No. 09-1404

In the Supreme Court of the United States

TEAMSTERS LOCAL UNION NUMBER 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

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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 the Board reasonably concluded that a labor union caused an employer to discriminate against an employee because the employee had not been represented by the union, in violation of Section 8 of the NLRA, 29 U.S.C. 158.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 5
Conclusion 6

TABLE OF AUTHORITIES

Cases:

New Process Steel, L.P. v. *NLRB*, No. 08-1475 (June 17, 2010) 3, 5, 6
Radio Officers' Union v. *NLRB*, 347 U.S. 17 (1954) 2

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
29 U.S.C. 151 1
29 U.S.C. 153(b)(§ 3(b)) 5
29 U.S.C. 157 (§ 7) 2
29 U.S.C. 158 4
29 U.S.C. 158(b)(1)(A) (§ 8(b)(1)(A)) 3, 4
29 U.S.C. 158(b)(2) (§ 8(b)(2)) 2, 3, 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 590 F.3d 849. The decision and order of the National Labor Relations Board (Pet. App. 14a-27a) is reported at 353 N.L.R.B. No. 14.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2009. Pet. App. 1a. A petition for rehearing and rehearing en banc was denied on February 16, 2010 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on May 17, 2010. 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 or not to participate in union activities. 29 U.S.C. 157. Section 8 of the NLRA, in turn, protects that right by declaring it an unfair labor practice for a union to "cause or attempt to cause an employer to discriminate against an employee" in regard to any term of employment so as to encourage or discourage union membership or participation. 29 U.S.C. 158(b)(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, 8a. Until late 2005, Interstate Brands distributed different brand name products through a bifurcated distribution system. *Id.* at 8a. Petitioner, a labor union, represented Interstate Brands' sales representatives in two separate bargaining units corresponding to each segment of the bifurcated distribution system. *Ibid.* When Interstate Brands consolidated its distribution systems in late 2005, it agreed with petitioner that the separate bargaining units should also be consolidated so that petitioner could represent all of Interstate Brands' sales representatives as one unit governed by one collective bargaining agreement. *Ibid.*

In the course of consolidating the separate bargaining units, a dispute arose between Interstate Brands and petitioner about how to calculate the seniority of employee Kirk Rammage, who had never been included in either bargaining unit. Pet. App. 2a, 9a. Although both agreed that Rammage should be covered by the new bargaining agreement, Interstate Brands sought to calculate his seniority according to his years of employment rather than his years of membership in the bargaining unit, while petitioner sought to "endtail" Rammage by placing him at the bottom of the seniority lad-

der in the new consolidated bargaining unit. *Id.* at 9a-10a. Petitioner prevailed and Rammage was designated the least senior employee for route-bidding purposes. *Id.* at 10a. Rammage was ultimately "bumped" from his regular route by an employee deemed to have greater seniority and had to transfer to another office. *Ibid.* One of Rammage's supervisors informed him that he was transferred because he "was not in the union"; another supervisor repeatedly told Rammage that he "would have to join the union." *Ibid.*

3. a. 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. See Board C.A. Br. 3. On October 31, 2006, after holding a hearing, an administrative law judge (ALJ) concluded that petitioner had not violated the NLRA by endtailing Rammage's seniority. Pet. App. 20a.

b. Rammage and the General Counsel 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*, 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 September 25, 2008. Pet. App. 1a-13a. The Board disagreed

with the ALJ, concluding that petitioner violated Section 8(b)(1)(A) and (2) by demanding that Rammage be endtailed on the seniority list, which resulted in Rammage's being bumped from his job and transferred to a different job. *Id.* at 25a-26a.

4. Petitioner filed a petition for review of the Board's order in the United States Court of Appeals for the Tenth Circuit, and the Board cross-applied for enforcement of its order. Pet. App. 2a. 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 by endtailing Rammage on the seniority list when it consolidated the two bargaining units. *Id.* at 2a-13a. The court of appeals enforced the Board's order and denied the petition for review. *Id.* at 2a, 13a.

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 "two members, both of whom were part of a three-member group to which the Board validly delegated all of its authority." Pet. App. 7a. Addressing petitioner's challenges to the merits of the Board's unfair-labor-practice findings, the court of appeals found that the Board's conclusion "reflects a reasonable application of the NLRA and the legal principles" governing Section 8 of the Act. *Id.* at 12a. 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" in violation of 29 U.S.C. 158. Pet. App. 12a.

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 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).

Respectfully submitted.

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