

No. 09-1194

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

LOCAL 2, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Intervenor

v.

**AMERICAN DIRECTIONAL BORING, INC.
d/b/a ADB UTILITY CONTRACTORS, INC.**

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board Order issued against American

Directional Boring, Inc. (“ADB”). In this case, the Board found that ADB committed “outrageous and pervasive” unfair labor practices in a “swift and severe” response to International Brotherhood of Electrical Workers, Local 2’s (“the Union”) nascent organizing campaign. (Add. 2.)¹

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a) (“the Act” or “NLRA”). The Court has jurisdiction over this proceeding under Section 10(e) of the Act, 29 U.S.C. § 160(e), because ADB’s principal office is in St. Louis, Missouri, and because the Board’s Order is a final order issued by a properly constituted, two-member Board quorum within the meaning of Section 3(b) of the Act, 29 U.S.C. § 153(b). However, because ADB challenges the authority of the two-member Board quorum, that question is now presented for decision.

The Board’s Supplemental Decision and Order issued on September 30, 2008, and is reported at 353 NLRB No. 21. (Add. 1-57.) The Board filed its application for enforcement on January 23, 2009. The Board’s application is

¹ “Add.” refers to the addendum to ADB’s brief, which contains the Board’s Supplemental Decision and Order in this case. “A.” refers to the appendix filed by ADB with its opening brief, and “S.A.” refers to the supplemental appendix the Board is submitting simultaneously with its brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to ADB’s opening brief.

timely as the Act places no time limit on filing for enforcement of Board orders. On February 18, 2009, the Court granted the Union's motion to intervene in support of the Board.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the Act, acted within the full powers of the Board in issuing the Board's Order in this case.

N.E. Land Servs., Ltd. v. NLRB, ___ F.3d ___, 2009 WL 638248 (1st Cir. Mar. 13, 2009). *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467 (7th Cir. 1980); *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996); *Michigan Dep't of Transp. v. ICC*, 698 F.2d 277 (6th Cir. 1983); *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983); *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982); *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335 (D.C. Cir. 1983).

2. Whether the Board is entitled to summary enforcement of uncontested portions of its Order. Specifically, ADB fails to contest the Board's findings that it violated Section 8(a)(3) and (1) of the Act by firing 13 employees because of their union activities. ADB also fails to contest the Board's findings that it committed numerous violations of Section 8(a)(1) of the Act, including threatening

employees, interrogating employees, and creating the impression of surveillance of employees' union activities.

NLRB v. MDI Commercial Servs., 175 F.3d 621, 624 (8th Cir. 1999).

3. Whether the Board acted within its broad remedial discretion in ordering ADB to bargain with the Union as a remedy for its numerous, serious, and extensive unfair labor practices.

NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969); *NLRB v. Cell Agric. Mfg. Co.*, 41 F.3d 389, 397-98 (8th Cir. 1994); *DeQueen Gen. Hosp. v. NLRB*, 744 F.2d 612, 619-20 & 620 n.3 (8th Cir. 1984).

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a consolidated unfair labor practice complaint alleging that ADB committed outrageous and pervasive violations of the Act and that a bargaining order was necessary to remedy those violations. (Add. 2, 6, 27-28.) On May 10, 2005, after a 16-day hearing, administrative law judge Benjamin Schlesinger sustained the complaint's allegations and issued a recommended order, which included an affirmative bargaining order. (Add. 27.) Among its exceptions to the judge's decision, ADB argued that 8 of the 13 employees it was found to have discriminatorily discharged were statutory supervisors. (Add. 6.) In September 2006, the Board issued the *Oakwood* trilogy of cases, in which it

refined the analysis to be applied in determining supervisory status. *See Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); *Golden Crest Healthcare Ctr.*, 348 NLRB 727 (2006). In light of the *Oakwood* cases, the Board remanded this case to the administrative law judge to give ADB an opportunity to justify its claims of supervisory status under the new standard. (Add. 6.)

The Board's deputy chief administrative law judge issued a show cause order, directing the parties to explain whether the record should be reopened, and, if it should, what additional evidence should be taken. (Add. 28; S.A. 1-2.) The General Counsel and the Union responded that the record should not be reopened. (Add. 28.) ADB argued that the record should be reopened for the "limited purpose" of taking additional evidence on the supervisory issue. (Add. 28; S.A. 3-8.)

Because he found that the issue of supervisory status could be determined on the existing record, administrative law judge Paul Buxbaum denied ADB's request to reopen.² (Add. 29.) Three months later, ADB filed a motion to reopen the record to receive evidence of changed circumstances in regard to the bargaining order. (A. 1-19.) Administrative law judge Buxbaum issued a supplemental

² The case was assigned to judge Buxbaum following judge Schlesinger's retirement. (Add. 1 n.2.)

decision on August 23, 2007, in which he found ADB's crew leaders to be statutory employees, not supervisors, and denied ADB's motion to reopen the record to take evidence of changed circumstances. (Add. 27-57.)

ADB filed exceptions to the judge's decision as well as a second motion to reopen the record. (A. 20-22, 47-49.) After reviewing ADB's exceptions, the Board (Chairman Schaumber and Member Liebman) issued its Decision and Order, affirming the judges' findings and denying ADB's second motion to reopen the record. (Add. 1, 4 n.14.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Introduction

The Union began organizing company employees in March 2003. (Add. 2.) ADB responded to the Union's organizing campaign by discharging 13 union supporters, including the leaders of the organizing campaign, in violation of Section 8(a)(3) and (1) of the Act. (Add. 3.) ADB also responded with threats: direct threats of job loss, futility, closure of the St. Louis facility, increased subcontracting of work, and loss of employees' insurance and retirement plan, as well as implied threats of discipline. In addition, ADB solicited union supporters to quit their employment and created an impression of surveillance of employees' union activities. (Add. 1 n.4, 25, 55.) All of these actions violated Section 8(a)(1)

of the Act. The Board determined that ADB's outrageous and pervasive unfair labor practices warranted a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Before the Court, ADB does not challenge any of the Board's unfair labor practice findings, and, as discussed below (pp. 43-44), the Board is entitled to summary enforcement of those findings. But because the Board relied on those findings as the basis for its *Gissel* order, the facts surrounding those findings are set forth here.

B. Background; ADB's Operations

ADB installs and maintains cable and fiber optics for utility companies, including Ameren UE, the local electric utility and ADB's biggest customer. (Add. 6; S.A. 27.) Its primary facility is in St. Louis, Missouri. (Add. 6; S.A. 28.) At the time in question, Chris Eirvin, ADB's founder and former co-owner, was the general manager of the St. Louis facility. (Add. 7; S.A. 26, 29.) Rusty Keeley co-owned ADB with Eirvin and has since assumed full ownership. (S.A. 26.) In addition to Eirvin and Keeley, ADB's supervisory staff included safety director Mike McElligott and project managers Rich Robinson, Ernie Nanney, Ray Door, Ed Eirvin, Mike Stankewitz, and Kevin Sellers. (Add. 8, 10, 16, 18, 23.)

C. The Employees Initiate a Union Campaign; ADB Responds by Threatening To Close the Facility in the Event of Unionization, Denying That it Would Recognize the Union, and Firing Leading Union Supporters

On March 29, 2003, 11 employees at the St. Louis facility held a meeting to discuss unionization. (Add. 7; S.A. 15, 55-56.) Those employees then spoke with other employees to gain support for the next union meeting scheduled for April 7. (S.A. 52, 56.) Two days later, on March 31, general manager Eirvin instituted weekly crew leader meetings and told the crew leaders that all boring crews should drill 1,000 feet per week. If not, he threatened, he would “start getting rid of them.” (Add. 16; S.A. 72-73.) In early April, project manager Stankewitz asked project manager Ed Eirvin if he had heard that ADB planned to fire the employees who had started “that union shit in St. Louis.” (Add. 16; S.A. 78.)

On April 7, 30 employees attended a second meeting about the Union. (Add. 7; S.A. 16.) Four employees – Adam Williams, Edgar Schreit, Matt Bridges, and Jeremy Farris – took leadership roles during the meeting, including sitting at the head table, helping employees complete authorization cards, collecting authorization cards, taking notes, and answering questions. (Add. 7; S.A. 37, 53, 57-58, 70-71.) The Union gave employees American flag pins to wear, with the plan that, later, employees would wear union pins. (Add. 7; S.A. 37-38.) All 30 attendees signed authorization cards and agreed to meet again on April 15. (Add. 7; S.A. 54, 64.) On April 14, project manager Nanney threatened

employee Rodney Hanephin that “if things keep going the way they are, there is going to be a bunch of people gone from the [Ameren] UE side” in the next few weeks. (Add. 16; S.A. 59.)

The next morning, general manager Eirvin called a meeting of employees. (Add. 7.) During this meeting, Eirvin informed employees that he knew there had been two meetings about the Union. (Add. 7; S.A. 13-14, 30-33.) He went on to state that Ameren UE “is not gonna tolerate” having the Union involved and that “if this Union is voted in—yes, we will shut the doors.” (Add. 7; S.A. 13.) He also told employees that “we are not even gonna recognize any union attempts at all.” (Add. 7; S.A. 14.) He urged union supporters to take jobs with union companies, and told employees not “to pull any shit with any pin or anything else.” (Id.) Eirvin ended his speech by emphasizing that “[b]ottom line is we’re not gonna go union, guys.” (Id.)

Just after that meeting, project manager Robinson warned employee Jeremy Farris to “watch your ass, and don’t give Mr. Happy [Eirvin’s nickname] a reason.” (Add. 16; S.A. 74-75.) Later that day – the day of Eirvin’s speech and only days after threatening to discharge crew leaders – Eirvin fired employees Farris, Schaffer, and Schreit. All three had attended the Union’s March 29 meeting, and Farris and Schreit had taken leadership roles at the April 7 meeting. (Add. 16; S.A. 37.)

Employees held their next union meeting on April 15, and the Union distributed “Union Yes” pins. (Add. 25; S.A. 60-61.) During the meeting, the firings of Farris, Schreit, and Schaffer were discussed; employees expressed concern that they would also be fired. (Add. 25; S.A. 60, 76-77, 79-80.) While most employees signed a request for union recognition, two employees refused because they were afraid that they would lose their jobs. (Add. 25; S.A. 12, 80.) The employees had gathered 33 signatures on authorization cards, a majority of the 59-employee unit. (Add. 24; S.A. 23-25.)

ADB refused to recognize the Union’s multiple requests for recognition. On April 16, employee Bridges presented the request for recognition to general manager Eirvin, but Eirvin refused to acknowledge it. (Add. 20; S.A. 65-66.) The Union then faxed the request to ADB, but ADB faxed the document back with “Fax Not Recognized” handwritten on the Union’s cover sheet. (S.A. 11, 34, 67.) Next, the Union sent the request by courier. ADB refused the document. (S.A. 21, 68-69.) Finally, the Union sent the request by certified mail; again, ADB refused to accept the document. (S.A. 20, 68-69.)

Thereafter, general manager Eirvin wrote and signed an antiunion letter and agenda. (Add. 3, 24; S.A. 9-10, 35.) On April 18, Eirvin gave the letter to project manager Robinson to read aloud to employees working on the Ameren UE crews. (Add. 3, 9; S.A. 18-19, 42-43, 46-48.) ADB also included the letter and agenda in

all the employees' checks that day and sent a copy to their homes. (Add. 9; S.A. 36, 49, 62, 81-82.) Eirvin's letter threatened loss of jobs, as well as loss of employees' insurance and retirement plan, if they voted to unionize. (Add 9-10; S.A. 9.) The accompanying agenda emphatically repeated many of these threats, including:

- "ADB will fight all attempts to bring a union into our company even if it takes years."
- "*ADB will never unionize!*"
- "I project to spend \$100K+ to fight [the Union]," and "This is part of your bonus money."
- "If your [sic] convinced you want UNION I will setup an interview at Gerstner [a union employer]."
- "ADB will subcontract more work."

(Add. 10; S.A. 10 (emphasis in the original).)

On April 23, employees distributed a list of union supporters at the facility and posted copies in conspicuous places. (Add. 8.) Employee Williams tried to give a copy of the list to general manager Eirvin, who refused it. (Add. 8, 10; S.A. 17, 40-41, 44-45.) The same day, Eirvin asked employee Jason Lohman if his name was on the list; Lohman responded that it was. Eirvin said that was all he needed to know. (Add 10; S.A. 63.) ADB fired Lohman on April 28.

By the end of May, ADB had fired 9 of the 11 employees who attended the first union meeting, and all 4 of the employees who sat at the head table during the second meeting. (Add. 3 & n.12.) During the unfair labor practice hearing in this case, ADB fired two more union supporters, John Shipp and Wayne Schaffer. (Add. 3.) ADB has recalled only two of the discriminatees, Ryan Adams and Clarence Williams. (Add. 4 n.16; S.A. 22.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Schaumber and Member Liebman) found, in agreement with both administrative law judges, that ADB violated Section 8(a)(3) and (1) of the Act by discharging 13 employees because of their union activities. The Board further found, also in agreement with the judges, that ADB violated Section 8(a)(1) of the Act by threatening employees with job loss, futility, closure of the St. Louis facility, increased subcontracting of work, and loss of their insurance and retirement plan; by impliedly threatening discipline for wearing union pins and loss or reduction of their bonuses; by soliciting union supporters to quit their employment; and by creating an impression of surveillance of employees' union activities.

The Board's Order requires ADB to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of

the Act, 29 U.S.C. § 157. Affirmatively, the Order directs ADB to take the following actions: bargain with the Union upon request; offer full reinstatement to the 11 employees not yet reinstated; make all 13 employees whole for any loss of earnings and benefits; provide information necessary to analyze the backpay owed; remove from ADB's files any reference to the unlawful discharges; and post a remedial notice.

SUMMARY OF ARGUMENT

ADB's contention that the Board's Order was not issued by a quorum of the Board must be rejected. Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order. Their authority to issue Board decisions and orders under such circumstances is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable situations under other federal administrative agency statutes, and general principles of administrative and common law. In contrast, ADB's argument is based on an incorrect reading of Section 3(b) and a misunderstanding of the statute governing federal appellate panels, which has no application to the Act.

This case also involves ADB's pervasive and egregious unfair labor practices, taken to undermine its employees' nascent union organizational

campaign. ADB reacted swiftly to its employees' attempts to organize: less than 2 months after employees began meeting to talk about union representation, ADB had fired 11 of the employees leading that effort and fired 2 more during the unfair labor practices hearing. In addition, supervisors and managers made a variety of coercive statements and threats to employees, including threatening job loss, plant closure, and loss of benefits. These coercive actions were not isolated statements by rogue supervisors to a few employees – ADB's threats were disseminated to employees through a mandatory meeting and letters sent to the home of every employee. Furthermore, ADB's "anti-union campaign was in accordance with [company owner] Keeley's anti-union sentiment." (Add. 4.) ADB fails to challenge *any* of the Board's unfair labor practice findings before this Court. Therefore, the Board is entitled to summary affirmance of those findings.

The Board acted well within its broad remedial discretion in ordering ADB to bargain with the Union. The Board determined that a bargaining order was necessary to remedy ADB's widespread and outrageous unfair labor practices, which included firing approximately 22 percent of the bargaining unit and numerous and widely communicated threats of plant closure and job loss. The Board also found that the involvement of ADB's general manager in the unfair labor practices and the production of fraudulent documentary evidence with which ADB attempted to falsely charge union supporters with critical job-related

mistakes further supported the bargaining order. Moreover, the Board reasonably found that, in the circumstances of this case, the passage of time and employee and management turnover did not preclude issuance of a remedial bargaining order.

The passage of time ADB complains about is largely the result of ADB's insistence that its crew leaders are statutory supervisors and thus not protected by the Act. And as the Board explained, subsequent management and employee turnover cannot erase the egregiousness of ADB's violations.

ARGUMENT

I. CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN ACTED WITH THE FULL POWERS OF THE BOARD IN ISSUING THE BOARD'S ORDER IN THIS CASE

Chairman Schaumber³ and Member Liebman, as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order in this case. *Northeastern Land Servs., Ltd. v. NLRB*, ___ F.3d. ___, 2009 WL 638248 (1st Cir. Mar. 13, 2009).⁴ As we now show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. ADB's contrary argument must be rejected because it is based

³ On March 18, 2008, President Bush announced the designation of Member Schaumber as Chairman of the Board. *See* BNA, *Daily Labor Report*, No. 53, at p. A-11 (Mar. 19, 2008). On January 20, 2009, President Obama designated Wilma B. Liebman as Chairman of the Board. *See* BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

⁴ In addition to the recent *Northeastern Land Services* decision by the First Circuit, this issue was also argued before the D.C. Circuit on December 4, 2008, in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162 and 08-1214. This issue has also been fully briefed in this Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291, in the Second Circuit in *Snell Island SNF v. NLRB*, Nos. 08-3822 and 08-4336, and in the Seventh Circuit in *New Process Steel v. NLRB*, Nos. 08-3517, et al. Oral argument is scheduled for April 10, 2009, in *New Process*, and for April 15, 2009, in *Snell Island*.

on an incorrect reading of Section 3(b), and a misunderstanding of the statute governing federal appellate panels, which has no application to the NLRA.

A. Background

The Act provides that the Board's five members will be appointed by the President with the advice and consent of the Senate, and will serve staggered terms of 5 years. *See* Section 3(a) of the Act, 29 U.S.C. § 153(a). The delegation, vacancy, and quorum provisions that govern the Board are contained in Section 3(b) of the Act, which provides in pertinent part as follows:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [29 U.S.C. § 153(b).]

Pursuant to this provision, the four members of the Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a group of three members, Members Liebman, Schaumber and Kirsanow. When, three days later, Member Kirsanow's recess appointment expired,⁵ the two remaining members, Members Liebman and Schaumber, continued to exercise the delegated powers they held jointly with Member Kirsanow, consistent with the express language of Section 3(b) that a

⁵ Member Walsh's recess appointment also expired on December 31, 2007.

vacancy shall not impair the powers of the remaining members and that “two members shall constitute a quorum” of any group of three members to which the Board had delegated its powers. Since January 1, 2008, this two-member quorum has issued over 250 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.⁶

B. Section 3(b) of the Act, By Its Terms, Provides That a Two-Member Quorum May Exercise the Board’s Powers

In determining whether Section 3(b) of the Act expresses Congress’ clear intent to grant the Board the option of operating the agency through a two-member quorum of a properly delegated, three-member group, the Court should apply “traditional principles of statutory construction.” *NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n. 9 (1984). This process begins with looking to the plain meaning of the statutory terms. *Haug v. Bank of America, N.A.*, 317 F.3d 832, 835 (8th Cir. 2003). The meaning of a term, however, “cannot be determined in isolation, but must be drawn from the context in which it is used.” *Deal v. United States*, 508 U.S. 129,

⁶ On March 17, 2009, it was reported that the two-member Board quorum had issued a total of 356 decisions, published and unpublished. *See* BNA, *Daily Labor Report*, No. 49, at p. AA-1 (Mar. 17, 2009). The published decisions include all decisions in Volume 352 NLRB (146 decisions) and Volume 353 NLRB (130 decisions as of April 3, 2009).

132 (1993). Moreover, “a statute must, if possible, be construed in such a fashion that every word has some operative effect.” *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate “all of the powers which it may itself exercise” to a group of three or more members; (2) a statement that vacancies shall not impair the authority of the remaining members of the Board to operate; and (3) a quorum provision stating that three members shall constitute a quorum, with an express *exception* stating that two members shall constitute a quorum of any three-member group established pursuant to the Board’s delegation authority.

As the First Circuit concluded, “the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b).” *Northeastern Land Servs.*, 2009 WL 638248, at *4-5. As the court’s decision recognizes, the three provisions of Section 3(b), in combination, authorized the Board’s action here. The Board first delegated all of its powers to a group of three members, as authorized by the delegation provision. As provided by the vacancy provision, the departure of Member Kirsanow after his recess appointment expired on December 31 did not impair the authority of the remaining Board members to continue to exercise the full powers of the Board which they held jointly with Member

Kirsanow pursuant to the delegation. And because of the express exception to the three-member quorum requirement when the Board has delegated its powers to a group of three members, the two remaining members constituted a quorum—the minimum number legally necessary to exercise the Board’s powers.

As the First Circuit noted (2009 WL 638248, at *5), two additional authorities support this reading of the statute's plain text. First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), a case where the Board had four sitting members, the Ninth Circuit held that Section 3(b)’s two-member quorum provision authorized a three-member group to issue a decision even after one panel member had resigned. In addition, the United States Department of Justice’s Office of Legal Counsel (“the OLC”) has directly addressed the issue in a formal legal opinion. The OLC concluded that the Board possessed the authority to issue decisions when only two of its five seats were filled, where the two remaining members constituted a quorum of a three-member group within the meaning of Section 3(b). *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

ADB, refusing to give full effect to all of Section 3(b)’s express terms, asks this Court to read into Section 3(b) an implicit minimum number of three sitting members necessary for issuing decisions. Thus, ADB asserts (Br. 12-13) that, because Section 3(b) only authorizes the Board to delegate its powers to “a group

of three or more members,” that section precludes the remaining two members from issuing decisions after the third member leaves the Board. That argument, however, interprets the delegation provision in isolation, and gives no effect to Section 3(b)’s vacancy and two-member quorum provisions, which appear in the same sentence. Indeed, the very effect that Congress intended to safeguard against—that a vacancy would preclude the remaining members from exercising the Board’s powers—would result if, as ADB suggests, Member Kirsanow’s departure disabled the remaining two-member quorum from exercising the Board’s powers.⁷ In contrast, the Board’s reading of Section 3(b) gives effect to *each* of those three provisions as they act in combination. That reading supports the conclusion that the Board properly delegated “all of its powers” to a three-member group consisting of Members Liebman, Schaumber and Kirsanow, and that the “vacancy” provision, in combination with the two-member quorum provision for a three-member group, operates to authorize Members Liebman and Schaumber to act for the Board and issue decisions.

ADB (Br. 14-15) invokes the maxim “*expressio unius est exclusio alterius*” (“expression of the one is exclusion of the other”) in support of its argument that the Board is prohibited from acting through two members because Section 3(b)

⁷ *Cf. Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (vacancy provision in Interstate Commerce Act vested the full power of the ICC in fewer than the full complement of commissioners).

only authorizes delegation to a group of “three or more.” The cases ADB cites, however, are totally inapposite, and, indeed, illustrate that principle’s inapplicability to this case. Both cases cited by ADB involve statutes that have specific restrictions in one part of the statute, but omit those restrictions in another part. In those circumstances, this Court concluded that Congress did not intend for the restrictions in one part to apply to another provision of the statute. *See Jama v. INS*, 329 F.3d 630, 634 (8th Cir. 2003), *affd. sub nom. Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005) (one provision of immigration statute requires receiving-country to grant permission to receive deported immigrant, but provision under which immigrant was deported did not); *Watt v. GMAC Mortgage Corp.*, 457 F.3d 781, 783 (8th Cir. 2006) (Real Estate Settlement Procedures Act prohibits mortgage servicers from charging borrowers a fee to provide certain types of information, but does not prohibit fees for other types of information). In this case, the “vacancy” and “quorum” provisions of Section 3(b) expressly allow the two-member quorum of the Board to act after the Board has delegated its powers to a three-member group, as authorized by the “delegation” provision. Thus, the provisions act together to authorize the Board’s action, and there is nothing in the delegation provision that prohibits it.

For the same reasons, ADB’s argument (Br. 15) that the Board is asking the Court to add an “exception” to the delegation provision of Section 3(b) has no

merit. The Board has in fact effectively delegated all its powers to a three-member group, and the vacancy and quorum provisions allow it to act through a two-member quorum, and thus no “exception” to the statute’s provisions is required. ADB’s interpretation takes the delegation provision entirely out of context and would in effect give no meaning at all to the vacancy and two-member quorum provisions. And, as we now show, giving effect to the statute’s plain meaning is consistent with the statute’s legislative history and confirms that Congress intended that a two-member quorum of a properly established, three-member group would be authorized, upon the departure of the third member, to continue issuing decisions and exercise all of the other powers of the Board delegated to that group.

C. Section 3(b)’s History Also Supports the Authority of a Two-Member Quorum To Issue Board Decisions and Orders

As shown above, the meaning of statutory language cannot be determined by isolating particular terms, but must take into account the intent and design of the entire statute. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574, 578 (1995). Thus, ascertaining that meaning often requires resort to historical materials, including the legislative history. *Id.* at 578.

A brief history of the Board’s operations and of the legislation that ultimately became Section 3(b) of the Act confirms that Congress intended for the Board to have the power to adjudicate cases with a two-member quorum. As originally enacted in 1935, the NLRA created a three-member Board and provided

in Section 3(b) that two members would constitute a quorum and that a vacancy would not prevent the two remaining members from exercising all of the Board's powers.⁸ Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued 464 published decisions with only two of its three seats filled.⁹ *See, e.g., NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.¹⁰ In 1947, however, when Congress was considering the Taft-Hartley amendments, the original two-member quorum provision was not a matter of concern. Indeed, the

⁸ *See* Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 449, reprinted in 2 *NLRB, Legislative History of the National Labor Relations Act, 1935* (hereinafter "*Leg. Hist. 1935*"), at 3272 (1935).

⁹ The Board had only two members during three separate periods between 1935 and 1947: from August 31 until September 23, 1936; from August 27 until November 26, 1940; and from August 27 until October 11, 1941. *See 2d Annual Report, NLRB*, at 7; *6th Annual Report*, at 7 n.1; *7th Annual Report*, at 8 n.1. Those two-member Boards issued 224 published decisions (reported at 35 NLRB 24-1360 and 36 NLRB 1-45) in 1941; 237 published decisions (including all decisions reported in 27 NLRB and those decisions reported at 28 NLRB 1-115) in 1940; and 3 published decisions (reported at 2 NLRB 198-240) in 1936.

¹⁰ *See* James A. Gross, *The Reshaping of the NLRB: National Labor Policy in Transition, 1937-1947* (1981); Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (1950).

House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.¹¹

The Senate bill, while proposing to enlarge the Board and amend the quorum requirement, was careful to do so in a manner that explicitly preserved the Board's authority to exercise its powers through a two-member quorum. Thus, the Senate bill would have expanded the Board to seven members, four of whom would be a quorum. However, that same bill authorized the larger Board to delegate its powers "to any group of three or more members," two of whom would be a quorum.¹² The Senate bill's preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity of viewpoint in deciding cases, contrary to the suggestion of one Senator.¹³ Rather, as the Senate Committee on Labor explained, the proposed expansion of the Board was designed to "permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage."¹⁴ Senator Taft similarly stated that the Senate bill was designed to

¹¹ See H.R. 3020, 80th Cong. § 3 (1947), reprinted in *1 NLRB, Legislative History of the Labor Management Relations Act, 1947* (hereinafter "*Leg. Hist. 1947*"), at 171-72 (1948); H.R. Rep. No. 80-3020, at 6, *1 Leg. Hist. 1947*, at 297.

¹² S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

¹³ Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

¹⁴ S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

“increase[] the number of the members of the Board from 3 to 7, in order that they may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much.”¹⁵ See *Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981) (recognizing Congress’ purpose “to enable the Board to handle an increasing caseload more efficiently”). The Conference Committee accepted, without change, the Senate bill’s delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members.¹⁶

Despite having only two additional members, rather than four as proposed by the Senate, the new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee created by

¹⁵ Remarks of Sen. Taft, 93 Cong. Rec. 3837 (Apr. 23, 1947), 2 *Leg. Hist. 1947*, at 1011. The three-member groups that the Senate proposed for the NLRB were similar to the three-member divisions that Congress had previously enacted for the Interstate Commerce Commission (“the ICC”) and the Federal Communications Commission (“the FCC”). Both the FCC and ICC statutes identically provided that “[t]he Commission is . . . authorized . . . to divide [its] members . . . into . . . divisions, each to consist of not less than three members. . . .” 48 Stat. 1068; Act To Provide for the Termination of Federal Control of Railroads, ch. 91, § 431, 41 Stat. 492. See *Eastland Co. v. FCC*, 92 F.2d 467, 469 (D.C. Cir. 1937).

¹⁶ 61 Stat. 136, 139 (1947), 1 *Leg. Hist. 1947*, at 4-5; H.R. Conf. Rep. No. 80-510, at 36-37 (1947), 1 *Leg. Hist. 1947*, at 540-41.

Title IV of the Taft-Hartley Act to study labor relations issues¹⁷ reported to

Congress the following year:

Section 3(a) of the [A]ct increased the membership of the Board from three to five members, and authorized it to delegate its powers to any three of such members. Acting under this authority, the Board in January 1948, established five panels for consideration of cases. Each of the Board members acts as chairman of one panel, and serves on two additional panels. Decisions in complaint cases arising under the Taft-Hartley law, and in representation matters involving novel or complicated issues, are still made by the full Board. A large majority of the cases, however, are being determined by the three-member panels.

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948).¹⁸ In this way, the Board was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.¹⁹

¹⁷ See 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

¹⁸ See also *Labor-Management Relations: Hearings Before J. Comm. on Labor-Management Relations*, 80th Cong. Pt. 2 at 1123 (statement of Paul M. Herzog, Chairman, NLRB) (reporting that “[o]ver 85 percent of the cases decided by the Board in the past 3 months have been handled by rotating panels of 3 Board members” and that the panel system “has added greatly to the Board’s productivity”).

¹⁹ The Board continues to decide the overwhelming majority of its cases by means of these three-member panels. See *Thirteenth Annual Report of the NLRB (1948)*, at 8-9; *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the H. Comm. on Gov’t Operations*, 100th Cong. 45-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman James M. Stephens’ statement) (“*1988 Oversight Hearings*”).

In sum, by authorizing the Board to delegate its powers to a group of three members, two of whom constitute a quorum, Congress enabled the Board to increase its casehandling capacity by operating in groups identical to the original three-member Board. In practical terms, the Act's two-member quorum provision authorized the Board's new three-member groups to function as the original three-member Board had done, *i.e.*, to issue decisions and orders with only two seats filled. If Congress were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have eliminated that quorum provision in 1947, when it enacted comprehensive amendments to the Act. Instead, Congress preserved the Board's power to adjudicate labor disputes with a two-member quorum where it had previously exercised its delegation authority. That clear expression of legislative intent controls the meaning of Section 3(b).

D. Construing Section 3(b) in Accord with Its Plain Meaning Furthers the Act's Purpose

As shown, in anticipation of the expiration of the recess appointments of Members Kirsanow and Walsh, the Board delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers. In so doing, the Board acted to ensure that it could continue to issue decisions and fulfill its agency mission through the use of the two-member quorum. The NLRA was designed to avoid "industrial strife," 29 U.S.C. § 151, and an interpretation of Section 3(b) that would allow the Board to continue functioning under the present

circumstances would give effect both to the plain language of the Act and its purpose.

ADB argues (Br. 12-13) that this is an “illogical and absurd result” that elevates form over substance, because the Board took this action in anticipation of the expiration of the recess appointments of Members Kirsanow and Walsh. As the First Circuit observed, however, courts have upheld similar actions taken by federal agencies to permit the agency to continue to function despite vacancies. *See Northeastern Land Servs.*, 2009 WL 638248, at *5. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996), after the five-member Securities and Exchange Commission (“the SEC”) had suffered two vacancies, the remaining three sitting members promulgated a new quorum rule so the agency could continue to function if it had only two members. *Id.* at 582 & n.3. In upholding both the rule and a subsequent decision issued by a two-member quorum of the SEC, the D.C. Circuit declared the rule “prudent,” because “at the time it was promulgated the [SEC] consisted of only three members and was contemplating the prospect it might be reduced to two.” *Id.* at 582 n.3. The statutory mechanism used by the Board is different, but the result is the same.

Likewise, in *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335 (D.C. Cir. 1983), the D.C. Circuit upheld the delegation of powers by the two sitting members of the three-member National Mediation Board (“the NMB”) to

one member, despite the fact that one of the two delegating members resigned “later that day,” leaving a single member to conduct agency business. The court reasoned that if the NMB “can use its authority to delegate in order to operate more efficiently, then *a fortiori* [it] can use [that] authority in order to continue to operate when it otherwise would be disabled.” *Id.* at 1340 n.26. Similarly, the Board properly relied on the combination of its delegation, vacancy, and quorum provisions to ensure that it would continue to operate despite upcoming vacancies.

To be sure, as ADB argues (Br. 15-16), *Railroad Yardmasters* is distinguishable, but the critical distinction points directly to the greater strength of the Board’s case. In *Railroad Yardmasters*, the D.C. Circuit faced the question whether an agency that acted principally in a non-adjudicative capacity could continue to function when its membership fell short of the quorum required by its authorizing statute. *See* 721 F.2d at 1341-42. That problem is not presented here. Here, unlike *Railroad Yardmasters*, the statutory requirements for adjudication are satisfied, because Section 3(b) expressly provides that two members of a properly constituted, three-member group is a quorum. In contrast to the one-member problem at issue in *Railroad Yardmasters*, the presence of the Board quorum that adjudicated this case “is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.” *Assure Competitive*

Transp., Inc. v. United States, 629 F.2d 467, 473 (7th Cir. 1980) (quoting Robert's Rules of Order 3, p. 16 (1970)).

E. Well-Established Administrative-Law and Common-Law Principles Support the Authority of the Two-Member Quorum To Exercise All the Powers Delegated to the Three-Member Group

The conclusion that the two remaining members of a three-member group can continue to exercise the powers of the Board that were properly delegated to that three-member group is consistent with established principles of both administrative law and the common law of public entities.

Contrary to ADB's contention (Br. 16), the powers which the Board delegated to the three-member group did not cease to exist after Member Kirsanow's departure. Under well-settled principles of administrative law, the delegation to the group of Members Liebman, Schaumber, and Kirsanow survived Member Kirsanow's departure. "Institutional delegations of power are not affected by changes in personnel, but rather continue in effect as long as the institution remains in existence and the delegation is not revoked or altered." *Railroad Yardmasters*, 721 F.2d at 1343. Indeed, as courts have agreed, "[a]ny other general rule would impose an undue burden on the administrative process." *Donovan v. National Bank of Alaska*, 696 F.2d 678, 682-83 (9th Cir. 1983) (quoting *United States v. Wyder*, 674 F.2d 224, 227 (4th Cir. 1982), and applying

the rule that administrative acts continue in effect until revoked or altered). Thus, the Board's December 28, 2007 delegation of powers continued in full force.

Further, the conclusion that a vacancy in the three-member group does not disable the remaining members from acting as the Board, as long as the statutory two-member quorum requirement is met, is congruent with common-law quorum rules applicable to public administrative entities. There is no doubt that such common-law principles are relevant to construing the Act's quorum and vacancy provisions. Thus, in *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183-86 (1967), the Supreme Court recognized that Congress enacted statutes creating administrative agencies against the backdrop of common-law quorum rules applicable to public bodies, and indeed, wrote common-law rules into the enabling statutes of several agencies, including the Board. *Id.* at 186 (also identifying the Interstate Commerce Commission).²⁰

²⁰ In *Flotill*, the Supreme Court held that where only three commissioners of the five-member Federal Trade Commission participated in a decision, a 2-1 decision of those three commissioners was valid, recognizing the common-law rule that "in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body." 389 U.S. at 183 & n.6 (collecting cases). The Court concluded that "[w]here the enabling statute is silent on the question, the body is justified in adhering to that common-law rule." *Id.* at 183-84. See also *United States v. Ballin*, 144 U.S. 1, 6 (1892) ("the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body").

At common law, the power held by a public board was held “not individually but collectively” (*Commonwealth ex rel. Hall v. Canal Comm’rs*, 9 Watts 466, 471, 1840 WL 3788, at *5 (Pa. 1840)), and “considered joint and several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at *16 (W.Va. 1875). Consistent with those principles, the majority view of common-law quorum rules was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body (see *Ross v. Miller*, 178 A. 771, 772 (N.J. Sup. Ct. 1935) (collecting cases)), even where that majority represented only a minority of the full board. See, e.g., *People v. Wright*, 30 Colo. 439, 442-43, 71 P. 365 (1902) (where city council was composed of 8 aldermen and 1 mayor, and the terms of 4 aldermen expired, vote of two of the remaining aldermen and the mayor was valid because they constituted a quorum of the five remaining members). See also *Lee v. Board of Educ. of the City of Bristol*, 181 Conn. 69, 83-84, 434 A.2d 333, 341 (1980) (where 1 vacancy existed on 6-member board, 3 members could hold hearing as a quorum because they were a majority of the 5 seated members); *State v. Orr*, 61 Ohio St. 384, 56 N.E. 14 (1899) (where 1 vacancy existed on 10-member city council, and statute defined quorum as a majority of all the members, 5 members constituted a quorum because they were a majority of the 9 seated members).²¹

²¹ A related common-law rule is the principle that when the law requires that a

That principle is reflected in several court decisions involving federal agencies, which recognize, in a variety of statutory contexts, that decisionmaking by a minority of an agency's total membership is allowable under that agency's authorizing statute. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 n.2 (D.C. Cir. 1996), the court observed that the underlying common-law rule likely permits "a quorum made up of a majority of those members of a body *in office* at the time." With this common-law principle as a backdrop, the court held that, in the absence of any countermanding provision in its authorizing statute, the SEC lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions and orders when only two of its five authorized seats were filled. *Id.* at 582.

The Seventh Circuit's decision in *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980), similarly recognizes the principle of minority decisionmaking. There, the court held that when only 6 of the 11 seats on the Interstate Commerce Commission were filled, 5 commissioners—a majority of the commissioners in office—constituted a quorum and could issue decisions.

measure can be passed only by the vote of a certain proportion of the body, that proportion is measured against the number of members of the body who are seated at the time the measure is passed, unless a statutory provision indicates otherwise. *See Peterson v. Hoppe*, 194 Minn. 186, 191, 260 N.W. 215, 218 (1935); *Board of Commissioners of Town of Salem v. Wachovia Loan & Trust Co.*, 143 N.C. 110, 55 S.E. 442, 443-44 (1906).

Similarly, in *Michigan Department of Transportation v. ICC*, 698 F.2d 277 (6th Cir. 1983), the Sixth Circuit held that, when 7 of the 11 seats on the ICC were vacant, a decision issued by the remaining 4 commissioners was valid. *Id.* at 279.

Finally, in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), the D.C. Circuit recognized that the enabling statute of the ICC not only permitted that agency to “carry out its duties in [d]ivisions consisting of three [c]ommissioners,” but also provided that “a majority of a [d]ivision is a quorum for the transaction of business.” *Id.* at 367 n.7. Based on that provision (which is analogous to the two-member quorum provision in the NLRA’s Section 3(b) (see above, p. 26 n.15)), the D.C. Circuit held that an ICC decision participated in and issued by only two of the three commissioners in a division was valid. *Id.*

Construing Section 3(b) of the NLRA to permit the two-member quorum to continue to exercise the Board’s powers that were properly delegated to the three-member group is consistent with the common law and court decisions reflecting that common law in the context of federal administrative agencies. The plain language of Section 3(b)—which provides for a two-member quorum as an exception to the three-member quorum provision where the Board’s powers have been delegated to a three-member group—expresses the same common law principle reflected in the above SEC and ICC cases that, when faced with vacancies, public bodies can function through quorums that are less than a majority

of the authorized membership of the public body. Accordingly, Section 3(b) should be read in the same manner as the statutes in issue in those cases.

F. Section 3(b) Grants the Board Authority that Congress Did Not Provide in Statutes Governing Appellate Judicial Panels

ADB contends (Br. 20-22) that the federal law governing the composition of three-judge appellate panels (28 U.S.C. § 46) should be imported to the NLRA to control the Board's exercise of its authority to delegate powers to three-member groups. It claims (Br. 21) that "there are substantial parallels between" 28 U.S.C. § 46 and Section 3(b) of the Act and "no meaningful basis to distinguish" them. To the contrary, the two statutes have sharp distinctions, and application of the federal judicial statute to the Board would improperly override express congressional intent and interfere with the option Congress provided for the Board to fulfill its agency mission through a properly constituted, two-member quorum.

ADB fails to grasp that Section 3(b) does not limit the Board's delegation powers to case assignment. Under the express terms of Section 3(b), the Board may delegate "any or all of the powers which it may itself exercise" to a group of three members, who accordingly may act *as the Board itself*. Those powers are not simply adjudicative, but also administrative, and include such powers as the power to appoint regional directors and an executive secretary (see 29 U.S.C. § 154), and the power, in accordance with the Administrative Procedure Act, to promulgate the

rules and regulations necessary to carry out the provisions of the NLRA (see 29 U.S.C. § 156).

By contrast, the judicial panel statute, in relevant part, is limited to adjudication of cases, providing that a federal appellate court must assign each case that comes before it to a three-judge panel. *See* 28 U.S.C. § 46(b) (requiring “the hearing and determination of cases and controversies by separate panels, each consisting of three judges”). *See also Murray v. Nat’l Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (relying on legislative history to find that Congress intended 28 U.S.C. § 46(b) to require that, “in the first instance, all cases would be assigned to [a] panel of at least three judges”) (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)).

Moreover, Section 3(b), unlike 28 U.S.C. § 46(b), does not contain an express requirement that particular cases be assigned to particular groups or panels of Board members. Therefore, a delegation of “all the Board’s powers” to a three-member group means that all cases that are pending or may come before the Board are before the group. Thus, the two-member quorum retains the authority to consider and decide those cases, including the authority to issue the decision in this case.

ADB argues at length (Br. 16-20) that the legislative history of the Taft-Hartley Act indicates that Congress wanted the Board to act more like a court, and

thus the judicial case assignment provisions of 28 U.S.C. § 46 should govern the Board. Contrary to ADB's contention, however, there is no indication in the legislative history of Section 3(b) that Congress wanted the Board to act more like the Courts of Appeals with regard to case assignment. Rather, as noted above, at p. 26 n.15, the delegation provisions and case processing practices of the ICC and the FCC appear to be the model that Congress had in mind in crafting Section 3(b). Congress' concern that the Board act more like a court was expressed in different provisions, such as Section 4 of the NLRA (29 U.S.C. § 154), which abolished the centralized "Review Section" that the Board had relied upon to review transcripts and prepare drafts and limited the individual Board members to using legal assistants employed on their staffs to perform those functions. *See* S. Rep. No. 80-105, at 8-10, *1 Leg. Hist. 1947*, at 414-16. This is the provision referred to in the legislative history by ADB (Br. 18-19), and ADB cites no other legislative history indicating that Congress expressed this concern with regard to the delegation, vacancy, and quorum provisions of Section 3(b). As shown above at pp. 23-28, the legislative history of Section 3(b) clearly shows Congress' intent to preserve the Board's authority to operate with a two-member quorum after it has delegated its powers to a three-member group.

ADB's position is not furthered by its reliance (Br. 20-21) on *Nguyen v. United States*, 539 U.S. 69 (2003). Instead, that case calls attention to additional

reasons why construing Section 3(b) of the NLRA to incorporate restrictions found in federal judicial statutes would constitute legal error. *Nguyen* illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b) of the NLRA. In that case, the Court held that the judicial panel statute requires that a case must be assigned to three Article III judges, that the presence of an Article IV judge on the panel meant that it was not properly constituted, and that the two Article III judges on the panel could not issue a valid decision, even though Section 46(d) provides that two Article III judges constitute a quorum. *See* 539 U.S. at 82-83. In so holding, the Court took into consideration that Congress amended the judicial panel statute in 1982 “in part ‘to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels.’” 539 U.S. at 83 (quoting *Murray*, 35 F.3d at 47, citing Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9). No such history underlies Section 3(b). *See* above, pp. 23-28. Moreover, the three-member group of Board members to which the Board delegated all of its powers *was* properly constituted pursuant to Section 3(b), and thus nothing in the Court’s *Nguyen* opinion—even if it were applicable—would prevent the two-member quorum from continuing to exercise those powers. Indeed, *Nguyen* specifically stated that two Article III judges “would have constituted a quorum if the original panel had been properly created” 539 U.S. at 83. That is the situation here. *Cf. United States*

v. Desimone, 140 F.3d 457, 458-59 (2d Cir. 1998) (decision by two judges, as quorum of panel properly constituted at its inception, after death of third panel member held valid).²²

Ayrshire Collieries Corp. v. United States, 331 U.S. 132 (1947), also cited by ADB (Br. 22), undermines its argument that the Board should be subject to federal law governing the composition of three-judge appellate panels. In *Ayrshire*, the Court held that a full complement of three judges was necessary to enjoin the enforcement of ICC orders because Congress, in the Urgent Deficiencies Act, had specifically directed that such cases “shall be heard and determined by three judges.” 331 U.S. at 137. The Court concluded that Congress “meant exactly what it said” (*id.*), finding it “significant that this Act makes no provision for a quorum of less than three judges.” *Id.* at 138. By contrast, in enacting Section 3(b) of the NLRA, Congress specifically provided for a quorum of two members, and did not provide that if the Board delegates all its powers to a three-member group, all three members must participate in a decision.

²² Also distinct is the *Nguyen* Court’s concern that the deliberations of the two-judge quorum were tainted by the participation of a judge not qualified to hear the case (see 539 U.S. at 82-83), a consideration wholly inapplicable here.

G. ADB's Policy Attacks on the Board's Authority Are Misdirected

ADB's claim (Br. 23-24) that there is a danger of abuse if two members of the Board are allowed to make decisions is nothing more than an attack on the policy choice that the Taft-Hartley Congress made in 1947 when it authorized the Board to delegate its powers to a three-member group, two of whom shall be a quorum. ADB relies on (Br. 22-23) the Supreme Court's discussion in *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 139 (1947), which indicates that a decision issued by two, rather than three, judges, might well have been altered by the views of a third judge, if one had been present. However, as shown at p. 40, the statute at issue in *Ayrshire* differs from NLRA Section 3(b) precisely because it did not provide for a quorum of less than three judges. *See* 331 U.S. at 138.

Moreover, in relying on the policy considerations discussed in *Ayrshire*, ADB overlooks that for the first 12 years of its administration of the NLRA, the Board issued hundreds of decisions in cases decided by two-member quorums at times when only two of the Board's three seats were filled. *See* p. 24 & n.9. If Congress were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have eliminated that quorum provision. Instead, in amending the Act after comprehensive review, the 1947 Congress preserved the Board's option to adjudicate labor disputes with a two-member

quorum where it had purposefully exercised its delegation authority. That is the determinative policy consideration that controls this case.

Equally misdirected is ADB's policy concern (Br. 24) that permitting a two-member Board quorum to decide cases could lead to abuses if the two remaining Board members were of the same political party. The D.C. Circuit rejected a similar policy argument in the ICC context. In *Nicholson v. ICC*, 711 F.2d at 367 n.7, the petitioner complained that a large number of vacancies on the ICC had caused a political imbalance that rendered it inappropriate for the agency to decide cases. In response, the D.C. Circuit simply pointed out that "nothing in the Interstate Commerce Act requires a [d]ivision of the [ICC] to be politically balanced." *Id.* The NLRA also contains no such political balance requirement.

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER

The Board found that ADB violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1),²³ by firing employees Farris, N. Schaffer, Schreit, Hanephin, Sutton, Adams, C. Williams, Lohman, Bridges, A. Williams, Mack, Shipp, and W. Schaffer because of their union activities. The Board also found that ADB committed numerous violations of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), including threatening employees, interrogating employees, and creating an impression of surveillance of employees' union activities. Because ADB fails to contest these violations, the Board is entitled to summary affirmance of its findings. *See NLRB v. MDI Commercial Servs.*, 175 F.3d 621, 624 (8th Cir. 1999).

ADB also fails to contest most of the Board's remedies for ADB's violations, including the broad cease-and-desist order. Therefore, the Board is entitled to summary enforcement of the corresponding portions of its remedial order. *Id.*

²³ Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(3) of the Act therefore results in a "derivative" violation of Section 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Finally, the uncontested violations do not disappear from the case simply because ADB has not challenged them. Rather, these violations remain and “affect the quantum of evidence upon which the Board based its finding of violations so pervasive that a bargaining order was justified.” *DeQueen Gen. Hosp. v. NLRB*, 744 F.2d 612, 614 n.1 (8th Cir. 1984). *Accord NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982) (finding that uncontested violations “remain, lending their aroma to the context in which the [contested] issues are considered”).

III. THE BOARD REASONABLY EXERCISED ITS BROAD DISCRETION IN ORDERING ADB TO BARGAIN WITH THE UNION AS A REMEDY FOR ITS UNFAIR LABOR PRACTICES

A. Applicable Principles and Standard of Review

In *NLRB v. Gissel Packing Co.*, the Supreme Court affirmed the Board’s authority to issue a remedial bargaining order in cases in which employers commit “serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election.” 395 U.S. 575, 594 (1969). The first category of cases warranting remedial bargaining orders under *Gissel* (“Category I”) are those marked by “outrageous” and “pervasive” unfair labor practices of “such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had.” *Id.* at 613-14. The Court in *Gissel* also approved the Board’s use of a bargaining

order in a second class of cases (“Category II”) in which the unfair labor practices are less pervasive. Bargaining orders are appropriate in Category II cases where the Board has reasonably found that “the possibility of erasing the effect of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order” *Id.* at 614-15.

Remedial bargaining orders predicated on such unfair labor practices advance employees’ free choice by giving effect to their designation of a union through authorization cards where, due to the employer’s misconduct, an election is “not likely to demonstrate the employees’ true, undisturbed desires.” *Id.* at 610-11. They also deter the commission of serious unfair labor practices by refusing to permit wrongdoers “to delay or disrupt the election process or put off indefinitely [their] obligation[s] to bargain.” *Id.* at 610.

Finally, the Court in *Gissel* emphasized that “[i]t is for the Board and not the Courts . . . to make that determination [as to whether a bargaining order is necessary] based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity.” *Id.* at 612 n.32. In doing so, the Board “draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *Id. Accord*

DeQueen Gen. Hosp. v. NLRB, 744 F.2d 612, 619 (8th Cir. 1984). *See also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (finding that the Board has “primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review”). Moreover, this Court will enforce the Board’s remedy “unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Pace Indus. v. NLRB*, 118 F.3d 585, 593 (8th Cir. 1997) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

B. The Board Reasonably Found that a Bargaining Order Is Necessary To Remedy ADB’s Unfair Labor Practices

The Board reasonably found (Add. 2) this to be a *Gissel* Category I case in which ADB’s outrageous and pervasive unfair labor practices render a fair election impossible. Accordingly, the Board properly issued an order requiring ADB to bargain with the Union.

The number and severity of the violations found by the Board make this a case where “common sense recognizes the dramatic and long term effects of [the violations].” *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 481 (7th Cir. 1994) (citation omitted). As the Board noted (Add. 1-6), ADB’s unfair labor practices included the discharge of union leaders and supporters – resulting in the firing of 22 percent of the bargaining unit. The violations also included threats of job loss, plant closure, futility, loss of retirement plan and insurance, and retaliation against

two employees who testified at the unfair labor practice hearing. The Board further cited the involvement of ADB's highest-level management in the unfair labor practices and its proffer of fraudulent documents designed to prove that discharged employees made critical on-the-job mistakes. Moreover, ADB (Br. 3 n.1) does not dispute – and thus implicitly concedes – that the unlawful conduct found by the Board would warrant a *Gissel* bargaining order.

Although it was probably not necessary given the extent and nature of the violations, the Board engaged in a detailed analysis of the specific effect of ADB's unfair labor practices and found (Add. 1-6) that those actions preclude a fair election. As this Court has recognized, the termination of union adherents is one of the most serious infringements of the Act and certainly undermines employees' support for a union. *See NLRB v. Sitton Tank Co.*, 467 F.2d 1371, 1372 (8th Cir. 1972). *Accord Chromalloy v. NLRB*, 620 F.2d 1120, 1130 (5th Cir. 1980). Here, the Board emphasized (Add. 3) that ADB's discriminatory discharges, which continued even during the unfair labor practice hearing, “[struck] at the core of the Union’s organizing efforts and spread[] fear among those who remained employed.” In these circumstances, the Board reasonably found (Add. 4) that ADB's flagrant and pervasive wrongdoing was such that “traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible.” *Allied Gen. Servs.*, 329 NLRB 568, 570 (1999).

Moreover, in discharging the employees, ADB carried out numerous threats of discharge and job loss that it had made during the campaign. As the Board explained, it has long held that “[t]hreats of job loss constitute ‘hallmark’ violations of the Act, ‘which are highly coercive because of their potentially long-lasting impact.’” (Add. 2 quoting *Nat’l Steel Supply, Inc.*, 344 NLRB 973, 976 (2005), *enforced*, 207 Fed. Appx. 9 (2d Cir. 2006)). The Board also noted that the implementation of those threats against 22 percent of the bargaining unit “illustrated to employees that [ADB’s] oral and written threats were to be taken literally.” (Add. 3.)

Further, the Board explained (Add. 3), the remaining employees were not immune from the effects of ADB’s unfair labor practices. ADB committed approximately 15 serious violations of Section 8(a)(1) in a single month, almost all of which were directed at the entire bargaining unit. (Add. 3.) And ADB’s discharges of union supporters continued even during the unfair labor practice hearing, “striking at the core of the Union’s organizing efforts and spreading fear among those who remained employed.” (Add. 3.) It is unlikely, then, that the Board’s traditional remedies could restore employees’ confidence in freely expressing their choice for representation after they saw or heard about the fate of so many other employees. The Board appropriately ordered ADB to bargain with

the Union, based on its undisputed card majority, as the only effective remedial measure to restore the status quo ante.

C. There is No Merit to ADB's Contention that the Bargaining Order Should Be Vacated Due to Changed Circumstances

To the Court, ADB argues (Br. 24-40) that the bargaining order should be set aside because the Board denied its motions for reconsideration and refused to reopen the record to take additional evidence. More specifically, through its motions, ADB sought to have the Board reopen the record to take additional evidence on turnover among employees and management and to evaluate the viability of the bargaining order given the passage of time in the case. As demonstrated below, the Board properly denied ADB's motions. Furthermore, the Board did, in fact, review the proffered evidence and found that, even considering that evidence, the passage of time and turnover would not require a different result.

1. The Board acted within its discretion in denying ADB's motion to reopen the record

ADB filed two motions to reopen the record "to accept evidence of changed circumstances." (A. 1-19, 47-49.) In his supplemental decision, judge Buxbaum denied ADB's first motion. (Add. 51.) ADB did not file specific exceptions to the judge's denial of the motion. (Add. 4 n.14; A. 20-22.) Instead, it filed a second motion to reopen the record with the Board. (Add. 4 n.14; A. 47-49.)

The Board reasonably denied ADB's second motion for two reasons. (Add. 4 n.14.) First, as the Board noted (Add. 4), under Board law, it evaluates the appropriateness of a *Gissel* bargaining order as of the time the unfair labor practices occurred and does not generally consider any changes in circumstances after the violations. *See Garvey Marine*, 328 NLRB 991, 995-96 (1999), *enforced*, 245 F.3d 819 (D.C. Cir. 2001).

The Board also rejected ADB's second motion to reopen the record because it was procedurally invalid. As the Board explained, ADB failed to file specific exceptions to the administrative law judge's denial of the first motion. (Add. 4 n.14.) Therefore, the Board found that ADB did not satisfy Section 102.46(b)(2) of the Board's Rules and Regulations, 29 C.F.R. § 102.46(b)(2), which requires that any exception "not specifically urged shall be deemed to have been waived." (Add. 4 n.14.) In addition, the Board noted that the second motion contained "only a bare recitation of [ADB's] argument, neglecting even to mention the nature of the evidence being offered." (Add. 4 n.14; A. 47-49.) Section 102.48(d)(1) of the Board's rules, 29 C.F.R. § 102.48(d)(1), however, requires that a motion to reopen state "the additional evidence sought to be adduced [and] why it was not presented previously." (Add. 4 n.14.) Thus, ADB's motion, providing only a "bare recitation," failed to convince the Board that a reopening of the record and an additional hearing were required. The Board's decision to deny that motion was

well within its broad discretion. *See NLRB v. USA Polymer Corp.*, 272 F.3d 289, 296 (5th Cir. 2001) (Board's refusal to accept motion for reconsideration that did not satisfy filing requirements was not an abuse of discretion).

2. In any event, the Board considered and properly rejected changed circumstances as a factor affecting the necessity for a bargaining order

Some courts, including this one, require the Board to consider changed circumstances in the less serious *Gissel* Category II cases. *NLRB v. Cell Agric. Mfg. Co.*, 41 F.3d 389, 397-98 (8th Cir. 1994); *Cogburn Health Ctr., Inc. v. NLRB*, 437 F.3d 1266, 1272-73 (D.C. Cir. 2006). This case, however, is a *Gissel* Category I case – a finding ADB does not dispute, despite its suggestion (Br. 31) that “the unfair labor practices in *Cell Agricultural* [a *Gissel* Category II case] were even more egregious than those involved in this case.” In *Gissel* Category I cases, the Board “need not make detailed findings of the type required for Category II cases, but instead must only make ‘minimal findings’ of the lasting effect of unfair labor practices to support a bargaining order.” *See Power, Inc. v. NLRB*, 40 F.3d 409, 422 (D.C. Cir. 1994) (quoting *Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 331 (D.C. Cir. 1989)); *Kaynard v. MMIC, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984). *Contra USA Polymer*, 272 F.3d at 297 (Board must consider current circumstances when issuing any *Gissel* bargaining order). Nevertheless, the Board considered the evidence of changed circumstances proffered by ADB in its first motion to reopen

and made detailed findings that show a bargaining order is necessary. *See USA Polymer*, 272 F.3d at 294 n.1 (noting that a *Gissel* order “may still be appropriate despite the changed conditions”) (citing *Chromalloy v. NLRB*, 620 F.2d 1120 (5th Cir. 1980)).

ADB’s motions fail to show that its proffered evidence of management and employee turnover would require a different result. With respect to *management* turnover, the Board noted (Add. 4) that several company managers and owners were still employed at the time ADB filed its motions. These included owner Keeley who, at the time of the unfair labor practices, co-owned ADB with general manager Eirvin. Despite ADB’s attempts to put all the violations at the feet of Eirvin, the Board’s undisputed findings show that Eirvin’s “behavior was entirely consistent with the desires and attitudes of the owner, Rusty Keeley” and that ADB’s “antiunion campaign was in accordance with Keeley’s antiunion sentiment.” (Add. 4, 53.) For example, Keeley spoke at management meetings stating that he would “help” prounion employees find work elsewhere. (Add. 53; S.A. 50-51.)

As the Board found, “the situation in this company is the same” as at trial when ADB’s counsel stated that “Mr. Keeley is the chief executive officer of this company. So, as such, he is in charge of everything. The buck stops with him.” (Add. 54; S.A. 83.) In addition to Keeley, fully half of the supervisors involved in

the unfair labor practices remain employed, including Nanney, Sellers, Door, and Stankewitz.²⁴

Moreover, the actions of ADB's management – which was not limited to Eirvin – showed such “potent evidence of malicious intent and behavior” that administrative law judge Buxbaum wrote, “if one of ADB's managers were to have testified that the city of St. Louis is located within the State of Missouri, I would have felt an overpowering compulsion to consult my road atlas for verification.” (Add. 33.) Given that evidence, and the lack of any evidence of change in company attitudes about the Union, the Board reasonably determined that “any management turnover does not mitigate the likelihood of continuing coercion of employees.” (Add. 54 & n.56.)

Nor did ADB show that *employee* turnover since the unfair labor practices will dissipate the effects of its pervasive and outrageous behavior. As the Board explained, “a substantial percentage of the turnover is attributable to [ADB's] unlawful discharge of 11 union supporters,” excluding the 2 recalled employees. (Add. 5.) Even if there has been substantial turnover of employees, the Board reasonably found that “ADB's behavior will resonate in other ways” beyond the

²⁴ ADB's claim (Br. 36) that only three of its supervisors “remain employed by [ADB's] Midwest operations” glosses over the employment of Stankewitz. ADB's suggestion that Stankewitz should not “count” because he works out of the Florida office is irrelevant; he worked out of that office at the time of the unfair labor practices as well. (Add. 20; A. 8 & n.2.)

impact of that behavior on the employees who witnessed it. (Add. 54.) Indeed, it is understood that egregious and widespread unfair labor practices such as those here are likely to “live on in the lore of the shop,” affecting new hires as well as veteran employees. *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 828 (D.C. Cir. 2001). *See also Power*, 40 F.3d at 423; *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978). Threats of job loss, for example, “are precisely the types of unfair labor practices that endure in the memories of those employed at the time and are most likely to be described in cautionary tales to later hires.” *Garvey Marine*, 328 NLRB at 996. In these circumstances, the Board was fully justified in concluding that “the persistent effects of the severe misconduct . . . cannot be dissipated through turnover in the work force.” (Add. 54.)

Due to the persistent effects of severe misconduct, bargaining orders have been approved in cases in which the employer commits serious violations and there is substantial employee turnover. *See NLRB v. Intersweet, Inc.*, 125 F.3d 1064, 1069-70 (7th Cir. 1997) (enforcing bargaining order in a *Gissel* Category I case where only 9 of original 31 employees remained employees and bargaining unit had grown by 105 new employees); *Amazing Stores*, 887 F.2d at 329 (enforcing bargaining order in a *Gissel* Category I case where there had been 95 percent turnover). Indeed, bargaining orders have been approved even in *Gissel* Category II cases with substantial employee turnover. *See Dunkin’ Donuts Mid-Atlantic*

Distribution Ctr., Inc. v. NLRB, 363 F.3d 437, 442 (D.C. Cir. 2004) (enforcing bargaining order in *Gissel* Category II case despite turnover of 74 and 81 percent in successive years); *G.P.D., Inc. v. NLRB*, 430 F.2d 963, 964 (6th Cir. 1970) (bargaining order proper in *Gissel* Category II case despite turnover of 7 of 8 employees). Thus, where, as here, the Board finds that the seriousness of the employer's behavior has not been dissipated, courts have found "no abuse of discretion in the Board's finding that the change in workforce did not make a bargaining order unnecessary." *Intersweet*, 125 F.3d at 1070. *See also Garvey Marine*, 245 F.3d at 828. *Cf. Cogburn*, 437 F.3d at 1274 (refusing to enforce a bargaining order in a *Gissel* Category II case where the Board "simply ignored the evidence of employee turnover").²⁵

Furthermore, contrary to ADB's suggestion (Br. 38), there is no requirement that the Board ascertain the actual sentiment of the majority of the work force before issuing a bargaining order. ADB's proposal (Br. 39) that employees be called before the Board to testify whether they were told "cautionary tales" of ADB's unfair labor practices is, as the D.C. Circuit has explained, ludicrous: "Forcing the NLRB to question new employees as to their knowledge of earlier

²⁵ Contrary to ADB's assertions (Br. 35-36), *Cogburn* is inapposite. In that case, the D.C. Circuit found a bargaining order to be inappropriate because the Board "simply ignored" evidence of changed circumstances, whereas here, the Board carefully considered ADB's evidence. *See Cogburn*, 437 F.3d at 1274.

representation elections is not only unnecessary to support its conclusion, but also would have the bizarre effect of alerting new employees to their employers' antipathy to union organization." *Amazing Stores*, 887 F.2d at 331; *see also USA Polymer*, 272 F.3d at 293 n.1 (citing *Chromalloy*, 620 F.3d at 1131-32).

Finally, the Board rejected ADB's argument that the bargaining order is no longer viable because of the passage of time. (Add. 5.) The Board found that the approximately 5 years between the unfair labor practices and the Board's decision "will not dissipate the coercive effects of [ADB's] unlawful coercive conduct."

(Add. 5) Indeed, where, as here, there are numerous egregious violations, courts have enforced bargaining orders despite the passage of similar or longer periods.

See Evergreen Am. Corp. v. NLRB, 531 F.3d 321, 332-33 (4th Cir. 2008)

(enforcing bargaining order where 5 years had passed between unfair labor

practices and Board order); *Intersweet*, 125 F.3d at 1068 (enforcing bargaining

order where more than 3 years had elapsed between unfair labor practices and the

Board's decision); *Power*, 40 F.3d at 423 (enforcing bargaining order where more

than 4 years had passed since the employer's most serious violations); *Churchill's*

Supermarkets, Inc., 285 NLRB 138, 142-43 (1987), *enforced mem.*, 857 F.2d 1474

(6th Cir. 1988) (passage of 7 years insufficient to eradicate effects of unlawful conduct).

Furthermore, as the Board observed (Add. 6), ADB's own actions prolonged the proceeding. In its exceptions to administrative law judge Schlesinger's decision, ADB "vigorously argued that 8 of the 13 discriminatees were statutory supervisors." (Add. 6; A. 20-22.) Not only did ADB argue that its crew leaders were supervisors – a claim it has abandoned before this Court – but it argued that the Board should reopen the hearing to take additional evidence on this point, an insistence that inevitably delayed the proceedings as the Board remanded the case after issuing its *Oakwood* trilogy of decisions. (Add. 6.) Moreover, as the Board pointed out, ADB's argument that the crew leaders were supervisors "was a complete turnaround from its position during the near-contemporaneous representation hearing, where it argued that its crew leaders were *not* supervisors" (emphasis in the original). (Add. 6.) Without its insistence on litigating the status of the crew leaders, the remand would have been unnecessary, and the Board's decision could have issued 2 years earlier. (Add. 6.)

CONCLUSION

For the reasons stated above, the Board respectfully requests that this Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board
April 2009

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
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Petitioner	*	No. 09-1184
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	*	
and	*	
	*	
LOCAL 2, INTERNATIONAL BROTHERHOOD	*	Board Case No.
OF ELECTRICAL WORKERS	*	14-CA-27386
	*	
Intervenor	*	
	*	
v.	*	
	*	
AMERICAN DIRECTIONAL BORING, INC.	*	
D/B/A ADB UTILITY CONTRACTORS, INC.	*	
	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,722 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the respondent and intervenor.

Board counsel further certifies that the CD-ROM has been scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (04/05/2009 rev. 3). According to that program, the CD-ROM is free of viruses.

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Dated at Washington, DC
this 8th day of April 2009

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	*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief and separate appendix in the above-captioned case, and has served two copies of the final brief and one copy of the Board's separate appendix by first-class mail upon the following counsel at the addresses listed below:

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