

No. 09-60327

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

**OAKTREE CAPITAL MANAGEMENT, L.P.,
TBR PROPERTY, L.L.C. d/b/a TURTLE BAY RESORTS
AND BENCHMARK HOSPITALITY, INC.**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument would be of assistance to the Court.

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Oaktree Capital Management L.P. (“Oaktree”), TBR Property, L.L.C. (“TBR”) d/b/a Turtle Bay Resorts (“the Resort”), and Benchmark Hospitality, Inc. (“Benchmark”), collectively “the Company,” to review and set aside, and on the cross-application of the National

Labor Relations Board (“the Board” or the “NLRB”) to enforce, a Board Order issued against the Company. The Board’s Decision and Order issued on March 31, 2009, and is reported at 353 NLRB No. 127.¹

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act” or “the NLRA”), which authorizes the Board to prevent unfair labor practices affecting commerce. The Company’s petition and the Board’s cross-application were timely; the Act imposes no time limitation on such filings.

The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the Board’s Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). However, because the Company challenges the Board’s Order on that basis, that question is now presented for decision.

¹ “D&O” refers to the Board’s Decision and Order. “Tr” refers to the transcript of the hearing before the administrative law judge. “GCX” and “RX” refer, respectively, to General Counsel and Respondent exhibits introduced at the hearing. “Br” refers to the Company’s brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

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 the Board is entitled to summary enforcement of its uncontested findings.

3. Whether substantial evidence supports the Board's finding that Oaktree and TBR are a single employer.

4. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing the access provision of the collective-bargaining agreement and thereafter preventing union representatives from collecting union dues.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by Unite Here! Local 5 ("the Union"), the Board's General Counsel issued a consolidated complaint, alleging that the Company had committed numerous unfair labor practices against union representatives and its employees during the Union's attempt to secure a new collective-bargaining agreement in 2004 and 2005. (D&O1,6-7;Tr404,GCX1(a)-(jjj),(eeee),(gggg).) A Board administrative law judge conducted a hearing and

found that the Resort had committed most of the violations alleged in the complaint. (D&O6-47;Tr135-36,404-05,2052-55.) The Resort filed exceptions to the judge's decision and recommended order. The Board (Chairman Schaumber and Member Liebman) issued its Decision and Order affirming, as modified, the judge's rulings, findings and conclusions.

STATEMENT OF FACTS

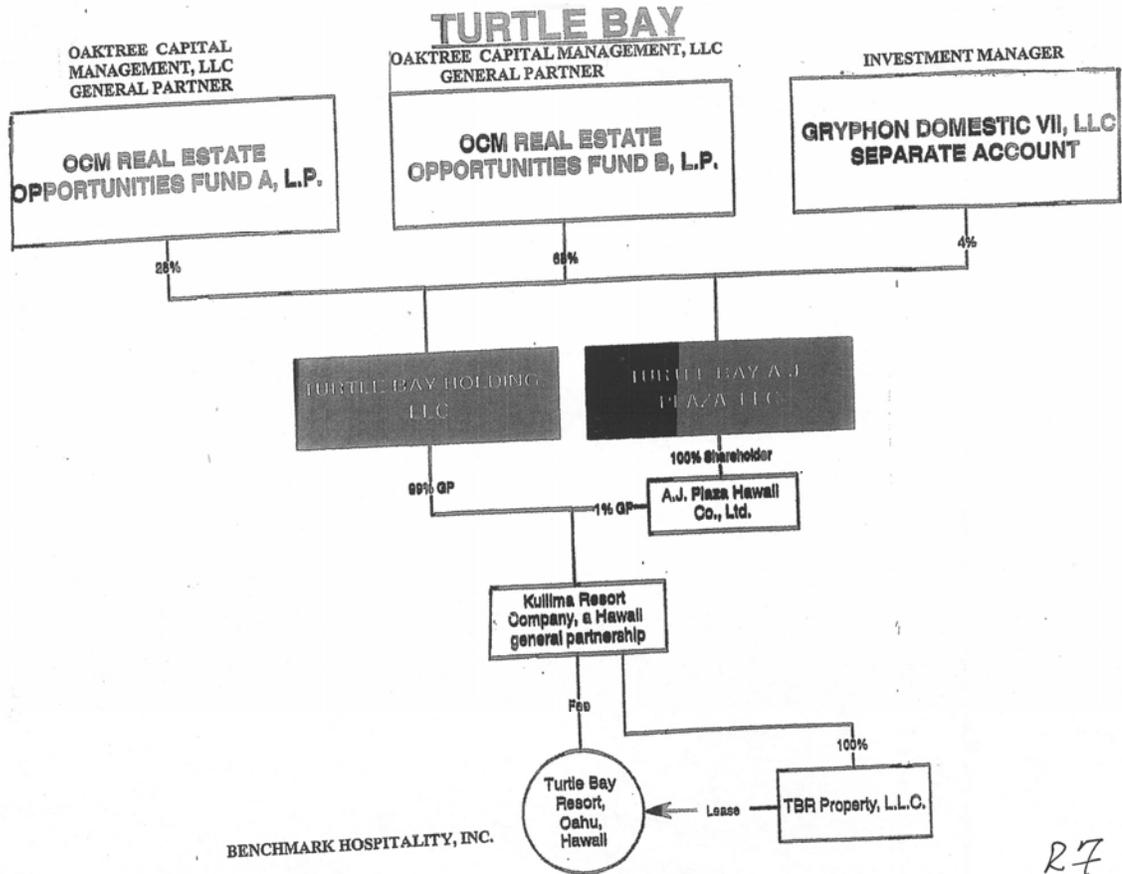
I. THE BOARD'S FINDINGS OF FACT

A. Background; the Resort's Operations and Ownership

Oaktree purchased the Resort in 2000. (D&O7;Company's brief to the Administrative Law Judge p.4,GCX 10 p.14.)² Thereafter, Oaktree invested \$50 million to renovate and upgrade the Resort, which is located on the island of Oahu in Hawaii. (D&O7;Tr143,145, 247,GCX 16,19.) The Resort has 535 employees, of which 360 are union members. They are covered by a collective-bargaining agreement from a predecessor employer that was extended by the Resort through November 25, 2003. (D&O1,7,9;Tr6,143-44,158,250,1148-50,3336,GCX 2,54.)

The ownership and control of the Resort, as shown in the Resort's exhibit reproduced here, is maintained through several intermediate companies, including TB Holding, TBR, and Kuilima. (RX7.)

² The Board has lodged with this Court page 4 of the Company's brief to the Administrative Law Judge.



In sum, Oaktree, through three separate funds or accounts, owns Turtle Bay Holding, LLC (“Turtle Bay Holding”) and Turtle Bay AJ Plaza, LLC (“AJ Plaza”). The partnership of Turtle Bay Holding (99 percent) and AJ Plaza Hawaii, Co., Ltd. (1 percent), a wholly owned subsidiary of AJ Plaza, owns Kuilima Resort Company (“Kuilima”). Kuilima is the record owner of the Resort. TBR is a wholly owned subsidiary of Kuilima, and it leases the Resort from Kuilima. In turn, TBR entered into a management agreement with Benchmark for Benchmark

to manage and operate the Resort. (D&O7;8,9;Tr139-40,142,1574-75,1589-90, 1654,GCX17,18.)

Russell Bernard, Marc Porosoff and Stephanie Schulman hold multiple roles in the entities. Bernard serves as a: 1) principal of Oaktree and portfolio manager for its real estate funds, which include the Resort; 2) general partner of Kuilima; 3) president of TBR; and 4) asset manager for the Resort. (D&O7;Tr1598,1602-04,1610-11,1618-19,1634-36.) Porosoff serves as: 1) senior vice-president, legal, of Oaktree; and 2) vice-president and treasurer of TBR. (D&O7;Tr1566,1614-15,1641.) Schulman serves as: 1) in-house counsel for Oaktree, through which she works with Porosoff; and 2) vice-president and secretary of TBR. (D&O7;Tr1642.)

The lease agreement was executed on behalf of both Kuilima and TBR by Oaktree “its manager,” and the management agreement was executed on behalf of TBR by Oaktree “its manager.” Both were signed by Bernard, as the principal of Oaktree, and Porosoff, as the senior vice-president of Oaktree. (D&O7;Tr1615-16,GCX 17p.44,GCX18.) Porosoff assisted in negotiating the management agreement. (D&O7;Tr1643,1645.) The management agreement listed TBR at the same address as Oaktree, with correspondence to TBR in “C/O Oaktree,” “Attention Russell [] Bernard and Marc Porosoff.” (GCX17 p.37.)

The management agreement between TBR and Benchmark provides that TBR remains liable for all operating expenses of the Resort, including all payroll and employee benefits. (D&O7;GCX 17 pp.5-6,16-17,22-24.) All revenues Benchmark derives from its management and operation of the Resort are deposited into accounts that TBR controls. Bernard and Porosoff are signatories on those accounts and can withdraw funds from them. (D&O7;Tr1618-19,GCX 17 pp.22-24.) Oaktree requires production companies to obtain insurance protecting Oaktree before they can film at the Resort. (D&O8;Tr2617-21,GCX69.) Oaktree also executed an “Employment Practices Insurance Application” on behalf of the Resort. (D&O8;Tr2625,GCX 71.)

Hy Adelman, a representative of Oaktree, maintains an office and residence on the Resort’s grounds, and is the “the person responsible for the overall resort.” (D&O7;Tr143,2593,2596,GCX65.) Oaktree is required to approve equipment leases for the Resort. Adelman meets with Abid Butt, Benchmark’s vice president, and the Resort’s general manager, concerning the Resort’s operation and management. (D&O7-8;Tr2576,2591-92,2596.) Adelman handles these matters, in one case authorizing and approving an equipment lease signed by TBR. Adelman also approves purchases of housekeeping supplies for the Resort. (D&O8;Tr2629-32,GCX 72,73.)

TBR and Benchmark “have control over labor relations or personnel matters” at the Resort. (D&O8;GCX 1(ttt)p.2 n.1,(uuu)p.2 n.1,(bbbb)p.2 n.1, (dddd)p.2 n.1,(iiii)-(kkkk).) The management agreement requires TBR to authorize and approve any negotiations with a labor union and any proposed collective-bargaining agreement. (D&O8;GCX17pp.20-21.)

Bernard required the Resort’s Human Resources Director Nancy Ramos to provide information on the Resort’s employees and their salaries to him for an “owners report.” (D&O8;Tr407-08.) Bernard participated in at least two negotiating sessions with the Union in which he was primarily involved in discussing and approving the Resort’s economic package. (GCX 63,Affidavit of Eileen Santoli pp.6,8.) In addition, union representative Eric Gill has spoken to Bernard about open issues, and Bernard “reviewed and approved” a subcontracting proposal before it was sent to the Union. (Tr1677-78,GCX 63, Affidavit of Eileen Santoli p.13 and Exhibits 4,5(a).)

In an April 24, 2003 letter written on Oaktree letterhead addressed to his “partners,” and signed as a “principal,” Bernard discussed the status of negotiations with the Union. (GCX16.) Bernard wrote:

You may have recently received correspondence from [the Union that represents] employees at our [] Resort. . . . We would like to assure you that, contrary to the [U]nion’s assertions, we have been acting in good faith to reach a fair and equitable agreement with [the Union]. . . . Since our funds acquired 100% ownership and control of the [] Resort in the fourth quarter of 2000, we have worked diligently to turn

around the property, guided by the principle that if the hotel is successful, then the employees will be among the beneficiaries of that success. . . . [W]e have invested approximately \$50 million over the last two years to renovate [the Resort]. . . . We wish [the Resort's] performance allowed us to offer [the Union] the generous contract it wants. However, the hotel has not been profitable for years, which is the main reason we were able to buy it at an attractive price. . . . Before we can give [the Union] the contract it wants, the hotel must make money. . . . In the meantime, we believe we have offered [the Union] a fair and equitable agreement.

(GCX16.)

B. The Company's Overbroad Restrictions on Employee Solicitation and Access to the Resort; the Union's Right to Access the Resort

The Company's handbooks restrict employee solicitation and distribution in working and public areas. They also restrict when employees can be at the Resort and require management approval before employees or their families can visit.

(D&O10-11;GCX 9 p.2,GCX10 pp. 33,37-38,40-41.)

The expired collective-bargaining agreement, most of whose terms the Company does not dispute survived its expiration,³ states that "[a]uthorized representatives of the Union shall be free to visit the hotel at all reasonable hours and shall be permitted to carry on their duties, provided they shall first notify the management or its designated representative, and there shall be no interference

³ See *U.S. Steel Wkrs. of America, AFL-CIO v. Asarco, Inc.*, 970 F.2d 1448, 1452 (5th Cir. 1992); *NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 403-04 (5th Cir. 1984).

with the normal conduct of business.” (D&O9;GCX 2 p.7.) Since 2002, when Business Agent Marian Marsh was assigned to the Resort, she has gone to the Resort about twice a week for union-related matters. Marsh regularly met with employees in the employee cafeteria during their breaks and lunchtime.

Occasionally, other union representatives also went to the Resort.

(D&O9,10;Tr699-708,752-53,872-73,889,1164-65.)

C. On February 12, 2004, the Company Precludes Union Representatives and Employees From Holding a Rally On a Public Beach Adjacent to the Resort

Public beaches are located on either side of the Resort. Because the Resort controls the land over which the public needs to travel to access those beaches, it has dedicated a separate parking lot at its facility for members of the public who want to use the public beaches, and it gives passes to those who want to access the public beaches. (D&O11-12;Tr3380-84,GCX 8,RX 46.)

In February 2004, the Union and the Resort were engaged in bargaining over a new collective-bargaining agreement. On February 12, 2004, Marsh and Union representative Claire Shimabukuro led approximately 50 employees and 25 union supporters in a 15-minute rally a public beach to demonstrate support for the Union’s bargaining efforts. (D&O11;Tr727-28,GCX 8.) The participants carried signs, chanted slogans, and gave speeches. (D&O11;Tr729,896-97.)

Although the group remained on the public beach, the noise led three men congregating at the Resort's pool area to confront the group in "a belligerent and threatening way." Security officers at the Resort witnessed the men demand the demonstrators leave the beach, try to pull a sign away from Marsh, wrestle a bullhorn from Shimabukuro's hands, and threaten to throw her into the ocean. (D&O11;Tr729-31.)

Chief of Security Thomas Dougher eventually interceded and told the men that he would handle the situation. (D&O11;Tr731-32,905,3361.) Dougher told Marsh, "This is illegal. You shouldn't be here. You have to leave." (D&O11;Tr905-906.) Marsh and Shimabukuro then led the group off the public beach, with the intention of resuming the demonstration on the public beach located on the other side of the Resort's property. (D&O11;Tr732,906.) As the group proceeded along the access road toward that beach, they were blocked by Dougher and other security officers. Dougher told the group that they could not go to the beach, and a security officer told them that needed a pass to enter the beach. (D&O11;Tr732-33.) The demonstrators went to the Resort's entrance to obtain a pass, but upon arriving, were met by police officers summoned by the security officers who told them that the Company wanted them to leave the property and warned of arrest unless they complied. (D&O12;Tr733-36,1367.) The group disbursed. (D&O12;735-37.) As Marsh was going to her car, a police officer told

her the Resort was preparing a trespass notice for her. She told the officer that the Resort could fax it to her and left. (D&O12;Tr736-37.)

D. On February 14 and February 18, the Company Evicts Union Representative Marsh from the Resort and Issues Trespass Notices to Her

On February 14, Marsh was meeting with employees in the employee cafeteria when Dougher told Marsh that she was not permitted on the Resort's property because she was trespassing, and because she had already received a verbal trespass notice on February 12. The security office also notified the police. Marsh ultimately complied with Dougher's directive and left. Dougher and the security officers followed Marsh to her car. Dougher told Marsh, "I'm trespassing your car." The security officers escorted Marsh down the Resort's access road and out to the highway. (D&O12;Tr744-45,3623-24,GCX46.)

On February 18, Marsh and Shimabukuro were in the employee cafeteria speaking to a unit employee. A security officer issued them trespass notices, and directed them to leave. The security officer explained that whenever a union representative came to the Resort, he was under orders from Dougher to call the police, issue trespass notices, and escort them off the Resort's property. (D&O12;Tr747-51,754-55,931-34,GCX47.)

E. On March 25, the Company Photographs or Videotapes Union Representatives and Employees as They Gather in Front of the Resort Prior to a Lawful Demonstration

On March 25, approximately 50 people, mostly union members from other locations, gathered on a highway outside the Resort's grounds to rally in support of the employees' efforts to obtain a new bargaining agreement. As the group gathered, two security guards held video cameras pointed toward the group, appearing to videotape them. (D&O13;Tr981-85,991-92,1051-52,1078,1277,1314-15,3321,GCX8,50.)

F. On April 28, the Union Requests Information from the Company

On April 28, the Union, in connection with the ongoing negotiations, sent a letter to a Resort attorney requesting information on condominiums being built at the Resort. (D&O28;GCX 42.)

G. On May 6, the Company Informs the Union that It Cannot Collect Union Dues at the Resort, and Thereafter the Company Prevents the Union From Collecting Union Dues

The collective-bargaining agreement between the Company and the Union required the Resort to deduct union dues, as authorized, from employees' wages. In April 2004, after the agreement expired, the Company declined to comply with

that provision. (D&O16;Tr957,1159,3798,GCX2p.4.)⁴ Marsh posted a notice to employees that the Union would collect dues. (Tr777,951,1159-60.) During a May 6 telephone conversation, Director of Human Resources Ramos told Marsh that the Union was prohibited from collecting dues on the Resort's grounds because union dues collection constituted solicitation, and the Resort had a "no solicitation" policy. (D&O9,16;Tr140,776-77.) Ramos confirmed her statement in a May 6 letter to Marsh, which stated, "Please be advised that we will not be allowing Business Agents or . . . [union] staff[] on property to solicit union dues from our employees." (D&O16;Tr170-71,GCX3(a).)

On May 24, two union representatives went to the Resort's cafeteria to collect union dues. A few minutes after they arrived, Dougher ordered them to leave and called the police. After a discussion with the police officers, the union representatives left the Resort. (D&O16-17;Tr1787-97.)

On June 22, Shimabukuro was at the Resort's cafeteria collecting union dues. A security officer, followed by Dougher, told Shimabukuro that she could not collect dues on the Resort property. She left after police officers called by the Resort directed her to leave, and after a security officer issued her a "Trespass Warning." (D&O18;Tr1269-74,3217-22,GCX 37(b).)

⁴ There is no allegation that such conduct was unlawful. The Board has held that an employer's dues-checkoff obligation terminates at contract expiration. *Hacienda Resort Hotel & Casino*, 331 NLRB 665, 666-67 (2000).

H. The Union Requests Information from the Company on August 30 and September 13; In October, the Company Reiterates that the Union Cannot Collect Dues at the Resort and Threatens to Close In Response to Union Activity

On August 30, the Union sent another letter to the Resort requesting additional information on the condominiums it was building. (D&O28;GCX43.)

On September 13, the Union sent a letter to the Resort requesting monthly gross earnings paid to bargaining unit members. (D&O28;GCX40.)

In an October 3 letter from Ramos to Marsh, Ramos reiterated that the Resort “will not allow union dues to be collected on resort property.” (D&O16;GCX 3(c).)

On October 22, Benchmark Vice-President and the Resort’s General Manager, Abid Butt, distributed a memorandum that criticized the Union’s tactics in seeking to reach a new agreement. The memo stated, in part, “the [U]nion has made a terrible mistake. We would rather close the Resort. . . . [.]” and warned employees not “to stand by in silence while you watch your jobs disappear[.]” (D&O20;GCX 6.)

I. During February and March 2005, Security Officers at the Resort Follow Union Business Agent Harmon and Eavesdrop on Her Conversations With Employees; on March 5 Dougher Disparages Harmon and Threatens to Discipline Employees for Talking to Her

In January 2005, Kimberly Harmon replaced Marsh as the union business agent at the Resort. (D&O20;Tr1392,1403.) On February 10, Harmon was talking

to an employee about a work issue when they noticed two security officers following and observing them. The employee immediately ended the conversation and departed. One of the security guards admitted to Harmon that he was following her. (D&O22;Tr1451-54,1822-27.)

On March 3, a security officer stopped within a few feet of Harmon as she talked to four employees in the parking lot about work issues. Three of the employees ended their conversation with Harmon and got into a car. As Harmon continued to talk to the fourth employee, the security officer said, "That's enough, that's enough," and the employee ended her conversation with Harmon.

(D&O22;Tr1538-44,1828-37,1853.) Later that day, Harmon tried to meet with another employee in the cafeteria, but the conversation ended when they saw a security officer sitting at the table next to them. (D&O22;Tr1455-59,1461,1533-34.)

On March 5, Harmon was conducting union business in the cafeteria when Dougher entered. In a loud voice Dougher repeatedly called Harmon stupid, stated that he could tell Harmon where she could and could not go, and asserted that he would discipline any employee that Harmon spoke to outside of the cafeteria.

(D&O22; Tr1473,1476-82,1493.)

On March 10, Harmon met with an employee at the loading dock, so the employee could give Harmon signed petitions that supported the Union's

bargaining efforts. They saw a security officer watching them, and he continued to follow them as they walked to the parking lot and the employee's car. The employee, as inconspicuously as he was able, gave the petitions to Harmon, all the while being monitored by a security officer. (D&O22;Tr1463-73,1867,1879,1910-11.)

J. On May 30, the Company Disciplines Union Supporter Jeannie Martinson; On June 10, It Suspends Union Supporter Timothy Barron For Using the Word "Scab" in a Conversation With Another Employee

On May 21, the Resort employees engaged in a one-day strike. Participating employees included Jeannie Martinson, a 25-year employee, and Timothy Barron, a 28-year employee who was a union steward. (D&O23;Tr323,342,447-48.) Thereafter, the Resort issued a warning to Martinson (D&O23;GCX 21), and suspended Barron for saying "scab" in a conversation with another employee. (D&O23;GCX23,24,29(a).)

K. On July 1, the Company Discharges Union Supporter Mark Feltman

On February 22, 2005, Ramos saw Mark Feltman wearing a union button, and stated, "I thought you signed the antiboycott petition that [another employee] was circulating around the hotel." Feltman said, "No," and Ramos replied, "Oh, oh." (D&O24-25;Tr367,515-16.) A few weeks later, another manager saw

Feltman wearing a union button and told him, "I thought you were [a] more sensible guy, but who am I." (D&O25;Tr140,517,GCX65.)

On May 21, Feltman participated in the one-day strike by walking the picket line with other employees in front of the Resort. (D&O25;Tr521.) Dougher observed Feltman on the picket line. (D&O42;Tr521.)

On July 2, the Resort discharged Feltman for allegedly swearing at another employee. (D&O25,26;GCX 27,28.)

L. On September 14 and 15, the Resort Provided Information that the Union Had Requested a Year Earlier

On September 14 and 15, 2005, the Resort provided information about the condominiums that the Union had requested on August 30 and October 22, 2004. It did not provide information about earnings the Union requested on September 13, 2004. (D&O29;RX 27,28.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by:

- Maintaining overly broad rules in its "Rules and Regulations" and "Staff Handbook";
- Preventing union representatives and employees from going to the public beaches adjacent to the Resort's property to engage in union activity;
- On February 14 and 18, 2004, telling union representatives that they were trespassing and had no right to be on the Resort's property,

issuing trespass notices to them, evicting them from the Resort, and summoning law enforcement officials to remove or assist in removing them;

- On March 25, photographing or videotaping union representatives and employees who were engaged in a lawful demonstration;
- Since May 6, 2004, telling the Union that it could not collect dues at the Resort;
- On October 22, 2004, threatening to close the Resort in response to union activity;
- On February 10, and March 3 and 10, 2005, following union representatives and eavesdropping on their conversations with employees;
- On March 5, 2005, disparaging union representatives and threatening to discipline employees for talking to union representatives.

(D&O3-4,44-45.)

The Board found, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) of the Act by:

- Failing and refusing to furnish, or by unreasonable delay in furnishing, the information requested by the Union in its letters of April 28, August 30, and September 13, 2004;
- On February 14 and 18, 2004, unilaterally changing the access provision of the collective-bargaining agreement.

(D&O3,45.)

Additionally, the Board found, in agreement with the judge, that the Resort violated Section 8(a)(3) and (1) of the Act by taking adverse action against employees because of their protected union activity by:

- Issuing a warning to employee Martinson;

- Suspending employee Barron;
- Discharging employee Feltman.

(D&O4,45.)

The Board's Order requires the Resort to cease and desist from engaging in the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights.

(D&O3.) Affirmatively, the Board's Order requires the Resort to rescind its overly broad rules, provide the information requested by the Union, and continue the access provision of the collective-bargaining agreement until an agreement is reached or there is an impasse on all mandatory subjects of bargaining. (D&O4.)

Additionally, the Order requires the Resort to offer reinstatement to Feltman, to make Feltman and Barron whole, and to expunge from its files any reference to the unlawful actions taken against Feltman, Barron, and Martinson. (D&O4.) Finally, the Order requires the Company to post a remedial notice. (D&O4.)

SUMMARY OF ARGUMENT

Chairman Liebman and Member Schaumber, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order. Their authority to issue Board decisions and orders under such circumstances is provided for in the express terms of Section 3(b), and is supported

by Section 3(b)'s legislative history, cases involving comparable situations under other federal administrative agency statutes, and administrative-law and common-law principles. The Company's contrary argument is based on an incorrect reading of Section 3(b) and a misunderstanding of the nature and extent of the authority delegated to the three-member group.

The Board is entitled to summary enforcement of its uncontested findings of numerous statutory violations and of the corresponding portions of its remedial order. Substantial evidence supports the Board's finding that Oaktree and TBR are a single employer. Ample record evidence supports the Board's finding that the Company acted unlawfully when it denied the Union its contractual right of access on February 14 and 18, 2004, and prevented union representatives from collecting union dues.

ARGUMENT

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

Chairman Liebman⁵ and Member Schaumber, as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the

⁵ On January 20, 2009, President Obama designated Member Liebman as Chairman of the Board. See Susan J. McGolrick, *Obama Designates Liebman as Chairman, Rewarding Her 11 Years of Service on Board*, Daily Labor Report (BNA), No. 13, at p. A-8 (Jan. 23, 2009).

Act, acted with the full powers of the Board in issuing the Board's Order. *Narricot Indus. v. NLRB*, 2009 WL 4016113 (4th Cir., Nov. 20, 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, ___ S.Ct. ___, 2009 WL 1468482 (U.S. Nov. 2, 2009) (No. 08-1457); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328).⁶ *But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377) (discussed below). As we now show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), is consistent with Section 3(b)'s legislative history, and is supported by cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. The Company's contrary argument (Br 67-70) 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.

⁶ The issue has been briefed to this Court in *Bentonite Performance Minerals LLC v. NLRB*, No. 09-60034, and *NLRB v. Coastal Cargo Co.*, No. 09-60156, and several other circuits. It also will be briefed to the Supreme Court, which granted certiorari in *New Process* on November 2, 2009.

A. Background

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

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

29 U.S.C. § 153(b). Pursuant to these provisions, the four members of the Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a group of three members: Liebman, Schaumber and Kirsanow. After the recess appointments of Members Kirsanow and Walsh expired three days later, the two remaining members, Liebman and Schaumber, continued to exercise the delegated powers they held jointly with Member Kirsanow, consistent with the express language of Section 3(b) that a vacancy "shall not impair the right of the remaining members to exercise all of the powers of the Board," and that "two members shall constitute a quorum" of any group of three members to which the Board has delegated its powers. Since January 1, 2008, this two-member quorum has issued over 391

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) 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," and this process begins with looking to the plain meaning of the statutory terms. *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1195 (5th Cir. 1997) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). The meaning of a term, however, "cannot be determined in isolation, but must be drawn from the context in which it is used." *Id.* at 1195-96 (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)). And of course, "a statute must, if possible, be construed in such a fashion that every word has some operative effect." *Id.* at 1196 (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)).

⁷ On November 12, 2009, it was reported that the two-member quorum had issued approximately 538 decisions, published and unpublished. See Susan J. McGolrick, 'We're Poised for Changes' in Labor Law, Chairman Liebman Says at ABA Conference, Daily Labor Report (BNA), No. 216, at p. C-3 (November 12, 2009). The published decisions include all of Volumes 352 NLRB (146 decisions), 353 NLRB (132 decisions), and 354 NLRB (113 decisions as of December 9, 2009).

As relevant to this case, Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate “any or all of the powers which it may itself exercise” to a group of three or more members; (2) a declaration that a vacancy in the Board “shall not impair” the authority of the remaining members to exercise the Board’s powers; and (3) a provision stating that three members shall constitute a quorum of the Board, but with an express exception stating that two members shall constitute a quorum of any group designated pursuant to the Board’s delegation authority.

As the First, Fourth and Seventh Circuits have concluded, the plain meaning of Section 3(b) authorizes a two-member quorum of a properly-constituted, three-member group to issue decisions, even when, as here, the Board has only two sitting members. *See Narricot Indus.*, 2009 WL 4016113, at *3; *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 Land*, 560 F.3d at 41 (“the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of [S]ection 3(b)”).

As those decisions recognize, the three provisions of Section 3(b), in combination, authorized the Board’s action here. When the then-four-member

Board delegated all of its authority to a three-member group of the Board in December 2007, it did so pursuant to the first provision. When the term of one of those members (as well as that of the fourth sitting Board member) expired on December 31, 2007, the remaining two members constituted a quorum of the group to which the Board's powers had been lawfully delegated. Consistent with Section 3(b)'s second and third relevant provisions identified above, those "two members" then continued to exercise the previously delegated powers, and their authority to do so was "not impair[ed]" by a vacancy in the other positions on the Board. 29 U.S.C. 153(b). The validity of the Board's actions thus follows from a straightforward reading of the Act.⁸

⁸ In our view, Congress' intention is clear, and "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. However, in *Snell Island*, 568 F.3d at 424, the Second Circuit found that Section 3(b) does not have a plain meaning, but that the Board's reasonable interpretation of Section 3(b) is entitled to deference. If this Court, like the Second Circuit, should find that Section 3(b) is susceptible to different reasonable interpretations, then the Court should also conclude, in agreement with the Second Circuit, that the Board's view is entitled to deference. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002) (If statute is ambiguous, agency's interpretation must be sustained unless it "exceeds the bounds of the permissible.") (citing *Chevron*, 467 U.S. at 843, and *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

The Board delegation at issue here, at a minimum, reflects a reasonable construction of Section 3(b) that is consistent with its legislative history, and furthers the overall purpose of the Act to avoid "industrial strife." 29 U.S.C. § 151. The fundamental point is that courts should prefer a permissible construction that permits an agency to continue to carry out its public function. *See Snell Island*, 568 F.3d at 424 (commending the Board for its "conscientious

Moreover, as the Fourth Circuit (*Narricot Indus.*, 2009 WL 4016113, at *3, *4), the Seventh Circuit (*New Process*, 564 F.3d at 846), and the First Circuit (*Northeastern Land*, 560 F.3d at 41-42) have noted, two persuasive authorities provide additional support for this reading of Section 3(b). First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), where the Board had four sitting members, the Ninth Circuit held that Section 3(b)'s two-member quorum provision authorized a three-member group to issue a decision even after one panel member had resigned. The court held that it was not legally determinative whether the resigning Board member participated in the decision, because "the decision would nonetheless be valid because a 'quorum' of two panel members supported the decision." *Id.* at 123. Second, the United States Department of Justice's Office of Legal Counsel ("OLC"), in a formal opinion, has concluded that the Board possesses the authority to issue decisions with only two of its five seats filled, where the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b). See Quorum Requirements, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (Mar. 4, 2003).

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, this Court should leave the Board's reasonable interpretation undisturbed.

The Company (Br 68-69), relying on the D.C. Circuit’s decision in *Laurel Baye*, argues that the two-member quorum does not have the authority to act because Section 3(b) requires the Board to have three members “at all times.” The *Laurel Baye* decision, however, is based on a strained reading of Section 3(b) that does not give operative meaning to all of its relevant provisions. *Laurel Baye*, 564 F.3d at 472-73, held that Section 3(b)’s provision—that “three members of the Board shall, at all times, constitute a quorum of the Board” (29 U.S.C. § 153(b), emphasis added)—prohibits the Board from acting when it has fewer than three sitting members, despite Section 3(b)’s express exception that provides for a quorum of two members when the Board has delegated its powers to a three-member group. The court concluded that the two-member quorum provision is not an exception to the three-member quorum requirement, because Congress’ use of the two different object nouns, “Board” and “group,” indicates that each quorum provision is independent of the other, and the two-member quorum provision does not eliminate the requirement that there be a three-member quorum present “at all times.” *Id.* at 473.

The D.C. Circuit’s interpretation fails to give the critical terms of Section 3(b) their ordinary meaning, thereby violating the cardinal canon of statutory construction “that courts must presume a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503

U.S. 249, 253-54 (1992); *see Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1890-91 (2009) (applying “ordinary English” to determine statutory meaning). The ordinary meaning of the word “except,” where, as here, it is used as a conjunction attaching a subordinate clause modifying a main clause, is “[e]xcepting; if it be not that; unless.” *Webster’s New International Dictionary* 608 (2d ed. 1945). 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 three-member quorum rule applies at all times unless the Board has delegated its powers to a three-member group, in which case two members constitutes a quorum.

In other words, the full Board must have at least three participating members to delegate powers to a group and, in turn, that delegee group must have at least two participating members to exercise the delegated powers. Accordingly, where, as here, the Board has delegated all of its powers to a three-member group, any two members of that group constitute a quorum and may continue to exercise the delegated powers. Once a delegation of the Board’s full powers has been made to the group, the continued exercise of the delegated powers by a quorum of the group does not depend on whether the full Board itself retains a quorum. *See Narricot Indus.*, 2009 4016113, at *4.

Although the D.C. Circuit in *Laurel Baye* purported to apply the rule that a statute should be construed so that “no provision is rendered inoperative or superfluous, void or insignificant,” 564 F.3d at 472, the court in fact treated the statute as though it did not contain the word “except.” The court reasoned that “the word ‘except’ is . . . present in the statute only to indicate that the delegee group’s ability to act is measured by a different numerical value” than the larger Board’s ability to act. *Id.* But Congress could have accomplished that result by leaving out the word “except” altogether and instead setting forth two independent clauses or sentences, the first stating that “three members of the Board shall, at all times, constitute a quorum of the Board,” and the second stating that “two members shall constitute a quorum of any group designated pursuant to [the delegation clause].” 29 U.S.C. 153(b). *See Narricot Indus.*, 2009 WL 4016113, at *4. Rather than doing that, Congress linked the two clauses with a comma and the word “except,” which means that the special quorum rule in the second clause constitutes an exception to the general quorum rule in the first. *See id.* Indeed, Congress has used the construction “at all times . . . except” in other statutes to accomplish exactly what it did here—to provide that a general rule should apply at all times except in the instances specified in the statute. *See, e.g.*, 20 U.S.C. § 1099c-1(b)(8) (Secretary of Education shall “maintain and preserve *at all times* the confidentiality of any program review report . . . *except that* the Secretary shall promptly disclose

any and all program review reports to the institution of higher education under review”) (emphasis added).⁹

Both the Company and the D.C. Circuit have also failed to give the word “quorum” its ordinary meaning. By definition, “quorum” means “[s]uch a number of officers or members of any body or association as is competent by law or constitution to transact business.” *Webster’s New International Dictionary* 1394 (2d ed. 1945). See *Railroad Yardmasters of Am.*, 721 F.2d at 1341 (“quorum” means “the minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted,” quoting ROBERT’S RULES OF ORDER 16 (rev. ed. 1981)). The Company (Br 69) confuses the meaning of “quorum” with the meaning of “delegation,” by arguing that just because Section 3(b) gives the three-member group the authority to delegate to two members, it does not mean that it can give two members the authority to act for the full Board. Section 3(b)’s quorum provision, however, does not grant a three-member group the authority to delegate authority to two members. Rather, Section 3(b)’s establishment of two members as a quorum of a delegee group denotes that

⁹ *Accord* 42 U.S.C. § 4954 (a) (full-time commitment of VISTA volunteer “shall include a commitment to live among and at the economic level of the people served . . . *at all times* during their periods of service, *except* for periods of authorized leave”) (emphasis added); 4 U.S.C. § 6, Historical Note, Proclamation No. 4064: “the flags of the United States displayed at the Washington Monument are to be flown *at all times* during the night and day, *except* when the weather is inclement”) (emphasis added).

the group may legally transact business with two of its members. Thus, the Company's argument has no merit, because those two members derive their authority from their status as a quorum of a three-member group, to which the Board has delegated all of its powers.

Under the reasoning of the *Laurel Baye* decision, however, the presence of a two-member quorum of a delegee group possessed of all the Board's powers is never in itself sufficient to permit the legal transaction of business by that group unless there also happens to be a third sitting Board member.¹⁰ That reading untethers the quorum requirement for the full Board from the purpose of a quorum provision—namely, to set the minimum *participation* level required before a body may take action. Under the D.C. Circuit's reading, the full Board quorum provision in Section 3(b) establishes a minimum *membership* level for the full Board that must be satisfied in order for a delegee group to act, even though the non-group members of the full Board would not participate in the delegee group's action.

The *Laurel Baye* court also misconstrued the delegation provision and the related two-member quorum provision by distinguishing “the Board” from “any

¹⁰ The D.C. Circuit's construction, as the Seventh Circuit aptly noted, appears to sap the quorum provision of meaning, “because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.” *New Process*, 564 F.3d at 846 n.2.

group,” so that no group may act unless the Board itself has three members.

Laurel Baye, 564 F.3d at 473. That conclusion ignores that Congress did not use the nouns “group” and “Board” to signify that a group could not function if there were fewer than three sitting Board members. Rather, Section 3(b) authorizes the Board to delegate all its powers to a three-member group in a manner that the group, possessing all the Board’s powers, is empowered to bind the Board as an institution through a two-member quorum comprised of the only two sitting Board members. *See Northeastern Land*, 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 . . .”).

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

As shown, the meaning of statutory language cannot be determined by considering particular terms in isolation, but must take into account the intent and design of the entire statute. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574, 578 (1995); *United States v. Mikell*, 33 F.3d 11, 12 (5th Cir. 1994). Thus, ascertaining that meaning often requires resort to historical materials, including legislative history. *Gustafson*, 513 U.S. at 578; *Mikell*, at 13-14.

A brief history of the Board’s operations and of the legislation that ultimately became Section 3(b) confirms that Section 3(b) authorizes the Board to adjudicate cases with a two-member quorum. In the Wagner Act of 1935, which created a

three-member Board, Section 3(b) provided only: “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 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

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).

¹² The Board had only two members during three separate periods between 1935 and 1947: from September 1 until September 23, 1936; from August 27 until November 26, 1940; and from August 28 until October 11, 1941. *See 2d Annual Report, NLRB*, at 7; *6th Annual Report*, at 7 n.1; *7th Annual Report*, at 8 n.1. Contrary to the Company’s assertions (BR 10, n.5), those two-member Boards issued 3 published decisions in 1936 (2 NLRB 198-240); 237 published decisions in 1940 (all of 27 NLRB, and 28 NLRB 1-115); and 224 published decisions in 1941 (35 NLRB 24-1360 and 36 NLRB 1-45).

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).

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 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 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."¹⁶ *See Snell Island*, 568 F.3d at 421 (Congress added Section 3(b)'s delegation provision "to enable the Board to handle an increasing caseload more efficiently") (quoting *Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir.

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.

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

¹⁶ S. REP. NO. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

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.¹⁷

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 issues¹⁸ reported to Congress the following year:

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

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948). In this way, the Board

¹⁷ 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.

¹⁸ See 61 STAT. at 160, *1 Leg. Hist. 1947*, at 27-28.

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

In sum, by authorizing the Board to delegate its powers to a group of three members, two of whom constitute a quorum, Congress enabled the Board to increase its casehandling capacity by operating in groups identical to the original three-member Board. As the Seventh Circuit concluded in rejecting the contention that Section 3(b) prohibits the Board from acting unless it has three sitting members:

To the extent that the legislative history points either way . . . , it establishes that Taft-Hartley created a Board that functioned as an adjudicative body that was allowed to operate in panels in order to work more efficiently. Forbidding the NLRB to sit with a quorum of two when there are two or more vacancies on the Board would thus frustrate the purposes of the [A]ct, 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. Congress preserved the Board's power to adjudicate labor disputes with a two-member quorum where it has exercised its delegation authority.

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

The conclusion that the two remaining members of a three-member group can continue to exercise the powers of the Board that were properly delegated to that three-member group is consistent with established principles of both administrative law and the common law of public entities. As the Supreme Court explained in *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967), Congress enacted statutes creating administrative agencies against the backdrop of the common-law quorum rules applicable to public bodies, and these common-law rules were written into the enabling statutes of several agencies, including the Board. *Id.* at 183-86 (also identifying the Interstate Commerce Commission (“ICC”)).¹⁹

At common law, the power held by a public board was held “not individually but collectively” (*Commonwealth ex rel. Hall v. Canal Comm’rs*, 9 Watts 466, 471, 1840 WL 3788, at *5 (Pa. 1840)), and “considered joint and several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at *16 (1875). Consistent with those principles, the majority view of common-law

¹⁹ In *Flotill*, the Supreme Court held that where only three commissioners of the five-member FTC participated in a decision, a 2-1 decision was valid, recognizing the common-law rule that “in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” 389 U.S. at 183 & n.6 (collecting cases). The Court concluded that “[w]here the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.” *Id.* at 183-84.

quorum rules was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body (*see Ross v. Miller*, 178 A. 771, 772 (N.J. Sup. Ct. 1935) (collecting cases)), even where that majority represented only a minority of the full board. *See, e.g., People v. Wright*, 71 P. 365 (Colo. 1902) (where city council was composed of eight aldermen and one mayor, and the terms of four aldermen expired, vote of two of the remaining aldermen and the mayor was valid because they constituted a quorum of the five remaining members).²⁰ By providing for an express two-member-quorum exception to Section 3(b)'s three-member-quorum requirement where the Board has delegated its powers to a three-member group, Congress enabled the Board to continue to exercise its powers through a quorum number identical to that called for under the common-law rule that a majority of remaining members constitute a quorum.

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. For example, in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), the D.C. Circuit, recognizing the relevance of these common-law principles, held

²⁰ Cases that appear to run counter to the common-law rules involve specific quorum rules dictated by statute or ordinance. *See, e.g., Gaston v. Ackerman*, 6 N.J. Misc. 694, 142 A. 545 (Sup. Ct. 1928) (three of five members were insufficient for a quorum because “the ordinance under which the meeting was held provided that a quorum shall consist of four members”).

that, in the absence of any countermanding provision in its authorizing statute, the Securities and Exchange Commission (“SEC”) lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions when only two of its five authorized seats were filled. *Id.* at 582 and n.2.

The common-law principles cited in *Falcon Trading* apply in interpreting the quorum provisions of the NLRA, even though, unlike the NLRA, the SEC’s authorizing statute contained no quorum provision. The only real difference is that the SEC had to hand-tailor its solution to the imminent problem of being reduced to two members by amending its own quorum rules at a time when its rules still required a three-member quorum. The statutory mechanism Congress provided for the NLRB differs from the mechanism afforded the SEC, but the result—that two members of a properly-delegated three-member group constitute a quorum that can issue agency decisions—is equally valid. *See New Process*, 564 F.3d at 848 (*Falcon Trading* supports the Board’s authority to issue decisions pursuant to Section 3(b)’s two-member quorum provision).

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

delegator's authority was suspended. 564 F.3d at 473 (citing Restatement (Third) of Agency § 3.07(4) (2006) for the proposition that “an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended”). The Company (Br 70) echoes this argument, citing both the law of corporations and the law of agency and contending that “the two-member group lost its authority to act when a delegation to a group of sufficient size expired.”

In so reasoning, the Company and the D.C. Circuit failed to heed the warning of the very treatises they relied on—namely, that governmental bodies are often subject to special rules not applicable to private bodies.²¹ *See Yardmasters*, 721 F.2d at 1343, n.30 (recognizing that the Railway Labor Act's delegation and vacancies provisions incorporated principles different from those of the private law of agency and corporations). The delegation, vacancy, and quorum provisions in Section 3(b) of the NLRA on their face manifest Congress' intent that the Board continue to function in circumstances where a private body might be disabled. As the Office of Legal Counsel recognized, Section 3(b)'s plain language is properly understood to permit the two-member quorum to continue to exercise the Board's

²¹ *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.”

powers that were delegated to the three-member group, because so construing Section 3(b) “would not confer power on a number of members smaller than the number for which Congress expressly provided in setting the quorum.” 2003 WL 24166831, at *3. The Company and the *Laurel Baye* Court have erred in failing to recognize that the two-member Board quorum that decided these cases possesses all of the Board’s institutional powers as a result of a valid delegation to a three-member group, and that Section 3(b) authorized them to exercise those powers, not as Board agents, but as Board principals acting for the Board itself.

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

Where an employer does not challenge in its opening brief the Board’s findings regarding a violation of the Act, those unchallenged issues are waived on appeal, and the Board is entitled to summary enforcement of the portions of its order based on these unchallenged findings. *See Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008); *California Gas Transport, Inc. v. NLRB*, 507 F.3d 847, 853 n.3 (5th Cir. 2007), and cases cited. *See generally* Fed R. App. P. 28(a)(9)(A).

The Board is entitled to summary enforcement of the portions of its remedial order based on the uncontested Section 8(a)(5),(3) and (1) findings described on pages 18-20.²²

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT OAKTREE AND TBR CONSTITUTE A SINGLE EMPLOYER

A. Introduction

The responsibility for remedying the unfair labor practices committed by the Company centers on the intertwined relationship among three entities: Oaktree, which purchased the Resort and invested \$50 million to renovate it; TBR, which also has a property interest in the Resort; and Benchmark, which operates the Resort through a management agreement.

Before this Court, the Company (Br 9,17) does not dispute the Board's finding (D&O1n.1,8-9 and n.3) that TBR is a joint employer with Benchmark because of the control that the two separate entities have over the Resort's employees. Nor does the Company dispute that, as a joint employer, TBR and Benchmark are jointly and severally liable for remedying the unfair labor practices. *See Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 872 F.2d 1279, 1287-89 (7th Cir. 1989).

²² The Company's meritless challenge to the Section 8(a)(5) and (1) findings pertaining to union access and dues collection described on pages 19-20 is discussed below, pages 54-62.

The only issue before this Court regarding liability for the unfair labor practices is whether Oaktree and TBR are a single employer. Single employer status “‘exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a single employer.’” *NLRB v. Western Temporary Services*, 821 F.2d 1258, 1266 (7th Cir. 1987) (citation omitted). If so, then Oaktree is jointly and severally liable with TBR to remedy the unfair labor practices. *See Vance v. NLRB*, 71 F.3d 486, 489 (4th Cir. 1995); *Emsing’s Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 872 F.2d 1279, 1288-89 (7th Cir. 1989); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985). Substantial record evidence supports the Board’s finding that Oaktree and TBR are sufficiently integrated to be deemed a single employer.

B. General Principles and Standard of Review

In determining whether single employer status exists, the Board considers four factors: common management, common ownership, interrelation of operations, and centralized control of labor relations. *See Radio and Broadcasters Union Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *NLRB v. DMR Corp.*, 699 F.2d 788, 790-91 (5th Cir. 1983). Not all of these factors need to be present before the Board can find single employer status, and no one factor is controlling. *See DMR Corp.*, 699 F.2d at 791.

As this Court has explained, “[s]ingle employer status ultimately depends on ‘all the circumstances of the case’ and is characterized as an absence of an ‘arm’s length relationship found among unintegrated companies.’” *DMR Corp.*, 699 F.2d at 791 (citation omitted). *See also Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 752 (7th Cir. 2001) (“the listed factors merely help to guide the Board as it assesses ‘whether there exists overall control of the critical matters at the policy level’”) (citation omitted).

Therefore, although centralized control of labor relations is one of the controlling factors, it is not, as the Company asserts (Br20-21), “‘critical’ in the sense of being the *sine qua non* of ‘single employer’ status.” *Local 627, Int’l Union of Operating Engineers v. NLRB*, 518 F.2d 1040, 1046 (D.C. Cir. 1975) (setting forth Board cases where the Board has found single employer status absent evidence of various factors, including common control of labor relations), *affirmed in relevant part sub nom. South Prairie Constr. Co. v. Operating Engineers, Local 627*, 425 U.S. 800 (1976). *Accord Naperville Ready Mix, Inc.*, 242 F.3d at 752. Rather, as the numerous Board cases the Company cites in its brief recognize, the Board examines all of the circumstances with the key question being whether the parties lack an arms-length relationship. *See, for example, In re Mercy Hosp. of Buffalo*, 336 NLRB 1282, 1284 (2001) (Br21-23).

A Board finding of single employer status is essentially a factual one and not to be disturbed provided substantial evidence in the record supports the Board's findings. *See DMR Corp.*, 699 F.2d at 791. The Board's finding is therefore entitled to affirmance if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998).

C. Oaktree and TBR Constitute a Single Employer

The Board (D&O1 n.5) found that Oaktree and TBR were a single employer. Indeed, the record amply supports the Board's conclusion (D&O8) that in the relationships among Oaktree, TBR, Kuilima, Benchmark, and the Resort, "the overbearing presence in these relationships is Oaktree, the effective owner of the Resort, which must be consulted, either directly or through TBR [], before any significant decisions are made by or at [the Resort], including decisions on labor matters."

1. Common ownership

Oaktree purchased the Resort in 2000. (D&O7;Company's brief to the Administrative Law Judge p.4,GCX 10 p.14.) Thereafter, Oaktree attempted, unsuccessfully, to separate itself from direct control of the Resort. It set up a multi-layered corporate structure under which Oaktree, through its funds, owns the owner of Kuilima, which, in turn, owns the Resort. TBR, a wholly owned

subsidiary of Kuilima, leases the Resort from Kuilima. TBR, in turn, has an agreement with Benchmark to manage the Resort. However, as the Board found (D&O8), TBR “seems to be a shell corporation with no purpose other than to provide insulation to Kuilima and Oaktree from [TBR’s] selection of Benchmark as the operator and manager of the [R]esort.”

Despite the corporate hierarchy between Oaktree and TBR, the evidence establishes that Oaktree and TBR acted as a single employer regarding ownership of the Resort. Thus, Russell Bernard, the principal of Oaktree, and Mark Porosoff, the senior vice-president of Oaktree, executed the lease between Kuilima and TBR, signing for Oaktree on behalf of *both* parties. Similarly, they both executed the management agreement between TBR and Benchmark, signing in their capacity as Oaktree officials. As the Board explained (D&O8), it would be “unusual” to have an Oaktree representative sign the lease and management agreement “because Oaktree was not ostensibly a party to those agreements, unless the parties to those agreements recognized that Oaktree was the entity in control of TBR[], Kuilima, and [the Resort].”

Indeed, Bernard’s letter to his partners about the union negotiations confirms not only that Oaktree is the “effective” owner of the Resort, but that it, not TBR, is the entity in control of the Resort. Thus, Bernard wrote that since “our funds acquired 100% ownership and control” of the Resort, “we have invested

approximately \$50 million” in the Resort, and he explained, “we have offered” the Union a “fair and equitable agreement.” (GCX16.)

There is no merit in Oaktree’s claim (Br2,5,6,13,19,25) that it is a mere investment advisor to the funds that own the Resort, and that (Br2,7,17,19) “the funds” are the “indirect” owner of the Resort. While Oaktree may have used various corporate forms to hold the Resort in a web of subsidiaries, Oaktree is, as the Board found (D&O7,8), its “effective” owner, as these entities did not operate at arms-length with one another. The evidence of common ownership helps to demonstrate that Oaktree and TBR are a single employer. *See NLRB v. Palmer Donavin Mfg.*, 369 F.3d 954, 957 (6th Cir. 2004) (finding that two entities were a single employer due, in part, to the parent company wholly owning a subsidiary).

2. Common management

Oaktree does not dispute that it and TBR share common management. Indeed, as the Board found (D&O8), “the principals and officers of Oaktree are the principals and officers of [TBR].” Bernard is the principal of Oaktree and the president of TBR; Porosoff is the senior vice-president of Oaktree and the vice-president and treasurer of TBR; Stephanie Schulman is the in-house counsel for Oaktree and the vice-president and secretary of TBR. The common management between Oaktree and TBR supports a finding that they are a single employer. *See Palmer Donavin Mfg.*, 369 F.3d at 957.

Moreover, TBR and Oaktree share a mailing address and mail is sent to TBR in care of Oaktree, which suggests that Oaktree managers effectively ran the Resort. Indeed, as shown, Oaktree officials, in their capacity as Oaktree officials, executed the relevant documents relating to Kuilima, TBR, the Resort, and Benchmark. (GCX16,17,18.)

Whatever the merits of the Company's claim (Br4,12-13,30-32,39-51) that officers of related entities can act on behalf of each entity while wearing several hats, it has not cited a scintilla of evidence that Oaktree officials acted on behalf of the Resort on a matter of substance in their capacity as TBR officials. Indeed, the Board's characterization (D&O8) of TBR as a "shell corporation" is amply supported by the testimony of Oaktree official Porosoff, who had difficulty recalling his positions at TBR (Tr1614-15) and was unsure of his duties as TBR's vice-president and treasurer (Tr1642). Likewise, had TBR not been a shell corporation, Porosoff presumably would have been able to testify about quarterly meetings between TBR and Benchmark required by the management agreement. Instead, Porosoff was unaware of a single meeting between TBR and Benchmark in the 4 years since Oaktree entered into the management agreement on TBR's behalf. (Tr1635-36,RX 8 p.26.)

In sum, as the brief of Oaktree, TBR, and Benchmark to the judge stated (D&O8), TBR is "nothing more than the legal lessor of the property where [the

Resort] is situated,” a statement fully consistent with the judge’s finding (D&O8) that Oaktree and TBR not only share common management, but also that Oaktree is the “overbearing presence” in their relationship. *See Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1041 (8th Cir. 1976) (conglomerate was a single employer with subsidiary where officers and directors of subsidiary came from parent and where subsidiary had “no real operational function of its own and was created primarily for tax purposes”).

3. Interrelationship of operations

The evidence amply supports the Board’s finding (D&O8) that Oaktree and TBR have interrelated operations. As an initial matter, as the Board found (D&O8), there is no evidence that TBR has any employees except for those who are also officers, principals, or employees of Oaktree, such as Bernard, Porosoff, and Schulman. Moreover, as the Board further found (D&O8), there is no evidence that TBR “has any purpose other than to act as Oaktree’s conduit through which the [R]esort is managed and operated by Benchmark.”

Indeed, Abid Butt, Benchmark’s vice-president and the Resort’s general manager, conceded that “the person responsible for the overall resort” is Hy Adelman, who maintains an office and residence on the Resort’s grounds. (D&O7;Tr2593,2596). Adelman is an Oaktree representative who met regularly with Butt and approved leases and the purchase of housekeeping supplies.

Significantly, the Company does not dispute that Adelman plays a vital role in the Resort's daily operation. Instead, the Company asserts that the Board erred by finding that Adelman was employed by Oaktree (Br30-31), and claims that Adelman actually worked for an employment agency (Br30). The Board (D&O7) did not find that Adelman was an Oaktree employee, only that he was an Oaktree representative. That finding was a reasonable synthesis of testimony from the Resort's Human Resources Director, Ramos (Tr143), and its General Manager, Butt, that Adelman was an Oaktree employee (Tr2593,2596), and from Oaktree Vice-President Porosoff's testimony (Tr1656-1656) that Adelman worked for Kuilima, which is owned by Oaktree.

The interrelation of operations among Oaktree, TBR, and the Resort is further demonstrated by the fact that the management agreement with Benchmark lists TBR's mailing address as "in care of Oaktree" at Oaktree's address; that Oaktree requested information from the Resort about employee salaries for an "owners" report; that Oaktree requires production companies to obtain insurance protecting Oaktree before they can film at the Resort; and that Oaktree executed an employment practices insurance application on behalf of the Resort.

In sum, as the Board explained (D&O8), "[e]very act and right to act by TBR[] is known by and controlled by the ultimate owner of TBR[]—Oaktree.

Thus, to the limited extent that TBR[] engages in any operations, those operations are controlled by and closely interrelated with the operations of Oaktree.”

4. Centralized control of labor relations

There can be no dispute that TBR controls labor relations at the Resort. Indeed, Oaktree, the Resort, and Benchmark conceded in their answers to the General Counsel’s complaint that TBR and Benchmark “have control over labor relations or personnel matters” at the Resort. In addition, the management agreement between TBR and Benchmark—that was signed by Oaktree principals—reserves to TBR the control over labor negotiations and agreements. However, the Board found (D&O8), the different responsibilities of Oaktree, TBR, and Benchmark in labor and personnel matters “are more fluid than solid.”

The fluidity is demonstrated by Oaktree’s involvement in the labor negotiations and daily operations at the Resort. Thus, whether it is Oaktree officials signing all of the relevant documents relating to TBR, Benchmark, and the Resort, or Oaktree principal Bernard taking responsibility for negotiations with the Union in a letter to his partners, or Oaktree representative Adelman having an undisputedly significant role in the Resort’s daily operations, Oaktree’s presence in the relationship among it, TBR, Benchmark, and the Resort is ubiquitous. Therefore, the Board was fully warranted in finding (D&O8) that “labor relations are centralized through TBR[] and Oaktree.” *See Asher Candy, Inc. v. NLRB*, 258

Fed Appx 334, 334 (D.C. Cir. 2007); *NLRB v. Cofer*, 637 F.2d 1309, 1313 (9th Cir. 1981).

Contrary to the Company's contention (Br18,20-25,27-33), Oaktree does not need to be found directly responsible for the unfair labor practices before it can be found to have control over labor relations. The Board's decision does not turn on whether Oaktree directed Benchmark managers and the Resort's security officers to commit unfair labor practices. The salient issue is whether Oaktree is sufficiently connected to TBR, as it is, so that Oaktree is jointly liable for TBR's unfair labor practices. Oaktree cannot act as a single employer, but then "expect to avoid the consequences . . ." *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir. 1976).

The decisions of this and other courts are not to the contrary. For example, in *Lusk v. FoxMeyer Health Corp.*, 129 F.3d 773 (5th Cir. 1997) (Br16,34-38), this Court simply found no evidence, despite overlapping officers, that the parent company was involved in the daily decision-making or operation of its subsidiary. On those facts, the Court found no liability for the parent regarding a claim that it, along with its subsidiary, had violated the ADEA. Here, by contrast, there is ample evidence that Oaktree is the controlling party in its relationship with TBR and TBR's relationship with the Resort.

Similarly, in *NLRB v. Transcontinental Theaters, Inc.*, 568 F.2d 125 (9th Cir. 1977) (Br16,22,33), the court recognized that control and single-employer status exists when the parent sets the policies and participates in negotiations. In that case, unlike here, the court found no parent involvement.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY ITS CONDUCT AT THE RESORT ON FEBRUARY 14 AND 18, 2004, AND VIOLATED SECTION 8(a)(5) BY PROHIBITING THE UNION FROM COLLECTING DUES AT THE RESORT

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) grants employees the right to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Those rights are enforced through Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which provides that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. An employer violates Section 8(a)(1) when its conduct tends to coerce or threaten employees in the exercise of their Section 7 rights. *See TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 415 (5th Cir. 1981).

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” 29

U.S.C. § 158(a)(5). This prevents an employer from making unilateral changes to terms and conditions of employment that are mandatory subjects of bargaining without first giving notice to and bargaining with the employees' representatives. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *NLRB v. Pinkston-Hollar Constr. Serv., Inc.*, 954 F.2d 306, 310 (5th Cir. 1992).²³ A collective-bargaining provision allowing union access is a term and condition of employment that survives the expiration of the agreement. *See NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 403-04 (5th Cir. 1984); *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir. 1990).

B. Despite the Union's Contractual Right of Access at the Resort, the Company Unlawfully Ordered Union Representatives Off the Resort on February 14 and 18, 2004

It is undisputed that despite the collective-bargaining agreement's expiration, the union access provisions were still in effect in February 2004, and provided that "[a]uthorized representatives of the Union shall be free to visit the hotel at all reasonable hours and shall be permitted to carry on their duties, provided they shall first notify the management or its designated representative, and there shall be no interference with the normal conduct of business."

(D&O9;GCX2 pp.7-8.) Nor is there any dispute that since 2002, union

²³ A Section 8(a)(5) violation results in a derivative violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *See Tri-State Health Serv., Inc. v. NLRB*, 374 F.3d 347, 350 n.1 (5th Cir. 2004).

representatives regularly went to the Resort, where they conducted union business with employees in the cafeteria during their breaks and lunch. Indeed, even those company witnesses whose testimony about limited access for union representatives was discredited (D&O1,9-10) conceded that union representatives could meet with employees in the cafeteria. (D&O10;Tr1017-18, 2112-13,2196-98,2237-41,2671-72,2877-88,3188-91,3268-71,3315.)

Despite the Union's contractual right and the parties' past practice, on February 14 and 18, 2004, the Company ordered union representatives to leave the cafeteria. Thus, on February 14, a company official told a union representative who was meeting with employees in the cafeteria, that she was not permitted on the Resort's property because she was trespassing, and escorted her off the property. Similarly, on February 18, a security officer issued union representatives trespass notices, called the police, and directed them to leave the cafeteria where they were talking to an employee. Since the Company does not claim that the Union forfeited its contractual right of access by interfering with business at the Resort on those dates, it follows that its prohibition on union access on those dates was an unlawful unilateral change.²⁴ *See Frontier Hotel & Casino*, 309 NLRB

²⁴ The Company's argument (Br45-55) that the General Counsel failed to prove a departure from past practice on dates other than February 14 and 18 is misplaced because the Board (D&O1n.6) relied only on events on those two dates.

761, 766 (1992), *enforced sub nom. NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995).

Such conduct also unlawfully interfered with employees' communication with their union representatives and coerced them in the exercise of their statutory rights. *See Frontier Hotel & Casino*, 309 NLRB at 766, *enforced sub nom. NLRB v. Unbelievable, Inc.*, 71 F.3d 1434; *Fabric Warehouse*, 294 NLRB 189, 192 (1989), *enforced sub nom. Hancock Fabrics v. NLRB*, 902 F.2d 28 (4th Cir. 1990); *Jerry Cardullo Ironworks, Inc.*, 340 NLRB 515, 515 (2003). As the Board explained (D&O32), the Company's "conduct either had the indirect impact on employees of interfering with union-related communications or directly coerced and restrained employees who were engaging in the union activity of conversing with their bargaining representative."

Contrary to the Company's claim (Br52-53), this is not a case where an employer is alleged to have changed a past practice upon taking ownership; rather, the issue is whether the Company changed its 4-year practice at the Resort. As such, the Board's finding regarding union access was not dependent on the testimony of a former union representative "under the prior operation." Moreover, there is no dispute that the Union had a contractual right of access and that the Union regularly carried out that right under the Company's regime by meeting with employees in the Resort's cafeteria.

To the extent that the Company claims (Br53-57) that its restrictions on union access did not have “significant consequences,” that claim is frivolous. The Company deprived the union representatives their contractual right to meet with employees. Moreover, the Company’s actions occurred in the context of numerous uncontested violations, ranging from surveilling and threatening union representatives, to suspending and discharging employees for union activity. In these circumstances, the Company’s actions bear little relation to the types of cases relied on by the Company (Br44,54,63). *See, for example, Peerless Food Products*, 236 NLRB 161 (1978) (employer did not act unlawfully where it limited the right of a union representative to converse with employees on the production floor on matters unrelated to employment issues). Likewise, its claim (Br63-65)—that because its unlawful conduct did not fully dissuade the union representatives from attempting to carry out their duties, the violation is de minimis (Br65) or does not materially interfere with statutory rights—borders on the absurd.

Finally, the Company’s attempt (Br58-60) to justify the eviction of the union representatives from the cafeteria on February 14 and 18 based on the February 12 rally at a public beach is utterly devoid of merit. Before the judge, the Company did not dispute that it unlawfully interfered with union representatives and employees engaged in protected activity on the public beach on February 12.

Before this Court, it does not dispute the Board's finding that its conduct that day violated the Act.

The Company misrepresents the record evidence by claiming that the union representatives on February 12 had "disrupted Resort business—and guests" and therefore, days later, it was privileged to throw the union representatives out of the cafeteria. This claim was discredited by the Board (D&O35), which found there was no inappropriate conduct by the rally participants. As such, the cases relied on by the Company (Br62) do not support its claim. *See, for example, Nynex Corp.*, 338 NLRB 659, 662 (2002) (union engaged in unprotected activity when its confrontational conduct in a work area caused a 2-hour cessation of the employer's operation, and such conduct justified subsequent limits on access).

C. Despite the Union's Contractual Right of Access at the Resort, the Company Unlawfully Prohibited the Union from Collecting Union Dues

The collective-bargaining agreement contained a broad access provision for union representatives to conduct union duties. The Company does not dispute the Board's findings (D&O35) that "[c]ollecting dues from its members is one of the duties of the Union," or (D&O16) that the Company regularly allowed various solicitations at the Resort. Indeed, company officials (Tr3730-31,3740-41,3662-67,3798-3800) conceded that union officials could collect dues, unless they were

disorderly and harassing.²⁵ Nevertheless, on May 6, 2004 the Company issued a blanket directive that prohibited the Union from collecting union dues at the Resort. On May 24 and June 22, union representatives were prohibited from collecting union dues in the cafeteria, although there was no claim that they had engaged in any improprieties. Accordingly, the Company's blanket prohibition on collecting union dues at the Resort constituted an unlawful unilateral change. *See Frontier Hotel & Casino*, 309 NLRB at 766, *enforced sub nom. NLRB v. Unbelievable, Inc.*, 71 F.3d 1434.

²⁵ The Company's claim that the General Counsel failed to establish a past practice for dues collection thus borders on the frivolous.

CONCLUSION

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

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**OAKTREE CAPITAL MANAGEMENT, L.P.,
d/b/a TURTLE BAY RESORTS AND
BEANCHMARK HOSPITALITY, INC.**

Petitioner/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross Petitioner

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No. 09-60327

**Board Case No.
37-CA-06601**

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,743 words excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman type.

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CERTIFICATES OF SERVICE

I hereby certify that on December 11, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by first-class mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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