

Nos. 09-1090, 09-1509

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RACETRACK FOOD SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

DAVID A. FLEISCHER
Senior Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2987

RONALD MEISBURG

General Counsel

JOHN E. HIGGINS, JR.

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

ROBERT ENGLEHART

Supervisory Attorney

National Labor Relations Board

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---	----

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--	----

<i>Webster’s New World College Dictionary</i> (4th ed. 2008)	23
--	----

Legislative History Materials:

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--	----

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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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 petition of Racetrack Food Services, Inc. (“the Company”) to review an Order issued against it by the National Labor Relations Board (“the Board”) and on the Board’s cross-application for

enforcement of its Order. The Board's Decision and Order was issued on December 31, 2008, and is reported at 353 NLRB No. 76. (A 3-19.)¹

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act" or "the NLRA"), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the unfair labor practices having occurred in Bensalem, Pennsylvania. The Board's Order is a final order within the meaning of Section 10(e) and (f) of the Act and, as shown below, pp. 16-42, was validly issued by a two-member quorum of a properly constituted three-member group within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).

The Company filed its petition for review on January 14, 2009. (A 1.) The Board filed its cross-application for enforcement on February 23, 2009. (A 2.) Section 10(e) and (f) of the Act place no time limits on such filings.

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 with the full powers of the Board in issuing the Board's Order.

¹ "A" references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by failing to supply the Union with relevant information and by closing its restaurant and bar on two nights each week without giving the Union notice or an opportunity to bargain about the decision or its effect on unit employees.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by UNITE HERE, Local 274 ("the Union"), the Board's General Counsel issued a complaint alleging, *inter alia*, that the Company had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to furnish the Union with relevant information and by closing a dining room and bar on two nights each week without notifying the Union or giving it an opportunity to bargain about the closure or its effect on unit employees. (A 68-73.)² At a hearing, the parties stipulated to the relevant facts. (A 52-66.)

After the hearing, Administrative Law Judge Wallace H. Nations found that the Company had violated the Act as alleged in the portions of the complaint described above, and recommended that it be ordered to cease and desist from the conduct found unlawful and to take affirmative remedial action. (A 20-51.) The Company filed exceptions.

² Other allegations in the complaint were settled at the hearing and are not in issue here.

The Board (Chairman Schaumber and Member Liebman) affirmed the administrative law judge's findings and conclusions and adopted his recommended order. (A 3.) The Company filed a petition for review, and the Board filed a cross-application for enforcement.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Company is a subsidiary of Greenwood Racing, Inc. ("Greenwood"), which owns and, through other subsidiaries, operates Philadelphia Park Casino and Racetrack ("Philadelphia Park") in Bensalem, Pennsylvania. Since May 2000, the Company, pursuant to a contract with the operating company, has provided food and beverage services at Philadelphia Park. (A 4-6; 52-53.) The Union, which had represented employees of the Company's predecessors since 1982, also represented the Company's employees after May 2000. The Company and the Union had a contract, effective from May 10, 2000, until November 20, 2003, and later extended to June 30, 2006, and further extended to August 31, 2006. (A 4; 5, 74-102, 132.) As of December 2006, the Company had about 45 to 50 employees at Philadelphia Park. (A 5; 53.)

Philadelphia Park had live horse racing on Saturdays, Sundays, Mondays, and Tuesdays, and occasionally on Wednesdays and Fridays. Beginning in December 2006, it also had a casino, operated by a subsidiary of Greenwood, with

about 2700 slot machines. The casino was open to the public 24 hours a day, 365 days a year. (A 5; 52-54.) Beginning in November 2006, Casino Food Services, Inc. (“CFS”), another subsidiary of Greenwood, had an agreement with the subsidiary operating the casino to provide food and beverage concessions at the casino. CFS hired about 200 employees for this purpose. (A 6; 54-55.)

The casino operations were on the first and third floors of a six-story building, while the racetrack operation was on the fifth floor. After the renovation of the building in 2005-06 to make way for the casino facility, the fourth floor contained a kitchen with separate work stations for employees of the Company and CFS, but both groups of employees used the same storage area and cooking utensils. (A 5; 52-54.)

Until June 2006, employees of the Company worked in concession stands, restaurants, and bars on the first and third floors, as well as the fifth floor. In the summer of 2006, the Company, without bargaining with the Union, ceased its operations on the first and third floors. The Company’s employees continued to work on the fifth floor, in the Turfside Terrace Restaurant and Bar, another bar, and a concession stand. The Turfside Terrace Restaurant and Bar was open every day during the daytime and on Wednesday through Saturday evenings. (A 5-6, 8-10; 53-54, 62-63.)

By January 2007, the Union possessed the following information that led it to believe that the Company and CFS were a single employer.³ Both firms were wholly owned subsidiaries of Greenwood, and they had one director in common (Matthew Hayes, Secretary/Treasurer of the Company and Treasurer of CFS.) Both had other managers in common with Greenwood and its other subsidiaries. During November 2006, several supervisors from both companies supervised employees of both. In December, two CFS supervisors directed employees of the Company to perform work which was considered CFS work. In a meeting in November 2006, an officer of the Company offered to include, in the existing bargaining unit of the Company's employees, all of the CFS employees except kitchen and cocktail servers. A week later, in a telephone conversation with the Union's chief negotiator, the same officer offered to include all but the cocktail servers. The Union rejected both offers. In late 2006, employees of the Company trained newly hired CFS employees. Cooks employed by both companies worked side by side in the fourth floor kitchen, using the same equipment and prep food, obtaining that food and other supplies from the same commissary area, and assisting each other on their work lines. All pans and other kitchen items,

³ The Company did not stipulate, nor did the Board find, that the information set forth below was in fact correct. However, the Company did stipulate that the Union believed in good faith that the information was correct. (A 55.)

regardless of which company's cooks used them, were washed in the same kitchen. (A 6-7; 55-58.)

The Union had the following additional information that led it to believe that the employees of the Company and CFS constituted a single appropriate bargaining unit: Employees of both companies used the same parking lot, employee entrance to Philadelphia Park, cafeteria, locker room, and payroll office, clocked in at the same location, and wore the same or similar uniforms. (A 8; 59.)

The parties agreed to begin negotiations for a new contract in January 2007. By letter dated January 17, the Union requested information including, *inter alia*, the names, addresses, and telephone numbers of all CFS food and beverage workers and the identity of all supervisory and managerial employees of both the Company and CFS. The Union asserted that the food and beverage employees of CFS were part of, or an accretion to, the existing bargaining unit of the Company's employees and that it needed the requested information to determine whether the Company was applying the terms of the now-expired contract to the CFS employees and, if not, to enable it to file a grievance. (A 8; 105.)

At the first bargaining session on January 30, the Company's negotiators stated that the CFS employees were a separate bargaining unit and that they would not negotiate with respect to those employees or respond to the Union's request for information. The Union's representatives stated that it would be difficult for the

Union to negotiate intelligently on behalf of the Company's employees without the requested information. (A 8; 60.)

By letter dated June 7, the Union reiterated its request for certain of the information concerning CFS food and beverage employees. It asserted that it needed this information to be able to assess what it could accomplish for the Company's employees in negotiations. At the time of this letter, the Union was concerned about the loss of work for the Company's employees in light of the recent closing of the Turfside Terrace Restaurant and Bar on two nights each week, the apparent performance of bargaining-unit work by CFS employees in November and December 2006, and the staffing by CFS employees of fifth-floor food and beverage outlets traditionally staffed by employees of the Company. (A 8-9; 60-61, 109-10.) The Union did not mention these concerns in its June 7 letter. However, in a further letter dated July 10, it gave the performance by CFS employees of work traditionally done by the Company's employees, as well as the alleged single-employer status of the two firms, as a reason for its information request. (A 9; 115.)

In the unfair labor practice charges it filed with the Board, the Union alleged that the Company and CFS were a single employer and that their employees constituted a single appropriate bargaining unit. (A 8; 68-71.) A unilateral informal settlement agreement, approved by the administrative law judge, resolved

the single-employer issue. (A 8, 13; 129-30.) After the Division of Advice in the Office of the Board's General Counsel concluded that the CFS employees were not a part of, or an accretion to, the existing bargaining unit, the Union withdrew its allegation that they were. (A 8; 118-28.)

Pursuant to the informal settlement agreement approved by the administrative law judge, the Company furnished some of the information requested by the Union on January 17, including all of the information specifically requested on June 7. However, the Company did not furnish the Union with the names, addresses, or telephone numbers of CFS food and beverage employees, or with the information it requested concerning supervisors and managers of both companies. (A 9; 61-62, 158-263.)⁴

⁴ The Union's request for the latter information was as follows (A 107):

Identify by names, titles, and respective dates of employment your company's managers, supervisors, forepersons or other supervisory persons with authority to hire, fire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline employees, or responsibly to direct employees, or to adjust their grievances, or effectively to recommend such action, with respect to employees in racing operations and employees in slot gaming operations, respectively.

Identify by names, titles, and respective dates of employment your company's representatives actively involved with day-to-day management of racing operations and slot gaming operations and the duties of each.

From the summer of 2006 until April 18, 2007, the Turfside Terrace Restaurant and Bar, on the fifth floor, was open every day from 10 a.m. until 4:30 p.m. On Wednesday through Saturday evenings, it remained open until 9 or 10 p.m. (A 9; 63.) From 5 to 10 employees of the Company worked on each shift. (A 9-10; 63.)

On April 18, 2007, the Company closed the Turfside Terrace Restaurant and Bar on Wednesday and Thursday evenings. The operation of the restaurant was otherwise unchanged. The closure was motivated in part by a desire to reduce labor costs. (A 10; 63.)⁵

All of the employees who had worked at the Turfside Terrace Restaurant and Bar on Wednesday and Thursday nights were transferred to other shifts. However, at least one employee lost work hours because of the closure. The Company did not notify the Union of the planned closure; the Union learned of the closure from employees after it occurred. Moreover, the Company never bargained with the Union about the decision to close the restaurant and bar on Wednesday and Thursday nights or the effects of that decision on bargaining unit employees. (A 10; 64-65.)

⁵ The other major reason for the closure was a lack of patronage on Wednesday and Thursday nights, due in part to the Company's failure to post a sign or otherwise notify casino patrons that there was a restaurant or bar on the fifth floor. (A 9-10; 62-63.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman) found, in agreement with the administrative law judge, that the Union had met its burden of showing that the information it requested was relevant to its investigation of whether the Company and CFS were a single employer, whether their employees were part of a single bargaining unit, and whether CFS employees were performing bargaining unit work. In addition, the Board found, the information was relevant to the negotiation of a new contract for the Company's employees. Accordingly, the Board found the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to supply the requested information. (A 3 n.2, 14-16.)

The Board further found, in agreement with the judge, that the decision to close the Turfside Terrace Restaurant and Bar on Wednesday and Thursday nights was a mandatory subject of bargaining and that the Union had not waived its right to bargain about this decision. Accordingly, the Board found the Company further violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to notify the Union of the decision or to give the Union an opportunity to bargain about the decision or its effects on bargaining-unit employees. (A 3 n.2, 16-17.)

The Board ordered the Company to cease and desist from the conduct found unlawful and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights; to provide the Union with the information it had requested; to reopen the Turfside Terrace Restaurant and Bar on Wednesday and Thursday evenings; to make its employees whole for any loss of earnings and other benefits suffered as a result of the closure of the restaurant and bar on those evenings; to bargain, on request, with the Union concerning terms and conditions of employment of bargaining-unit employees; and to post copies of an appropriate notice. (A 17-19.)

STATEMENT OF RELATED CASES

This case has not previously been before this Court or any other court. Board counsel is not aware of any other cases involving the same parties or the same substantive issues pending in this Court or any other court. The authority of the same two-member quorum that issued the Board's decision here has also been put in issue in five other cases pending in this Court: *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729, 09-1035; *St. George Warehouse, Inc. v. NLRB*, Nos. 08-4875, 09-1269; *NLRB v. Windstream Corp.*, Nos. 09-2207, 09-2394; and *NLRB v. Windstream Corp.*, Nos. 09-2208, 09-2395; and *Operating Engineers Local 542 v. NLRB*, 09-2574, 09-2817. Cases decided by or currently pending in other courts of appeals are listed in the Addendum at the end of this brief; those in which all parties

have filed briefs are listed below, p. 16, note 7.

STATEMENT OF STANDARD OF REVIEW

Section 10(e) of the Act (29 U.S.C. § 160(e)) makes the Board’s factual findings conclusive if supported by substantial evidence on the record as a whole. A reviewing court “may [not] displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The “substantial evidence” standard is satisfied if “it would have been possible for a reasonable jury to reach the Board’s conclusion.” *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998). *Accord NLRB v. FES, a Division of Thermo Power*, 301 F.3d 83, 91 (3d Cir. 2002).

Where the decision of a case turns on construction of a provision of the Act, a two-step approach is required. If “Congress has directly spoken to the precise question at issue,” then “the court, as well as the [Board], must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). But, “if the [Act] is silent or ambiguous with respect to the specific issue,” then “a court may not substitute its own construction . . . for a reasonable interpretation made by the [Board].” *Id.* at 843, 844. *Accord Quick v. NLRB*, 245 F.3d 231, 241 n.7 (3d Cir. 2001).

SUMMARY OF ARGUMENT

1. 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 administrative-law and common-law principles. The Company's contrary argument is based on an incorrect reading of Section 3(b) and a misunderstanding of the nature and extent of the authority delegated to the three-member group and of the statute governing panels of federal appellate courts, which is not analogous to the NLRA.

2. The Company violated Section 8(a)(5) and (1) of the Act by refusing to supply the Union with relevant information. The Union had reasonable grounds to believe that the Company and CFS were a single employer; that the employees of both were a single appropriate bargaining unit; and that CFS employees were doing work traditionally done by employees of the Company, who were concededly part of the bargaining unit represented by the Union. It specifically informed the Company that it needed the information to investigate all of these issues, as well as to formulate a proposal for a new contract. It also informed the

Company of the factual basis for the beliefs underlying its information request.

Moreover, the Company was aware of the underlying facts and never asked for a clarification of the Union's reasons for seeking the information, but flatly refused to furnish it. Under these circumstances, the Union was not required to provide a more detailed justification for its information request.

The unilateral closure of the Turfside Terrace Restaurant and Bar on Wednesday and Thursday nights also violated Section 8(a)(5) and (1) of the Act. The closure was a mandatory subject of bargaining. It was motivated in part by labor costs and did not change the scope or direction of the Company's business. The Union did not waive its right to bargain about the closure. Even if the contractual "management rights" clause authorized unilateral changes in hours of work or operations during the term of the contract, its waiver of bargaining rights did not survive the expiration of the contract and therefore did not encompass post-expiration changes in the operating hours of the Turfside Terrace Restaurant and Bar. Nor did the Union's alleged failure to request bargaining about prior changes in hours of work and operation waive its right to bargain about subsequent changes of the same type. A waiver of the right to bargain on one occasion does not waive that right for all time, nor can it make the practice of unilaterally changing hours of operation an established term and condition of employment which survives the expiration of the contract.

ARGUMENT

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

Chairman Schaumber⁶ 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.

New Process Steel, L.P. v. NLRB, 564 F.3d 840 (7th Cir. 2009) (“*New Process*”), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009) (“*Northeastern*”), *reh'g denied* (May 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009) (“*Snell Island*”).⁷ *But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) (“*Laurel Baye*”), *reh'g denied* (July 1, 2009) (discussed below). As we now show, their authority to issue

⁶ On January 20, 2009, President Obama designated Member Liebman as Chairman of the Board. *See* BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

⁷ The issue was argued before the Eighth Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291, on June 9, 2009. It has also been briefed in this Court in *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729 and 09-1035, and *St. George Warehouse, Inc. v. NLRB*, Nos. 08-4875, 09-1269; in the Fourth Circuit in *Narricot Industries, L.P. v. NLRB*, Nos. 09-1164 and 09-1280, and *McElroy Coal Company v. NLRB*, Nos. 09-1332, 09-1427; the Fifth Circuit in *Bentonite Performance Mineral LLC v. NLRB*, No. 09-60034, and *NLRB v. Coastal Cargo Co.*, No. 09-60156; the Eighth Circuit in *NLRB v. American Directional Boring, Inc.*, No. 09-1194; the Ninth Circuit in *NLRB v. UFCW Local 4*, No. 09-70922, and *NLRB v. Barstow Community Hosp.*, No. 09-70771; and the Tenth Circuit in *Teamsters, Local 523 v. NLRB*, Nos. 08-9568 and 08-9577.

Board decisions and orders is provided for in the express terms of Section 3(b), and confirmed by Section 3(b)'s legislative history, as well as supported by cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. The Company's contrary argument must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

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:

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 these provisions, 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: Liebman,

Schaumber and Kirsanow. When, three days later, Member Kirsanow's recess appointment expired,⁸ the two remaining 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 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 has delegated its powers. Since January 1, 2008, this two-member quorum has issued over 325 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.⁹

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) 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. Food & Commercial Workers Local 23*, 484 U.S. 112, 123 (1987); *Chevron, U.S.A., Inc. v. Natural Resources*

⁸ Member Walsh's recess appointment also expired on December 31, 2007.

⁹ On May 4, 2009, it was reported that the two-member quorum had issued approximately 400 decisions, published and unpublished. See BNA, *Daily Labor Report*, No. 83, at p. AA-1 (May 4, 2009). The published decisions include all of Volumes 352 NLRB (146 decisions), 353 NLRB (132 decisions), and 354 NLRB (62 decisions as of July 31, 2009).

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. *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 155 (3d Cir. 2009). 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, 132 (1993); *see Kaufman*, 561 F.3d at 155. 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); *see Kaufman*, 561 F.3d at 155 (“When the statutory language is not clear on its face, the statute must be construed to give effect, if possible, to every word and clause.”).

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 Board members; 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 by the Board’s delegation authority.

As both the First and Seventh Circuits have concluded, the plain meaning of Section 3(b) authorizes a two-member quorum of a properly constituted three-member group to issue decisions, even when, as here, the Board has only two

sitting members. *See New Process*, 564 F.3d at 845 (“As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text.”); *Northeastern*, 560 F.3d at 41 (“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)”).

As those decisions recognize, 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 did not impair the authority of the remaining members to continue to exercise the Board’s full powers which they held jointly with him 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 three-member group, the two remaining members constituted a quorum—the minimum number legally necessary to exercise the Board’s powers.¹⁰

¹⁰ In our view, Congress’ intention is clear, and “that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43. However, in *Snell Island*, 568 F.3d at 424, the Second Circuit found that Section 3(b) does not have a plain meaning, but that the Board’s reasonable interpretation of Section 3(b) is entitled

Moreover, as both the Seventh Circuit (*New Process*, 564 F.3d at 846) and the First Circuit (*Northeastern*, 560 F.3d at 41-42) noted, two persuasive authorities provide additional support for this reading of Section 3(b). First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), 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. The court held that it was not legally determinative whether the resigning Board member participated in the decision, because "the decision would nonetheless be valid because a 'quorum' of two panel members supported the decision." *Id.* at 123. Second, the United States Department of Justice's Office of Legal Counsel ("OLC"), in a formal opinion, has concluded that the Board

to deference. If this Court, like the Second Circuit, should find that Section 3(b) is susceptible to different reasonable interpretations, then the Court should find, in agreement with the Second Circuit, that the Board's view is entitled to deference. *See Barnhart v. Walton*, 535 U.S. 212, 214-15 (2002) (If statute is ambiguous, agency's interpretation must be sustained unless it "exceeds the bounds of the permissible.") (citing *Chevron*, 467 U.S. at 843, and *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

The Board delegation at issue here, at a minimum, reflects a reasonable construction of Section 3(b) that is consistent with its legislative history, and furthers the overall purpose of the Act to avoid "industrial strife." 29 U.S.C. § 151. The fundamental point is that courts should prefer a permissible construction that permits an agency to continue to carry out its public function. *See Snell Island*, 568 F.3d at 424 (commending the Board for its "conscientious efforts to stay 'open for business'"). *Accord Falcon Trading Group, Ltd. v. NLRB*, 102 F.3d 579, 582 n.3 (1996); *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335, 1340 n.26 (D.C. Cir. 1983). Thus, under any standard of deference, the Board's reasonable interpretation should be respected by this Court.

possesses the authority to issue decisions with only two of its five seats filled, where the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b). *See* QUORUM REQUIREMENTS, Department of Justice, OLC, 2003 WL 24166831 (Mar. 4, 2003).

The Company relies in large part (Br 12-14) on the D.C. Circuit’s decision in *Laurel Baye*. That decision, however, is based on a strained reading of Section 3(b) that does not give operative meaning to all of its relevant provisions. *Laurel Baye*, 564 F.3d at 472-73, held that Section 3(b)’s provision—that “three members of the Board shall, *at all times*, constitute a quorum of the Board” (29 U.S.C. § 153(b), emphasis added)—prohibits the Board from acting when it has fewer than three sitting members, despite Section 3(b)’s express exception that provides for a quorum of two members when the Board has delegated its powers to a three-member group. The court concluded that the two-member quorum provision is not in fact an exception to the three-member quorum requirement, because Congress’ use of the two different object nouns, “Board” and “group,” indicates that each quorum provision is independent of the other, and the two-member quorum provision does not eliminate the requirement that there be a three-member quorum present “at all times.” *Id.* at 473.

The D.C. Circuit’s interpretation fails to give the critical terms of Section 3(b) their ordinary meaning, thereby violating the cardinal canon of

statutory construction “that courts must presume a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); see *Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1890-91 (2009) (applying “ordinary English” to determine statutory meaning). The ordinary meaning of the word “except” is “with the exclusion or exception of.” *Webster’s New World College Dictionary* (4th ed. 2008). Thus, in ordinary English usage, the statement in Section 3(b)—that “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” (emphasis added)—denotes that the two-member quorum rule that applies when the Board has delegated its powers to a three-member group is an *exception* to the requirement of a three-member quorum “at all times.”

Laurel Baye’s refusal to give full effect to this express exception is based on the erroneous assumption that it would be anomalous for Congress to have used the statutory rubric “at all times . . . except” if Congress intended that there be some times when the general requirement of a three-member quorum would not apply. That assumption ignores the fact that, in other statutes, Congress has used that same statutory rubric to state a true exception to a general rule. See, e.g., 20 U.S.C. § 1099c-1(b)(8) (Secretary of Education shall “maintain and preserve *at all times* the confidentiality of any program review report . . . *except*

that the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review”) (emphasis added).

Laurel Baye also fails to give the word “quorum” its ordinary meaning. “Quorum” means “the minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted.” *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (“*Yardmasters*”) (quoting ROBERT’S RULES OF ORDER 16 (rev. ed. 1981)).

Under the court’s construction of Section 3(b), however, the actual presence of a two-member quorum, possessed of all the Board’s powers by a valid delegation, is *never* a sufficient number to transact business *unless* there is also a third sitting Board member.

Laurel Baye correctly stated that Congress intended that “each quorum provision is independent from the other” (564 F.3d at 473), but flouted that clear intent by denying Section 3(b)’s two-member quorum provision *any* true independence. Under the court’s construction, whether a two-member quorum is ever a legally sufficient number to decide a case is wholly *dependent* on the presence of a third sitting member.¹¹ In so holding, the court violated a cardinal principle of statutory construction that “a statute ought, upon the whole, to be so

¹¹ See *New Process*, 564 F.3d at 846 n.2 (“[The employer’s] reading, on the other hand, appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.”).

construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

Laurel Baye also failed to read the words “except” and “quorum” in the context of Section 3(b)’s textually interrelated provisions authorizing three or more Board members to delegate “any or all” of the Board’s powers to a three-member group, two members of which “shall constitute a quorum.” The court mistakenly distinguishes “the Board” and “any group” so that no “group” can act if the membership of “the Board” falls below three. *Laurel Baye*, 564 F.3d at 473. That conclusion ignores that where, as here, the Board has delegated all its powers to a three-member group, that group cannot logically be distinguished from the Board itself. *See Northeastern*, 560 F.3d at 41 (upholding “the Board’s delegation of *its institutional power* to a panel that ultimately consisted of a two-member quorum” (emphasis added)).

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

As shown, the meaning of statutory language cannot be determined by considering particular terms in isolation, but must take into account the intent and design of the entire statute. *See Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 69 (3d Cir. 2007). Thus, ascertaining that meaning often requires

resort to historical materials, including legislative history. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 578 (1995).

A brief history of the Board’s operations and of the legislation that ultimately became Section 3(b) confirms that Section 3(b) authorizes the Board to adjudicate cases with a two-member quorum. In the Wagner Act of 1935, which created a three-member Board, Section 3(b), in its entirety, provided: “A vacancy on the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and two members of the Board shall, at all times, constitute a quorum.”¹² 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.¹³ *See, e.g., NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).

¹² *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).

¹³ 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 in 1941 (35 NLRB 24-1360 and 36 NLRB 1-45); 237 published decisions in 1940 (all of 27 NLRB, and 28 NLRB 1-115); and 3 published decisions in 1936 (2 NLRB 198-240).

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.¹⁴ 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 House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.¹⁵

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.¹⁶ 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

¹⁴ 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).

¹⁵ 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.

¹⁶ S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

Senator.¹⁷ 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.”¹⁸ Senator Taft similarly stated that the Senate bill was designed to “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.”¹⁹ *See Snell Island*, 568 F.3d at 421 (Congress added Section 3(b)’s delegation provision “to enable the Board to handle an increasing caseload more efficiently”) (quoting *Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981)). The Conference Committee accepted, without change, the Senate bill’s delegation and two-member quorum

¹⁷ Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

¹⁸ S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

¹⁹ 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 (“ICC”) and the Federal Communications Commission (“FCC”). At that time, both the FCC and ICC statutes 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).

provisions, but, as a compromise with the House bill, agreed to a Board of five members.²⁰

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 Title IV of the Taft-Hartley Act to study labor relations issues²¹ 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). In this way, the

²⁰ 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.

²¹ See 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

Board implemented Congress' intent that the Board exercise its delegation authority to increase its casehandling efficiency.²²

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. As the Seventh Circuit concluded in rejecting the contention that Section 3(b) prohibits the Board from acting unless it has three sitting members:

To the extent that the legislative history points either way . . . , it establishes that Taft-Hartley created a Board that functioned as an adjudicative body that was allowed to operate in panels in order to work more efficiently. Forbidding the NLRB to sit with a quorum of two when there are two or more vacancies on the Board would thus frustrate the purposes of the act, not further it.

New Process, 564 F.3d at 847.

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 changed or eliminated that quorum

²² 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's statement).

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 has exercised its delegation authority.

D. 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.

As the Supreme Court explained in *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967), Congress enacted statutes creating administrative agencies against the backdrop of the common-law quorum rules applicable to public bodies, and these common-law rules were written into the enabling statutes of several agencies, including the Board. *Id.* at 183-86 (also identifying the ICC).²³

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

²³ In *Flotill*, the Supreme Court held that where only three commissioners of the five-member FTC participated in a decision, a 2-1 decision 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.

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 (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*, 71 P. 365 (Colo. 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).²⁴ By providing for an express two-member-quorum exception to Section 3(b)’s three-member-quorum requirement where the Board has delegated its powers to a three-member group, Congress enabled the Board to continue to exercise its powers through a quorum number identical to that called for under the common-law rule that a majority of remaining members constitute a quorum.

²⁴ Cases which appear to run counter to the common-law rules involve specific quorum rules dictated by statute or ordinance. *See, e.g., Gaston v. Ackerman*, 6 N.J. Misc. 694, 142 A. 545 (Sup. Ct. 1928) (three of five members were insufficient for a quorum because “the ordinance under which the meeting was held provided that a quorum shall consist of four members”).

Giving effect to Section 3(b)'s plain language produces a result that is consistent with what Congress has authorized in similar statutes, enacted like the NLRA against the backdrop of common-law quorum rules applicable to public agencies. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), the D.C. Circuit, recognizing the relevance of these common-law agency principles, held that, in the absence of any countermanding provision in its authorizing statute, the Securities and Exchange Commission ("SEC") lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions when only two of its five authorized seats were filled. *Id.* at 582 and n.2

The common-law principles cited in *Falcon Trading* apply in interpreting the quorum provisions of the NLRA, even though, unlike the NLRA, the SEC's authorizing statute contained no quorum provision. The only real difference is that the SEC had to hand-tailor its solution to the imminent problem of being reduced to two members by amending its own quorum rules at a time when its rules still required a three-member quorum. The statutory mechanism Congress provided for the NLRB differs from the mechanism afforded the SEC, but the result—that two members of a properly-delegated three-member group constitute a quorum that can issue agency decisions—is equally valid. *See New Process*,

564 F.3d at 848 (*Falcon Trading* supports the Board’s authority to issue decisions pursuant to Section 3(b)’s two-member quorum provision).

The common-law quorum rule is reflected in the authorizing statutes of other administrative agencies. *See Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980) (when only 6 of the 11 seats on the ICC were filled, a majority of the commissioners in office constituted a quorum and could issue decisions); *Michigan Dep’t of Transport. v. ICC*, 698 F.2d 277, 279 (6th Cir. 1983) (when 7 of the 11 seats on the ICC were vacant, a decision issued by the remaining 4 commissioners was valid); *cf. Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983) (based on provision permitting 11-member 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,” ICC decision participated in and issued by only two of the three division members was valid).

In *Laurel Baye*, the D.C. Circuit compounded its failure to interpret Section 3(b) in light of applicable common-law quorum principles by invoking instead private-law principles “of agency and corporation law” to hold that the three-member group to which four Board members delegated all of the Board’s powers was an “agent” of the Board, whose delegated authority terminated when the delegator’s authority was suspended. 564 F.3d at 473 (citing RESTATEMENT

(THIRD) OF AGENCY § 3.07(4) (2006) for the proposition that “an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended”).

In so reasoning, the D.C. Circuit failed to heed the warning of the very treatises it cited—namely, that governmental bodies are often subject to special rules not applicable to private bodies.²⁵ *See Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1343, n.30 (D.C. Cir. 1983) (recognizing that the Railway Labor Act’s delegation and vacancies provisions incorporated principles different from those of the private law of agency and corporations). The delegation, vacancy, and quorum provisions in Section 3(b) of the NLRA on their face manifest Congress’ intent that the Board continue to function in circumstances where a private body might be disabled. As the OLC recognized, Section 3(b)’s plain language is properly understood to permit the two-member quorum to continue to exercise the Board’s powers that were delegated to the three-member group, because so construing Section 3(b) “would not confer power on a number of members smaller than the number for which Congress expressly provided in

²⁵ *See* FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2 (2008) (distinguishing between private and municipal corporations, stating that “the law of municipal corporations [is] its own unique topic,” and concluding that “[a]ccordingly, this treatise does not cover municipal corporations.”). Similarly, RESTATEMENT (THIRD) OF AGENCY (2006), in its introduction, states that it “deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government.”

setting the quorum.” 2003 WL 24166831, at *3. The *Laurel Baye* court erred in failing to recognize that the two-member Board quorum that decided this case possesses all of the Board’s institutional powers as a result of a valid delegation to a three-member group, and that Section 3(b) authorized them to exercise those powers, not as Board agents, but as Board principals acting for the Board itself.

E. The Two-Member Quorum Has Authority To Decide All Cases Before The Board

The Company contends (Br 11-12) 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 delegation authority. It claims (Br 12) that 28 U.S.C. § 46 and Section 3(b) of the Act are “nearly identical.” To the contrary, the two statutes have sharp distinctions, and application of the federal judicial statute to the Board would improperly override congressional intent and interfere with the option Congress provided for the Board to fulfill its agency mission through a two-member quorum.

Unlike the statutes governing the federal courts, 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 require that particular cases be assigned to panels of Board members. Therefore, a delegation of “all the Board’s powers” to a three-member group means that all cases that may come before the Board are before the group, and the two-member quorum has the authority to decide those cases.

The Company’s position is not aided by its reliance (Br 11-12) on *Nguyen v. United States*, 539 U.S. 69 (2003). Instead, that case further demonstrates why construing Section 3(b) 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). *See New Process*, 564 F.3d at 847-48. In *Nguyen*, 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. However, 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. *See Snell Island*, 568 F.3d at 419 (three-member panel that took effect on December 28, 2007, was properly constituted). 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 analogous to the situation here.²⁶

Ayrshire Collieries Corp. v. United States, 331 U.S. 132 (1947), also illustrates the differences between the statutes authorizing the creation of judicial

²⁶ The *Nguyen* Court’s further 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) is wholly inapplicable here.

panels and Section 3(b). 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,” and made “no provision for a quorum of less than three judges.” 331 U.S. at 137. By contrast, in enacting Section 3(b), 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.

**F. Construing Section 3(b) in Accord with Its Plain
Meaning Furthers the Act’s Purpose**

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.

The Company (Br 10) attacks the Board’s delegation of authority as a “facade” on the ground that the Board was aware that Member Kirsanow’s departure was imminent and that the delegation would soon result in the Board’s

powers being exercised by a two-member quorum. Rejecting that argument, the Second Circuit aptly recognized that the anticipated departure of one member of the group “has no bearing on the fact that the panel was lawfully constituted in the first instance.” *Snell Island*, 568 F.3d at 419.

Indeed, as both the Seventh and the First Circuits observed, similar actions taken by federal agencies to permit the agency to continue to function despite vacancies have been upheld. *See New Process*, 564 F.3d at 848; *Northeastern*, 560 F.3d at 42. As noted, in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d at 582 & n.3, after the five-member SEC had suffered two vacancies, the remaining three sitting members promulgated a new quorum rule so the agency could continue to function with only two members. In upholding both the rule and a subsequent decision issued by a two-member SEC quorum, 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.*

Likewise, in *Yardmasters*, 721 F.2d at 1335, 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.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO SUPPLY THE UNION WITH RELEVANT INFORMATION AND BY CLOSING ITS RESTAURANT AND BAR ON TWO NIGHTS EACH WEEK WITHOUT GIVING THE UNION NOTICE OR AN OPPORTUNITY TO BARGAIN ABOUT THE DECISION OR ITS EFFECT ON UNIT EMPLOYEES

The Board found that the Company committed two separate violations of the Act: refusing to supply the Union with relevant information and closing the Turfside Terrace Restaurant and Bar on two nights per week without giving notice to, or bargaining with, the Union. The Company raises different defenses to these findings. We discuss each of them separately below.

A. Refusal To Furnish Information

1. Applicable principles

An employer’s statutory duty to bargain with a union representing its employees includes the obligation to furnish the union, upon a proper request, with information relevant and necessary to the union’s proper performance of its role as bargaining representative. This includes information relevant either to the

negotiation of a new contract or to the administration of an existing one. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). The latter category includes not only information relevant to the processing of a pending grievance, but also information that will help the union determine whether to file a grievance in the first place. *See NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437-38 (1967) (“*Acme*”).

Although information relating to supervisors or non-bargaining-unit employees, unlike information relating to bargaining-unit employees, is not presumptively relevant, the union’s right to it is evaluated under a “discovery-type” standard. *Acme*, 385 U.S. at 437; *NLRB v. New Jersey Bell Telephone Co.*, 936 F.2d 144, 150 (3d Cir. 1991). To meet his burden of proof, the General Counsel need only show the “potential or probable relevance” of the requested information. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). *Accord NLRB v. New Jersey Bell Telephone Co.*, 936 F.2d at 150.

Where the ground for seeking information not directly pertaining to bargaining-unit employees is a desire to police an existing contract, the union need only demonstrate that it has “‘a reasonable basis to suspect [that contract] violations have occurred.’ . . . ‘Actual violations need not be established in order to show relevancy.’” *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531, 535 (4th Cir. 1985) (citations omitted). Where two separate companies are involved, and the

union's argument is that both are a single employer, and the employees of both are in a single bargaining unit, so that the employer should be applying the same contract to both, "the union must show that it had a reasonable belief . . . that the two companies were in legal contemplation a single employer." *Id.* at 536. Similarly, an objective factual basis for believing that nonunit employees are performing bargaining-unit work, in violation of one or more contractual provisions, is sufficient to entitle the union to information that could be useful in determining whether it should file a grievance. *See Blue Diamond Co.*, 295 NLRB 1007, 1007, 1011 (1989); *NLRB v. Jaggars-Chiles-Stovall, Inc.*, 639 F.2d 1344, 1347-48 (5th Cir. 1981).

The Board has held that a union is not required to establish in advance exactly how the requested information would be helpful in pursuing a possible grievance. *See Blue Diamond Co.*, 295 NLRB at 1007. It has also held that "the requesting union need not inform the . . . employer of the factual basis for its requests, but need only indicate the reason for its request." *Corson & Gruman Co.*, 278 NLRB 329, 334 (1986), *enforced mem.*, 811 F.2d 1504 (4th Cir. 1987).

In *Hertz Corp. v. NLRB*, 105 F.3d 868, 874 (3d Cir. 1997), where the union sought information about applicants for employment and asserted that it needed the information to "investigat[e] allegations that [the employer] may have discriminated against certain protected classes of applicants in making hiring

decisions,” this Court held that to obtain information about applicants, the union “was required to apprise [the employer] of *facts* tending to support its suspicion” of discrimination. (Emphasis in original.) However, the Court stressed that, to obtain the information, the union “did not need to demonstrate actual discrimination,” but “needed only to communicate some reasonable basis for its *suspicion* that the employer *might* be engaging in discrimination.” 105 F.3d at 874 (emphasis in original). This Court also observed that, in some cases, a union’s reasons for suspecting discrimination would be readily apparent, and that “[w]hen it is clear that the employer should have known the reason for the union’s request for information, a specific communication of the facts underlying the request may be unnecessary.” *Id.*

The Board has also held that, even where a union’s initial request for information is inadequate under the *Hertz* standard, the employer violates the Act if it continues to withhold the requested information after the union makes clear the factual basis for its request. *See Contract Flooring Systems, Inc.*, 344 NLRB 925, 925 (2005).

2. The requested information was relevant to the Union’s representational duties

The Union’s initial request for information (A 105) expressly stated the Union’s belief that the CFS employees were part of, or an accretion to, the existing bargaining unit of the Company’s employees, as well as its concern that the

Company was improperly failing to apply the terms of its expired contract to those employees. The Union also stated, both in the January 17 letter and at the January 30 negotiating session, that it needed the information to bargain intelligently on behalf of the Company's employees, whom it unquestionably represented. (A 60, 105.) In another letter, dated June 7, the Union renewed its request for information and reiterated its assertions that the CFS food and beverage workers were part of its bargaining unit and that, in any event, it needed to know about their terms and conditions of employment to assess what it could accomplish for the Company's employees in negotiations. (A 109-10.) In another letter, dated June 14, the Union asserted that, whether or not the CFS employees were part of its bargaining unit, the Union was entitled to information about them "because they are so comparable to the [Company's] workers and work side by side with them in the same workplace." (A 157.) Finally, in a letter dated July 10, the Union gave three reasons for demanding the information: that the Company and CFS were a single employer; that the same corporate entities owned, operated, and funded both; and that CFS employees were doing work traditionally done by employees of the Company. (A 115.)

The Board found (A 3 n. 2, 14-15) that the Union had demonstrated a reasonable belief that (1) the Company and CFS were a single employer; (2) their employees were part of a single bargaining unit; and (3) non-unit employees were

taking work away from bargaining-unit employees. The Board further found (A 15-16) that the Union had shown the relevance of the information it sought to all of these issues, as well as to the Union's formulation of a position in contract negotiations for the Company's employees. On the basis of these findings, the Board found that the Company's refusal to furnish the information was unlawful.

The Company contends (Br 14-17) that the Union failed either to prove the relevance of the requested information or to explain the relevance to the Company. As shown below, these contentions are without merit.

The Union, as shown above, made it clear to the Company, both in the January 30 meeting and in its June 7 letter, that, regardless of the bargaining-unit status of the CFS employees, it needed to know their terms and conditions of employment to bargain effectively on behalf of the undisputed unit employees. Subsequently, in its July 10 letter, it expressly gave, as an additional reason for its information request, its belief that CFS employees were doing work traditionally done by the Company's employees. Both grounds have been recognized as bases for finding the identity of nonunit employees to be relevant. *See Comar, Inc.*, 349 NLRB 342, 355 (2007), and cases cited therein. Addresses of such employees are also relevant, as they enable the union to contact the employees and seek information from them that would assist it in formulating bargaining positions with respect to unit employees, and in confirming or refuting its beliefs on the questions

of single-employer status, single bargaining unit, and diversion of unit work. *See Comar, Inc.*, 349 NLRB at 355.

The requested information concerning supervisors was also potentially relevant in more ways than one. The Company here stipulated that on several occasions, one company's supervisors directed the other company's employees. (A 56-57.) If such cross-supervision was more widespread than the Company admitted, that would support the Union's claims that a single employer and single bargaining unit existed. The information was also potentially relevant to the issue of diversion of unit work. *See Certco Food Distribution Centers*, 346 NLRB 1214, 1215 (2006).

The stipulated facts also show that the Union not only had a reasonable basis for suspecting the existence of a single employer and a single bargaining unit, as well as diversion of unit work, but informed the Company of that basis. Its June 14 letter (A 157)—a direct response to a letter (A 111) in which the Company said it would negotiate only for its own employees—specifically referred to the similarity of the work of those employees and the CFS employees and the fact that the two groups worked side by side. This amounted to an explanation, not only of why the Union believed that both groups of employees belonged in the same bargaining unit, but also of why, assuming they were in separate units, the terms of

employment of nonunit employees would likely affect the parties' bargaining positions with respect to unit employees.

In the July 7 letter (A 115), the Union also set forth a specific reason for its prior assertions of single-employer status: that the same corporate entities owned, operated, and funded (in other words, managed) both the Company and CFS. The same letter also referred to the performance by CFS workers of work traditionally done by the Company's employees. Significantly, the Company never asserted that it did not know what work the Union was talking about.

Indeed, at no time did the Company ask the Union for a clarification of the reasons why it needed the information in issue, or for a factual basis for its request for that information. This is in contrast to *Hertz*, 105 F.3d at 871, 874. There, the employer, after specifically noting that the union had not alleged discriminatory hiring practices or any breach of contract, requested an explanation of the relevance of the information sought, but the union responded with only a conclusory allegation of possible discrimination. Here, the Company, at the January 30 bargaining session and in all subsequent correspondence, flatly refused to furnish any information concerning CFS, based solely on the assertions that CFS was a separate employer, that its employees were a separate bargaining unit, and that the Company could not and would not bargain with respect to them. (A 60, 108, 111-12, 114, 116.) Conclusory assertions of this sort do not justify a refusal

to furnish information. The Union was not required to accept the Company's position on the single-employer and single-unit issues; it was entitled to conduct its own investigation and reach its own conclusions. *See Reiss Viking*, 312 NLRB 622, 625 (1993).

In addition, the Company's responses completely failed to address the two theories on which the Union argued that it would need the information even if the CFS employees were outside the bargaining unit: that it was needed to bargain intelligently about unit employees and that it was needed to determine whether to file a grievance over the performance of unit work by nonunit employees (which, under the Company's theory, would include the CFS employees.) That the Company simply ignored these aspects of the requests for information, rather than seeking clarification, demonstrates that its refusal to furnish the information was not due to any failure by the Union to justify its requests. *See Beth Abraham Health Services*, 332 NLRB 1234, 1234, 1240 (2000).

Moreover, the Company, unlike the employer in *Hertz*, cannot plausibly claim that it was unaware of the factual basis for the Union's requests for information. The Company stipulated to the Union's good-faith belief in the facts indicating single-employer and single-bargaining-unit status (A 55-59), and all of those facts were within the Company's knowledge. Similarly, the Union's concerns about diversion of bargaining-unit work were based on specific incidents

of CFS employees' performing such work, as well as the performance of similar work by the employees of both companies. Here, too, the Company stipulated to the significant facts (A 57-58, 60-63), and it was plainly aware of those facts at the time of the Union's requests for information. Accordingly, the Board was warranted in finding (A 15) that "the circumstances were reasonably calculated to put [the Company] on notice of the relevance of the Union's information request" and the underlying factual basis. This is the situation, contemplated in *Hertz*, 105 F.3d at 874, where "it is clear that the employer should have known the reason for the union's request for information," and it was therefore unnecessary to recite specific facts to justify the request.

The cases relied on by the Company (Br 14-17) are clearly distinguishable. In *NLRB v. A.S. Abell Co.*, 624 F.2d 506, 511-13 (4th Cir. 1980), the union sought information concerning unit employees who were being cross-trained to do nonunit work. When it had received similar information a few months earlier with respect to another group of cross-trained employees, it used the information, not for any proper purpose, but solely to harass those employees. Under these circumstances, the court held, the employer was justified in refusing to provide the requested information until the union demonstrated its relevance for purposes of collective bargaining, which the union did not attempt to do. The court held that a "bare assertion" of relevance could not overcome the justification provided by the

employer's reasonable fear of harassment. 624 F.2d at 512-13. Here, as shown above, pp. 47-49, there was much more than a "bare assertion" of relevance, and the Company has not shown, or even contended, that it had a reasonable fear that the information sought would be used to harass CFS employees.

San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 866-69 (9th Cir. 1977), also involved employees (this time concededly nonunit employees) who were being trained as potential striker replacements. The court, stressing the deference owed the Board's determination as to relevance, affirmed the Board's finding that the information requested concerning the trainees was not relevant. Because the trainees were not in the bargaining unit, the court held, "*the Union must show that the requested information [about them] is relevant to bargainable issues.*" 548 F.2d at 868 (emphasis added). Since the hiring of striker replacements was not a bargainable issue, and there were no ongoing or imminent contract negotiations, the only possible relevance would be to help the union determine whether the employer had violated the existing contract. *Id.* However, "the Board held that the [u]nion had failed to make *any* initial showing that the [employer] had violated the . . . contract," and the record indicated that the union's suspicion of a contract violation was "totally unfounded." 548 F.2d at 869 (emphasis in original). Here, as shown above, the Company stipulated to the Union's good-faith belief in facts

suggesting a possible contract violation, and nothing in the record negates that possibility.

S.W. Motor Lines v. NLRB, 621 F.2d 598 (4th Cir. 1980), also involved a request for information concerning nonunit employees (their names, addresses, and Social Security numbers) in the context of a strike marred by “sabotage of equipment and other harassment” 621 F.2d at 602. The union gave no explanation, in its letter requesting the information, of the purpose of the request (*id.*), and its explanation in court, that the employer was inconsistently arguing that laid-off nonunit employees, but not laid-off unit employees, should receive unemployment benefits, did not show its need for the information. *Id.* at 603. Here, the Union clearly set forth its reasons for seeking the information in issue.

In summary, all the cases cited by the Company involved requests for information in the context of actual or potential strikes, where there were objective grounds to believe that the information might be used to harass nonunit employees. Neither that context nor that reasonable fear of misuse of the information exists here, and the evidence of a proper purpose for the information requests is far stronger. In addition, the Board specifically noted (A 3 n.2) that the Company is free, at the compliance stage of this case, to make a particularized showing of legitimate confidentiality concerns relating to specific information requested by the Union. Such concerns may properly be balanced against the Union’s need for the

information. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 317-19 (1979). They do not, however, justify the Company's flat refusal to furnish any of the information. *See Resorts International Hotel Casino v. NLRB*, 996 F.2d 1553, 1556-57 (3d Cir. 1993).

B. Closure of the Turfside Terrace Restaurant and Bar

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally changes any "term or condition of employment," within the meaning of Section 8(d) of the Act (29 U.S.C. § 158(d)), unless the employees' bargaining representative has waived its right to bargain about such changes. *See NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Ciba-Geigy Pharmaceuticals Div. v. NLRB*, 722 F.2d 1120, 1126-27 (3d Cir. 1983).

Here, it is undisputed that the Company reduced the number of nights the Turfside Terrace Restaurant and Bar was open from four per week to two, without otherwise changing the manner of operation of the facility and without bargaining with the Union about either the decision to close or its effect on bargaining unit employees. (A 63-65.) The closure forced all employees who had worked on the two nights in question to transfer to other shifts and resulted in a loss of working hours for at least one of them. (A 64.) The Board found (A 3 n.2, 16-17) that the closure was a mandatory subject of bargaining; that the Union had not waived its right to bargain; and that the Company's unilateral action therefore violated

Section 8(a)(5) and (1) of the Act. As shown below, these findings are entitled to affirmance.

The Company does not challenge the Board's finding that its action was a mandatory subject of bargaining. It is clear that the scope and direction of the Company's business did not change. It continued to operate a restaurant and bar at the same location, and it stipulated that nothing about the operation changed except the number of nights per week. It also stipulated that labor costs were a factor in the decision to close the facility on Wednesday and Thursday nights. Accordingly, that decision was a suitable one for bargaining. *See Furniture Rentors of America v. NLRB*, 36 F.3d 1240, 1248-50 (3d Cir. 1994).

The Company does, however, contend (Br 17-19) that the Union waived its right to bargain, by agreeing to the contractual "management rights" clause and by failing to object to prior changes in the hours of operation of facilities, even when such changes resulted in reductions of employees' working hours. Neither of these is sufficient to establish a waiver of bargaining rights.

The basis for the claim of contractual waiver is the "management rights" clause, which states, in pertinent part, that the Company "retains the exclusive right to determine, direct, and control the nature and extent of . . . its kitchen, dining room, bar and allied operation," as well as the right "to determine the number of [e]mployees it deems essential to fill . . . various jobs, to schedule the work day,

the work week, [and] the hours of operations” (A 83.) However, the last extension of the entire contract expired on August 31, 2006 (A 53, 132), and the closing of the Turfside Terrace Restaurant and Bar on Wednesday and Thursday nights did not occur until April 18, 2007. (A 63.) Nothing in the “management rights” clause indicates that it is to survive the expiration of the contract.

It is settled that “waivers of statutorily protected rights must be clearly and unmistakably articulated.” *Furniture Rentors of America v. NLRB*, 36 F.3d 1240, 1245 (3d Cir. 1994). This principle applies to the duration, as well as the scope, of the waiver. A contractual waiver of bargaining rights does not survive the expiration of the contract unless the contract clearly says so. *Id.* As there is no evidence here that the parties agreed that the “management rights” clause would continue in effect after the contract expired, the Board properly found (A 3 n.2, 17) that any waiver of bargaining rights contained in that clause expired with the contract.

The Company (Br 18) bases its “waiver by inaction” argument on the Union’s alleged failure to request bargaining over changes in the operation of concession stands on the first and third floors in June 2006, when the contract was still in effect. (A 53.) Even assuming (although it was not stipulated) that the Union did not request bargaining about these changes, it did not thereby waive its right to bargain about the subsequent changes, after the contract had expired, in the

hours of operation of the Turfside Terrace. “[I]t is simply not the law that a waiver of the right to bargain collectively on one issue is a waiver for all purposes for all time. ‘Each time the bargainable incident occurs . . . [the] [u]nion has the election of requesting negotiations or not.’” *Ciba-Geigy Pharmaceuticals Div. v. NLRB*, 722 F.2d 1120, 1127 (3d Cir. 1983) (citation omitted). This is particularly true where, as here, the prior unilateral changes were made when the “management rights” clause was still in effect and, according to the Company, relieved it of the obligation to bargain about such changes.

The Company contends (Br 18) that the Union’s failure to request bargaining over the prior changes made the practice of unilaterally changing hours of operation an established term and condition of employment which survived the expiration of the contract. A similar argument was rejected in *Ciba-Geigy*, 722 F.2d at 1127. Moreover, the Company’s argument would negate the presumption that a contractual waiver of statutory rights is limited in duration to the term of the contract. Such a waiver gives the employer the right to act unilaterally for a limited period of time. The Company’s position would allow the employer, simply by exercising this right, to extend indefinitely the period of its existence. This would be contrary to national labor policy, under which bargaining is the rule, and unilateral action the exception, for changes in terms and conditions of employment.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

/s/ David A. Fleischer

DAVID A. FLEISCHER

Senior Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2987

RONALD MEISBURG

General Counsel

JOHN E. HIGGINS, Jr.

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

ROBERT J. ENGLEHART

Supervisory Attorney

NATIONAL LABOR RELATIONS BOARD

August 2009

H:racetrackFoodbrief-09-1090-redf

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

RACETRACK FOOD SERVICES, INC.	:
	:
Petitioner/Cross-Respondent	:
	:
	: Nos. 09-1090, 09-1509
v.	:
	:
NATIONAL LABOR RELATIONS BOARD	: Board Case No.
	: 4-CA-35158
Respondent/Cross-Petitioner	:
	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,954 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 10th day of August, 2009

**UNITED STATES COURT OF APPEALS
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Respondent/Cross-Petitioner	:	

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 in the above-captioned case, and has served two copies of the brief by first-class mail upon the following counsel at the addresses listed below:

Henry Van Blunk, Esq.
Stark & Stark, P.C.
777 Township Line Road
Suite 120
Yardley, PA 19067-5559

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

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