

No. 09-70771

**UNITED STATES COURT of APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

**BARSTOW COMMUNITY HOSPITAL –
OPERATED BY COMMUNITY HEALTH SYSTEMS, INC.**

Respondent

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**FRED B. JACOB
Supervisory Attorney**

**KIRA DELLINGER VOL
Attorney**

**National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2971
(202) 273-0656**

RONALD MEISBURG

General Counsel

JOHN E. HIGGINS, JR.

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

National Labor Relations Board

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issues presented	2
Statement of the case.....	3
Statement of the facts.....	5
I. The Board’s findings of fact.....	5
A. Background	5
B. The acting clinical coordinator’s role	5
C. Barstow interrogated, suspended, and ultimately fired RN Sanders because of her union activities	7
II. The Board’s conclusions and order.....	9
Summary of argument.....	10
Argument.....	12
I. Chairman Schaumber and Member Liebman acted with the full powers of the Board in issuing the Board’s Order in this case.....	12
A. Background.....	13
B. Section 3(b) of the Act, by its terms, provides that a two-member quorum may exercise the Board’s powers.....	14
C. Section 3(b)’s history also supports the authority of a two-member quorum to issue Board decisions and orders	22

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
D. Construing Section 3(b) in accord with its plain meaning furthers the Act’s purpose.....	27
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	30
F. Section 3(b) grants the Board authority that Congress did not provide in statutes governing appellate judicial panels	36
II. Barstow violated Section 8(a)(1) and (3) of the Act by interrogating Sanders about, and suspending and discharging her for, her union activities	40
A. Barstow admittedly suspended Sanders because of her reported union activities, coercively interrogated her about those activities, and then discharged her because of them	40
B. Sanders was not a supervisor in her role as acting CC.....	42
C. The Board reasonably declined to reopen the record on remand to admit evidence relevant to an untimely affirmative defense	48
1. Barstow forfeited its opportunity to argue that Sanders was a supervisor in her role as an RN	50
2. Barstow’s contention that Sanders was a supervisor in her role as RN is a waivable affirmative defense, not jurisdictional	52
Conclusion	56

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Assure Competitive Transp., Inc. v. United States</i> , 629 F.2d 467 (7th Cir. 1980)	30,33
<i>Automobile Salesmen's Union, Local 1095 v. NLRB</i> , 711 F.2d 383 (D.C. Cir. 1983)	53
<i>Avante at Wilson, Inc.</i> , 348 NLRB 1056 (2006)	45
<i>Ayrshire Collieries Corp. v. United States</i> , 331 U.S. 132 (1947)	39
<i>Barnhart v. Walton</i> , 535 U.S. 212 (2002)	17
<i>Bentonite Performance Mineral LLC v. NLRB</i> , No. 09-60034 (5th Cir.)	12
<i>Bourne v. NLRB</i> , 332 F.2d 47 (2d Cir. 1964)	41
<i>Carroll College, Inc. v. NLRB</i> , 558 F.3d 568 (D.C. Cir. 2009)	55
<i>Chevron Shipping Co.</i> , 317 NLRB 379 (1995)	46
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	14,16,17
<i>City of Los Angeles v. U.S. Department of Commerce</i> , 307 F.3d 859 (9th Cir. 2002)	22
<i>Cliffstar Transport Co.</i> , 311 NLRB 152 (1993)	50

TABLE OF AUTHORITIES

Cases – cont'd	Page(s)
<i>Commonwealth ex rel. Hall v. Canal Comm'rs</i> , 1840 WL 3788 (Pa. 1840).....	31
<i>Connecticut National Bank v. Germain</i> , 503 U.S. 249 (1992).....	19
<i>Croft Metals, Inc.</i> , 348 NLRB 717 (2006)	4
<i>Deal v. United States</i> , 508 U.S. 129 (1993).....	15
<i>Duncan v. Walker</i> , 533 U.S. 167 (2001).....	21
<i>East Bay Automobile Council v. NLRB</i> , 483 F.3d 628 (9th Cir. 2007)	42,43
<i>Eastland Co. v. FCC</i> , 92 F.2d 467 (D.C. Cir. 1937).....	25
<i>Falcon Trading Group, Ltd v. SEC</i> , 102 F.3d 579 (D.C. Cir. 1996).....	17,28,32,33
<i>Fall River Dyeing & Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987).....	42
<i>Flores-Figueroa v. United States</i> , 129 S.Ct. 1886 (2009).....	19
<i>FTC v. Flotill Products, Inc.</i> , 389 U.S. 179 (1967).....	30,31
<i>Gaston v. Ackerman</i> , 142 A. 545 (Sup. Ct. 1928).....	31

TABLE OF AUTHORITIES

Cases – cont'd	Page(s)
<i>Glass v. Hopkinsville</i> , 9 S.W.2d 117 (1928).....	31
<i>Golden Crest Healthcare Center</i> , 348 NLRB 727 (2006)	4,47
<i>Grandview Health Care</i> , 322 NLRB 54 (1996)	49
<i>Gustafson v. Alloyd Co., Inc.</i> , 513 U.S. 561 (1995).....	22
<i>Hall-Brooke Hospital v. NLRB</i> , 645 F.2d 158 (2d Cir. 1981).....	25
<i>Hi-Craft Clothing Co. v. NLRB</i> , 660 F.2d 910 (3d Cir. 1981).....	53
<i>Hotel & Restaurant Employees v. NLRB</i> , 760 F.2d 1006 (9th Cir. 1985)	40,41
<i>J.S. Carambola, LLP v. NLRB</i> , Nos. 08-4729, 09-1035 (3rd Cir.)	12
<i>Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB</i> , 564 F.3d 469 (D.C. Cir. 2009), <i>petition for reh'g denied</i> (July 1, 2009)	12,18,19,20,21,29,33,34,35
<i>Loyalhanna Care Ctr.</i> , 352 NLRB No. 105, 2008 WL 2616528 (2008)	47
<i>Lynwood Manor</i> , 350 NLRB 489 (2007)	46,47
<i>McElroy Coal Company v. NLRB</i> , Nos. 09-1332, 09-1427 (8th Cir.).....	12

TABLE OF AUTHORITIES

Cases – cont'd	Page(s)
<i>Michigan Dep't of Transp. v. ICC</i> , 698 F.2d 277 (6th Cir. 1983)	33
<i>Murray v. Nat'l Broadcasting Co.</i> , 35 F.3d 45 (2d Cir. 1994).....	37
<i>NLRB v. American Directional Boring, Inc.</i> , No. 09-1194 (4th Cir.)	12
<i>NLRB v. Cheney California Lumber Co.</i> , 327 U.S. 385 (1946).....	55
<i>NLRB v. Hanna Boys Ctr.</i> , 940 F.2d 1295 (9th Cir. 1991)	49
<i>NLRB v. Kentucky River Community Care</i> , 532 U.S. 706 (2001).....	43,44,52
<i>NLRB v. Konig</i> , 79 F.3d 354 (3d Cir. 1996).....	54
<i>NLRB v. Ochoa Fertilizer</i> , 368 U.S. 318 (1961).....	55
<i>NLRB v. Southern Bell Tel. & Tel. Co.</i> , 319 U.S. 50 (1943), enforcing 35 NLRB 621 (Sept. 23, 1941).....	23
<i>NLRB v. St. George Warehouse, Inc.</i> , Nos. 08-4875, 09-1269 (4th Cir.).....	12
<i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983).....	40

TABLE OF AUTHORITIES

Cases – cont'd	Page(s)
<i>NLRB v. United Food & Commercial Workers Union, Local 23</i> , 484 U.S. 112 (1987).....	14
<i>NLRB v. Whitesell Corp.</i> , No. 08-3291 (8th Cir.)	12
<i>Nabors Alaska Drilling, Inc. v. NLRB</i> , 190 F.3d 1008 (9th Cir. 1999)	40
<i>Narricot Industries, L.P. v. NLRB</i> , Nos. 09-1174, 09-1280 (4th Cir.)	12
<i>New Process Steel, L.P. v. NLRB</i> , 564 F.3d 840 (7th Cir. 2009), <i>petition for cert. filed</i> , 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457)	12,15,17,21,27,28,33,38
<i>Nguyen v. United States</i> , 539 U.S. 69 (2003).....	37,38,39
<i>Nicholson v. ICC</i> , 711 F.2d 364 (D.C. Cir. 1983)	33
<i>Northeastern Land Services v. NLRB</i> , 560 F.3d 36 (1st Cir. 2009), <i>reh'g denied</i> (May 20, 2009).....	12,16,17,21,28
<i>Nursing Ctr. at Vineland</i> , 318 NLRB 337 (1995)	50,51
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006)	4,9,11,43,44,46,47,48,49,50,51,52
<i>Parker-Robb Chevrolet</i> , 262 NLRB 402 (1982)	53,54

TABLE OF AUTHORITIES

Cases – cont'd	Page(s)
<i>Patenaude v. Equitable Life Assurance Soc’y</i> , 290 F.3d 1020 (9th Cir. 2002)	15
<i>People v. Wright</i> , 71 P. 365 (1902).....	31
<i>Photo-Sonics, Inc. v. NLRB</i> , 678 F.2d 121 (9th Cir. 1982)	17
<i>Polynesian Cultural Ctr., Inc. v. NLRB</i> , 582 F.2d 467 (9th Cir. 1978)	55
<i>Providence Alaska Med. Ctr. v. NLRB</i> , 121 F.3d 548 (9th Cir. 1997)	42,43,54
<i>Railroad Yardmasters of America v. Harris</i> , 721 F.2d 1332 (D.C. Cir. 1983).....	17,20,29,30,35
<i>Ross v. Miller</i> , 178 A. 771 (N.J. Sup. Ct. 1935)	31
<i>SNE Enterprises</i> , 344 NLRB 673 (2005)	48
<i>S.S. Joachim & Anne Residence</i> , 314 NLRB 1191 (1994)	49
<i>Sears, Roebuck & Co.</i> , 304 NLRB 193 (1991)	46
<i>Snell Island SNF LLC v. NLRB</i> , 568 F.3d 410 (2d Cir. 2009).....	12,16,17,24,28,38
<i>St. Barnabas Hosp.</i> , 334 NLRB 1000 (2001), <i>enforced mem.</i> , 46 F. App'x 32 (2d Cir. 2002)	54

TABLE OF AUTHORITIES

Cases – cont'd	Page(s)
<i>St. Elizabeth Comm. Hosp. v. NLRB</i> , 626 F.2d 123 (9th Cir. 1980)	55
<i>TRW, Inc. v. Andrews</i> , 534 U.S. 19 (2001)	21
<i>Taylor Constr. v. ABT Serv. Corp.</i> , 163 F.3d 1119 (9th Cir. 1998)	15
<i>Teamsters, Local 523 v. NLRB</i> , Nos. 08-9568, 08-9577 (10th Cir.)	12
<i>The Majestic Star Casino, LLC</i> , 335 NLRB 407 (2001)	49
<i>United Cerebral Palsy of New York City</i> , 343 NLRB 1 (2004)	49
<i>United States v. \$493,850 in U.S. Currency</i> , 518 F.3d 1159 (9th Cir. 2008)	15,22
<i>United States v. Desimone</i> , 140 F.3d 457 (2d Cir. 1998).....	38
<i>United States v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	50
<i>United States v. Mead Corp.</i> , 533 U.S. 218 (2001).....	17
<i>United States v. Nordic Village, Inc.</i> , 503 U.S. 30 (1992).....	15
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	42,43

TABLE OF AUTHORITIES

Cases – cont'd	Page(s)
<i>Westwood Health Care Ctr.</i> , 330 NLRB 935 (2000)	41
<i>Yesterday's Children, Inc.</i> , 321 NLRB 766 (1996), <i>enforced in relevant part</i> , 115 F.3d 36 (1st Cir. 1997).....	50, 54
<i>Wheeling Gas Co. v. City of Wheeling</i> , 1875 WL 3418 (W.Va. 1875)	31

TABLE OF AUTHORITIES

Statutes	Page(s)
 National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 2(3) (29 U.S.C. § 152(3))	43
Section 2(11) (29 U.S.C. § 152(11))	43
Section 3(a) (29 U.S.C. § 153(a)).....	13,25
Section 3(b) (29 U.S.C. § 153(b))	passim
Section 4 (29 U.S.C. § 154).....	36
Section 6 (29 U.S.C. § 156).....	37
Section 7 (29 U.S.C. § 157).....	10,40
Section 8(a)(1) (29 U.S.C. §158(a)(1))	2,3,9,40,41
Section 8(a)(3) (29 U.S.C. §158(a)(3))	2,3,9,40,41
Section 10(a) (29 U.S.C. §160(a)).....	1
Section 10(e) (29 U.S.C. § 160(e)).....	2,42
 Court of Appeals, Assignment of judges; panels; hearings; quorum	
28 U.S.C. §46.....	36,38
28 U.S.C. §46(b).....	37
28 U.S.C. §46(d).....	38
 Education, Higher Education Assistance	
20 U.S.C. §1099c-1(b)(8)	20
 Statutes At Large	
41 Stat. 492	25
48 Stat. 1068	25
61 Stat. 136	25
61 Stat. 160	25
 Other Authorities	
<i>Quorum Requirements</i> , Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003)	18,36

TABLE OF AUTHORITIES

Miscellaneous	Page(s)
 Board Annual Reports:	
<i>Second Annual Report of the NLRB</i> (1937).....	23
<i>Sixth Annual Report of the NLRB</i> (1942)	23
<i>Seventh Annual Report of the NLRB</i> (1943).....	23
<i>Thirteenth Annual Report of the NLRB</i> (1948).....	26
 Publications, Treatises:	
BNA, <i>Daily Labor Report</i> , No. 13 at A-8 (Jan. 23, 2009)	12
No. 83 at AA-1 (May 4, 2009)	14
Fletcher Cyclopedia of the Law of Corporations § 2 (2008).....	34
James A. Gross, <i>The Reshaping of the NLRB: National Labor Policy in Transition, 1937-1947</i> (1981)	23
Harry A. Millis and Emily Clark Brown, <i>From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations</i> (1950)	23
Restatement (Third) Of Agency (2006).....	34
Robert’s Rules of Order (1970)	30
Robert’s Rules of Order (rev. ed. 1981).....	20
Webster’s New World College Dictionary (4th ed. 2008).....	19

TABLE OF AUTHORITIES

Miscellaneous – cont’d

Page(s)

Legislative History Materials

*1 NLRB, Legislative History of the National Labor Relations Act,
1947 (1947)*

H.R. 3020, 80th Cong. § 3.....	23
H.R. Conf. Rep. No. 80-510.....	25
H.R. Rep. No. 80-3020.....	23
S. 1126, 80th Cong. §3.....	24
S. Rep. No. 80-105.....	24
S. Rep. No. 97-275.....	37

*2 NLRB, Legislative History of the National Labor Relations Act,
1947 (1947)*

93 Cong. Rec. 3837 (Apr. 23, 1947) (Remarks of Sen. Taft).....	24
--	----

*2 NLRB, Legislative History of the National Labor Relations Act,
1935 (1935)*

Act of July 5, 1935, 49 Stat. 449.....	22
93 Cong. Rec. 4433 (May 2, 1947) (Remarks of Sen. Ball).....	24

*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).....*

.....	26
-------	----

*Labor-Management Relations: Hearings Before J. Comm. on Labor-
Management Relations, 80th Cong. Pt 2.....*

.....	26
-------	----

*Staff of J. Comm. On Labor-Management Relations, 80th Cong.,
Report on Labor-Management Relations (J. Comm. Print. 1948).....*

.....	26
-------	----

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-70771

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

BARSTOW COMMUNITY HOSPITAL –
OPERATED BY COMMUNITY HEALTH SYSTEMS, INC.

Respondent

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board to enforce a Board (“the Board”) Order against Barstow Community Hospital – Operated by Community Health Systems, Inc. (“Barstow”). The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a) (29 U.S.C. § 160(a)) of the National Labor Relations Act, as amended (“the Act,” 29 U.S.C. §§ 151). The Decision and Order, issued on

August 18, 2008, and reported at 352 NLRB 1052 (ER 248-58),¹ is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)).

The Board applied for enforcement of its Order on March 17, 2009. The Court has jurisdiction over the Board's application pursuant to Section 10(e) of the Act because the unfair labor practices occurred in Barstow, California. It was timely filed, as the Act imposes no time limit for 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 in this case.

2. Whether substantial evidence supports the Board's determination that Barstow violated Section 8(a)(1) and (3) of the Act by suspending, coercively interrogating, and discharging Lois Sanders because of her union activities.

Because Barstow essentially admits the underlying violation, the issues directly before the Court relate to Barstow's affirmative defenses. They are, first, whether substantial evidence supports the Board's finding that Sanders was not a statutory

¹ "ER" refers to Barstow's Excerpts of Record, filed with its brief, and "SER" refers to the Board's Supplemental Excerpts of Record, filed with this brief. Where applicable, references preceding a semicolon are to the Board's findings; those following, to the supporting evidence.

supervisor in her role as acting Clinical Coordinator and, second, whether the Board abused its discretion in denying Barstow's request to reopen the record for hearings on a new supervisory defense.

STATEMENT OF THE CASE

This unfair-labor-practice case came before the Board on an amended complaint issued by the Board's General Counsel on April 10, 2003, pursuant to charges filed by the United Nurses Association of California, Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO ("the Union"). (ER 251; ER 12-13, SER 24-33.) Following a hearing, an administrative law judge issued an initial decision on August 29, 2003, finding that Barstow had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by investigating Lois Sanders' union activities and by interrogating her about them, and had violated Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) by suspending, and subsequently terminating, Sanders for those activities. (ER 248 n.1, 254.) In reaching her decision, the judge rejected Barstow's affirmative defense that the Act did not protect Sanders because she engaged in the union activities while acting as statutory supervisor in her role as a fill-in clinical coordinator. (ER 254.) Barstow filed exceptions to the judge's decision before the Board. (ER 248 n.1; ER 189.)

On September 30, 2006, the Board remanded this case to the judge (ER 248 n.1, 256.) for further consideration in light of its modification of the supervisory-

status test in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). See *Barstow Community Hosp.*, 348 NLRB 957 (2006). On remand, Barstow filed a Motion to Reopen the Record in a new attempt to show that Sanders was a supervisor, this time in her role as a registered nurse (“RN”). The judge denied that motion, and the parties filed briefs. (ER 248 n.1, 256; ER 209-26.) The judge issued a supplemental decision on February 23, 2007, reevaluating, and once again rejecting, Barstow’s defense that Sanders was a supervisor, in her role as acting clinical coordinator, when she engaged in the union activities. (ER 248, 256-258.) Barstow filed exceptions to the supplemental decision before the Board, and the General Counsel and the Union filed answering briefs. (ER 248; ER 232-47.)

In its August 18, 2008 Decision and Order, the Board affirmed the judge’s finding that Barstow’s interrogation, suspension, and termination of Sanders violated the Act,² agreeing with the judge that Sanders was not a statutory supervisor when she engaged in the union activities. (ER 248-49.) The Board further affirmed the judge’s denial of Barstow’s Motion to Reopen the Record, and

² The Board did not pass on her finding that Barstow’s investigation of Sanders was unlawful, as it would not materially affect the remedy. (ER 248 n.4.)

declined to rule on whether Sanders qualified as a supervisor in her role as an RN, finding Barstow had waived that issue. (ER 248.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

Barstow is a hospital with an emergency room (“ER”), two medical-surgical floors, and various specialty departments. (ER 251, 253; ER 27, 65, SER 9.) Maureen Bodine, Director of Nurses, supervises Barstow’s operations, and each department also has a manager. (ER 252; ER 27, 72, 79, 104, SER 11-13.) In addition, Barstow employs Clinical Coordinators (“CCs”), who schedule employees, ensure appropriate staffing for changing patient loads, act as point person for personnel disputes, patient conflicts, and other problems, and occasionally fill in as nurses when Barstow is short-staffed. (ER 256; ER 34, 76-77, 101.)

B. The Acting Clinical Coordinator’s Role

In the ER, RNs triage patients and effectuate doctors’ patient-care orders. (ER 251, 256; ER 26.) When Barstow has no permanent CC on duty, RNs also cover the CC position, receiving a 10-percent pay differential when they assume that role. (ER 251-52; ER 30, 79, 82, SER 15, 17.) An RN learns of her additional CC duties – primarily staffing, pharmacy duty, and admissions, but also potentially

dealing with other issues that arise or calling in a manager to do so – when she reports to work for the affected shift, or when the acting-CC duties commence. (ER 252-53; ER 31, 33, 116, 157, SER 19.) The RN performs the CC duties in addition to her normal RN workload, and those supplemental tasks account for only a fraction of the work she performs during her shift. (ER 253 & n.9; ER 112-13.)

When an RN is assigned to act as CC, she receives a book that one of Barstow's managers referred to as "The Brains." (ER 129.) The Brains contains Barstow's policies and guidelines, staffing grids dictating nurse-patient ratios, master employee schedules, daily assignment sheets (already prepared by the permanent CCs), a list of patients, an emergency call list, instructions for "stocking" the emergency rosters, and other relevant information. (ER 252-53; ER 31-33, 77, 89, 129, SER 7-8.) Acting CCs are "encouraged . . . absolutely" to follow the book's policies, and the manager handing over The Brains may also provide additional, often quite specific, oral or written instructions. (ER 253; ER 32, 81, 138, SER 3, 13, 21.)

Aside from supplying The Brains as a reference and guide, the only training Barstow gives an RN to prepare her for CC duty consists of explaining how to read the staffing grid and how to retrieve medicine when the pharmacy is closed, and possibly having the RN shadow another RN performing the role. (ER 253;

ER 151-53, 173, SER 22.) Before shifts covered by acting CCs, Barstow's management "usually trie[s] to make sure that things [a]re sorted out" but, in addition to comprehensive hospital policies, The Brains also contains contact numbers for all hospital supervisors should any problem arise requiring their assistance or advice. Acting CCs "certainly call" if they encounter any issues, and it is "not uncommon" for Barstow's managers to come in or otherwise handle problems themselves. (ER 253; ER 89, 160, 129, 131, SER 8, 14, 18-20.) An acting CC has no disciplinary authority and is to refer any employee misconduct to the manager of the employee's unit. (ER 253; ER 77, SER 16, 18.)

C. Barstow Interrogated, Suspended, and Ultimately Fired RN Sanders Because of Her Union Activities

In May 2001, Barstow hired Lois Sanders to work as an RN in its ER. (ER 251, 256; ER 25-26, 28.) Starting a few months into her tenure, Sanders was assigned to fill in as CC once or twice a week, on an ad hoc basis. (ER 251, 256; ER 30, 38.) Like other acting CCs, Sanders still spent the bulk of her time performing her usual RN duties. As acting CC, she had no authority to discipline, never gave permission for any employee to leave work, and believed that she would need to contact management for authorization before doing so. (ER 253, 257; ER 35, 37-38.) The manager who assigned Sanders to cover as CC instructed Sanders to call her at home if any problems arose. (ER 253 6; ER 39.) When calling in staff to work, Sanders followed the prepared list in The Brains. She had

no authority to order anyone to work and could contact a manager if she encountered staffing difficulties. (ER 253, 257; SER 4, 12-13.)

Early Spring 2002, after discussing working conditions with some of her coworkers, Sanders contacted various unions to set up informational meetings for Barstow's employees. (ER 251; SER 2.) On August 9, while acting CC, Sanders approached RN Mary Capolupo about the Union. Capolupo reported her discussion with Sanders to nursing director Bodine, and followed up that report with an August 9 memo claiming that Sanders had asked her to speak to Barstow's nurses about the Union. (ER 251-52; ER 97-99, 176.)

On August 31, Bodine called Sanders at home and informed her that Barstow was suspending her without pay, pending investigation. (ER 252; ER 40.) She provided no reason for the suspension. (ER 252; ER 40-41.) Barstow subsequently sent Sanders a letter notifying her of a scheduled September 17 "investigatory interview . . . for the purpose of inquiring into [her] conduct while recently assigned as a Clinical Coordinator." (ER 252; ER 43, 174.) During that interview, Bodine asked Sanders questions off a list prepared in advance. (ER 252; ER 52-53, 82-83, SER 36-41.) In response to one question, Sanders stated her understanding that, when acting CC, she had no authority, could not reprimand or discipline, did staffing for the following shift, and dealt with pharmacy needs. She further stated that she often accepted the acting-CC assignment under protest.

(ER 252; ER 53.) In a September 26 letter, Barstow terminated Sanders “based upon [its] recent investigation into [her] conduct while assigned as a Clinical Coordinator.” (ER 252; ER 174, SER 1.) Barstow later admitted that it discharged her for engaging in union activity while acting CC, in violation of Barstow’s “policy . . . to remain union-free.” (ER 252; ER 74-76, 91, SER 23.)

II. THE BOARD’S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found (ER 249-50), in agreement with the administrative law judge, that Barstow had violated Section 8(a)(1) by interrogating Sanders about her union activities, and had violated Section 8(a)(3) and (1) by suspending, and subsequently discharging, Sanders due to those same activities.³ The Board rejected (ER 249) Barstow’s defense that Sanders was a statutory supervisor in her role as acting CC. It also held (ER 248 n.3) that Barstow had waived its belated defense, raised only after the Board’s post-*Oakwood* remand, that Sanders was a statutory supervisor in her role as an RN. Consequently, the Board affirmed the judge’s denial of Barstow’s Motion to Reopen the Record to elicit evidence in support of that defense.

To remedy Barstow’s unfair labor practices, the Board’s Order requires Barstow to cease and desist from: interrogating employees about their union or

³ The Board did not rule on the judge’s additional finding that Barstow’s investigation of Sanders’ activities was unlawful, as it would not materially affect the remedy in this case. (ER 248 n.4.)

other protected concerted activities; suspending any employee for engaging in union or other protected concerted activities; discharging any employee for engaging in union or other protected concerted activities; or, in any like or related 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). (ER 250.)

Affirmatively, the Order requires Barstow to: offer Sanders full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position; make Sanders whole for any loss of earnings and other benefits suffered as a result of the discrimination against her; remove from its files any reference to the unlawful suspension and discharge and, within 3 days thereafter, notify Sanders in writing that this has been done and that the suspension and discharge will not be used against her in any way; and post a remedial notice. (ER 250.)

SUMMARY OF ARGUMENT

1. Barstow'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 administrative-law and common-law principles. In contrast, Barstow'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.

2. There is no dispute as to the essential elements of the violations at issue here: Barstow admittedly suspended, coercively interrogated, and subsequently discharged Sanders because of her protected union activities. Barstow defends its conduct by arguing that Sanders was outside the Act's protection as a statutory supervisor, either as acting CC or as an RN. With respect to the acting-CC position, however, Barstow has dropped all but one half-hearted argument in support of supervisory status, relying on conclusory testimony insufficient to meet its burden of proof, and little else. Barstow focuses on its RN-supervisor defense, but cannot overcome the fact that it forfeited that defense by failing even to suggest it before either the judge or the Board until after the Board's post-*Oakwood* remand. In sum, this Court should have no trouble determining that ample evidence supports the Board's unfair-labor-practice findings and that the Board did not abuse its discretion in denying Barstow leave to develop an entirely new defense on remand.

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 Schaumber⁴ 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. *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *reh'g denied* (May 20, 2009).⁵ *But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for reh'g denied* (July 1, 2009) (discussed below). As we now show, their

⁴ 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).

⁵ The issue was argued before the Eighth Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291, on June 9, 2009. This issue has also been fully briefed in this Circuit in *NLRB v. United Food and Commercial Workers, Local 4*, No. 09-70922; in the Fifth Circuit in *Bentonite Performance Mineral LLC v. NLRB*, No. 09-60034, and *NLRB v. Coastal Cargo Co., Inc.*, No. 09-60156; in the Third Circuit in *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729 and 09-1035, and *NLRB v. St. George Warehouse, Inc.*, 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; in the Eighth Circuit in *NLRB v. American Directional Boring, Inc.*, No. 09-1194; and in the Tenth Circuit in *Teamsters, Local 523 v. NLRB*, Nos. 08-9568 and 08-9577.

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. Barstow'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.

A. Background

Section 3(a) of the Act (29 U.S.C. § 153(a)) 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. The delegation, vacancy, and quorum provisions that govern the Board are contained in Section 3(b) of the Act (29 U.S.C. § 153(b)), 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. . . .

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,⁶ 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 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 300 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.⁷

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 & 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

⁶ Member Walsh’s recess appointment also expired on December 31, 2007.

⁷ On May 4, 2009, it was reported that the two-member Board 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 decisions in Volume 352 NLRB (146 decisions), Volume 353 NLRB (132 decisions), and Volume 354 NLRB (54 decisions as of July 30, 2009).

(1984). This process begins with looking to the plain meaning of the statutory terms. *United States v. \$493,850 in U.S. Currency*, 518 F.3d 1159, 1167 (9th Cir. 2008). 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 also Patenaude v. Equitable Life Assurance Soc’y*, 290 F.3d 1020, 1025 (9th Cir. 2002). 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). *Accord Taylor Constr. v. ABT Serv. Corp.*, 163 F.3d 1119, 1122 (9th Cir. 1998) (citing *Nordic Village*).

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 both the Seventh Circuit and the First Circuit have concluded, the plain meaning of the statute’s text 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 (“[T]he 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 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.⁸

⁸ In our view, as set forth above, 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 842-843. In *Snell Island*, 568 F.3d at 424, however, the Second Circuit found that Section 3(b) does not have a plain meaning, but that the Board’s reasonable interpretation of its authority under Section 3(b) is entitled to deference. If this Court, like the Second Circuit, should find that Section 3(b) is susceptible to different reasonable

Moreover, the Seventh Circuit (*New Process*, 564 F.3d at 846) and the First Circuit (*Northeastern*, 560 F.3d at 41-42), both noted that two persuasive authorities provide additional support for this reading of Section 3(b)'s plain text. First, in *Photo-Sonics, Inc. v. NLRB*, this Court held that, where the Board had four sitting members, Section 3(b)'s two-member quorum provision authorized a three-member group to issue a decision even after one panel member had resigned. *See* 678 F.2d 121 (9th Cir. 1982). The Court held that it was not legally determinative whether the resigning Board member participated in the decision, reasoning that “the decision would nonetheless be valid because a ‘quorum’ of two panel members supported the decision.” *Id.* at 123. Second, the United States

interpretations, then the Court should also find, in agreement with the Second Circuit, that the Board 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 decision at issue here, at a minimum, reflects a reasonable construction of Section 3(b). As explained further below, that construction is consistent with the Act’s legislative history and with the common law principles governing public agencies, and it furthers the overall purpose of the Act to avoid “industrial strife,” 29 U.S.C. § 151. The fundamental deference 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. SEC*, 102 F.3d 579, 582 n.3 (D.C. Cir. 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 understanding of its statutory authority should be respected by this Court.

Department of Justice’s Office of Legal Counsel, in a formal opinion, concluded that the Board possessed the authority to issue decisions with only two of its five seats 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 (Mar. 4, 2003).

Barstow relies (Br. 15, 18) in large part on the reasoning of the D.C. Circuit in its *Laurel Baye* decision. The D.C. Circuit’s contrary conclusion, however, is based on a strained reading of Section 3(b) that does not give operative meaning to all of its relevant provisions. In *Laurel Baye*, 564 F.3d at 472-73, the D.C. Circuit 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 in any capacity 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 that applies to a “group” is not in fact an exception to the three-member quorum requirement for the “Board.” *See id.* at 473. The court stated that Congress’ use of those two different object nouns indicates that each quorum provision is independent, and thus the two-member quorum provision does not eliminate the requirement that there be a three-member quorum present “at all times.” *Id.*

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 also Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1890-91 (2009) (applying “ordinary English” to determine the meaning of a statute). 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 an 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 is erroneous. *Laurel Baye* ignores that, in other statutes, as in Section 3(b), 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) (The 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 Amer. v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (quoting ROBERT'S RULES OF ORDER 16 (rev. ed. 1981)). Under the D.C. Circuit’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.

The *Laurel Baye* court correctly states that Congress intended that “each quorum provision is independent from the other,” 564 F.3d at 473, but then flouts that clear intent by denying Section 3(b)’s two-member quorum provision *any* truly independent role. Rather, 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 three-member quorum.⁹ In so holding, the court violated a cardinal principle of statutory construction that “a statute ought, upon the whole, to be so 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 fails 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 continue to 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, possessing all the Board’s powers, cannot logically be distinguished from the Board itself.¹⁰

⁹ 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.”).

¹⁰ 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 Also 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 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); *United States v. \$493,850 in U.S. Currency*, 518 F.3d 1159, 1167 (9th Cir. 2008); *City of Los Angeles v. U.S. Dep't of Commerce*, 307 F.3d 859, 871 (9th Cir. 2002). Thus, ascertaining that meaning often requires resort to historical materials, including legislative history. *Gustafson*, 513 U.S. 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. 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."¹¹ 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

¹¹ *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).

filled.¹² 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.¹³ 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.¹⁴

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

¹² 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* (1936), at 7; *6th Annual Report* (1940), at 7 n.1; *7th Annual Report* (1941), 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.

¹³ 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).

¹⁴ 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.

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.¹⁵ 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.¹⁶ 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.”¹⁷ 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.”¹⁸ *See Snell Island*, 568 F.3d at 421 (Congress added

¹⁵ S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

¹⁶ Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

¹⁷ S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

¹⁸ 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

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 provisions, but, as a compromise with the House bill, agreed to a Board of five members.¹⁹ 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 issues²⁰ 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

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).

¹⁹ 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.

²⁰ See 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

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).²¹ 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.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 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

²¹ 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”).

²² The Board continues to decide the overwhelming majority of its cases by means of these three-member panels. See *13th 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).

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 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.

**D. Construing Section 3(b) in Accord with Its Plain Meaning
Furtheres 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 Act 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 to its purposes.

Barstow attacks (Br. 17) the Board's delegation of authority as a "sham" on the grounds that the Board was aware that Member Kirsanow's departure was imminent and that the three-member group formed by the delegation was thus "intended to function as a two-[m]ember group." Rejecting that argument, the Second Circuit recognized that the anticipated departure of one group member "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 Circuit and the First Circuit observed, courts have upheld similar actions taken by federal agencies to permit the agency to continue to function despite vacancies. *See New Process*, 564 F.3d at 848; *Northeastern*, 560 F.3d at 42. In *Falcon Trading Group, Ltd v. SEC*, 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 if it had only two members. 102 F.3d 579, 582 & n.3 (D.C. Cir. 1996). 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.

Likewise, in *Yardmasters*, 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. 721 F.2d at 1335. 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 to continue to operate when it otherwise would be disabled.” *Id.* at 1349 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.

In *Laurel Baye*, the D.C. Circuit noted that its *Yardmasters* decision was distinguishable because it involved only the issue of “whether the NMB was able to delegate its authority to a single member.” *Laurel Baye*, 564 F.3d at 474. But the distinction actually points directly to the greater strength of the Board’s case. In *Yardmasters*, the court faced the question of 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. 721 F.2d at 1341-42. That problem is not presented here. Here, unlike in *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. Therefore, 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. As the Supreme Court explained in *FTC v. Flotill Products, Inc.*, 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. 389 U.S. 179, 183-86 (1967) (also identifying the ICC).²³

²³ 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

At common law, the power held by a public board was held “not individually but collectively” (*Commonwealth ex rel. Hall v. Canal Comm’rs*, 1840 WL 3788, *5 (Pa. 1840)), and “considered joint and several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 1875 WL 3418, *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*, 71 P. 365, 366-67 (1902) (where the city council was composed of 8 aldermen and 1 mayor, and the terms of 4 aldermen expired, a 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

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.

²⁴ Cases which, at first, may appear to run counter to the common-law rules are easily reconciled when it is recognized that their holdings are instead controlled by a specific quorum rule dictated by statute or ordinance. *See, e.g., Gaston v. Ackerman*, 142 A. 545, 546 (Sup. Ct. 1928) (three of five members were insufficient for a quorum because “[t]he ordinance under which the meeting was held provided that a quorum shall consist of four members.”); *Glass v. Hopkinsville*, 9 S.W.2d 117, 118 (1928) (state statute required that a school board quorum be a majority of the full board, so five of nine members were needed for a quorum).

exception to Section 3(b)'s three-member quorum requirement where the Board has appropriately 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 the remaining members constitutes a quorum.

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 quorum principles, held that, in the absence of any countermanding provision in its authorizing statute, the SEC lawfully promulgated a two-member quorum rule that enabled the commission to issue decisions and orders when only two of its five authorized seats were filled. *See id.* at 582 & n.2.

The common-law principles applied in *Falcon Trading* apply as well in interpreting the quorum provisions Congress enacted in 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 three members remained as a quorum prescribed by its rules. 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).

That common-law rule is reflected in the authorizing statutes of other administrative agencies, as well. *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, 4 commissioners, a majority of those in office, constituted a quorum and could issue decisions); *Michigan Dep’t of Transp. 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,” a “majority” of whom “is a quorum for the transaction of business,” ICC decision participated in and issued by only two of the three division members was valid).

Barstow, echoing the D.C. Circuit in *Laurel Baye*, not only ignores these applicable common-law quorum principles, it erroneously cites “rudimentary agency law” to argue (Br. 19) that “the moment the Board’s membership dropped below the quorum requirement of three” all authority previously delegated by the Board to the group ceased. *See Laurel Baye*, 564 F.3d at 473 (citing various legal

treatises). Barstow’s argument has no merit. In giving controlling weight to “basic tenets of agency and corporation law,” the *Laurel Baye* court failed to heed the warning of the treatises upon which it relied that governmental bodies are often subject to special rules not applicable to private bodies.²⁵

Specifically, the court erroneously concluded that the three-member group to which a Board quorum delegated all of the Board’s powers was an “agent” of the Board. *See id.* (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”). “Agency” is defined as “the fiduciary relationship that arises when one person (‘the principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests consent or otherwise consents so to act.” *Id.* § 1.01. The delegation of institutional powers to the three-member group authorized by Section 3(b) does not create any kind of “fiduciary” relationship and does not involve the three-member group acting on “behalf” of the Board or under its “control.” Instead, the Board members

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.”

in the group have been jointly delegated all of the Board's institutional powers, and thus are fully empowered to exercise them, not as Board agents, but as the Board itself.

Laurel Baye's misapprehension concerning the governing common-law principles also led it unwarrantedly to disregard the teaching of its own *Yardmasters* decision. There, the D.C. Circuit had properly rejected reliance on the principles of agency and private corporation law it erroneously invoked in *Laurel Baye*. The court in *Yardmasters* discerned that the delegation and vacancies provisions of the federal statute at issue there demonstrated that Congress intended that certain operations of a public agency should continue to function in circumstances where a private body might be disabled. *See* 721 F.2d at 1343 n.30. Similarly, in this case, the plain meaning of Section 3(b)'s delegation, vacancy, and quorum provisions manifests Congress' intent that three or more members of the Board should have the option to delegate the Board's powers to a three-member group, knowing that an imminent vacancy "shall not impair the right of the remaining members to exercise all the powers of the Board" and that "two members shall constitute a quorum of any group" so designated. As the Office of Legal Counsel properly concluded, construing Section 3(b)'s plain language to permit the two-member quorum to continue to exercise the Board's powers that were properly delegated to the three-member group "would not confer power on a

number of members smaller than the number for which Congress expressly provided in setting the quorum.” 2003 WL 24166831, *3.

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

Barstow contends (Br. 19-21) 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. 19) that “there are striking parallels” between 28 U.S.C. § 46 and Section 3(b) of the Act. 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 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 primary 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 S. 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.

Barstow’s position is not furthered by its reliance (Br. 19-21) 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. *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. 539 U.S. at 82-83. The three-member group of Board members to which the Board delegated all of its powers, however, *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. *Cf. United States v. Desimone*, 140 F.3d 457, 458-

59 (2d Cir. 1998) (valid decision was issued by two judges, as quorum of panel properly constituted at its inception, after death of third panel member).²⁶

Ayrshire Collieries Corp. v. United States, 331 U.S. 132 (1947), also illustrates the differences between the statutes authorizing the creation of judicial panels and Section 3(b) of the Act. 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) 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.

²⁶ 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.

II. BARSTOW VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY INTERROGATING SANDERS ABOUT, AND SUSPENDING AND DISCHARGING HER FOR, HER UNION ACTIVITIES

A. Barstow Admittedly Suspended Sanders Because of Her Reported Union Activities, Coercively Interrogated Her About Those Activities, and Then Discharged Her Because of Them

Section 7 of the Act (29 U.S.C. § 157) confers on employees “the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities” To protect those rights, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)), in turn, bars “discrimination in regard to . . . tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” An employer thus violates Section 8(a)(1) when it coercively interrogates an employee about the employee’s union activities. *Hotel & Restaurant Employees v. NLRB*, 760 F.2d 1006, 1008-09 (9th Cir. 1985) (enforcing Board’s totality-of-circumstances test for determining when interrogations are coercive). It violates Section 8(a)(3) and (1) when it suspends or terminates the employee because of those activities. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 394 (1983); *Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1014 (9th Cir. 1999).

The undisputed facts of this case establish the elements of the Section 8(a)(1) and (3) violations that the Board found. Sanders' union activities admittedly motivated Barstow's decisions to suspend and terminate her. And the circumstances of her interview were undeniably coercive: Barstow summoned her in writing to an "investigatory interview" during an unexplained suspension. When she arrived at the interview, two high-level hospital officials asked her a series of pre-determined questions about her job duties and union activities, recording her answers and declining to answer her questions. After that interrogation, Barstow's next communication with Sanders was a formal letter of termination.²⁷

Understandably, Barstow does not contest any of the elements of the violations found. Its challenge to the merits of the Board's Order rests exclusively on Sanders' alleged supervisory status, so the Board is entitled to enforcement of that Order if the Court agrees that Sanders is not a statutory supervisor. As this brief will demonstrate, Barstow has not established that Sanders was a supervisor

²⁷ See *Westwood Health Care Ctr.*, 330 NLRB 935, 939 (2000) (noting that factors such as appearance interrogator is seeking information to use as a basis for action against questioned employee, interrogator holding relatively high position in employer's hierarchy, employee having been summoned to boss' office for questioning, and "an atmosphere of unnatural formality" during the interview tend to show unlawful coercion) (citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)). Compare *Hotel & Restaurant Employees*, 760 F.2d at 1007, 1009 (holding employer's casual questions to avowed union adherent as to why he was organizing the union were not coercive).

in her role as acting CC and it has forfeited its opportunity to argue that she was a supervisor in her role as an RN. In reviewing the Board's Order, this Court will uphold the Board's legal determinations under the Act so long as they are "reasonable and not precluded by Supreme Court precedent." *East Bay Auto. Council v. NLRB*, 483 F.3d 628, 633 (9th Cir. 2007) (quotations omitted).²⁸ It must also accept as conclusive Board findings of fact that are supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).²⁹

B. Sanders Was Not a Supervisor in Her Role As Acting CC

Having admitted to interrogating, suspending, and discharging Sanders due to her union activities (Br. 12), Barstow asserts as an affirmative defense that it had the right to engage in such otherwise unlawful conduct because Sanders was acting as a supervisor in her role as CC when she engaged in those activities. This Court has recognized the Board's "expertise in making the subtle and complex distinctions between supervisors and employees," and consequently accords the

²⁸ *See also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts.") (citation omitted); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997) ("We defer to the Board's reasonably defensible interpretation and application of the [Act].") (quotations omitted).

Board “particularly strong” deference regarding such determinations. *Providence*, 121 F.3d at 551 (quotations omitted). Barstow utterly fails to establish its supervisory defense or even show that Sanders’ status is a close call, much less demonstrate that the Court should disregard the Board’s determination despite the agency’s particular expertise.

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes “any individual employed as a supervisor” from the definition of “employee” protected under the Act. Section 2(11) of the Act (29 U.S.C. § 152(11)) defines a “supervisor” as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An individual is a statutory supervisor, as defined in Section 2(11), if she holds the authority either to perform or effectively to recommend any one of the 12 supervisory functions enumerated in the statute, and if her “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712-13 (2001) (quotation omitted). *Accord Oakwood Healthcare, Inc.*, 348 NLRB

²⁹ *Accord East Bay*, 483 F.3d at 633; *Providence*, 121 F.3d at 551. Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera*, 340 U.S. at 477.

686, 687 (2006).³⁰ The burden to prove an individual’s supervisory status by a preponderance of the evidence rests with the party asserting it. *Oakwood*, 348 NLRB at 694. *Accord Kentucky River*, 532 U.S. at 710-12.

Before this Court, Barstow has dropped any claim that Sanders engaged in the responsible direction of others (which it had argued before the Board), and now bases its defense entirely on the claim that Sanders “assigned” with independent judgment as acting CC. In determining whether an individual exercises a supervisory function with “independent judgment,” rather than in a “routine or clerical” manner, the Board looks at the “degree of discretion” involved in making the decisions at issue. *Oakwood*, 348 NLRB at 693 (emphasis omitted). “[A]t a minimum,” the alleged supervisor must “act . . . free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* Judgments dictated or constrained by detailed written or oral policies or instructions are not “independent.” *Id.*

While the Board agreed that Sanders “assigned” work to others under the statute, it reasonably determined (ER 249) that Barstow failed to show that she did so with the independent judgment necessary to qualify as a statutory supervisor. To show otherwise, Barstow relies (Br. 40-41) on a few isolated statements in the

³⁰ A third requirement, that the authority be held “in the interest of the employer,” *Kentucky River*, 532 U.S. at 713; *Oakwood*, 348 NLRB at 687, is not at issue here.

record. It cites testimony that, in assigning work, CCs would sometimes consider how long nurses had been at Barstow, their years of nursing experience, and whether they were experienced in a specialty required for a particular vacancy (ER 136-37, 142), and refers the Court to testimony that a CC might have to evaluate whether a department's resistance to taking a new patient is warranted (ER 107). The record, however, also contains substantial evidence to the contrary, both in the form of Sanders' account of her actual experiences as acting CC and through Barstow's witnesses' testimony regarding the primacy of The Brains and the sometimes limited responsibilities of acting CCs. *See, e.g.*, ER 32-33, 59-60, 141, SER 3-6, 9-10.

The Board explicitly declined to resolve that testimonial conflict. (ER 249.) Instead, it reasonably found (ER 249 n.2) the paucity and conclusory nature of Barstow's evidence suggesting discretion in the CC's implementation of The Brains – *even assuming* it would be fully credited over contradictory testimony – insufficient to satisfy Barstow's burden to prove independent judgment by a preponderance of the evidence.

The Board has long required specific evidence and concrete examples to establish supervisory status, and has made clear that broad assertions like the ones at issue here are inadequate. *See Avante at Wilson, Inc.*, 348 NLRB 1056, 1056-57 (2006) (holding employer failed to establish supervisory status where testimony

generally asserted the existence of the supervisory function at issue but failed to “particularize” when or in what context it was exercised, which personnel were involved, whether management was consulted, or any other similar details); *Chevron Shipping Co.*, 317 NLRB 379, 381 n.6 (1995) (rejecting supervisory determination based on conclusory evidence); *Sears, Roebuck & Co.*, 304 NLRB 193, 193 (1991) (“[C]onclusionary statements made by witnesses in their testimony, without supporting evidence, do[] not establish supervisory authority.”).

In *Lynwood Manor*, for example, the Board held that testimony very similar to Barstow’s witnesses’ here was insufficient to establish independent judgment. 350 NLRB 489 (2007). In that case, a nurse testified that she “determine[d] staffing needs based on her assessment of patient acuity, the oral report of the prior shifts, and the 24-hour report.” The Board noted the lack of any evidence that staffing decisions were tailored to account for patients’ needs, the staff’s abilities, or the time required to treat different medical conditions. *Id.* at 490. Both *Lynwood* and this case contrast with *Oakwood*, where the Board found independent judgment based on testimony – containing a number of specific examples – that charge nurses, guided by employer policies, had actually considered various

factors in making assignments, including staff skills, work loads, and patient needs.

Oakwood, 348 NLRB at 696.³¹

In sum, even crediting Barstow’s witnesses, Barstow failed to demonstrate that acting CCs enjoy the level of autonomy required to qualify as statutory supervisors. Many of the acting CCs’ “discretionary” decisions closely track examples the Board specifically declared insufficient in *Oakwood*, notably maintaining the nurse-patient ratios set forth in *The Brains* or equalizing patient loads on the two medical-surgical floors. 348 NLRB at 693 (explaining that an assignment “dictated or controlled by detailed instructions” such as fixed nurse-patient ratios, or “made solely on the basis of equalizing workloads[,] . . . does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data”).³²

³¹ See also *Loyalhanna Care Ctr.*, 352 NLRB No. 105, 2008 WL 2616528, *3 (2008) (holding employer failed to show independent judgment when manager “testified generally that [alleged supervisors] ‘determine the acuity level . . . of the residents on the floor’ and reassign staff accordingly, such as by assigning more than one aide to a particular patient,” but provided no concrete evidence that alleged supervisors matched skills of staff to particular patients’ needs).

³² Accord *Lynwood Manor*, 350 NLRB 489, 490 (2007) (citing *Oakwood* and holding employer had “not established that the reassignment of a[n aide] from one nursing unit that is overstaffed to another that is understaffed involves anything more than the ‘mere equalization of workloads’”); *Golden Crest Healthcare*, 348 NLRB 727, 730 n.9 (2006) (citing *Oakwood* and explaining that altering workloads to balance quantity of work is routine and does not implicate independent judgment).

More fundamentally, not only did Barstow provide acting CCs with “detailed instructions and policies” by way of its aptly nicknamed book, *The Brains*, but there is also ample evidence that it expected the CCs to adhere to those hospital procedures. (ER 77, 129, SER 7-8, 13.)

C. The Board Reasonably Declined to Reopen the Record on Remand to Admit Evidence Relevant to an Untimely Affirmative Defense

Barstow contests the Board’s denial of its motion to reopen the record. It argues that the denial is inconsistent with the Board’s typical practice of applying newly announced rules to ongoing cases, and inequitably prevents Barstow from establishing a new affirmative defense based on Sanders’ purported supervisory status as an RN. Those arguments, however, misconstrue both the procedural history of this case and the applicable law.

As an initial matter, contrary to Barstow’s suggestion (Br. 31) (citing *SNE Enterprises*, 344 NLRB 673 (2005)), the Board explicitly applied *Oakwood*’s new supervisory standard retroactively to the argument Barstow has pressed since the beginning of this litigation: it remanded the case to the judge for reconsideration of Sanders’ supervisory status as acting CC in light of *Oakwood*, allowed the judge discretion to reopen the record if necessary, and later reviewed the judge’s supplemental decision under the new standard. On remand, however, Barstow’s motion to reopen sought to present evidence regarding a brand new, and thus

untimely, defense – Sanders’ supervisory status as an RN. Barstow’s motion did not suggest that Barstow would proffer any evidence newly relevant in light of *Oakwood* regarding the only disputed issue in this case – Sanders’ supervisory status as acting CC. Consequently, the Board reasonably denied the request to reopen and applied the *Oakwood* standard to analyze (and reject) Barstow’s only timely defense.

In order to prevail in its efforts to reopen the record, Barstow would have to persuade this Court that the Board abused its “considerable discretion” in denying its motion. *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1300 (9th Cir. 1991) (quotations omitted). But far from constituting an abuse of discretion, that denial is consistent with the Board’s practice of remanding cases for development of further evidence regarding *already litigated* issues in light of new law, exemplified by the cases Barstow cites in its brief.³³ Barstow cites no case for the proposition

³³ See *United Cerebral Palsy of New York City*, 343 NLRB 1, 1 & n.2 (2004) (explaining that employer had argued employees’ supervisory status in earlier proceeding, and that Board had remanded case and reopened record “for further consideration of whether the disputed employees are supervisors” in light of Supreme Court decision); *The Majestic Star Casino, LLC*, 335 NLRB 407, 408 (2001) (remanding for reopening of record regarding supervisory status issues already litigated by parties and decided by hearing officer, in light of Supreme Court decision); *Grandview Health Care*, 322 NLRB 54, 54 n.1 (1996) (describing remand and reopening of record upon grant of reconsideration of Board decision adjudicating fully litigated supervisory issue in light of Supreme Court decision); *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1192 & n.3 (1994) (noting remand for new hearing to elicit *further* evidence regarding certain employees’ supervisory status in light of Supreme Court decision but also holding RNs were

that the Board must – or regularly chooses to – reopen the record in its cases to receive evidence relevant to newly raised issues like Barstow’s RN-supervisor defense here. Nor, as demonstrated below, has Barstow raised any equitable or other issue that would warrant the Board or this Court giving it a second crack at justifying its otherwise plainly unlawful interrogation, suspension, and discharge of Sanders.

1. Barstow forfeited its opportunity to argue that Sanders was a supervisor in her role as an RN

Under well-established Board law, an argument not raised before the conclusion of the administrative hearing in a case is untimely. *See Yesterday’s Children, Inc.*, 321 NLRB 766, 766 n.1 (1996), *enforced in relevant part*, 115 F.3d 36, 47 (1st Cir. 1997); *Nursing Ctr. at Vineland*, 318 NLRB 337, 337 (1995); *Cliffstar Transp. Co.*, 311 NLRB 152, 152 n.4 (1993).³⁴ By its own admission (Br. 4-6, 27, 35), Barstow argued, before both the judge and the Board, only that Sanders was a supervisor *when acting as CC*. Barstow asserts that it “instantly augmented” its supervisory defense upon the post-*Oakwood* remand (Br. 35) –

not supervisors, without remand or rehearing, based on lack of any evidence of their supervisory status in original hearing).

³⁴ *Cf. United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”).

which occurred 3 years after this case started – to include a claim that Sanders was a supervisor *in her role as RN*. But the Board reasonably found (ER 248 n.3) that Barstow had long since waived any such argument by failing even to suggest it before the close of the hearing, much less in its post-hearing brief to the judge or exceptions to the Board. The Board’s refusal to let Barstow inject a new defense in the middle of this case is thus unexceptional, and Barstow has not given this Court any valid reason to override that decision.

To the contrary, Barstow’s contention (Br. 27-28) that it had “no earthly reason . . . (at least in good faith)” to anticipate a possible RN-supervisor defense is disingenuous at best and, frankly, somewhat perplexing.³⁵ Barstow describes (Br. 27) *Oakwood’s* “most important[.]” change – presumably the basis for any assertion that the Board and this Court should ignore Barstow’s procedural waiver of the RN-supervisor defense – as the express abandonment of the Board’s “previous position that a party could not prove a putative supervisor’s independent judgment based upon her ordinary professional or technical judgment.” But nearly 2 years before the Complaint issued in this case (and well over a year before

³⁵ There is even less merit to Barstow’s suggestion (Br. 30-31), based on *Nursing Center at Vineland*, that the Board might have considered a timely RN-supervisor defense frivolous or unethical. 318 NLRB 337. As Barstow acknowledges (Br. 31-32), the employer in that case, which involved multiple related proceedings, affirmatively argued that the same individuals had, variously, both supervisory and non-supervisory status depending, apparently, on which was most advantageous to the employer at the time. 318 NLRB at 338 n.7.

Barstow unlawfully suspended, interrogated, and fired Sanders for union activities), the Supreme Court, in *NLRB v. Kentucky River Community Care*, held that the Board's technical/professional limitation on "independent judgment" was "unlawful," necessarily setting the stage for a change in Board law. 532 U.S. 706, 714, 721 (2001). *Oakwood* is the Board's response to *Kentucky River*.

Incredibly, Barstow still essentially asks this Court to find that, as it formulated its defense, it had neither any reason to expect a material change in the Board's supervisory-status test nor any opportunity to develop evidence regarding Sanders' role as an RN in the first instance (Br. 26-30, 33, 38). To the contrary, Barstow had every reason to foresee the possibility of a significant change in the Board's supervisor test – given that the Supreme Court had mandated one in *Kentucky River*, a case that itself involved the supervisory status of RNs.

The bottom line here is that Barstow made a deliberate – and not, as it argues, "entirely understandable" (Br. 27) – choice, for whatever reason, not to develop a record regarding Sanders' duties as an RN or to argue that she qualified as a supervisor in that role. And, as demonstrated above, it made that choice with the full knowledge that Board law on supervisory status, particularly in the healthcare context, was unsettled. It cannot now use *Oakwood* to reconsider a questionable strategic decision even if, as it asserts (Br. 36-38), a remand would change the outcome of this case. That assertion, if true, proves only that Barstow

made a bad call, not that the Board somehow owes it a chance to try again.

Similarly, Barstow's "equitable" argument (Br. 38-39), that it should not be forced to reinstate a putative supervisor, asks this Court both to accept the unproven (by choice) contention that Sanders is a supervisor and to insulate Barstow from the consequences of its own litigation strategy. In other words, Barstow's outcome-based and equitable arguments lose any power to persuade when viewed in light of its failure to preserve the reasonably foreseeable RN-supervisor defense.

2. Barstow's contention that Sanders was a supervisor in her role as RN is a waivable affirmative defense, not jurisdictional

Barstow's remaining contention, that the RN-supervisor defense is a subject-matter-jurisdiction challenge, unwaivable by choice or negligence (Br. 33-36), does not hold water. The proposition that the Board lacks authority to adjudicate an alleged unfair labor practice *once it determines* that the putative discriminatee is a statutory supervisor is unremarkable. The Board itself recognizes that limit on its authority. *See Parker-Robb Chevrolet*, 262 NLRB 402, 402-04 (1982) (acknowledging "the general exclusion of supervisors from coverage under the Act"), *rev. denied sub nom. Automobile Salesmen's Union, Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). *See also Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 918 (3d Cir. 1981) (holding the Board had no authority to remedy *conceded* supervisor's discharge for threatening to institute Board action

against employer, even to protect access to its process).³⁶ But that initial supervisory determination is a highly factual one and lies squarely within the Board's expertise and jurisdiction under the Act.³⁷ When the party bearing the burden of proof and persuasion on the supervisory issue fails even to suggest it in a timely manner, the Board and the courts have had no trouble finding the issue waived.³⁸

As Barstow acknowledges (Br. 34), this Court has distinguished between non-waivable jurisdictional arguments that involve the Board's "power to hear and

³⁶ The discharge of supervisors may be unlawful when it interferes with non-supervisory employees' rights under the Act, *Parker-Robb*, 262 NLRB at 404, but that exception is not at issue in this case.

³⁷ See *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997) ("Because the Board has expertise 'in making the subtle and complex distinctions between supervisors and employees, ... the normal deference [we] give to the Board is particularly strong when it makes those determinations.'") (citation omitted). *Providence* also illustrates the fact-intensive analysis required to make a supervisory determination.

³⁸ See, e.g., *NLRB v. Konig*, 79 F.3d 354, 359-62 (3d Cir. 1996) (finding supervisory argument waived when not raised before the Board, and explaining that "the facts upon which the Board determines it has jurisdiction may be challenged only upon timely exception.") (internal citations omitted); *Yesterday's Children, Inc.*, 321 NLRB 766, 766 n.1 (1996) (denying as untimely employer's motion to amend answer and supplement record to argue employee was statutory supervisor), *enforced in relevant part*, 115 F.3d 36, 46-47 (1st Cir. 1997) (agreeing that employer waived supervisory argument by failing to raise it in a timely manner under the Board's procedures). Cf. *St. Barnabas Hosp.*, 334 NLRB 1000, 1000 n.2 (2001) (declining to reopen record to examine discriminatees' supervisory status when employer had presented no evidence of such status at the hearing or in its brief), *enforced mem.*, 46 F. App'x 32 (2d Cir. 2002).

determine the controversy,” or “patently travel outside the orbit of [the Board’s] authority,” and waivable arguments that, like the RN-supervisor defense, involve “jurisdiction in the sense of the power under the authority of the [Act] to act under the particular circumstances which a labor relations controversy presents.”

Polynesian Cultural Ctr., Inc. v. NLRB, 582 F.2d 467, 472 (9th Cir. 1978) (finding employer waived First Amendment challenge to Board’s jurisdiction) (citing *NLRB v. Cheney California Lumber Co.*, 327 U.S. 385, 388 (1946) and *NLRB v. Ochoa Fertilizer*, 368 U.S. 318, 322 (1961)).³⁹

The supervisory defense explicitly emanates from the language of the Act and thus constitutes a challenge to the Board’s jurisdiction in the latter, waivable sense. Moreover, the fact-specific nature of the supervisory inquiry undermines any suggestion that a case could be “patently” beyond the Board’s authority because of a contested supervisory issue. *Compare Carroll College, Inc. v. NLRB*, 558 F.3d 568, 574 (D.C. Cir. 2009) (holding religiously affiliated college “patently beyond the [Board’s] jurisdiction” because Board “should have known immediately” that college satisfied “bright-line” jurisdictional test court had established for First Amendment exemption from Act’s bargaining requirements).

³⁹ *Cf. St. Elizabeth Comm. Hosp. v. NLRB*, 626 F.2d 123, 125 (9th Cir. 1980) (finding employer’s assertion of First Amendment challenge to Board’s jurisdiction late in representation proceeding adequate to preserve it, but distinguishing rather than overruling *Polynesian*, which found waiver of same jurisdictional issue).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court grant its application for enforcement, and enter a judgment enforcing in full the Board's Order.

s/Fred B. Jacob
FRED B. JACOB
Supervisory Attorney

s/Kira Dellinger Vol
KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th St., NW
Washington, D.C. 20570
(202) 273-2971
(202) 273-0656

RONALD E. MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

August 3, 2009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner	*
	* No. 09-70771
v.	*
	* Board No.
BARSTOW COMMUNITY HOSPITAL -	* 31-CA-26057
OPERATED BY COMMUNITY HEALTH	*
SYSTEMS, INC.	*
	*
Respondent	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,993 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the Board notes that *NLRB v. United Food & Commercial Workers Union, Local 4* (9th Cir. No. 09-70922) also raises the issue of whether Chairman Schaumber and Member Liebman acted with the full powers of the Board.

Dated at Washington, DC
this 3rd day of August 2009

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner	*
	* No. 09-70771
v.	*
	* Board No.
BARSTOW COMMUNITY HOSPITAL -	* 31-CA-26057
OPERATED BY COMMUNITY HEALTH	*
SYSTEMS, INC.	*
	*
Respondent	*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date served two copies of the Board's brief in the above-captioned case by first-class mail upon the following counsel at the addresses listed below:

Don T. Carmody, Esq.
Law Offices of Don T. Carmody
P.O. Box 3310
Brentwood, TN 37024-3310

Michael Tumble
Barstow Community Hospital -
Operated by Community Health
Systems, Inc.
555 South Seventh Avenue
Barstow, CA 92311

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

Dated at Washington, D.C.
this 3rd day of August, 2009