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 SUPPORT OF DEFENDANT'S RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT

Defendant National Labor Relations Board ("Board") respectfully requests that this Court reconsider its decision of May 14, 2012, holding that only two members of the Board participated in issuing a rule amending the Board's election procedures. Docket 39 & 40 (invalidating 76 Fed. Reg. 80138 et seq.). The Court's finding that the third member of the Board, Member Brian Hayes, did not "show up" or participate on December 16, 2011, when the other two Board members voted, is predicated upon a mistaken understanding of the facts regarding the Board's electronic voting room.

To correct this mistake, the Board is supplying the Court with proof that on December 16 Member Hayes was present in the Board's electronic voting room. While the voting was occurring on this rule, he simultaneously participated in the votes taken on other matters, and deliberately abstained from voting on this rule. He opened, but did not act upon, the voting task in this rule.

In addition, the Board's motion points out that the Court's holding that the final rule does

not reflect Member Hayes' judgment concerning its merits disregards the indisputable fact that on December 15 Member Hayes had already notified his two colleagues that he would not be attaching a dissenting statement to the final rule, and he would issue his dissent later. This evidence compels the conclusion that Member Hayes's dissented from the rule and that his choice not to vote the following day was a deliberate *abstention*. His December 15 recognition that the election rule would be issuing by a 2-1 decision of the Board is consistent with his November 30 statements to the same effect at a Board hearing on the rule.

Standard for Relief under Rule 59(e)

A motion to reconsider under Rule 59(e) should be granted to correct a clear error, whether of law or of fact, and to prevent a manifest injustice. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (the four grounds for reconsideration are: to prevent manifest injustice, to accommodate for an intervening change in controlling law, to account for newly discovered evidence, or to correct clear error of fact or law); *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997). So long as the Rule 59(e) motion is timely filed, the courts have considerable discretion. *Lockheed Martin Corp.*, 116 F.3d at 112. Although the courts are not required to consider new legal arguments,[1] or mere restatements of old facts or arguments,[2] the court can and should correct clear errors in order to "preserve the integrity of the final judgment." *Turkmani v. Republic of Bolivia*, 273 F. Supp. 2d 45, 50 (D.D.C. 2002).

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.

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1 *Dist. Of Columbia v. Doe*, 611 F.3d 888, 896 (D.C. Cir. 2010).

2 *State of New York v. United States*, 880 F.Supp. 37, 38 (D.D.C.1995).

> 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 correct view of the facts, the EEOC was clearly entitled to prevail. *Id.* The Fourth Circuit affirmed, explaining that "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).

Reconsideration is particularly appropriate in this case because the Court's decision is based upon an argument first articulated in the Chamber's reply brief, which the Board has had no opportunity to address. Until late March, the Chamber did not contest that Member Hayes abstained from voting.

In its motion for summary judgment on February 3, 2012, the Chamber appeared to concede that Member Hayes had *abstained* from voting, and argued that members that "entirely abstained from voting [are] not counted towards [the] quorum requirement." Docket 22-1, at n.6; *see id.* (arguing that the quorum was lacking because "[t]he undisputed evidence is that Member Hayes did not vote on whether to approve the text of the Final Rule").[3]

The Board fully responded to this argument. *See* Docket 29, at 3-4. As the Board explained, an abstaining member is in the quorum. In light of the Chamber's apparent position that Member Hayes had abstained, the Board did not have cause to burden the record with evidence about the Board's electronic voting room, and the way presence and participation are

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[3] In its responsive opposition on February 28, 2012, the Chamber appears to have adhered to this position. Docket 30, at 5-7 (equating "participat[ing] in the vote" with whether "Member Hayes did not vote on whether to approve the Final Rule").

made manifest and recorded there.

On March 22, a little more than a month before the rule was to go into effect, the Chamber sought special permission to file an additional brief limited only to the quorum issue. The Board consented because "the parties were unable to fully anticipate the arguments on this issue." Docket 33. In this brief, for the first time the Chamber contested the fact that Member Hayes was "abstaining" from voting, arguing instead that he was "completely absent from the notation voting procedure." *Id.*, Docket 33-1 at 4-5. On May 14, this Court issued a decision finding the Board lacked a quorum. The Court relied exclusively upon the argument the Chamber presented on March 22, that Member Hayes was "completely absent" instead of "abstaining."

This decision was predicated on a number of clear errors, and should be reconsidered. The Board's rule serves an important public purpose, and the invalidation of the rule on clearly erroneous grounds is manifestly unjust.

Argument

I. Chairman Pearce and Members Becker and Hayes were all present and participating in the electronic voting room on December 16.

The Court asks: Did Member Hayes "show up" on December 16th? "[H]ow does one draw the line between a present but abstaining voter (who may be counted toward a quorum) and an absent voter (who may not be) when the voting is done electronically? Even if 'mere presence' is enough, the translation of that physicality-based concept to the JCMS process, which 'automatically calls for an electronic vote when drafts are circulated,' Hayes Decl., ¶ 11, is not obvious." Docket 40 at 2, 13-14. The Court's answer—that Member Hayes did not abstain, but was entirely absent—is clearly mistaken. The facts show that here, as in *Ballin*, Member Hayes was in the room when the vote was held. *United States v. Ballin*, 144 U.S. 1, 5-6 (1892).

He was present and participating in every relevant sense.

The Board's electronic voting room mimics a physical meeting space like a corporate boardroom or the floor of Congress. Burnett Aff. at ¶ 2, 4-5 (Burnett is the principle architect of the room).

A user "shows up" in the electronic room by logging in. *Id.* at ¶ 6-7. A user participates by taking actions such as viewing documents, circulating documents and casting votes. Votes on a wide variety of matters can be held in the room simultaneously.

On December 16th all three Members showed up to the room. The system records activity in the voting room on behalf of all three Members almost continuously from 9 to 5 on that day. *Id.* at ¶ 26, *see also id.* at ¶ SD_3. There was approximately simultaneous activity by all three Members at the very time the voting was occurring in this rule. *Id*. Indeed, Member Hayes directed eighteen votes to be cast in the room on the 16th while this rule was pending. *Id.* at ¶ 27, *see also id.* at ¶ SD_2. This is more voting activity than Member Hayes had on any other day from December 13 to 22, and more voting activity than any other member had in the room on that day.

The facts demonstrate that all three Board members participated in *this rulemaking* in the voting room in the span of less than one hour. At the start of the day on December 16th, suggested modifications circulated by Member Becker on the prior day were under deliberation. *Id.* at ¶ 25. At 11:54:42 a.m., Chairman Pearce voted that he "approved" Member Becker's suggestions with further modifications. *Id.* at ¶ 28. Attached to this vote was a document reflecting these further suggested modifications. Any user who entered the room would have been able to see that vote and the attached document, and could cast a vote as directed by the Board member. A red arrow would have indicated to the user that there was a new document he

had not yet viewed. *Id.* at ¶ 15. And so, at 12:05:32 p.m., Member Becker voted that he "approved" these suggested modifications. *Id.* at ¶ 29. The final text had now been approved by the majority.

But that was not the end of it. At 12:24:02 p.m., Chairman Pearce then used the system to circulate the document. *Id.* at ¶ 30. This circulation was *only* to the remaining participating members *who had not yet voted*. *Id.*; *see also id.* at ¶ 13-14. Thus, in this case, Chairman Pearce created a "task" for Member Hayes, and only Member Hayes, asking him to vote.

And indeed, only a few minutes later, at 12:37:21 p.m., the system records that this very task was opened by Member Hayes's deputy chief counsel. *Id.* at ¶ 31.

Thus, there is no question that Member Hayes not only received the call to vote in this case, but he acted by opening that call to vote, and was actually present and participating in the very same room and at the very same time that this vote was held.

Here three members were clearly participating in the voting room on December 16. Three members were tasked with voting, and Member Hayes's deliberate decision not to cast such a vote does not deprive the Board of a quorum. Thus, even if "an individual needs to [do] something – that is, he needs to show up – in order to be counted toward a quorum (Docket 40 at 17)," here Member Hayes affirmatively showed up to the electronic room. And, under *Ballin* and this Court's decision, "showing up . . . is the only thing that matters." Docket 40 at 1; *United States v. Ballin*, 144 U.S. 1, 5-6 (1892).

II. Member Hayes's statements on November 30 and December 15 demonstrate that he was participating and *abstaining* from voting, and did not intend to deprive the Board of a quorum by refusing to participate.

Even on the existing record, however, this Court clearly erred. By dealing in a rigidly compartmentalized "unduly technical" fashion with the events preceding December 16th, the

Court (Docket 40 at 2, 6-7, 13-16) fails to recognize that these events provide the context necessary to understand the events of the 16th.[4]

The question whether Member Hayes was *abstaining* on the 16th, or, instead, *absent*, must be addressed in context. Member Hayes's own statements—on November 30 and on December 15 (less than 24 hours before the voting)—unambiguously demonstrate that Member Hayes was *not* absent. To the contrary, he participated and *deliberately chose* not to cast a vote, i.e., he *abstained*. *See* Black's ("abstain, vb, 1. To voluntarily refrain from doing something, such as voting in a deliberative assembly.").

On November 30, the two member majority adopted a resolution committing the Board to issuing a rule limited to eight of the new election procedures initially proposed in the Notice of Proposed Rulemaking on June 22, 2011. Member Hayes attended this meeting and voted against the resolution, knowing that his participation would create a quorum and enable a rulemaking he adamantly opposed. And the reason was eloquently articulated by Member Hayes himself:

> So 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 believe is an inadequate and flawed process, that I considered resigning in an effort to render such concerns moot. This was a matter of personal conscience, not a response to outside entreaty. I have, however, rejected this option, and I wanted to take a moment to indicate why. First, it is not in my nature to be obstructionist. Since I

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[4] It should also be noted that the Court clearly erred in finding that the rule became final on December 16th. Under well established law, the rule became final upon publication, on December 22nd. *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191, 1205-06 (D.C. Cir. 1996) (agency withdrew rule after submission to the Federal Register); 1 C.F.R. § 18.13. Thus, Member Hayes had more than "a matter of hours" in which to cast his vote. Docket 40 at 14.

This shows the fundamental error of the Court's holding that only the 16th matters: regardless of the day the rule became final, the relevant question is whether the *entirety of the prior voting procedure* demonstrates the presence or participation of a quorum. Voting is rarely held on the date of publication. The publication rests on the prior process. The "participation" analysis for that voting must therefore, by necessity, be retrospective.

> 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. . . .
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> 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.

Admin. Rec. Sec C, audio recording of Meeting November 30, 2012, at 42:19.

This Court's interpretation of Member Hayes's conduct—comparing him to Wisconsin state legislators who fled the jurisdiction to obstruct the majority's agenda—profoundly frustrates Member Hayes's deliberate choice not to engage in such obstructionism. Docket 40 at 17 (citing Monica Davey, "Wisconsin Bill in Limbo as G.O.P. Seeks Quorum," N.Y. Times, A14 (Feb. 18, 2011)).

Furthermore, *less than 24 hours before the vote*, Member Hayes told the other Board members that he would be abstaining from circulating anything in the voting room. It was clear error to ignore this and interpret his non-voting the next day as *absence* rather than *abstention*.

On December 15, all Board Members knew that the rule would likely be sent to the Federal Register on the next day. Chairman Pearce and Member Becker had cast their votes approving the rule in the electronic room, and were very near accord on certain suggested modifications. The Chairman had set December 16 as the deadline for the vote. Docket 29-1, Hayes Aff. at ¶ 4 (the 16th was "Friday of the next week").

But Member Hayes had not yet voted on any of these circulated documents. And so, in the late afternoon on the 15th, Chairman Pearce took action to ascertain Member Hayes's intentions. His staff contacted Member Hayes to determine whether he would be circulating anything to be published with the final rule. Hayes Aff. at ¶ 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.* at ¶ 9.[5]

By disregarding these statements, the Court misinterpreted Member Hayes's conscious decision not to circulate anything in the electronic room. Indeed, had Member Hayes voted "noted" on the rulemaking documents, it would have suggested that he would not dissent in the future, and the case would have been automatically closed in the electronic voting room. Burnett Aff. at ¶ 18-19. And so, here, the procedure for this rule was specifically changed to make it possible for Member Hayes to *abstain* from voting—and, thus, to maintain an opportunity to express his views about the rule at a later date. That was the purpose of the Order voted upon by all three Board Members. Docket 21-2 Exh 3. The Order stated that later dissents would be circulated "through the Board's usual procedures"—that is, in JCMS—which would mean that the dissenter would *abstain* for now so that the voting would remain open for his later dissent to be circulated.

There was never any doubt that Member Hayes was abstaining only for the present, and would publish a dissent at a later date. Indeed, earlier that day, Member Hayes had described the Board as "proceeding [with the final rule] on a divided 2-1 basis." Docket 29-1, Hayes Aff. at ¶ 8. He stated that he opposed proceeding with *any* rule at that particular time, when there was "the prospect of a full Board to address these proposed rule changes" in the future. *Id.*

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[5] In this context, it is particularly mistaken to suggest that, if only "someone [had] reached out to [Member Hayes] to ask for a response" on December 16 there might have been a quorum. Docket. 40 at 14, 15. The Chairman had already reached out on December 15, and the response from Member Hayes was quite clearly to abstain. To contact him again, less than 24 hours later, would be to act in disregard of Member Hayes' expressed views. The other two Board members had every reason to think that no further action was required of Member Hayes once he had reviewed the rule on December 15 and informed the majority that he opposed the rule and would

In *New Process*, relied on by the Court, only two members were on the Board and the judgment of only two Board members was brought to bear on the labor policy questions at issue. *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010). There simply was no third member, participating or otherwise. *New Process* would govern this case if, as the Court notes (Docket 40 at 11), death or term expiration had reduced the Board to only two members before the rule issued, but that did not happen. Here, unlike the situation in *New Process*, at all relevant times three members were on the Board, all three members expressed their judgment on the labor policy issues presented by the rule, and on December 15 and 16, they divided 2-1 (with one member technically abstaining from voting for the present) on the issuance of a final rule resolving the labor policy issues in dispute. In context, the Court's finding that Member Hayes did not participate in issuing the final rule has no legal or factual support.

For all the forgoing reasons, this Court's decision was clearly in error and manifestly unjust, and should be reconsidered.

III. This Court should promptly reinstate the Rule pending a final judgment.

On April 30, 2012, the rule went into effect. Two weeks later this Court's decision erroneously invalidated the rule. This Court should vacate its decision and restore the post-April 30th status quo under the rule. Had this Court's decision not been entered in error, the rule would have remained in effect. To prevent this, the Chamber would have to show that it is entitled to the extraordinary relief of a preliminary injunction, similar to the Chamber's motion of April 27, 2012 (Docket 35).

A preliminary injunction is an "extraordinary remedy." *Winter v. Natural Res. Def.*

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circulate his dissent in due course following the publication of the rule. See Docket 29-1, Hayes Aff. at ¶ 11.

Council, Inc., 555 U.S. 7, 24 (2008) (quotation omitted); *see also Munaf v. Geren*, 553 U.S 674, 689-90 (2008). It is "an intrusion into the ordinary process of administration and judicial review . . . and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (internal quotation marks and citation omitted). There are four criteria for injunctive relief:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter, 129 U.S. at 374. The Chamber bears the burden of proof. *Id.* The Supreme Court has recently cautioned that, more than a mere "possibility" of irreparable harm must be shown, no matter how strong the likelihood of success. *Id.* at 375.[6]

First, as the briefs demonstrate, the Chamber is not likely to succeed on the merits. Indeed, it does not challenge the merits of much of the rule. Docket 29 at 41-42. Meanwhile, the aspects of the rule that are challenged are similar in nature to practices which the Board has used on a case-by-case basis for many years. Docket 29, at 15-17 (discussing the deferral of litigation under *Mariah, Inc.*, 322 NLRB 586, n.1 (1996)); *id.* at 33-34 (explaining how the new Board review procedure changes only the time for review, not the substantive rights of the parties). And the Board is accorded extraordinary deference in its representation procedures by the courts, far beyond the usual *Chevron* standard. Docket 21-1, at 8-9 (discussing *NLRB v. A.J. Tower Co.*,

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[6] The Chamber's April 27, 2012, motion cites cases from close to ten years ago for the proposition that a strong showing on one element may "compensate" for a weaker showing on another. Docket 35, at 1 (citing *Cuomo v. NRC*, 772 F.2d 972 (D.C. Cir. 1985) and *AFL-CIO v. Chao*, 297 F. Supp. 2d 155 (D.D.C. 2003). Whatever precisely *Winter* may mean, it is clear that this "compensation" theory cannot be used to make up for a failure to show *both* a *likelihood* of success and that irreparable harm is *likely*. *See also Sanofi-Aventis U.S. LLC v. FDA*, 733 F. Supp. 2d 162, 167 (D.D.C. 2010) (discussing circuit split following *Winter*); *accord Sherley v.*

329 U.S. 324, 330-31 (1946); and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978)).

Second, there is no irreparable harm to the Chamber. As the Board has explained, "the whole parade of horribles . . . is cured by simply rerunning the election whenever the problem actually arises." Docket 29 at 38. In an effort to find some irreparable harm, the Chamber tries to resurrect free speech and due process claims that it has already abandoned. Docket 35 at 3 (citing "Section 8(c) free speech rights" that are not mentioned in any of the merits briefs). Suffice it to say, the opportunity for speech and process would be more than adequately ensured by a second election if the first was determined to be improper.

The litigation costs associated with court review or a rerun election do not constitute irreparable harm. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980). The Chamber's claim that the litigation required to seek court review of Board elections would harm an employer's "reputation," is not cognizable. *See* Docket 35 at 3-4. This is a basic feature of NLRA litigation, and any such harm was contemplated and accepted by Congress.

Third, in contrast to the Chamber, the Board and the public interest *are* irreparably harmed by enjoining this rule. Harm to the public and harm to the government are considered together when an injunction is sought against the government. *Nken*, 129 S. Ct. at 1761-62 (2009). In this analysis "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation omitted).

New representation petitions are being filed every day by or on behalf of employees,

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Sebelius, 644 F.3d 388, 392-93 (D.C. Cir. 2011); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009).

who, under the policies of the National Labor Relations Act, should be given the most expeditious and fair opportunity to vote for or against union representation reasonably possible. Congress has repeatedly emphasized "the exceptional need for expedition" in resolving employee representation disputes. Docket 21-1, at 9-11 (discussing the legislative history, *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330-31 (1946), and *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971)).

Every day that has passed since May 14th, these employees and the Board have been irreparably harmed, contrary to this clear Congressional purpose, because they have not been able to use the representation procedure which the Board has definitively determined is best. There is no way to cure the lost time and expense suffered in these cases.

The plaintiffs claim that there is no special urgency because the procedures in the rule had not been substantially changed for many years previously. Docket 35 at 4 (citing *Chao*, 297 F. Supp. 2d at 165). The *Chao* case is wholly inapposite. In that case, union reporting requirements were being changed. A brief delay caused no lasting harm to anyone, because the reporting could just as easily be done the next year. Here, by contrast, changing the rule next year does absolutely nothing to help the employees who file a petition this year.

The mere fact that *other* employees have suffered under the old procedures in the past does nothing to alleviate the irreparable harm to the employees who are *filing petitions today*, and who have never had any prior dealings with the Board's process. For employees on the verge of filing a petition, any delay in implementing this rule could make all the difference.[7]

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[7] This Court suggested that the Board could fix the problem by simply voting again on the rule. Docket 40 at 18. The issue is not so simple. In fact, the same plaintiffs who attack this rule have also jointly moved to intervene in a pending D.C. Circuit case to argue that the *current* Board lacks a quorum. *Noel Canning v. NLRB*, 12-1115 (D.C. Cir. March 15, 2012). Although

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court grant the Board's motion for reconsideration and vacate its prior decision, thereby permitting the rule to go back into effect pending the resolution of the remaining issues in this litigation, and that the Court grant summary judgment to the Board in this matter.

RESPECTFULLY SUBMITTED,

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that contention is without merit, the issue is pending before the D.C. Circuit. To inject that issue into this litigation, when the Board clearly had a quorum for this rule, would needlessly subject this rule to further uncertainty.