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.	)	Civil Action No. 11-2262 Judge James E. Boasberg

JOINT MOTION TO ADJUST BRIEFING SCHEDULE

The Court previously granted the joint motion of the parties to waive replies and file simultaneous motions and oppositions. The parties requested such a briefing schedule in an effort to expedite these proceedings to enable the Court to rule on the parties' summary judgment motions before the April 30, 2012 effective date of the rule at issue. Most of the issues in this litigation had been fully aired in the rulemaking before the Board. However, the quorum issue had not been raised in the rulemaking because it relates to the final approval of the rule. Thus, the parties were unable to fully anticipate the arguments on this issue. For this reason, the parties agree that the Chamber and the CDW may file a short reply limited to responding on the merits to the Board's argument that the "quorum . . . [is] created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present." NLRB Opposition at 3. Plaintiffs' reply is attached to this motion as Exhibit A.

Exhibit A

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REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Defendant's ever-changing quorum argument continues to fall short of satisfying the statutory requirement that "three members of the Board, at all times, shall constitute a quorum of the Board." 29 U.S.C. § 153(b). In its motion for summary judgment, the Board argued that Member Hayes "participated" in approving the Final Rule by voting on two procedural actions related to drafting the Final Rule. (Memo. 42.) Perhaps recognizing that the procedural votes clearly did not constitute participation in the vote to approve the text of the Final Rule, Defendant now argues that it was not necessary for Hayes to participate in approving the final rule because the quorum requirement was satisfied by his "mere presence" on the Board. (Opp. 3.) Considering that there was no formal meeting to approve the Final Rule, the Board's argument that Member Hayes was "present" is effectively that the quorum requirement was satisfied because the Board had three Members at the time the Final Rule was approved by two Members. This argument is illogical, as well as inconsistent with the statute, Supreme Court precedent and other case law.

As an initial matter, the Defendant's argument that "mere presence" is enough to create a quorum (Opp. 3) is inapposite in this case. All of the cases and authorities cited by the Board on this issue address determining whether there was a quorum for a *formal meeting*. *United States v. Ballin*, 144 U.S. 1 (1892), for example, examines formal proceedings of the United States House of Representative. *Id.* at 4-6.[1] Both American Jurisprudence articles cited by the Defendant also address quorum of a body "when assembled." 59 Am. Jur. 2d Parliamentary Law § 9; 2 Am. Jur. 2d Admin. Law §§ 82-83 ("III. Meetings and Records; Disclosure to the Public. A. Meetings; in General."). Indeed, the Parliamentary Law article the Board relies upon provides that "[a] deliberative body can act only at a formal meeting where a quorum is present." 59 Am. Jur. 2d Parliamentary Law § 6. There was no formal meeting in this case. As the Board itself points out, the Board uses a notation voting procedure that allows members to vote individually and separately. (Opp. at 3.) The effect of being present at a formal meeting is thus plainly irrelevant to the issue of what constitutes participation for purposes of a quorum in this case.

By arguing that Member Hayes was "present" at the vote under the Board's notation voting procedure, the Board is in effect arguing that quorum is the same as Board membership. This position is clearly incorrect and cannot be reconciled with the statute itself nor Supreme Court precedent. The Supreme Court in *New Process Steel v. NLRB* explained unequivocally that "[t]he requisite membership of an organization, and the number of members who must participate for it to take action, are separate (albeit related) characteristics." 130 S.Ct. 2635,

[1] Moreover, *Ballin* is also inapposite to the NLRA's quorum requirements because, as the Court noted therein, under the Constitution, the House of Representatives itself determines when a quorum is present. *Id.* at 6 ("The constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact."). The Board, of course, has no such similar powers and its attempts to circumvent the statutorily required quorum should be rejected.

2643 n.4 (2010). "A quorum is the number of members of a larger body that *must participate* for the valid transaction of business." *Id.* at 2642 (emphasis added). "We thus understand the quorum provisions merely to define the number of members *who must participate* in a decision." *Id.* at 2643 (emphasis added).

There is clearly a difference between being a member in a body and participating in an action of that body. *See, e.g., Fed. Trade Comm'n v. Flotill Products, Inc.*, 389 U.S. 179, 180 (1967) ("[O]nly three Commissioners participated in the decision because the new Commissioner, not having heard the oral argument, declined to participate."). Indeed, the Board essentially conceded as much in its *New Process Steel* brief: "[T]he general Board quorum requirement . . . has force only when fewer than five Board members *participate* in a decision. Under the general Board quorum requirement, the Board may transact business with the *participation* of only three members." NLRB *New Process Steel* Br. 22 (emphases added). In fact, in *Flotill Products*, the Supreme Court reversed the Ninth Circuit and held that the affirmative vote of two of the three Commissioners who participated in the vote was sufficient to issue the order because the fourth member, who declined to participate in the vote, was not part of the quorum. *Flotill Products*, 389 U.S. at 180, 183-84. Had the non-participating member been part of the quorum merely because he was present as a member of the Commission the measure would have failed because only two of four Commissioners would have voted for the order.

Even as an analogy, the Board's reliance on quorum principles for formal meetings is misplaced. The Board's notation voting procedure requires some form of action by the participants: "The JCMS process automatically calls for an electric vote when drafts are circulated. As stated above, such a vote would either indicate the draft was 'approved' or

'noted,' accompanied by circulation of a separate statement in the latter event." Hayes Decl. ¶ 11 (Opp. Exh. 1). Moreover, "[i]n situations where a particular Board Member has not voted and immediate action is desired, the Executive Secretary or Solicitor may convey, by phone or e-mail, *a request to act*." *Id.* (emphasis added); *see also Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453, 460 (D.C. Cir. 1967) ("[Notation voting] permits the Board to proceed with its members *acting* separately, in their various offices, rather than jointly in conference." (emphasis added)); *id.* ("But the quorum *acting* on a matter need not be physically present together at any particular time." (emphasis added)).

Member Hayes took no action. Hayes Decl. ¶ 11. He did not enter a vote either to approve or to note the Final Rule. *Id.* And he was not asked to record a final vote. *Id.* He was completely absent from the notation voting procedure. This complete lack of purposeful action by Member Hayes in the official vote to approve the Final Rule is akin to an absent voter, either not present at the meeting or not participating in any meaningful, purposeful way. *See, e.g., 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 commissioner participated in agency deliberations and took purposeful action by joining, concurring in, dissenting from, or even abstaining from the final decision. Goldsmith did none of these things."). The Board's suggestion that Member Hayes was like a participant in a formal meeting who abstained from voting, therefore, is an inapt analogy. There is no basis for suggesting that Member Hayes purposefully "abstained" from voting. Indeed, he stated that "he gave no thought to whether further action was required." Hayes Decl. ¶ 11. Failing to participate is clearly not

the same as determinedly refraining from voting on the final decision.[2] Only the latter is an abstention; the former is simply an absent voter. And under the authority cited by the Board for formal meetings, "[a]bstention and the absence of a voter are not to be treated alike. The abstaining voter is counted in determining the presence of a quorum while the absent voter is not included." 59 Am. Jur. 2d Parliamentary Law § 15.

In *King*, the case most analogous to the present case, the Supreme Court of New Jersey determined that "mere presence" was insufficient for a member to be counted towards the quorum requirement. 511 A.2d at 618-19. Absent purposeful action, such as affirmatively abstaining from the final decision, a "merely present" member is treated the same as a member who is physically absent, disqualified, or has recused herself or himself. *Id.* The reason for a member's lack of purposeful participation is not relevant. *Id.* at 618 ("We are thus entirely satisfied that for purposes of determining whether a legal quorum is present, it is not relevant whether a member is physically absent, is disqualified because of interest, bias, or prejudice, or other good cause, or voluntarily recuses herself or himself.").

This distinction between mere presence and purposeful participation is particularly appropriate for analyzing the quorum requirement under the NLRA. Under the NLRA, there is an express exception to the Board quorum requirement. The group quorum provision provides that "two members shall constitute a quorum" of a delegee group. 29 U.S.C. § 153(b). As explained in Plaintiffs' opening brief (at 11), the Board makes full use of this provision when the Board only has three members and one is precluded from participating: "[W]hen the Board's membership has fallen to three members, the Board has developed a practice of designating

[2] *See also* Hayes Decl. ¶ 6 ("The case is moved to issuance when votes are recorded for *all* Board Members as to the final versions of all circulated documents. That is the procedure that was followed with respect to the Board's notice posting rule." (emphasis added)).

those members as a 'group' in cases where one member will be disqualified, and then proceeding to a decision with a quorum of the two members able to participate." Office of Legal Counsel Memorandum Opinion for the Solicitor National Labor Relations Board, NLRB *New Process Steel* Br., Appendix A at 7a. And, as the dissenting opinion in *New Process Steel* points out, "the statute . . . is indifferent to the reason for the third member's absence, be it illness, recusal, or vacancy." *New Process Steel*, 130 S.Ct. at 2647 (Kennedy, J., dissenting). Whatever the reason for Member Hayes's failure to vote on the Final Rule, whether it was because he gave no thought to taking action; or because the Executive Secretary and Solicitor did not—per the usual practice—request him to take action, or because the other members erroneously believed that their approval of the December 15 procedural order obviated the need for Member Hayes to take further action (Hayes Decl. ¶ 11), Member Hayes was absent from the final vote to approve the rule and the Board's action is thus invalid due to a lack of quorum.

Once all the Defendant's subterfuge of "mere presence" and abstention are stripped away, it is clear that approval of the Final Rule was an action taken by only two Board members: "[T]he draft . . . was approved in JCMS by Chairman Pearce and Member Becker. As approved, the rule was forwarded that day by the Solicitor for publication in the Federal Register." Hayes Decl. ¶ 10. Indeed, the fact that the Final Rule itself states that "Member Hayes has *effectively* indicated his opposition," 76 Fed. Reg. 80,138, 80,146 (Dec. 22, 2011) (emphasis added), demonstrates that the two members who approved the Final Rule intended to act without Member Hayes's participation in the vote. This was clearly a violation of the NLRA: "[H]ad Congress wanted to provide for two members alone to act as the Board, it could have maintained the NLRA's original two-member Board quorum provision." *New Process Steel*, 130 S.Ct. at 2641 (citing 29 U.S.C. § 153(b)). "The Rube Goldberg-style [two-vote, auto-publish]

mechanism employed by the Board . . . is surely a bizarre way for the Board . . . to decide cases with only two members." *Id.* Under this mechanism, the Final Rule could have been "approved" without Member Hayes even being aware of the vote. For example, if for some reason Member Hayes had fallen ill the morning of December 16 and been rushed to the hospital, and remained incapacitated until the next day, under the Board's theory the Final Rule could have nonetheless been "approved" by a majority and sent for publication. This clearly would have been inappropriate. The Board itself, in its prior practice of delegating to itself when it only has three members, has recognized that two members cannot act alone unless there has been a delegation. In this case the facts show that Member Hayes simply, but fatally, did not participate in the vote to approve the Final Rule. The Final Rule should be set aside as inconsistent with the NLRA.

Dated: March 22, 2012

Respectfully submitted,

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ORDER GRANTING JOINT MOTION TO ADJUST BRIEFING SCHEDULE

Upon review and consideration of the joint motion to adjust the briefing schedule, it is this ____ day of _____, 2012, hereby

ORDERED that the motion is **GRANTED**; and it is further

ORDERED that Plaintiffs may file the short reply responding on the merits to Defendants argument regarding quorum that was attached to the parties' joint motion;

SO ORDERED.

_____
Hon. James E. Boasberg