

Nos. 09-1248 and 09-1397

In the Supreme Court of the United States

NARRICOT INDUSTRIES, L.P., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

SHIRLEY M. LEWIS, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION AND CONDITIONAL CROSS-PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. 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.

2. Whether substantial evidence supports the Board's finding that petitioner's active participation in and direction of a petition drive to decertify its employees' incumbent union constituted unlawful assistance.

3. Whether the Board reasonably concluded that the decertification petition on which petitioner based its withdrawal of recognition from the incumbent union was tainted by petitioner's unlawful assistance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 587 F.3d 654.¹ The decision and order of the National Labor Relations Board (Pet. App. 34-48) and the decision of the administrative law judge (Pet. App. 49-118) are reported at 353 N.L.R.B. No. 82.

¹ Unless otherwise noted, all references to “Pet. App.” are to the appendix in the petition for a writ of certiorari in No. 09-1248.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2009 (Pet. App. 1). A petition for rehearing and rehearing en banc was denied on January 19, 2010 (Pet. App. 32). The petition for a writ of certiorari was filed on April 15, 2010. A conditional cross-petition for a writ of certiorari was filed on May 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, guarantees that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit.” 29 U.S.C. 159(a).

A union that has been selected pursuant to Section 9(a) by the majority of unit employees is usually entitled to a conclusive presumption of majority support during the term of its collective-bargaining agreement with the employer (up to three years), and a rebuttable presumption of majority support thereafter. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-786 (1996); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-38 (1987). In order to lawfully withdraw recognition from its employees’ incumbent union, an employer must “prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time” of the withdrawal. *Levitz Furniture Co.*, 333 N.L.R.B. 717, 725 (2001) (*Levitz*). A decertification petition signed by a majority of unit employees can demonstrate such

loss of support. See *Eastern States Optical Co.*, 275 N.L.R.B. 371, 373 (1985).

Section 8(a)(1) of the NLRA, 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” protected by the Act, including “the right to self-organization, to form, join, or assist labor organizations,” and “the right to refrain from any or all of such activities.” See 29 U.S.C. 157. Thus, an employer may not interfere with or coerce employees’ expression of their preference regarding representation. See, e.g., *V & S ProGALV, Inc. v. NLRB*, 168 F.3d 270, 274, 276-277 (6th Cir. 1999); *NLRB v. American Linen Supply Co.*, 945 F.2d 1428, 1433 (8th Cir. 1991).

An employer violates its duty to bargain under Section 8(a)(5) of the NLRA if it withdraws recognition from its employees’ union absent evidence that the union has lost majority support. See *Levitz*, 333 N.L.R.B. at 725. Although a decertification petition signed by a majority of employees can establish a loss of majority support, the Board has held that an employer cannot rely on such a decertification petition if the petition is tainted by the employer’s unlawful assistance. See *Tyson Foods, Inc.*, 311 N.L.R.B. 552, 556 (1993); see also *V & S ProGALV*, 168 F.3d at 281; *Texaco, Inc.*, 264 N.L.R.B. 1132, 1132-1133 (1982), enforced, 722 F.2d 1226 (5th Cir. 1984).

2. Petitioner in No. 09-1248 is a Georgia corporation engaged in the business of producing textile fabrics used to construct vehicle seatbelts. Pet. App. 4. Since 1976, the United Brotherhood of Carpenters and Joiners of America, Carpenters Industrial Council, Local No. 2316 (the Union) has represented the production and maintenance employees at petitioner’s plant in Boykins, Vir-

ginia. *Ibid.* The International Textile Group (ITG) acquired the Boykins plant in 2007, at which time the Union represented approximately 329 bargaining unit employees pursuant to an agreement executed in February 2005. *Id.* at 4-5.

In July 2007, the Union notified petitioner that it wished to negotiate a new or modified collective-bargaining agreement, and negotiations commenced on July 30, 2007. Pet. App. 4-5. A manager and supervisor at the plant each then actively participated in attempting to decertify the Union as the bargaining representative for the plant. *Id.* at 16-17. For example, the manager prepared a decertification petition in response to an employee's query as to how the Union could be ousted. *Id.* at 16. The manager gave the petition to another employee and to an intern, told them how many signatures were needed, and instructed them to return the signed petitions to him. *Ibid.* When the intern returned copies of the signed petition to the manager, the manager expressed approval and told the intern she needed more signatures. *Ibid.* The intern solicited signatures four hours a day for more than a week, going to work early and leaving late to collect signatures from employees on all three shifts. *Id.* at 21, 56. Petitioner paid the intern overtime for her additional work soliciting signatures. *Id.* at 21. In addition, the supervisor told an employee that employees would receive a pay raise if the Union were decertified. *Id.* at 16-17.

On September 29, 2007, petitioner withdrew recognition of the Union based on the decertification petition signed by a majority of the bargaining-unit employees. Pet. App. 16-17. Petitioner then made a number of unilateral changes (*i.e.*, changes petitioner did not bargain

for with the Union) in the terms and conditions of employment of employees at the plant. *Ibid.*

3. a. Acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (NLRB or Board) issued a complaint alleging that petitioner unlawfully assisted employees in the circulation of a petition to remove the Union, solicited employees to sign a petition to remove the Union, solicited employees to withdraw their union membership and revoke dues checkoff authorizations, and promised employees increased benefits if they removed the Union as bargaining representative, in violation of Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1). Pet. App. 6. The complaint also alleged that petitioner unlawfully withdrew recognition from the Union and unilaterally implemented changes in wages, benefits, and other conditions of employment, in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5). *Ibid.* On May 6, 2008, an administrative law judge (ALJ) found that petitioner had violated Section 8(a)(1) and (5).

b. Petitioner filed exceptions to the ALJ's decision, and the Board reviewed the case. Pet. App. 24-48. 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*, No. 08-1457 (June 17, 2010), slip op. 3. 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 2-3. Among the cases the two-member Board decided was the instant case, which the Board decided on January 30, 2009. Pet. App. 34. The Board agreed with the ALJ that petitioner violated Section 8(a)(1) by: providing

unlawful assistance to employees in the initiation and circulation of the union-decertification petition; soliciting an employee to sign the decertification petition; and promising increased wages if employees removed the Union as their bargaining representative. *Id.* at 6-7, 19. The Board also agreed with the ALJ that the decertification petition was tainted by petitioner's unlawful assistance, and that petitioner therefore violated Section 8(a)(5) and (1) by relying on it to withdraw recognition from, and refuse to bargain with, the Union, and by subsequently making unilateral changes in terms and conditions of employment. *Id.* at 6-7, 15-16.

4. Petitioner filed a petition for review of the Board's order in the United States Court of Appeals for the Fourth Circuit, and the Board cross-applied for enforcement of its order. Pet. App. 3. 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 unfair labor practices in connection with the decertification-petition process and in withdrawing recognition from the Union and implementing unilateral changes. *Ibid.* The court of appeals enforced the Board's order and denied the petition for review. *Id.* at 29, 31.

On the question of the Board's authority to operate with its two remaining members, the court of appeals held that the challenged decision was properly issued by a two-member quorum "empowered to act with the full powers of the Board." Pet. App. 8, 13. Addressing petitioner's challenges to the merits of the Board's unfair-labor-practice findings, the court of appeals found that the Board's determination that petitioner's conduct during the union-decertification drive exceeded permissible bounds and constituted unlawful assistance in violation

of Section 8(a)(1) was rational, consistent with the NLRA and the Board's precedent, and supported by substantial evidence. *Id.* at 15, 19, 21-22. In addition, the court upheld the Board's finding that petitioner violated Section 8(a)(5) and (1) by withdrawing recognition from the Union based on the decertification petition tainted by petitioner's unlawful assistance. *Id.* at 15-16, 21-22.

5. Petitioner filed a petition for a writ of certiorari and two of petitioner's employees filed a conditional cross-petition for a writ of certiorari, No. 09-1397, seeking review of the validity of the Board's rule that an employer may not supply more than ministerial aid to employee decertification efforts.

DISCUSSION

In the first question presented, 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. In the second question presented, petitioner challenges the Board's substantive unfair-labor-practice determinations in this case.

The first question presented was answered in the negative by this Court's recent decision in *New Process Steel, L.P. v. NLRB*, *supra*, which held that the National Labor Relations Board 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 reconsidered by a quorum of the Board or a properly constituted group to which the Board has delegated

decision-making authority. There is, therefore, no need for this Court to review the substantive issues underlying the Board's decision at this time. Instead, 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*.

CONCLUSION

The petition for a writ of certiorari in No. 09-1248 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*, No. 08-1457 (June 17, 2010). The conditional cross-petition for a writ of certiorari in No. 09-1397 should either be denied or should be treated in the same manner as the petition in No. 09-1248.

Respectfully submitted.

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JULY 2010