

No. 08-3932

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DALE EDWARD MICHAEL, *et al.*,

Plaintiffs-Appellees,

v.

UNITED TRANSPORTATION UNION and
MALCOLM B. FUTHEY, JR., President,

Defendants-Appellees,

and

JAMES M. BRUNKENHOEFER, *et al.*,

Intervening Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

JOINT PETITION FOR REHEARING OR REHEARING *EN BANC*

Arthur L. Fox, II
Lobel, Novins and Lamont, L.L.P.
888 17th Street, N.W.
Suite 810
Washington, DC 20006

Counsel for Plaintiffs-Appellees

Joseph Guerrieri, Jr.
Jeffrey A. Bartos
Guerrieri, Edmond, Clayman
& Bartos, P.C.
1625 Massachusetts Ave., N.W., Suite 700
Washington, DC 20036-2243

Counsel for Defendants-Appellees

TABLE OF CONTENTS

	<u>Page</u>
RULE 35(B)(1) STATEMENT	1
PROCEDURAL BACKGROUND	3
REASONS FOR GRANTING THE PETITION	7
I. THE PANEL’S INABILITY TO REACH AN INTERNALLY CONSISTENT MAJORITY RESULT WARRANTS A REHEARING	7
II. DISTRICT JUDGE HOLSCHUH’S OPINION REJECTING THE “MEANINGFUL VOTE” REQUIREMENT DIRECTLY CONFLICTS WITH SIXTH CIRCUIT PRECEDENT	9
III. JUDGE McKEAGUE’S PRECEDENT-SETTING DECISION CREATES AN ANOMALY IN THE SCOPE OF RIGHTS AFFORDED TO UNION MEMBERS UNDER THE LMRDA	10
CONCLUSION	15
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Federal Cases</u>	
<i>Atchison, Topeka and Santa Fe Ry. Co. v. Buell</i> , 480 U.S. 557 (1987)	11
<i>Blanchard v. Johnson</i> , 532 F.2d 1074 (6th Cir. 1976), <i>cert. denied</i> , 429 U.S. 869 (1976)	passim
<i>Castro v. United States</i> , 310 F.3d 900 (6th Cir. 2002)	10
<i>Corea v. Welo</i> , 937 F.2d 1132 (9th Cir. 1991)	4, 12
<i>Minjares v. Indep. Ass’n of Cont’l Pilots</i> , 293 F.3d 895 (5th Cir. 2002)	13
<i>Nashville & St. L. Ry. v. Ry. Employees’ Dep’t of Am. Fed. of Labor</i> , 93 F.2d 340 (6th Cir. 1937)	11
<i>NLRB v. Allis-Chalmers Mfg.</i> , 388 U.S. 175 (1967)	11
<i>Re: Indep. Ass’n of Cont’l Pilots/Air Line Pilots Ass’n</i> , 28 N.M.B. 473 (2001)	11, 13
<i>Sertic v. District Council of Carpenters</i> , 423 F.2d 515 (6th Cir. 1970)	12

TABLE OF AUTHORITIES

Page

Federal Cases

Sheet Metal Workers v. Lynn,
488 U.S. 347 (1989) 12

United States v. Andrews,
633 F.2d 449 (6th Cir. 1980) 1

Federal Statutes & Regulations

Labor Management Relations Act,
29 U.S.C. § 141, *et seq.* 1
29 U.S.C. § 185 3, 6

Labor-Management Reporting and Disclosure Act,
29 U.S.C. § 401, *et seq.* 1, 11
29 U.S.C. § 401(c) 12
29 U.S.C. § 402(c) 12
29 U.S.C. § 411 passim
29 U.S.C. § 412 12
29 C.F.R. § 201(k) 12

Railway Labor Act,
45 U.S.C. § 152, Ninth 4, 11, 13
45 U.S.C. § 155 10

RULE 35(B)(1) STATEMENT

This case involves matters of exceptional public importance concerning the jurisdiction of the federal courts to hear claims by union members under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq.* (“LMRDA”), and the Labor Management Relations Act, 29 U.S.C. § 141, *et seq.* (“LMRA”), as well as the vitality of binding Sixth Circuit precedent concerning the standard governing such claims. The panel’s issuance of three separate irreconcilable decisions will apparently result in the dismissal of the entire case below for lack of subject matter jurisdiction, even though two judges clearly found that jurisdiction was proper. Indeed, two judges of the panel also agreed that the trial court was within its discretion in issuing the preliminary injunction below. However, the consequence of the panel’s decisions would cause that injunction to be vacated on opposing grounds. These competing rationales have produced an incongruous result on matters of vital public importance which should not stand without review by other Judges of this Court. *See United States v. Andrews*, 633 F.2d 449, 450-51 (6th Cir. 1980) (noting grant of rehearing *en banc* where original panel “produced three separate opinions without any consensus” or “unifying rationale”).

The impact of the splintered decision on the parties, the public and our labor laws underscores the pressing necessity for rehearing or rehearing *en banc*. For the

first time in the 50 year history of the LMRDA, this Court has effectively held that railroad and airline union members seeking to vindicate federal statutory claims regarding a union merger have no judicial remedy. Rather, the first decision of the panel (by Judge McKeague) has ordered that such claims are within the exclusive jurisdiction of the National Mediation Board, an agency which has no authority to hear such claims, has expressly disavowed such jurisdiction, and has never adjudicated such a claim. The third decision (by District Judge Holschuh), while rejecting the notion that federal courts are ousted of jurisdiction of such claims, nevertheless repudiated a binding Circuit decision, *Blanchard v. Johnson*, 532 F.2d 1074 (6th Cir. 1976), and erroneously ordered dismissal of an LMRDA claim finding that the Act does not protect the right of union members to a “meaningful” vote in union affairs and opining that the Circuit’s precedent had gone too far. The second decision (by Judge Clay), however, holds that LMRDA jurisdiction continues to be in the federal courts, that the injunction was providently granted and would affirm.

The fundamental but differing deviations from settled practice and precedent of the first and third decisions suggests two votes for dismissal, but on grounds diametrically opposed to one another and contrary to the holdings of a majority of the panel’s own members, and to the longstanding precedent of this Court. Thus, unless reheard, the Court will have failed to resolve the pressing dispute between the parties

herein and, more broadly, will have utterly failed to provide coherent guidance to future parties and lower courts concerning their fundamental role in the protection of vital federal rights in similar disputes. Rehearing is thus essential to the parties, the public, and this Court.

PROCEDURAL BACKGROUND

This is an appeal from an order granting Plaintiffs' motion for a preliminary injunction, enjoining the merger of two labor organizations (UTU and SMWIA). The Complaint asserted two causes of action: *First*, Plaintiffs brought a claim under the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, alleging that the UTU violated both its own Constitution and its Merger Agreement with the SMWIA by failing to submit the merged organization's Constitution to the UTU membership for a vote. ROA 28-29. *Second*, Plaintiffs alleged that the UTU violated § 101(a)(1) and § 101(a)(2) of the LMRDA because it "misrepresented ... material facts concerning the proposed merger" and "withheld other material facts" from both the UTU Board of Directors and UTU membership, and "discriminated unlawfully" between its membership based on their access to, and facility with, the internet. ROA 29-30.

The district court issued a preliminary injunction on the grounds that Plaintiffs had a substantial likelihood of success in showing that the UTU's merger ratification vote violated LMRDA § 101(a)(1) as well as Plaintiffs' contractual rights under the

Merger Agreement. The court held that the UTU's conduct of the vote likely violated its statutory obligation to make "full disclosure of the terms of" the merger as required by *Blanchard v. Johnson*, 532 F.2d 1074 (6th Cir. 1976), *cert. denied*, 429 U.S. 869 (1976); *see also Corea v. Welo*, 937 F.2d 1132, 1140 (6th Cir. 1991).

In the interim the UTU elected new top officers, including President Malcolm B. Futhey, Jr., who determined that compliance with the court's injunction and a new referendum vote to include a new fully-formed SMART constitution was in the best interests of the UTU membership. However, several subordinate officers, funded by the SMWIA, intervened to block a settlement of the case and to continue resistance to the injunction and a second ratification vote. They are the appellants in this case.

On appeal, the panel members issued three separate and conflicting opinions. On a matter of first impression for this Court, Judge McKeague concluded that the district court lacked subject matter jurisdiction of LMRDA claims concerning the conduct of union merger referenda and that exclusive jurisdiction is vested in the National Mediation Board ("NMB") under Section 2, Ninth of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Ninth. Op. 8-18 (McKeague, J.).^{1/} Judge McKeague

^{1/} That section provides: "If any dispute shall arise among a carrier's employees as to who are the representatives of such employee, designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon the request of either party to the dispute, to investigate and
(continued...)"

further observed, however, that “were I to reach the merits ... it was not an abuse of discretion for the district court to conclude, in the process of granting the preliminary injunction, that the Plaintiffs had shown a substantial likelihood of success on their claim that they were deprived of a meaningful vote on the merger referendum.” Op. 8 n.2 (McKeague, J.)

District Judge Holschuh, sitting by designation, joined Judge Clay in rejecting the notion that federal courts were ousted of LMRDA jurisdiction by the earlier enacted RLA. However, he joined Judge McKeague in the judgment of dismissal on the ground that this Court’s decision in *Blanchard*, guaranteeing union members the right to a “‘meaningful’ vote,” and applied by Judge Adams below, was itself wrongly decided: “I personally believe that this court has judicially inserted a requirement in a statute, § 101(a)(1) of the LMRDA, that does *not exist, i.e.*, a requirement that not only must there be no discrimination in voting, but also that all votes cast must be ‘meaningful’ votes as determined by a federal court.” Op. 35-36 (Holschuh, D.J.) (emphasis in original).^{2/}

^{1/}(...continued)
to certify to both parties ... the name ... of the individuals or organization that have been designated and authorized to represent the employees ..., and certify the same to the carrier.”

^{2/} As Judge McKeague held, however, *Blanchard* is not so limited: “I do
(continued...) ”

Plaintiffs' Complaint also raised claims under the LMRA, 29 U.S.C. § 185, and Section 101(a)(2) of the LMRDA, which Judge Holschuh did not acknowledge nor discuss. He nevertheless erroneously concluded that the entire case below was subject to dismissal. *Id.* at 58. It is his mistaken concurrence only in the result, but not in the jurisdictional basis or reasoning of Judge McKeague, that provided the second vote for dismissal.

Finally, Judge Clay concluded, as did Judge McKeague, that the trial court correctly applied this Circuit's precedents in deciding preliminarily that the merger vote was not "meaningful" or based on "sufficient information." *Id.* at 31. Thus, with respect to jurisdiction, Judges Clay and Holschuh rejected Judge McKeague's relegation of the case to the NMB and agreed that: "Congress clearly did not intend the RLA's resolution procedures for representation disputes to apply to an internal union dispute over the validity of its merger vote," Op. 19, and "the LMRDA expressly grants authority for federal courts to hear this type of claim." Op. 22.

^{2/}(...continued)

not believe that [Judge Holschuh's] reading of *Blanchard* is consistent with the decision's requirement that there be sufficient information to permit a meaningful vote. It is a longstanding rule in the Sixth Circuit that "[a] panel of the Court cannot overrule the decisions of another panel." Op. 8 n.2 (McKeague, J.). Judge Holschuh countered that he was not claiming that "*Blanchard* is no longer the law in the Sixth Circuit," but affirmed that in his view there can be no violation of § 101(a)(1) "when merely less information than possible has been provided the voters in a non-discriminatory manner." Op. 44 n.2 (Holschuh, D.J.).

In sum, two judges of this panel held that federal courts have jurisdiction over Plaintiffs' LMRDA claims; and two judges of the same panel held that the trial court did not abuse its discretion in finding a likelihood of success on the merits of those claims, with only one Judge directing the parties to the NMB. Nonetheless, the collective and fundamentally unfair effect of the three decisions seemingly is an order to vacate the injunction and dismiss the case in its entirety albeit on wholly inconsistent grounds.

Noting this "incongruous result," Judge Clay observed, "in light of the competing rationales and potential for confusion, the panel might have been better advised to have permitted this appeal to be reassigned to another panel, in lieu of deciding it, in the hope that another panel might have been capable of producing a two-judge majority." Op. 19 n.1 (Clay, J.).

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S INABILITY TO REACH AN INTERNALLY CONSISTENT MAJORITY RESULT WARRANTS A REHEARING.

It is imperative for a meaningful resolution of this case that it be reheard, either by the panel or *en banc*, to establish an internally consistent Sixth Circuit decision which can coherently settle the rights and obligations of the parties and guide the course of any further judicial or administrative proceedings below. Perhaps the most troubling incongruity, noted by Judge Clay, is that "Although Judge McKeague

instructs the district court to dismiss for lack of jurisdiction, dismissal by the district court on that basis would be inappropriate because a majority of the panel (Judges Clay and Holschuh) have decided that jurisdiction is proper.” Op. 19 n.1 (Clay, J.). Indeed, Judge McKeague’s decision that the NMB has exclusive jurisdiction of Plaintiffs’ claims failed to draw a second vote and is effectively a dissenting opinion that cannot support a dismissal order. We submit that the panel has issued such internally inconsistent directives that no commanding majority rationale can be discerned which can properly guide the parties or the trial court or furnish the basis for a mandate.

Similarly, the basis for Judge Holschuh’s reversal -- a “personal[]” disagreement with Sixth Circuit precedent -- was rejected by the majority of the panel. Judge McKeague and Judge Clay each held that the panel was bound by the *Blanchard* decision and that the trial court acted within its discretion in issuing its injunction.

Rehearing is independently necessary because Judge Holschuh, in ordering dismissal of the entire action (and not just vacatur of the preliminary injunction), overlooked the fact that the LMRDA Section 101(a)(1) claim was not the only claim presented below. Judge Holschuh held only that Plaintiffs could not state a claim under that Section 101(a)(1) of the LMRDA; he did not discuss, nor did his reasoning

reach, the viability of Plaintiffs' independent claims below under the LMRA or Section 101(a)(2) of the LMRDA. These claims, which served as an independent basis for the preliminary injunction below, were not addressed by Judge Holschuh. Judge Holschuh's order of dismissal of the entire action was inappropriate both in that only a preliminary injunction and not a final judgment had been rendered by the district court and because it inexplicably dismissed viable, unaddressed claims.

II. DISTRICT JUDGE HOLSCHUH'S OPINION REJECTING THE "MEANINGFUL VOTE" REQUIREMENT DIRECTLY CONFLICTS WITH SIXTH CIRCUIT PRECEDENT.

Of the panel, only District Judge Holschuh found that the district court abused its discretion in granting a preliminary injunction of the UTU-SMWIA merger, based on his view that the Sixth Circuit erred in its reading of Title I to include a "meaningful" vote requirement in merger referenda. *See Blanchard*, 532 F.2d at 1078. Based on his "personal[] belie[f]" that this Court was wrong in *Blanchard*, Op. 35, Judge Holschuh cast his vote to dismiss the entire action even while joining with Judge Clay in rejecting the entire jurisdictional rationale of Judge McKeague's decision.

While Judge Holschuh undoubtedly believes that *Blanchard* and its progeny are wrongly decided, it is well-settled that one panel of this Court cannot overturn the decision of another. *See Op. 8 n.2 (McKeague, J.); Castro v. United States*, 310 F.3d

900, 902 (6th Cir. 2002). Accordingly, *en banc* rehearing is necessary to secure and maintain uniformity of the Court's decisions.

III. JUDGE McKEAGUE'S PRECEDENT-SETTING DECISION CREATES AN ANOMALY IN THE SCOPE OF RIGHTS AFFORDED TO UNION MEMBERS UNDER THE LMRDA.

Two of the three Judges on the panel found that the district court has subject matter jurisdiction over this action and specifically rejected the notion that the RLA ousts federal courts of jurisdiction to hear airline and railroad workers' LMRDA claims. Op. 19 (Clay, J.) and 35 (Holschuh, D.J.). Nonetheless, and on a matter of first impression for the Court, Judge McKeague held that the Plaintiffs' claims fall within the exclusive jurisdiction of the NMB. Op. 18 (McKeague, J.). This was the sole basis for his vote for dismissal. We submit that this decision will be momentous in depriving hundreds of thousands of union members in the airline and railroad industries of the right to seek redress in federal courts for violation of their LMRDA rights. Accordingly, rehearing is warranted to correct this precedent-setting error.

The NMB, a small federal agency created by the RLA, has a far more circumscribed jurisdiction than the National Labor Relations Board. The NMB is charged with assisting in resolving collective bargaining disputes between labor and management, 45 U.S.C. § 155, and certifying collective bargaining representatives following representation elections conducted under its auspices. 45 U.S.C. § 152,

Ninth. Under Section 2, Ninth, the NMB in its conduct of representation elections is responsible for ensuring that the employees' bargaining representatives are selected without "interference, influence, or coercion exercised by the carrier." *Nashville & St. L. Ry. v. Ry. Employees' Dep't of Am. Fed. of Labor*, 93 F.2d 340, 341 (6th Cir. 1937). However, the NMB has expressly rejected the idea that a merger vote between two unions "constitute[s] a representation election pursuant to the [RLA]." *Re: Indep. Ass'n of Cont'l Pilots/Air Line Pilots Ass'n*, 28 N.M.B. 473, 483-84 (2001). Because a union's decision to merge into another union is an "internal union matter," the NMB has held, a union merger "has no relationship to the RLA representation process" governed by Section 152, Ninth. *Id.* The NMB neither conducts nor monitors union merger referenda. Moreover, it is undisputed that the NMB has no jurisdiction whatsoever of LMRDA claims.

As Judge Clay noted, the LMRDA was passed long after the RLA and the two federal statutes must be read to avoid conflict. *Op. 24; Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 566-67 (1987). The LMRDA, passed in 1959, unlike the RLA, specifically governs the relationship between labor organizations and their members. *See 29 U.S.C. § 401, et seq.; NLRB v. Allis-Chalmers Mfg.*, 388 U.S. 175, 193 (1967) (The LMRDA was "thought to be the first comprehensive regulation by Congress of the conduct of internal union affairs."). The Act applies to all private

sector union members, and by its terms specifically includes members covered by the RLA. *See* 29 U.S.C. § 401(c), § 402(c),(i)(1); 29 C.F.R. § 201(k). Title I “was enacted with the clear purpose of assuring the full and active participation by the rank and file in the affairs of the union.” *Sertic v. District Council of Carpenters*, 423 F.2d 515, 521 (6th Cir. 1970) (internal citations omitted); *see also Blanchard*, 532 F.2d at 1079. This Court has found that the “right to a meaningful vote and full participation is necessarily dependent on the dissemination of sufficient information so as to permit rank and file members to ‘exercise their statutorily guaranteed right to an informed vote.’” *Corea*, 937 F.2d at 1136 (*quoting Blanchard*, 532 F.2d at 1079). “Title I also provides for private enforcement actions to further the primary objective of the LMRDA, ‘ensuring that unions [are] democratically governed and responsive to the will of their memberships.’” *Corea*, 937 F.2d at 1136 (*quoting Sheet Metal Workers v. Lynn*, 488 U.S. 347, 352 (1989)); 29 U.S.C. § 412. Until the issuance of Judge McKeague’s decision, airline and railroad workers enjoyed the protections of these provisions on an equal basis with employees in other industries.

Relying on a strained interpretation of the term “representation dispute” arising from Section 2, Ninth of the RLA, Judge McKeague held that an internal union vote on a union merger, which is at issue here, is in fact a representation dispute which falls

within the exclusive jurisdiction of the NMB.^{3/} In reaching this decision, Judge McKeague found that it was irrelevant (1) that a large minority of UTU members and a majority of SMWIA members were not even subject to the RLA, but rather the National Labor Relations Act (Op. 9); (2) that this case involves an internal union matter while “the RLA covers labor-management disputes between union members on one side and covered employers on the other”(Op. 12); (3) that this issue does not involve the certification of a bargaining representative at any particular carrier (Op. 12); and (4) that the NMB considers “an organization’s decision to merge into another organization as an internal union matter,” and that “[t]herefore, the merger process has no relationship to the RLA representation process.” Op. 15 (*quoting Indep. Ass’n of Cont’l Pilots/Air Line Pilots Ass’n*, 28 N.M.B. at 483-84).

The term “representation” as used in Section 2, Ninth, of the RLA is clearly intended to govern the collective bargaining relationship between unions and

^{3/} Judge McKeague’s decision, to our knowledge is the first to cite *Minjares v. Indep. Ass’n of Cont’l Pilots*, 293 F.3d 895 (5th Cir. 2002), with approval. Judge Clay correctly points out that the Fifth Circuit’s “dubious” decision in *Minjares* is unworthy of Judge McKeague’s reliance because it reached its holding summarily, without examining the purpose of the RLA and even after recognizing such disputes are an internal union matter that do not readily fall within the ambit of the RLA. Op. 26 (Clay, J.). Moreover, *Minjares* involved two pilots’ unions exclusively representing members under the RLA, a merger which affected employees of just one airline, and which had already occurred before the Circuit issued its decision.

management, but was misconstrued by Judge McKeague to encompass relationships between labor organizations and their members. *See* Op. 19-22, and cases cited therein (Clay, J.). Because this case does not concern the identity of the certified collective bargaining representative at any employer, it is not governed by the representation election procedures outlined in the RLA and, as the NMB has held, falls outside of the Board's limited jurisdiction.

Judge McKeague's decision eliminates a broad range of rights afforded by the LMRDA to union members working in the rail and airline industry in this Circuit. Despite the fact that the LMRDA (1) specifically covers union members employed in the rail and airline industry; (2) empowers the federal courts with subject matter jurisdiction to hear the precise claims at issue in this litigation, and (3) does not empower the NMB with jurisdiction to hear these claims, Judge McKeague nonetheless found that the district court lacked subject matter jurisdiction. There is no evidence, however, that Congress intended the RLA to govern internal union disputes, much less that it intended the RLA to completely preclude all after-enacted federal laws, or that Congress intended to exclude union members in the rail and airline industries from the full protections of the LMRDA.

Because the lead opinion largely eliminates LMRDA coverage for rail and airline employees within the Sixth Circuit, a rehearing is warranted on that ground as well.

CONCLUSION

In light of the foregoing, we respectfully submit that the joint petition for panel rehearing or rehearing *en banc* should be granted.

Respectfully submitted,

/s/ Arthur L. Fox
Arthur L. Fox, II
Lobel, Novins and Lamont, L.L.P.
888 17th Street, N.W.
Suite 810
Washington, DC 20006
202-371-6643
alfii@lnllaw.com

/s/ Jeffrey A. Bartos
Joseph Guerrieri, Jr.
Jeffrey A. Bartos
Guerrieri, Edmond, Clayman & Bartos, P.C.
1625 Massachusetts Ave., N.W.
Suite 700
Washington, DC 20036-2243
202-624-7400
Fax: 202-624-7420
jguerrieri@geclaw.com
jbartos@geclaw.com

Counsel for Plaintiffs-Appellees

*Counsel for Defendants-Appellees
the UTU and Malcolm B. Futhey, Jr.*

Dated: November 3, 2009

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I hereby certify that the foregoing petition was prepared using Times New Roman (14 point) proportional type and consists of no more than 15 pages.

/s/ Jeffrey A. Bartos

Jeffrey A. Bartos

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2009, a copy of the foregoing Joint Petition For Rehearing Or Rehearing *En Banc*, was served to all parties via the Court's electronic filing system.

/s/ Jeffrey A. Bartos

Jeffrey A. Bartos