correct to note, however, that the Board has, on appeal, abandoned an alternative argument that Member Hayes actually *voted* against the rule by voting against the Resolution to draft the rule, and against the procedural order. NLRB Mot. Sum. Judg., Docket 21-1, at 43; *see also* NLRB Opposition, JA243. But the refinement and selection among alternative arguments is a typical part of the appeal process, and there is no need to complicate the merits by arguing matters not in dispute.

December 9, 12, and 13, JA 247-48 ¶¶ 4-6, 8, thereby affording Member Hayes the opportunity to evaluate the majority drafts and decide whether he wished to publish a dissent either with the final rule, or after publication, or both.

B. Member Hayes' affidavit makes clear that he abstained.

Member Hayes opted to abstain, and dissent later. On December 15, when the majority position of Chairman Pearce and Member Becker was nearly in final form, Chairman Pearce inquired of the third member, Member Hayes, whether he wished to include a dissenting statement in the final rule. Hayes Affidavit, JA 248 ¶ 9. Member Hayes responded that he did not, and that, as long as he "had the assurance of adding a dissent [later], he could say what he wanted in that single document." *Id.*

As argued in the Board's opening brief, pp. 8-20, Member Hayes' deliberate decision on December 15 not to issue a dissent at the time of the rule's issuance is, as a matter of law, a decision to abstain. The Chamber's answering brief admits that abstainers count in the quorum. Chamber Br. 24. Thus, Member Hayes's deliberate abstention is a legally sufficient basis for finding that that he participated in the three member quorum that issued the rule.

Contrary to the Chamber's argument (p. 26), it is irrelevant that Member Hayes did not use the word "abstain" because his deliberately refraining from dissenting constitutes abstention as a matter of law. See NLBR Br. 13-15.

C. After his final decision to abstain, there was no need for Member Hayes to do anything more.

i. There is no inconsistency in Member Hayes' abstaining and giving no thought to taking further action the following day.

There is no merit to the Chamber's argument (Br. 24) that Member Hayes affidavit is inconsistent with his abstaining because it related that, following his advising his colleagues on December 15 that he would not attach a dissent to the final rule, he "gave no thought to whether further action was required of [him]." JA 248 ¶ 11. As explained in the Board's opening brief, p. 17, there was no reason for Member Hayes to give further thought to the matter, since his communication to his colleagues of his decision to abstain was sufficient to constitute participation in a decision by a three member quorum of the Board.

ii. The Board did not have to call Member Hayes on the phone.

Equally without merit is the Chamber's repeated implication (pp. 8, 20-25) that the Board's decisional process is flawed because another draft of the final rule was circulated on December 16 and that, contrary to the Board's usual practice, Member Hayes "was not asked by email or phone to record a final vote in JCMS before or after the Final rule was modified, approved by Chairman Pearce and Member Becker, and forwarded by the Solicitor for publication on December 16." JA 248-49 ¶ 11. The Chamber's argument fails to acknowledge that the rationale for the Board's usual practice is inapplicable where, as here, Member Hayes had

announced a deliberate decision to abstain. Accordingly, there is no merit to the Chamber's argument that Member Hayes did not participate in the quorum because he did not receive a phone call.

The Board's usual practice of making phone calls requesting a vote serves a practical purpose in the context of the Board's usual voting procedure. Under that procedure, no Board rule or decision issues without a quorum of the participating Board members manifesting either approval of the action or noting the action "with an attached dissent or concurrence." Hayes Affidavit, JA 247-48 ¶¶ 6, 11. That is the context in which the Board's Executive Secretary or Solicitor solicits Board members by email or phone to take action.

In this case, the Board's December 14 resolution had established an alternate procedure that gave another option to members who wished to dissent, but did not yet have a dissenting statement prepared. Under that option, instead of voting noted and attaching a dissent at the time the rule issued, the Board member could wait until later to circulate "any separate dissenting statement ('dissent') that a Member of the Board who is serving on the dates of publication of the final rule [wishes] . . ." Procedural Order, JA117-18 ¶ 3. That is the option that Member Hayes selected on December 15. Given Member Hayes' announced position that he was not going to issue a dissent until after publication, neither the Executive Secretary nor the Solicitor had any reason to solicit Member Hayes to take action

on December 16.

iii. Member Hayes casting a vote on December 16 would have been inconsistent with his decision to abstain.

The Chamber attempts (p. 28) to distinguish between "casting a vote, as an initial matter, and issuing a dissent, as a secondary matter." That argument misunderstands the Board's voting system: under that system, dissenting entails voting "noted" *and* attaching a dissent at the same time. Hayes Affidavit, JA 247-8 ¶¶ 6, 11. The two tasks are inextricable. Indeed, as acknowledged in the Board's opening brief, p. 22 n.18, because the electronic voting procedure used for the rule would close automatically once three votes were cast, Member Hayes's abstaining from voting noted and attaching a dissent at the time of the rule's issuance was the means by which he preserved the opportunity to vote noted and circulate a dissent later. Burnett Affidavit, JA 336 ¶19.[4]

3. Member Hayes can lawfully abstain on the day before the vote, and nothing in Section 3(b) requires him to repeat himself.

Finally, the Chamber contends that "statements . . . before the final vote

[4] In this respect, as the Chamber correctly notes (p. 27), the Board's voting procedure is distinguishable from that followed in *SEC v. Chenery Corp.*, 322 U.S. 194 (1947) and similar cases discussed in the Board's opening brief, pp. 18-19 n.7. In those cases the dissenter had voted "no," and then issued a dissent later. But because abstaining is just as valid a form of participation in the quorum as voting "no," it is difficult to see what difference the Chamber thinks that distinction should make. As the Board previously argued, the procedures are similar in all relevant senses.

cannot constitute . . . [an] abstention on the final rule." *See* Chamber Br. 20-23. This is not true. In light of the deference owed the Board, *see supra*, the Chamber's contention on this point depends upon its argument that "the intent of Congress is clear," that Section 3(b) forbids Board members from telling their colleagues the day before the final vote that they will be abstaining. Chamber Br. 33-35. To the contrary, as the courts have held, provisions like Section 3(b) are "silent as to what point in time, or over what period of time, the quorum requirement may be satisfied." *Idaho v. ICC*, 939 F.2d at 787-88.

Nothing is cited to show any contrary clear intent, either in Section 3(b), or in the legislative history, or in the common law applying to the quorum inquiry. Instead, the Chamber cites (p. 21) to the district court's reliance on an analogy to "ripeness" doctrine. This is insufficient to establish that Congress intended any such analogy to apply to Section 3(b), and there is no reason to read it into the statute.

Nor is there force to the Chamber's attempt to answer the Board's argument that Member Hayes decision to abstain "was final on December 15" (NLRB Br. 16) with a hypothetical in which Member Hayes dies after making his final decision to abstain but before the remaining two Board members cast their votes approving the final text of the rule on December 16. Chamber Br. 21. The Chamber is mistaken is its assumption that, under its hypothetical, Member Hayes

could not be counted in the quorum.

In analogous circumstances, the Interstate Commerce Commission has counted the votes of members whose terms have expired before the remaining members have cast their votes so long as "the decision issued is in all material respects the same as the decision voted on by the departing Commissioner." *United Pac. R.R. Co.*, 6 I.C.C.2d 641, 645 (1990), *affirmed sub nom. Idaho v. ICC*, 939 F.2d at 787 -788. In other words, contrary to the Chamber's implication, there is nothing absurd about holding that "departed commissioners" can be counted in the quorum, so long as their final decision was made before they departed the agency. *Idaho v. ICC*, 939 F.2d at 787-88.[5] Because casting a vote or deliberately abstaining are equally valid ways of participating in a decision, the ICC's practice supports the Board's argument that Member Hayes' deliberate abstention suffices to make him part of the three member quorum even though his decision was voiced prior to the vote of the other two Board members.

Counting Member Hayes as part of the quorum is also consistent with the ICC's policy that an action considered seriatim by a quorum must, in all material respects, be the same. Here, the differences between the December 15 draft of the

[5] The Ninth Circuit in that particular case also relied upon the historical practice of the ICC, but a change in procedure is not reviewed with any heightened scrutiny, and the same deference applies. *See infra*, (discussing, e.g., *Fox Television Stations, Inc.*, 556 U.S. at 515.)

rule and the December 16 draft were not material to Member Hayes decision to abstain then and dissent later. To the contrary, Member Hayes' expressed rationale for refraining from dissenting at the time the rule was sent to the Federal Register was that he could was "say whatever I needed to say in one [dissenting] document" to be added after the final rule's publication. JA 248 ¶ 9. The further changes made by the majority on December 16 were all comprehended in Member Hayes' decision to abstain and to issue his dissent after the final rule was sent for publication. For these reasons, the Chamber has introduced nothing which demonstrates a "clear intent" on the part of Congress to prohibit Board members from abstaining on the day before the vote in circumstances like those presented here.

* * *

In sum, although the Board did not follow its usual voting procedure here, the alternate procedure that the Board did follow satisfied the three member quorum requirement. The Chamber may disparage as "one-off" (p. 10) the Board's issuing the final rule on the basis of the affirmative votes of Chairman Pearce and Member Becker cast on December 16 and the decision to abstain from dissenting at that time expressed by Member Hayes on December 15. But that is not the same thing as providing legal support for the Chamber's broad claim (pp. 33-35) that the procedure followed is beyond the Board's authority. Like the district court, the

Chamber has failed to respect the principle that an agency's crafting a novel procedure is within its discretion so long as it is not "'a totally unjustified departure from well settled agency procedures of long standing.' *Vermont Yankee*, 435 U.S. at 542." NLRB Mot. Sum. Judg., Docket 21-1, at 35 (where the Board pointed out that the courts have never found any change in internal procedures "totally unjustified" under this doctrine); *id.* (discussing *Consol. Alum. Corp. v. TVA*, 462 F.Supp. 464, 476 (M.D. Tenn. 1978), in which the court found the impending loss of quorum compelling reason to change TVA voting procedures); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (imposing no heightened scrutiny for changes in policy). And, here, the imminent loss of a Board quorum justified the Board's crafting a new procedure that that gave Member Hayes the option, which he elected, to refrain from dissenting at the time the majority agreed to publish the final rule and instead to express his objections to the rule in a later dissent. Because, as shown, Member Hayes definitively expressed his decision to abstain on December 15, he was not obliged to repeat himself the following day in order to satisfy NLRA Section 3(b)'s three member quorum requirement.

4. Reconsideration was appropriate because Member Hayes was present in the quorum in the voting room during the final vote.

In the alternative, even under the district court's erroneous view of the law, the additional affidavit submitted by the Board on reconsideration (Burnett

Affidavit JA334-342) demonstrates that the Board had a quorum. The affidavit shows that Member Hayes was in fact in the electronic voting room during the vote and so could not have been "absent" during the final vote. As previously explained, this is very similar to the basis for reconsideration in *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110 (4th Cir. 1997). The Chamber correctly notes that *Lockheed* is from the Fourth Circuit, and so not binding here. Chamber Br. 43 n.14. But as persuasive authority, it shows that the district court abused its discretion in refusing to consider this case.

A. Member Hayes was in the room and specifically asked to vote.

In arguing that there was no error, the Chamber states that "[w]hatever online voting scheme the Board uses, at a minimum the member must know and be specifically asked to cast a vote and decline to do so." Chamber Br. 47.

Yet that is precisely what is shown here: Member Hayes knew about the vote (he received both advance notice, JA247¶4, and contemporaneous electronic notice, JA336¶14 (the system "sends an email notification to the Board Members and their staff")) and was specifically called to vote (again by the electronic system, JA248¶11, JA336¶14 ("a call to each participating Board Member to cast his vote on the circulated document")). As discussed in the Board's opening brief, pp. 22-23, Member Hayes, through his staff, opened the voting task for the rule but did not act upon it.

B. Member Hayes's agents act on his behalf in casting votes, and therefore constitute his presence in the quorum.

The Chamber's primary arguments in response all relate to the supposed agency/principal problem arising from the fact that Member Hayes delegated to his most senior staff the task of logging in to the room and acting on his behalf. Chamber Br. 44-46. These arguments are unavailing.

The Chamber does not dispute that senior staff can be authorized to log in to the room and cast a member's vote. They were so authorized by Member Hayes on 18 other matters at about the same time as this final rule. This is markedly different from Congress, where a member cannot send his staff to the floor of Congress to cast the member's votes. *See* Chamber Br. 45.

But the Chamber asserts that an agent is nonetheless not present "for this case" unless he is specifically authorized to abstain or vote on the particular case. That standard is satisfied here. In this very matter, Member Hayes had authorized his Chief Counsel the day before "to advise that he would not attach any statement to the Final Rule." Hayes Affidavit, JA 248 ¶ 9. In view of Member Hayes' announced position with respect to this matter, the only authority of senior staff assigned to monitor calls to vote on Member Hayes' behalf was to abstain in response to the December 16 call for his vote on the final rule.[6]

[6] The only other argument on the merits presented by the Chamber concerns the precise time that the task was opened. Chamber Br. 46-47. But the Chamber

C. There is no adequate procedural reason for not correcting the clear error in this case.

Without a substantive argument of any weight, the Chamber instead argues that the Board acted too late and the district court's error should therefore be final. In essence, the Chamber argues that judicial administrative considerations should outweigh the inequity of an erroneous decision in this case.

This argument should be rejected. Many of the Chamber's cases deal with "newly discovered" evidence, yet, as the Fourth Circuit explained in *Lockheed*, those cases are wholly inapplicable when an affidavit is being introduced solely to correct a clear error or manifest injustice. Chamber Br. 35-36. Indeed, the Chamber admits that "affidavits (or other evidence) may help show that a Rule 59(e) motion should be granted 'to correct a clear error of law or prevent manifest injustice.'" Chamber Br. 43n.14 (quoting *Lockheed*). And so the Chamber must show that it should prevail notwithstanding the clear error in the district court's decision.

The Chamber faults the Board for not making the clear error of the Chamber's arguments more apparent prior to judgment by the district court. Chamber Br. 37-42. Specifically, the Chamber faults the Board for relying on its

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wholly fails to respond to the fact that "a Member noted as present . . . may be permitted to vote after the calling of the role is concluded." NLRB Br. 24 (quoting *Hinds*). As explained above, that was the option Member Hayes elected when he chose not to dissent at the time of the rule's being sent to the Federal Register but to do so at a later time.

footnote in its motion for summary judgment.

But the Chamber does not mention that this was, in fact, the *only* relevant part of the Chamber's brief, and that almost the full ten pages of the Chamber's quorum argument were devoted to the wholly uncontested point that two members do not equal a quorum. JA228-238. In this context, it would not be fair to expect the Board to seek leave of the court to file an additional sur-reply—nowhere contemplated in the briefing scheduling order—where on the issues raised in the Chamber's motion for summary judgment and opposition, the Board had already supplied the court with legally sufficient grounds for rejecting the Chamber's argument. NLRB Br. 27-28.

In any event, the government in *Lockheed* could have introduced the affidavits before final judgment—yet the Fourth Circuit held that it would be inequitable to exact upon the public the grievous consequences of the district court's erroneous decision, and that it would be an abuse of discretion to refuse to reconsider. The Chamber has no response. Therefore, the district court should have modified its judgment on reconsideration, giving due weight to the Burnett affidavit.

Conclusion

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

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National Labor Relations Board
January 16, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), I certify that this brief complies with the applicable word count limitations, containing 4,914 words. This count was obtained using the word count feature of Microsoft Word.

/s/ Abby Propis Simms
ABBY PROPIS SIMMS

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2013, the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia using the appellate CM/ECF system and served electronically on all counsel of record.

/s/ Abby Propis Simms
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