No. 10-8

In the Supreme Court of the United States

EUGENE IOVINE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether Section 3(b) of the National Labor Relations Act (NLRA), 29 U.S.C. 153(b), authorizes the National Labor Relations Board (NLRB or Board) to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter*, but is reprinted in 371 Fed. Appx. 167 and is available at 2010 WL 1193434. The decision and order of the National Labor Relations Board (Pet. App. 8a-18a) and the decision of the administrative law judge (Pet. App. 19a-59a) are reported at 353 N.L.R.B. No. 36.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 30, 2010. The petition for a writ of certiorari was filed on June 24, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(5) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5). Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7" of the Act, including "the right * * * to bargain collectively through representatives of their own choosing," 29 U.S.C. 157. An employer violates its obligation to bargain with its employees' representatives "if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991). Thus, in order to meet its collective-bargaining obligations under the Act, an employer must, *inter alia*, give the union advance notice and an opportunity to bargain about a proposed decision. See *Scepter, Inc.* v. *NLRB*, 280 F.3d 1053, 1056 (D.C. Cir. 2002).

2. Petitioner provides electrical contracting services to other businesses and government entities at jobsites in New York City and the surrounding area. Pet. App. 21a. Petitioner is a member of an employers' bargaining association known as the United Electrical Contractors Association (UECA), which represents petitioner in negotiating and administering collective-bargaining agreements with a unit of employees that included petitioner's. *Id.* at 21a-22a. On February 23, 1993, following an election, the Board issued an order certifying Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (the Union), as the exclusive collective-bargaining representative of a unit of employ-

ees employed by various members of UECA, including petitioner. *Id.* at 22a-23a.

Petitioner and the Union were in the process of negotiating for a collective-bargaining agreement when, during a period spanning from December 1996 to May 1998, petitioner laid off 30 employees. Pet. App. 23a-25a. With respect to the first three employees who were laid off, petitioner did not provide notice of the layoffs to the Union either before or after the layoffs. *Id.* at 23a. With respect to the following 27 employees who were laid off, petitioner provided notice to the Union either after or simultaneously with the layoff, but never in advance. *Id.* at 24a-25a.

3. a. Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued two consolidated complaints alleging that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by laying off employees without providing to the Union advance notice of the layoffs and an opportunity to bargain with petitioner over the layoffs and their effects. See Pet. App. 19a-20a. After a hearing, an administrative law judge (ALJ) issued a decision, finding that petitioner had engaged in the alleged unfair labor practices. *Id.* at 20a. The Board subsequently remanded the case for reassignment to a different ALJ with the instruction to "review the record and issue a reasoned decision." *Id.* at 20a-21a. The newly assigned ALJ issued a decision also finding that petitioner had engaged in unfair labor practices by unilaterally laying off 30 employees without providing to the Union advance notice of the layoffs and a meaningful opportunity to bargain over both the layoff decisions and their effects. *Id.* at 48a-49a.

b. Petitioner filed exceptions to the ALJ's decision, and the Board reviewed the case. Between January 1, 2008, and March 27, 2010, the NLRB operated with only two of its five seats filled. *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2639 (2010). During that time, the two-member Board continued to issue decisions, asserting that it had authority to do so as a two-member quorum of a three-member group to which the Board had previously delegated all of its authority when it had four members. *Id*. at 2638-2639. Among the cases the two-member Board decided was the instant case, which the Board decided on September 30, 2008. Pet. App. 8a-18a. Affirming, the Board found that petitioner's failure to provide the Union with timely notice and an opportunity to bargain over the layoff decisions and their effects violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 9a.

4. The Board filed an application for enforcement in the United States Court of Appeals for the Second Circuit. Pet. App. 1a. Before the court, petitioner challenged the authority of the two-member Board to issue the decision and order, and disputed the Board's finding that petitioner had engaged in an unfair labor practice by unilaterally laying off its employees without providing the Union with notice and an opportunity to bargain. *Id.* at 3a-6a. Petitioner also claimed that the Board abused its remedial discretion by ordering petitioner to reinstate the laid-off employees and to compensate them for earnings and other benefits lost as a result of the unlawful layoffs. *Id.* at 6a-7a. The court of appeals enforced the Board's order. *Id.* at 1a-7a.

On the question of the Board's authority to operate with its two remaining members, the court of appeals held that its prior decision in *Snell Island SNF LLC* v.

NLRB, 568 F.3d 410 (2d Cir. 2009), vacated, 130 S. Ct. 3498 (2010), holding that two members of the Board may issue enforceable decisions, foreclosed petitioner's argument that the Board lacked the quorum necessary to issue a valid order. Pet. App. 3a. Addressing petitioner's challenges to the merits of the Board's decision, the court of appeals concluded that the Board had "reasonably determined" that petitioner violated the Act "by failing to provide adequate notice and an opportunity to bargain over the challenged layoffs." *Id.* at 6a. The court agreed with the Board that petitioner did not provide a valid defense for the failure to provide notice, including by relying on past practices regarding unilateral layoffs. *Id.* at 4a-5a. The court also rejected petitioner's claim of exigent circumstances, finding that "the record reveals no extraordinary event or imminent disaster" that would qualify as an exception to the bar against unilateral employment actions. *Id.* at 5a-6a. Finally, the court rejected petitioner's challenge to the Board's remedial order, finding "no departure from the purposes of the Act in the Board's order." *Id.* at 7a.

DISCUSSION

Petitioner asks this Court to decide whether Section 3(b) of the NLRA, 29 U.S.C. 153(b), authorizes the Board to act when only two of its five positions are filled, if the Board previously delegated its full powers to a three-member group of the Board that included the two remaining members. The question presented was answered in the negative by this Court's recent decision in *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635 (2010), which held that the National Labor Relations Board had exceeded its statutory authority in issuing decisions when three of its five seats were vacant. In light of that

ruling, the Board had no authority to issue the decision in this case, which should now be considered by a quorum of the Board or a properly constituted group to which the Board has delegated decision-making authority. Therefore, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for reconsideration in light of the decision in *New Process Steel, L.P.*

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635 (2010).

Respectfully submitted.

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