No. 12-517

In the Supreme Court of the United States

TEAMSTERS LOCAL UNION NO. 523, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in ruling that the National Labor Relations Board reasonably concluded that a labor union violated Section 8 of the National Labor Relations Act, 29 U.S.C. 158, by causing an employer to discriminate against an employee because the employee had not been previously represented by the union.

2. Whether the court of appeals erred in sanctioning petitioner for raising issues decided by that court at a prior stage of this case even though this Court had vacated the prior judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported but is available at 2012 WL 2580999. The decision and order of the Board (Pet. App. 8a-57a) is reported at 357 N.L.R.B. No. 4.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2012. A petition for rehearing was denied on July 23, 2012 (Pet. App. 85a). The petition for a writ of certiorari was filed on October 22, 2012 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, recognizes the right of an

employee to choose freely whether to participate in union or other labor-organization activities. 29 U.S.C. 157. Section 8 of the NLRA protects that right by declaring it an unfair labor practice for a union to restrain or coerce employees in the exercise of rights guaranteed by Section 7, or to "cause or attempt to cause an employer to discriminate against an employee" with regard to any term of employment so as to encourage or discourage union membership or participation. 29 U.S.C. 158(b)(1)(A) and (2); see *Radio Officers' Union* v. *NLRB,* 347 U.S. 17, 40 (1954).

2. Interstate Brands makes and distributes bakery products under various brand names. Pet. App. 2a. Until late 2005, Interstate Brands distributed its products through two different distribution systems, and petitioner, a labor union, represented Interstate Brands' sales representatives in two separate bargaining units. *Ibid.* When Interstate Brands consolidated the distribution systems, it agreed with petitioner that the separate bargaining units should also be consolidated, thus allowing petitioner to represent all of the sales representatives as one unit. *Id.* at 3a. The parties contemplated that one of the two existing collective-bargaining agreements would remain in effect and that employees previously covered by the other agreement would be slotted in according to seniority. *Ibid.*

In the course of consolidating the bargaining units, a dispute arose between Interstate Brands and petitioner about how to calculate the seniority of sales representative Kirk Rammage. Rammage had been employed by Interstate Brands for approximately 15 years, but had never been included in either bargaining unit. Pet. App. 2a-3a, 12a. Although both Interstate Brands and petitioner agreed that Rammage should be part of the new,

consolidated bargaining unit, Interstate Brands sought to "dovetail" Rammage by calculating his seniority according to his years of employment, while petitioner sought to "endtail" Rammage by placing him at the bottom of the seniority list. *Ibid.*

Petitioner's position prevailed in the bargaining. Accordingly, while the employees who had been covered by the defunct agreement were dovetailed into the merged unit, Rammage was designated the least senior employee for route-bidding purposes. Pet. App. 3a. Had he been credited with his years of employment, that designation would not have been appropriate. *Id.* at 13a. Rammage ultimately had to transfer to a less desirable location when he was "bumped" from his regular route by an employee deemed to have greater seniority. *Id.* at 3a. One of Rammage's supervisors informed him that he lost his route because he "was not in the Union"; another supervisor told him that he "would have to join the Union." *Id.* at 43a.

3. Acting on charges filed by Rammage, the General Counsel of the National Labor Relations Board (NLRB or Board) issued a complaint alleging, *inter alia*, that petitioner violated Section 8(b)(1)(A) and (2) of the NLRA, 29 U.S.C. 158(b)(1)(A) and (2), when it demanded that Rammage be endtailed on the employee seniority list. Pet. App. 3a, 9a, 36a. On October 31, 2006, after holding a hearing, an administrative law judge (ALJ) concluded that petitioner had not violated the NLRA. *Id.* at 53a.

Rammage and the General Counsel filed exceptions to the ALJ's decision, and the Board reviewed the case. Pet. App. 8a. The Board reversed in relevant part, holding that petitioner had violated Section 8(b)(1)(A) and (2) by demanding that Rammage be endtailed. *Id.* at

73a; see 353 N.L.R.B. 122 (2008). That decision was issued on September 25, 2008, by a Board operating with only two of its five positions filled. Pet. App. 72a-84a; *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2639, 2644 (2010) (*New Process*).

Petitioner sought review of the Board's order in the Tenth Circuit, challenging both the substance of the Board's ruling and the authority of the two-member Board to act; the Board cross-applied for enforcement of its order. Pet. App. 61. The court of appeals upheld the Board's authority to operate with two members, enforced the Board's order, and denied the petition for review. *Id.* at 60a-71a.

With respect to the merits of the Board's unfair-labor-practice ruling, the court of appeals held that the Board's conclusion "reflects a reasonable application of the NLRA and the legal principles" governing Section 8 of the Act. Pet. App. 70a. The court noted that petitioner's "insistence on Mr. Rammage's endtailing coupled with [Interstate Brands'] acquiescence and its statements that Mr. Rammage was demoted because he was not in the Union reasonably suggest that [petitioner] caused [Interstate Brands] to discriminate against Mr. Rammage in a way that encourages Union participation." *Ibid.*

Petitioner filed a petition for a writ of certiorari (No. 09-1404). While that petition was pending, this Court held in *New Process* that the Board exceeded its statutory authority by issuing decisions when it had only two members. See 130 S. Ct. at 2644 (holding that "the delegation clause requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board"). The Court therefore granted the petition, vacated the judgment of the court of ap-

peals, and remanded the case for further consideration in light of *New Process*. See 131 S. Ct. 109 (2010). The court of appeals in turn vacated the Board's order and remanded the case to the Board for further proceedings. Pet. App. 58a-59a.

4. a. On remand, the Board—now operating with three members—once again found that petitioner violated Section 8(b)(1)(A) and (2) of the NLRA by insisting that Rammage be endtailed. Pet. App. 11a. The Board explained that it "has drawn a clear distinction between discrimination based on *unit* seniority and that based on *union* seniority." *Id.* at 16a. A union "may lawfully insist on the endtailing of new bargaining unit employees' seniority when it is based on unit rather than union considerations," *id.* at 16a-17a (citation omitted)—for example, where one company purchases another and an employee of the purchased company is added to an existing unit for the first time, *id.* at 18a. However, it is unlawful under the NLRA for "parties to place employees at the end of the seniority list because they were unrepresented by a particular union or any union in their prior employment." *Id.* at 17a (citing *Whiting Milk Corp.*, 145 N.L.R.B. 1035 (1964), enf. denied, 342 F.2d 8 (1st Cir. 1965)).[1]

The Board rejected the ALJ's finding that petitioner had simply treated Rammage as a new unit employee. Pet. App. 18a. The Board concluded that the ALJ's analysis was flawed because it "fail[ed] to recognize that

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[1] The Board cited (Pet. App. 17a) several other cases in which it had found that kind of endtailing unlawful: *Woodlawn Farm Dairy Co.*, 162 N.L.R.B 48, 50 (1966); *Teamsters Local 435*, 317 N.L.R.B. 617, 618 n.3 (1995), enf. granted, 92 F.3d 1063 (1996); and *Teamsters Local 480*, 167 N.L.R.B. 920, 923-924 (1967), enforced, 409 F.2d 610 (6th Cir. 1969).

neither" of the prior two units "continued to exist, as before, once the Employer and the Union * * * merged all of the sales representatives into a single unit." *Ibid*; see *ibid.* ("[T]he parties did not preserve unit seniority in either unit."). "The only difference between Rammage" and the employees being merged into the consolidated unit "in regard to unit seniority was that he had *not* been previously represented by the Union." *Id.* at 19a. Because those other employees were dovetailed, there was no reason other than "union seniority" to place Rammage at the end of the line. *Id.* at 18a-19a; see *id.* at 21a.

The Board acknowledged the First Circuit's decision in *NLRB* v. *Whiting Milk Corp.*, 342 F.2d 8 (1st Cir. 1965), which "suggests that parties do not unlawfully discriminate by respecting preexisting enforceable seniority rights" arising from contract or statute. Pet. App. 20a-21a. The Board found that principle inapplicable here, however. *Ibid.* While petitioner "might lawfully have agreed that all employees would retain any preexisting enforceable seniority rights," that is "not the rationale they offered for their treatment of Rammage." *Id.* at 21a; see *id.* at 21a n.13 (rejecting the First Circuit's suggestion "that previously represented status can be used as a proxy for enforceable seniority rights").

b. Petitioner filed a petition for review in the Tenth Circuit, and the Board cross-applied for enforcement of its order. Pet. App. 1a. Rammage intervened. 7/12/11 Notice of Intervention. After petitioner filed its brief, Rammage moved for sanctions against petitioner pursuant to Federal Rule of Appellate Procedure 38, arguing that the appeal was frivolous because petitioner repeated the same arguments that the court had rejected in the prior appeal. Pet. App. 1a, 6a. The Board took no

position on Rammage's sanctions motion. See 10/19/11 Motion.

In an unpublished decision, the court of appeals enforced the Board's order and denied the petition for review. Pet. App. 1a, 7a. The court stated that the Board had "reasonably concluded" that petitioner violated the Act "by protecting union seniority in a merged bargaining unit at the expense of a previously unrepresented employee." *Id.* at 5a-6a. The court agreed with the Board's rejection of petitioner's contention that it acted permissibly to preserve unit seniority, because the only thing distinguishing Rammage from the employees who were dovetailed was that he did not have any seniority in the union. *Id.* at 5a.

The court of appeals also granted Rammage's motion for sanctions. Pet. App. 7a. The court acknowledged that it "was not frivolous for the Union to attempt to persuade the three-member NLRB panel to reach a different result on remand," although that attempt was unsuccessful. *Id.* at 6a. In the court's view, however, petitioner "had no objectively reasonable basis to believe it would prevail in raising the same arguments th[e] court had already rejected on the merits" in the first petition for review. *Ibid.* The court ordered petitioner to pay Rammage $4,000 plus double costs—a total of $4,030.80—"for the * * * frivolous petition for review." *Id.* at 7a; 8/10/12 Order.

ARGUMENT

1. This Court's review is not warranted with respect to the Tenth Circuit's affirmance of the NLRB's decision that petitioner violated the NLRA. Petitioner asserts (Pet. 7-10) that the decision below creates a circuit conflict and is inconsistent with decisions of this Court regarding a union's duty of fair representation. That

assertion is wrong; no such conflict or inconsistency exists.

a. Petitioner identifies (Pet. 7-8) only one court of appeals decision with which the ruling below purportedly conflicts: *NLRB* v. *Whiting Milk Corp.*, 342 F.2d 8 (1st Cir. 1965). *Whiting Milk* dealt with the interpretation of a particular term in a collective bargaining agreement expressly addressing how seniority would be treated in the event of an acquisition. Four of the facilities acquired by Whiting Milk were covered by that agreement, which provided that "the seniority of the Union employees * * * carried over into the acquiring company"; a fifth facility was not covered. *Id.* at 9. In that circumstance, the court held, employees at the fifth facility could not complain about being placed at the bottom of the seniority list when they joined the new company—no contract granted them any seniority rights, and they did not obtain such rights merely by being employed for any particular length of time. See *id.* at 10-11; see also Pet. App. 21a n.13.

The Board properly concluded that *Whiting Milk* is not relevant to this case (and the Tenth Circuit did not directly address that decision). Applying the principle set forth in *Whiting Milk*, the Board noted, petitioner here arguably *could* "lawfully have agreed that all employees would retain any preexisting enforceable seniority rights," and then argued that "parties do not unlawfully discriminate by respecting" such rights "but not simple length of service." Pet. App. 20a-21a. But "that is not the rationale [petitioner] offered for [its] treatment of Rammage." *Id.* at 21a. Rather, petitioner claimed that Rammage was endtailed because he was a new employee of the new, merged unit—a characteristic that, as the Board pointed out, did not distinguish him

from other employees who were dovetailed into that unit. See *id.* at 18a-19a. *Whiting Milk* does not lend support to that kind of claim.

Because petitioner did not seek to preserve preexisting contractual seniority rights, the Tenth Circuit's decision is more analogous to *Teamsters Local Union No. 42* v. *NLRB*, 825 F.2d 608 (1st Cir. 1987)—a First Circuit decision that post-dates and analyzes *Whiting Milk*, but which petitioner does not cite. In *Teamsters Local Union No. 42*, the First Circuit made clear that *Whiting Milk* has no force in cases in which a preexisting contract governing seniority is not at issue: "The distinctions between *Whiting* and the case before us are glaring. In *Whiting,* the existing contract served as a blueprint which dictated the shape of the seniority ladder. There was no such antecedent contractual blueprint at [the unit before the court]. There, the issue of seniority was not foreordained by any existing pact; it was an unresolved matter suitable for collective bargaining." *Id.* at 613. Where no such "blueprint" is asserted, the court concluded, a union cannot "arbitrarily endtail" certain employees "solely because of their shorter union tenure." *Ibid.*

Accordingly, the decision below does not conflict with the approach taken by the First Circuit. Moreover, even assuming that some conflict did exist between *Whiting Milk* and the decision below, this Court's review would not be warranted. The decision below is unpublished and not precedential in the Tenth Circuit, Pet. App. 1a, and petitioner does not argue that the issue is important to the current administration of the Act. No other court

of appeals has addressed the issue, and the *Whiting Milk* decision issued over 45 years ago.[2]

b. In addition, there is no conflict between the Tenth Circuit's ruling and decisions of this Court addressing a union's duty of fair representation. None of the decisions petitioner cites (Pet. 9) discusses the scope of that duty in the context of a merged unit in which a "previously unrepresented" employee, Pet. App. 3a, 21a, is gaining union representation. See *Marquez* v. *Screen Actors Guild, Inc.*, 525 U.S. 33 (1998) (discussing negotiation of a union security clause); *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65 (1991) (discussing agreement to strike-settlement terms); *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (discussing representation in the grievance-arbitration process). The Tenth Circuit agreed with the Board that in the particular context of this case a union—though "legitimately concerned about its duty to the employees it already represented"—is not "permitted to discriminate against * * * merged employees on the basis of their previously unrepresented status." Pet. App. 21a; see *id.* at 6a. This Court has not held otherwise.

2. Although the Tenth Circuit's ruling on the merits was correct and creates no conflict, its award of sanctions against petitioner pursuant to Federal Rule of Appellate Procedure 38 was erroneous. The court stat-

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[2] Two other courts of appeals have enforced without discussion Board orders that declined to follow the First Circuit's decision in *Whiting Milk*. See *International Photographers Local 659*, 197 N.L.R.B. 1187, 1188-1191 (1972), enforced mem., 477 F.2d 450 (D.C. Cir. 1973), cert. denied, 414 U.S. 1157 (1974); *Teamsters Local 480,* 167 N.L.R.B. 920, 923-924 & n.12 (1967), enforced, 409 F.2d 610 (6th Cir. 1969).

ed that sanctions were appropriate because petitioner "simply repeats the same arguments this court already rejected on the merits, albeit in a decision that was vacated because the underlying NLRB decision was decided by an invalid two-member panel," and therefore had "no objectively reasonable basis to believe it would prevail." Pet. App. 6a. Under the circumstances of this case, however, petitioner's reraising of those arguments cannot properly be described as sanctionably "frivolous." Fed. R. App. P. 38.

The Tenth Circuit panel appears to have recognized that neither it nor petitioner was bound as a formal matter by that court's prior opinion in this case. Because this Court vacated the resulting judgment, petitioner was not subject to the strictures of the law-of-the-case doctrine. See, *e.g.*, *Johnson* v. *Board of Educ.*, 457 U.S. 52, 53-54 (1982) (per curiam) (stating that when "we have vacated [a] Court of Appeals' judgment[] * * * the doctrine of the law of the case does not constrain either the District Court or, should an appeal subsequently be taken, the Court of Appeals"). In addition, the vacatur drained the prior opinion of binding precedential force. See *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979) (stating that this Court's order "vacating the judgment of [a] Court of Appeals deprives that court's opinion of precedential effect") (citation omitted); *United States* v. *Roberts*, 185 F.3d 1125, 1136 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000). That is so regardless of the fact that this Court's order was based on the Board's lack of authority to act and not on the substance of the parties' arguments. See *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 335 F.3d 1161, 1163-1165 (10th Cir. 2003).

Nevertheless, the court of appeals seems to have thought that petitioner should have forgone any effort to overturn the Board's decision in the Tenth Circuit unless it could muster some arguments it had not previously raised, on the understanding that the court was unlikely to reach a different result as a practical matter. But that course of action would have deprived petitioner of any opportunity to obtain review in the Tenth Circuit or this Court of an argument that petitioner had pressed in the prior petition for review: whether endtailing Rammage was permissible under the principles set forth in the First Circuit's *Whiting Milk* decision. See Pet. App. 6a. As petitioner explains (Pet. 6), even when circuit precedent forecloses an argument entirely, a party is entitled to raise that argument in the court of appeals as a means of "preserv[ing] the issue pending a possible favorable decision by this Court." *McKnight* v. *General Motors Corp.*, 511 U.S. 659, 660 (1994). Pursuing that course does not justify an award of sanctions. See *ibid.* (stating that "if the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument was foreclosed by Circuit precedent, the order was not proper").[3]

If petitioner had tried to preserve an argument that had no basis in fact or law, or had done so in an inappro-

[3] Respondent Rammage suggests that petitioner could have avoided sanctions by expressly stating in its brief in the Tenth Circuit "that it was merely preserving arguments for a petition for certiorari." Br. in Opp. 6; see *ibid.* (arguing that "[i]t was the repetition of the unsuccessful arguments that led the Tenth Circuit to hold the Union's arguments frivolous, not the mere filing of a second appeal"). But a party should not be required to employ a particular form of words to avoid sanctions in such a situation. Petitioner's brief was short and to the point, and it properly alerted the court of appeals to the existence of the decision in the prior appeal. See Pet. C.A. Br. iv, 1-10.

priate manner, then sanctions might have been proper. But the court of appeals did not suggest that it would have issued sanctions here independent of the existence of the decision in the prior appeal. Petitioner was not sanctioned for the legal position it took the first time the court of appeals considered the case, see Pet. App. 6a; see also *ibid.* (explaining that "it was not frivolous for [petitioner] to attempt to persuade the three-member NLRB panel to reach a different result on remand")—and while petitioner's assertion of a circuit split is not meritorious, see pp. 8-9, *supra*, it is not sanctionably frivolous, see *McKnight*, 511 U.S. at 660; see generally 16AA Charles A. Wright et al., *Federal Practice and Procedure* § 3984.1 (4th ed. 2008).

The Tenth Circuit therefore erred in imposing sanctions here. Despite the error, however, there is no need for plenary review of the sanctions ruling. The ruling is unpublished and thus not precedent in the Tenth Circuit. The consequences for petitioner are small, since the amount at stake is only a little over $4,000. In addition, this Court has already adequately discussed the effects of an order granting a petition for a writ of certiorari, vacating the judgment, and remanding for further proceedings, see *Johnson*, 457 U.S. at 53; *Davis*, 440 U.S. at 634 n.6, and there does not appear to be meaningful confusion on that score in the lower courts.

In the government's view, however, the court of appeals' error is clear. Accordingly, if the Court believes the sanctions order warrants this Court's intervention, summary reversal of that portion of the court of appeals judgment would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition for a writ of certiorari should be granted with respect to the question regarding sanctions and the judgment of the court of appeals summarily reversed insofar as it orders sanctions against petitioner, and the petition should be denied with respect to the remaining question.

Respectfully submitted.

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