

**Nos. 10-1075 and 10-1157**

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

**LOCAL 1075, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AND  
MICHIGAN LABORERS' DISTRICT COUNCIL**

**Petitioners/Cross-Respondents**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS  
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**Nos. 10-1317 and 10-1157**

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**LOCAL 1075, LABORERS' INTERNATIONAL UNION OF NORTH  
AMERICA AND MICHIGAN LABORERS' DISTRICT COUNCIL**

**Petitioners/Cross-Respondents**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Local 1075, Laborers' International Union of North America ("Local 1075") and Michigan Laborers' District Council ("District Council") (collectively "the Unions") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a

Board order against the Unions. The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a) (“the Act”). This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the unfair labor practice having occurred in Marysville, Michigan.

The Board’s Decision and Order issued on January 28, 2010, and is reported at 355 NLRB No. 6. (A. 6-11.)<sup>1</sup> That order is a final order under Section 10(e) and (f) of the Act, and, as shown below, pp. 15-41, was validly issued by a two-member quorum of a properly constituted three-member group within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b). (A. 6 n.1). The Unions filed a petition for review on February 9, 2010, and the Board cross-applied for enforcement on March 8, 2010. Both filings were timely because the Act imposes no time limits on such filings.

### **ORAL ARGUMENT STATEMENT**

As the Unions recognize (Br. 10), “the outcome of [the Board’s authority to issue decisions with two members] will in all likelihood be resolved by the United States Supreme Court before the end of the Court’s current term.” The Board

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<sup>1</sup> “A.” refers to the pages of the Appendix that accompanies the Unions’ brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

believes that the remaining issue, the finding that the Unions engaged in unlawful picketing, involves the application of well-settled principles to straightforward facts, and argument would not materially assist the Court. If the Court decides that argument is necessary, however, the Board believes that 10 minutes per side is sufficient.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether 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 Order in this case.

2. Whether substantial evidence supports the Board's finding that the Unions, which had a labor dispute with employers Brazen & Greer and Gemelli Concrete, violated Section 8(b)(4)(i) and (ii)(B) of the Act by trying to enmesh unrelated employers working on the same jobsite in that labor dispute.

### **STATEMENT OF THE CASE**

Acting on an unfair labor practice charge filed by general contractor McCarthy & Smith, Inc. ("M&S"), the Board's General Counsel issued a complaint alleging that during a labor dispute between the Unions and two employers—Brazen & Greer, Inc. ("B&G") and Gemelli Concrete, LLC ("Gemelli")—the Unions tried to force M&S and other unrelated employers at a

common M&S jobsite from doing business with B&G and Gemelli, and tried to induce and encourage employees of those neutral employers to strike or refuse to work. After a hearing, an administrative law judge issued a decision and recommended order finding merit to the complaint allegation. (A. 7-11.) The Unions filed exceptions to the judge's finding that they had violated the Act. (A. 6; 76-78.) Thereafter, the Board (Chairman Liebman and Member Schaumber) issued its Decision and Order affirming the judge's rulings, findings, and conclusions with some modifications to the recommended remedial order. (A. 6.)

As noted above, the Unions then initiated these proceedings with a petition to review the Board's Order, followed by the Board's cross-application for enforcement of its Order.

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### **A. Background; In May 2009, B&G and Gemelli's Bargaining Agreements With the Unions Expire; In June 2009, B&G and Gemelli Are Performing Work at a M&S Jobsite in Marysville, Michigan**

The Associated General Contractors of Michigan ("AGC") is a multiemployer bargaining representative that negotiates collective-bargaining agreements with the District Council and its local affiliates, including Local 1075.

(A. 8; 173, 303-07.) M&S is a construction management company based in Framingham, Michigan. M&S is a member of the AGC, but never a party to an AGC multiemployer bargaining agreement with the District Council or its affiliates. Nor has the AGC ever bargained on M&S's behalf. (A. 8; 173, 196, 205-06, 270, 306-08.)

Similarly, B&G and Gemelli are members of the AGC, but did not give the AGC authority to negotiate on their behalves. Instead, they signed "independent agreements" with the District Council and its affiliates, including Local 1075. (A. 8; 111, 289-90.)

Both AGC's multiemployer agreement and the independent agreements entered into by B&G and Gemelli expired around May 31, 2009. (A. 8; 111, 175, 290, 311-12.) In a March 6, 2009 letter, AGC's director of labor relations notified

the Unions of the AGC's intent to terminate the agreement upon expiration. (A. 7, 8; 303-04, 311-12.) Prior to engaging in negotiations for a new agreement, the AGC gave the Unions a list of employers who had given the AGC authority to bargain on their behalf. Neither B&G nor Gemelli was on that list. (A. 173, 306-07.) Accordingly, at the beginning of June: 1) B&G and Gemelli's independent bargaining agreements with the Unions had expired, and they were operating without a contract; and 2) the AGC was not negotiating on behalf of B&G or Gemelli.

M&S had begun managing the construction of a new Marysville High School in July 2008, through a contract with the Marysville public school system. M&S had no employees performing laborers work on the jobsite at any relevant time. (A. 8; 197-202, 270-71.) As of early June 2009, the work involved the services of approximately 45 contractors and subcontractors, including B&G and Gemelli, which had contracted directly with the school district. (A. 8; 147-48, 197-200, 208, 288-89.) On June 3, B&G had approximately 29 employees at the Marysville site (A. 208, 285), and Gemelli was a few days away from having employees at the site (A. 216, 299-300).

**B. Between June 4 and June 8, the Unions Picket the Marysville Site Without Identifying B&G and Gemelli as the Target of Their Labor Dispute; Employees of B&G and Other Employers Honor the Picket Line**

Between 6 and 6:30 a.m. on Thursday, June 4, Local 1075 Business Agent Jeff Perkins and five or six Local 1075 members began picketing at the only employee entrance to the Marysville site. The picketers held signs stating “No Contract/No Work/Laborers Local #1075.” (A. 8; 149 (see gate 1/gate “B”), 203-04, 209, 216, 226.) Over the next half hour, employees of various contractors showed up for work, including B&G, Casadei Steel, Inc., Port Huron Roofing Company, Contrast Mechanical, Inc., Delta Temp, Inc., and Gillis Electric. B&G was the only employer who would have used laborers that day, and the only employer who had previously signed a bargaining agreement with the Unions. Nevertheless, the employees of all of those companies, except for nonunion contractor Contrast, left without performing any work. Gemelli was not scheduled to work that day. (A. 8; 208-16.)

The picketing continued on Friday, June 5. Employees of Contrast, Delta, and Casadei crossed the picket line. Employees of B&G, Gillis, and Port Huron again showed up, but left without working. (A. 8; 219-24.)

During picketing on Monday, June 8, Casadei, Contrast, and Delta employees performed work; Gillis employees did not. On approximately June 8,

William Bartlett of the Abatement Coordinator Trust Fund, an affiliate of the District Council, began picketing as a representative of the District Council at the request of a District Council business manager. (A. 7, 8; 224-26, 238, 316-17.)

**C. M&S Sets Up a Separate Entrance For B&G and Gemelli Employees Effective June 9**

On June 5, M&S Senior Project Manager Steve Banchero sent a letter by certified mail and fax to Local 1075 Business Agent Perkins stating that effective June 9, M&S would have a separate entrance for employees of B&G and Gemelli. Banchero explained that B&G and Gemelli employees would use the new employee entrance, “gate A,” and that the employees of all other employers would continue to use the existing entrance, “gate B.” Banchero also sent a copy of the letter to B&G and Gemelli, and to the other employers at the Marysville site. (A. 7, 8; 157, 164-68, 240-43, 274-76, 278-79, 286-87.) Project Superintendent Brian MacAskill provided Gemelli with a key to gate A. He did not give a key to B&G because its employees had not crossed the picket line, and he could open the gate for them if necessary. (A. 8; 258, 262, 299.)

M&S proceeded to get permission from the city of Marysville to cut a curb for a second employee entrance. M&S then spent approximately \$2,600 to perform the work necessary to build that entrance. (A. 160, 163, 229-32, 263.) Late in the day on June 8, M&S placed signs at the two employee entrances

identified as “gate A” and “gate B.” M&S located gate A, the new gate, approximately 300 feet from gate B, the original gate. The sign at gate A stated: “This gate is exclusively reserved for Personnel, Visitors, Subcontractors and Suppliers” of B&G and Gemelli; “ALL OTHERS MUST USE GATE B”. The sign at gate B, the original gate, advised that “[t]his gate is for the use of all Employees, Visitors, Subcontractors, and Suppliers of all Companies EXCEPT [B&G and Gemelli].” The entrances were about the same width. (A. 8; 150-53, 230-32, 260-61, 263.)

**D. Between June 9 and June 25, When Gemelli Concrete Signed a New Independent Bargaining Agreement, the Unions Continued to Picket at the Gate Designated for Employers Other than B&G and Gemelli**

On June 9, the picketers, carrying the same sign as earlier, “No Contract/No Work/Laborers Local #1075,” picketed at gate B, which M&S had marked as the entrance for employees other than those of B&G and Gemelli. Gillis employees showed up and worked. M&S Project Superintendent MacAskill asked Local 1075 Business Agent Perkins to move the picketing to gate A, but Perkins refused to move. (A. 8; 232-37, 249.) From June 9, until the last day of picketing on June 25, between 4 and 10 picketers stayed at, or near, gate B. On several hot days, they moved to a tree about 100-200 feet away from gate B. They never picketed at gate

A, the gate reserved for employees of B&G and Gemelli. (A. 8; 149, 154-56, 178, 244-45, 247-51, 280-82, 314-15.)

**E. The Unions End Their Picketing After B&G and Gemelli Sign New Contracts**

B&G employees honored the picket line by refusing to work until B&G signed a new independent bargaining agreement with the Unions on approximately June 24. (A. 8; 310, 325-26.) On that day, the Unions added the words “Gemelli Concrete” to the picket signs. (A. 8; 251-52, 325-26.)

Gemelli employees continued to honor the picket line through June 25, when Gemelli co-owner Rebecca Gemelli signed a new “Independent Contractors Agreement” with the Unions. (A. 8, 9; 169-71, 252, 288-90, 296-98.) Rebecca Gemelli had reached an agreement after about five conversations with District Council Secretary-Treasurer Chris Chwalek that had started in early June. (A. 8; 289-99, 310.)

On the morning of June 26, no picketing took place. Abatement Coordinator Bartlett told M&S Project Superintendent MacAskill at the Marysville site, “Thanks . . . . Gemelli signed, and we’re all set.” (A. 8; 243-44, 265-66, 327.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Liebman and Member Schaumber) found, in agreement with the administrative law judge, that the Unions violated Section 8(b)(4)(i) and (ii)(B) of the Act (29 U.S.C. § 158(b)(4)(i) and (ii)(B)) for their conduct toward employers at the Marysville site with whom they had no labor dispute. Specifically, the Board found that the Unions unlawfully induced or encouraged employees of Casadei Steel, Delta Temp, Gillis Electric, Contrast Mechanical, and Port Huron to engage in a strike or a refusal to perform work with the object of forcing or requiring M&S to cease doing business with B&G and Gemelli, the only two employers at the Marysville jobsite with whom the Unions had a labor dispute. Similarly, the Board found that the Unions acted unlawfully by threatening, coercing, or restraining those employers, as well as M&S, through their picketing because the picketing had an object of forcing M&S to cease doing business with B&G and Gemelli. (A. 6-7.)

The Board's Order requires the Unions to cease and desist from the unfair labor practices found. (A. 6.) Affirmatively, the Order requires the Unions to post notices at their union hall and office, and at the employers, if the employers are willing. (A. 6-7.)

## SUMMARY OF ARGUMENT

1. As the Unions state (Br. 10, 13), the issue of the Board's authority to issue its Order in this case—that is, whether 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—is now before the United States Supreme Court in *New Process Steel, L.P. v. NLRB*, S. Ct. No. 08-1457. The Supreme Court heard argument in that case on March 23, 2010. As the Board argues to the Supreme Court, the authority of Chairman Liebman and Member Schaumber to issue Board decisions and orders under such circumstances is provided for in the express terms of Section 3(b), and is consistent with Section 3(b)'s history and general background principles governing the operation of government agencies. The Unions' contrary argument must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and is otherwise meritless.

2. Settled legal principles required the Unions to limit the target of their picketing at the Marysville jobsite to the employers with whom they had a labor dispute. Their failure to do so enmeshed other employers and their employees in the labor dispute with B&G and Gemelli and unlawfully pressured them to take sides.

Here, essentially undisputed facts establish that the Unions' labor dispute at the Marysville site was limited to employers B&G and Gemelli, specifically, to the negotiations to replace their recently-expired independent bargaining agreements. Indeed, that conclusion was inevitable, as B&G and Gemelli were the only two employers at the site during the picketing that even had a bargaining relationship with the Unions.

Furthermore, the Board reasonably found that, applying its decision in *Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950), the Unions failed to limit their picketing to B&G and Gemelli. First, the Unions named no specific employer targets on their picket signs for the majority of their picketing, and only added Gemelli to the signs after B&G signed a contract shortly before the picketing ended. Second, the Unions failed to picket at the gate designated by M&S for B&G and Gemelli, but instead picketed at the entrance for the use of all other employers. Those actions justified the Board's finding a strong presumption that the Unions unlawfully aimed their picketing at pressuring neutral employers to take sides in the labor dispute with B&G and Gemelli.

Moreover, the Unions did not rebut that presumption. The Unions' bald assertion that they did move the picketing to the gate designated for B&G and Gemelli falls woefully short because the Unions fail to offer any supporting evidence and ignore the ample credited evidence that established otherwise.

Further, the Unions' argument is fatally undermined by their simultaneous concession (Br. 32) that they "did not limit their picketing" to the designated gate. Finally, the Unions do not defeat the presumption by pointing to the absence of evidence of threats or violence because the picketing itself—notwithstanding its generally peaceful conduct—was unlawful.

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

Chairman Liebman and Member Schaumber, 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. The First, Second, Fourth, Seventh, and Tenth Circuits have upheld the authority of the two-member quorum,<sup>2</sup> with the D.C. Circuit having issued the only contrary decision.<sup>3</sup> The issue is before the Supreme Court, which heard argument on March 23, 2010, in *New Process Steel, L.P. v. NLRB*, S. Ct. No. 08-1457. Although the Supreme Court's forthcoming decision in *New Process Steel, L.P.* should resolve

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<sup>2</sup> See *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009), petition for cert. filed, \_\_ U.S.L.W. \_\_ (U.S. May 17, 2010) (No. 09-1404); *Narricot Indus. v. NLRB*, 587 F.3d 654 (4th Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3629 (U.S. Apr. 15, 2010) (No. 09-1248); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted, 130 S.Ct. 488 (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. Aug. 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).

<sup>3</sup> 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).

the issue for this Court, because the Unions have briefed the issue, the Board responds in full.<sup>4</sup>

The authority of the two-member quorum to issue Board decisions and orders is provided for in the express terms of Section 3(b), and is consistent with Section 3(b)'s history and general background principles governing the operation of government agencies. The Unions' contrary argument (Br. 13-27) must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and is otherwise meritless.

#### **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 (29 U.S.C. § 153(b)), 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.

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<sup>4</sup> The issue was previously briefed to this Court in *SPE Utility Contractors, LLC v. NLRB*, Nos. 09-1692 and 09-1730, and *NLRB v. Hartford Head Start Agency, Inc.*, Nos. 09-1741 & 09-1764.

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 3 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.

Between January 1, 2008, and March 26, 2010, the two-member quorum issued nearly 600 decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.<sup>5</sup> On March 27, 2010, the President made a number of recess appointments, including the appointments of Mr. Craig Becker and Mr. Mark Gaston Pearce to serve as members of the Board. *Press Release*,

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<sup>5</sup> 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 (Nov. 12, 2009). The published decisions are reported in 352 NLRB (146 decisions), 353 NLRB (132 decisions), 354 NLRB (129 decisions), and 355 NLRB (15 decisions as of February 28, 2010).

*President Obama Announces Recess Appointments to Key Administration Positions* (Mar. 27, 2010). Mr. Becker and Mr. Pearce were sworn into office, respectively, on April 5 and April 7, 2010. Accordingly, the Board's December 28, 2008 delegation of powers was revoked. *Minute of Board Action* (Dec. 20, 2007) (the delegation "shall be revoked when the Board returns to at least three [m]embers").

**B. Section 3(b) of the Act, by Its Terms, Authorizes the Two-Member Quorum To Exercise the Board's Powers**

In determining whether Section 3(b) expresses Congress' clear intent to grant the Board the option of operating the agency through a two-member quorum of a properly delegated, three-member group, the Court should apply "traditional principles of statutory construction." *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 123 (1987). This process begins with looking to the plain meaning of the statutory terms. *Terrell v. United States*, 564 F.3d 442, 449-51 (6th Cir. 2009). The meaning of a term, however, "cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see Terrell*, 564 F.3d. at 451. Moreover, "a statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992); *see United States v. Perry*, 360 F.3d 519, 537 (6th Cir. 2004) ("any interpretation of [the statute] that makes one of its provisions irrelevant is presumptively incorrect"); *United States v.*

*Caldwell*, 49 F.3d 251, 251 (6th Cir. 1995) (“The statute is read as a whole and construed to give each word operative effect.”).

Section 3(b) consists of three relevant 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 at all times 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 properly 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*, 587 F.3d at 659; *New Process*, 564 F.3d at 845; *Northeastern*, 560 F.3d at 41. 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 group members (along with the term 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 delegated. Consistent with Section 3(b)’s

second and third relevant provisions identified above, those “two members” then continued to exercise the delegated powers, and their authority to do so was “not impair[ed]” by vacancies in the other Board positions. 29 U.S.C. 153(b). The validity of the Board’s actions thus follows from a straightforward reading of Section 3(b).<sup>6</sup>

Moreover, as the Fourth Circuit (*Narricot*, 587 F.3d at 659), the Seventh Circuit (*New Process*, 564 F.3d at 846), and the First Circuit (*Northeastern*, 560

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<sup>6</sup> In the Board’s view, Congress’ intent 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 U.S.A. v. Natural Resources Def. Council*, 467 U.S. 837, 842-43 (1984). However, in *Snell Island*, 568 F.3d at 424, and *Teamsters*, 590 F.3d 850-52, the Second and Tenth Circuits held that Section 3(b) does not clearly indicate Congress’ intent, but that the Board’s reasonable interpretation of Section 3(b) is entitled to deference. If this Court similarly should find Section 3(b) susceptible to more than one construction, then the Court should also conclude that the Board’s view is entitled to deference. At the very least, the judgment of the Board as to the meaning of the statute it enforces is entitled to the kind of deference owed to agency actions having persuasive authority. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”). Among other things, the Board’s considered construction is consistent with the text of the statute, as well as with the legislative history of Section 3(b)’s quorum provisions, and the overall purpose of the NLRA to promote labor peace and the free flow of commerce. *See* pp. 18-31; S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947), *reprinted in* NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 414 (1948); *see also* *Snell Island*, 568 F.3d at 424 (commending the Board for its “conscientious efforts to stay ‘open for business’”).

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, 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).

The Unions rely heavily (Br. 13-14, 19, 24) on the D.C. Circuit’s decision in *Laurel Baye* for its contrary view. The *Laurel Baye* decision, however, is based on a strained reading that does not give operative meaning to all of Section 3(b)’s relevant provisions. In *Laurel Baye*, the D.C. Circuit held that Section 3(b)’s quorum provision—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” (29 U.S.C. § 153(b), emphasis added)—does not authorize the Board from adjudicating cases without at least three sitting Board members, even if the Board had previously delegated its full powers to a three-member group and the two current members constitute a quorum of that group. 564 F.3d at 472-73.

The D.C. Circuit’s interpretation fails to give the critical terms of Section 3(b)’s quorum provision their ordinary meaning, thereby violating the cardinal canon of statutory construction “that courts must presume a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); see *Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1890-91 (2009) (applying “ordinary English” to determine statutory meaning). The ordinary meaning of the word “except,” is “[w]ith exclusion of; leaving or left out; excepting.” 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 two-member quorum rule for a group to which the Board has delegated powers is an exception to the general three-member quorum rule for the full the Board.

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 may 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*, 587 F.3d at 659-60.

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 Section 3(b) as though it did not contain the word “except.” The court reasoned that “the word ‘except’ is . . . present . . . 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*, 587 F.3d at 660. 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. *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).<sup>7</sup>

The D.C. Circuit 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. v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983)

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<sup>7</sup> *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).

(“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)). Section 3(b)’s establishment of two members as a quorum of a delegee group denotes that the group may legally transact business where two of its members are participating. Under the reasoning of *Laurel Baye*, however, the presence of a two-member quorum of a 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.<sup>8</sup> 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 requirement in Section 3(b) establishes a minimum *membership* level for the full Board that must be satisfied for a delegee group to act, even though the non-group member or 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

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<sup>8</sup> 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

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*, 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”).

The Unions also argue (Br. 19) that the delegation was only valid “as long as the group remained intact,” and that once Member Kirsanow’s appointment expired, the three-member group no longer existed and could not act. Rejecting that argument, the Fourth Circuit observed that such a “reading of [Section] 3(b) would turn the two-member quorum provision on its head [because] [i]f the loss of one member of a three-member group automatically caused the group to cease to exist, then a two-member quorum would *never* suffice.” *Narricot*, 587 F.3d at 660 (emphasis in original). Further, as the court concluded, that argument was

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constituted panel of three members from proceeding with a quorum of two.” *New Process*, 564 F.3d at 846 n.2.

“entirely inconsistent with [Section] 3(b)’s ‘vacancy’ provision, which specifies that a “vacancy in the Board”—or, necessarily, a three-member group acting with the full powers of the Board—“shall not impair the right of the remaining members to exercise all of the powers of Board.” *Id.*

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

Because Section 3(b)’s language is clear, there is no need to consult its history. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 539 (2004).

Nevertheless, that history confirms the plain meaning of the statutory text: that a two-member quorum of a three-member group to which the Board has legally delegated all of its powers may continue to operate when those two members are the only sitting members of the Board.

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.”<sup>9</sup> Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal

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<sup>9</sup> *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).

labor policy, issued 464 published decisions with only two of its three seats filled.<sup>10</sup> See, e.g., *NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), enforcing 35 NLRB 621 (Sept. 23, 1941).

Although the Unions argue (Br. 13-14, 19, 24) that a two-member quorum may never exercise all of the Board's institutional powers or decide cases without a third sitting member, the 1947 Congress showed no concern about the Board's regular manner of deciding cases when it considered the Taft-Hartley amendments. 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.<sup>11</sup>

The Senate bill, while proposing to enlarge the Board and amend the quorum provision, was careful to do so in a manner that explicitly preserved the Board's ability 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

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<sup>10</sup> 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 Unions' 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).

<sup>11</sup> 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.

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.<sup>12</sup>

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.<sup>13</sup> Rather, the Senate Committee on Labor expressed the concern that the Board was taking too long to decide cases. Explaining that “[t]here is no field in which time is more important,” the Committee proposed expansion of the Board 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.”<sup>14</sup> 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.”<sup>15</sup> *See Snell Island*, 568 F.3d at 421 (Congress added Section 3(b)’s delegation provision “to enable the Board to

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<sup>12</sup> S. 1126, 80TH CONG. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

<sup>13</sup> Remarks of Sen. Ball, 93 CONG. REC. 4433 (May 2, 1947).

<sup>14</sup> S. REP. NO. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

<sup>15</sup> Remarks of Sen. Taft, 93 CONG. REC. 3837 (Apr. 23, 1947), *2 Leg. Hist. 1947*, at 1011.

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 agreed, as a compromise, to a Board of five members but accepted, without change, the Senate bill’s delegation and two-member quorum provisions, thereby preserving the Board’s ability to act through two members even as an expanded Board.<sup>16</sup> Had Congress been dissatisfied with the Board’s practice of operating through two-member quorums, it could have eliminated the Board’s authority to do so when amending the statute. Instead, Congress preserved the Board’s authority to act through a two-member quorum whenever the Board exercised its delegation authority.

Nor was the delegation-quorum scheme Congress established through adoption of the Taft-Hartley amendments in 1947 unprecedented. At that time, the statute governing the operation of the Federal Communications Commission provided that four of the seven members constituted a quorum, but authorized the commission to assign any of its work to divisions of at least three members, a majority of whom could decide matters with the same force and effect as could the commission.<sup>17</sup> Similarly, the statute governing the Interstate Commerce

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<sup>16</sup> 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.

<sup>17</sup> See Communications Act of 1934, ch. 652, §§ 4-5, 48 Stat. 1066.

Commission (ICC) at that time provided that a “majority of the Commission” (then nine members) constituted a quorum, but authorized the commission to delegate any of its work to divisions consisting of no fewer than three members, a majority of whom constituted a quorum.<sup>18</sup>

**D. The Authority of the Two-Member Quorum Is Consistent with Background Principles Governing the Operation of Government Agencies**

The Unions urge this Court (Br. 19) to interpret Section 3(b)—indeed, to override its plain language—by borrowing selected common-law rules governing private corporations and private agency relationships. Those rules, the Unions contend (Br. 19), would dictate that, at the moment the authority of the Board as a whole expired (*i.e.*, when the Board lost its three-member quorum), the Board’s prior delegation of authority to the group also lapsed and no group continued in existence. *See Laurel Baye*, 564 F.3d at 473 (asserting that an agent’s delegated authority “terminates when the powers belonging to the entity that bestowed the authority are suspended”). But the rules on which the Unions rely do not govern the continuing validity of lawful government actions. Rather, Section 3(b)’s

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<sup>18</sup> *See* Transportation Act of 1940, ch. 722, § 12, 54 Stat. 913-914; *Nicholson v. ICC*, 711 F.2d 364, 366 n.7 (D.C. Cir. 1983) (holding that an ICC decision in which only two of the three commissioners in a division participated was validly issued by a quorum of the assigned division).

special group quorum provision is fully consistent with the background rules governing the operation of government agencies.

When a governmental entity such as the Board takes an action, that action—whether a regulation, order, or delegation—acquires the force of law in its own right. There is no basis in Section 3(b) for concluding that such an action is deprived of its legal force and effect if the full Board thereafter loses its quorum. *Cf. Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2194-2195 (2009) (noting that the “expiration of the *authorities* \* \* \* is not the same as cancellation of the *effect* of the President’s prior valid exercise of those authorities”) (emphasis in original). Given that the Board made a valid delegation to a three-member group, the Board’s subsequent loss of a quorum did not abrogate the legal effect of that delegation, any more than the loss of a quorum abrogated the effect of the Board’s other prior actions and decisions. In this respect, Section 3(b) is in harmony with the general principle that “[t]he acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office.” *United States v. Wyder*, 674 F.2d 224, 227 (4th Cir. 1982); *accord Donovan v. Spadea*, 757 F.2d 74, 77 (3d Cir. 1985); *Donovan v. National Bank*, 696 F.2d 678, 682-83 (9th Cir. 1983).

The Unions, relying on *Laurel Baye*, err in assuming that Congress intends the common-law rules applicable to private corporations and agency relationships

to serve as default rules for public entities. As the Court noted in *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967), when an agency’s enabling statute is silent on the matter, quorum rules governing federal agencies are derived from the common law of *public* bodies. *Id.* at 183-84 & n.6 (collecting cases). *Accord 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). Indeed, even the agency and corporations treatises on which *Laurel Baye* relied note that governmental bodies are often subject to special rules not applicable to private bodies. *See* FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2, at 6 (2006) (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.”); RESTATEMENT (THIRD) OF AGENCY 6 (2006) (noting in its introduction 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”). Moreover, when a delegee group possessed of all of the Board’s powers acts, it is acting as the Board, not as an agent of the Board.<sup>19</sup>

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<sup>19</sup> The relevant background common-law quorum rule is that “a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” *Flotill*, 389 U.S. at 183 & n.6; *cf. Assure Competitive Transp., Inc.*

In any event, background common-law rules cannot override the clear intent of Congress, as expressed in statutory text. *See Flotill*, 389 U.S. at 183. And, here, the delegation, vacancy, and quorum provisions in Section 3(b), on their face, manifest Congress' unambiguous intent that the Board continue to function in circumstances where a private body might be disabled. There is, moreover, nothing unusual or unprecedented about Congress' decision to authorize the Board to delegate powers to a group, a quorum of which may exercise those powers even when a majority of the Board's seats are vacant. Indeed, Congress has permitted some federal agencies to establish and amend their own quorum requirements, and at least two agencies have exercised that authority to continue operating when more than half of their seats are vacant.

For example, the Securities and Exchange Commission (SEC), whose enabling statute does not include a quorum provision, adopted its own quorum requirements in 1995 when faced with the prospect of having three out of five seats

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*v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980) (holding valid a decision of the ICC issued by 4 members at a time when only 6 of the ICC's 11 seats were filled, because the 4 members were a majority of those in office and therefore constituted a quorum); *Michigan Dep't of Transp. v. ICC*, 698 F.2d 277, 279 (6th Cir. 1983) (upholding as valid a decision of ICC issued by 4 members when the other 7 Commission seats were vacant). Congress' decision that the two remaining members of a group delegated all the Board's powers are legally competent to transact business on behalf of the Board is consistent with the common-law rule that a majority of the seated members constitutes a quorum.

vacant. The rule adopted by the SEC provides that three members of the commission shall constitute a quorum unless the number of sitting commissioners is fewer than three, in which case “a quorum shall consist of the number of members in office.” 17 C.F.R. 200.41; *see Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996) (upholding the SEC’s quorum provisions and action taken under those provisions by two sitting members). The Federal Trade Commission has also amended its quorum rule, changing from a rule defining a quorum as a majority of all the members of the commission to a rule defining a quorum as “[a] majority of the members of the Commission in office and not recused from participating in the matter.” 16 C.F.R. 4.14(b).

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

The Unions argue at length (Br. 11, 13-14, 20-24) that the statutes governing the federal courts, including the federal law governing the composition of three-judge appellate panels (28 U.S.C. § 46), should control the meaning of Section 3(b) based on their “similarities.” (Br. 11.) To contrary, unlike the judicial panel statute, Section 3(b) does not limit the Board’s delegation powers to case assignment. Under the express terms of Section 3(b), the Board may delegate “any or all of the powers which it may itself exercise” to a group of three members, who accordingly may act *as the Board itself*. Those powers are not simply adjudicative,

but also administrative, and include such powers as the power to appoint regional directors and an executive secretary (*see* 29 U.S.C. § 154), and the power, in accordance with the Administrative Procedure Act, to promulgate the rules and regulations necessary to carry out the provisions of the NLRA (*see* 29 U.S.C. § 156).

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

Section 3(b), unlike 28 U.S.C. § 46(b), does not require that particular cases be assigned to panels of Board members. Therefore, a delegation of “all the Board’s powers” to a three-member group means that all cases that may come before the Board are before the group, and the two-member quorum has the authority to decide those cases.

*Nguyen v. United States*, 539 U.S. 69 (2003), upon which the Unions rely (Br. 11, 20-21), further demonstrates why construing Section 3(b) to incorporate restrictions found in federal judicial statutes would constitute legal error. *Nguyen* illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b). *See New Process*, 564 F.3d at 847-48. In *Nguyen*, the Court held that the judicial panel statute requires that a case must be assigned to three Article III judges, that the presence of an Article IV judge on the panel meant that it was not properly constituted, and that the two Article III judges on the panel could not issue a valid decision, even though Section 46(d) provides that two Article III judges constitute a quorum. *See* 539 U.S. at 82-83. However, the three-member group of Board members to which the Board delegated all of its powers *was* properly constituted pursuant to Section 3(b), and thus nothing in the Court’s *Nguyen* opinion—even if it were applicable—would prevent the two-member quorum from continuing to exercise those powers. *See Snell Island*, 568 F.3d at 419 (three-member panel that took effect on December 28, 2007, was properly constituted). Indeed, *Nguyen* specifically stated that two Article III judges “would have constituted a quorum if

the original panel had been properly created . . . .” 539 U.S. at 83. That is analogous to the situation here.<sup>20</sup>

*Ayrshire Collieries Corporation v. United States*, 331 U.S. 132 (1947), which the Unions also cite (Br. 22-23), is another case that illustrates the differences between the statutes authorizing the creation of judicial panels and Section 3(b). In *Ayrshire*, the Court held that a full complement of three judges was necessary to enjoin the enforcement of ICC orders because Congress, in the Urgent Deficiencies Act, had specifically directed that such cases “shall be heard and determined by three judges,” and made “no provision for a quorum of less than three judges.” 331 U.S. at 137. By contrast, in enacting Section 3(b), Congress specifically provided for a quorum of two members, and did not provide that if the Board delegates all its powers to a three-member group, all three members must participate in a decision.

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

In anticipation of the expiration of the recess appointments of Members Kirsanow and Walsh, the Board delegated to Members Liebman, Schaumber, and

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<sup>20</sup> The *Nguyen* Court’s further concern that the deliberations of the two-judge quorum were tainted by the participation of a judge not qualified to hear the case (see 539 U.S. at 82-83) is wholly inapplicable here.

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 remaining two-member quorum. The NLRA was designed to avoid "industrial strife," 29 U.S.C. § 151, and an interpretation of Section 3(b) that would allow the Board to continue functioning under such circumstances would give effect to both the Act's plain language and its purpose.

The Unions attack (Br. 18, 19-20) the Board's delegation of authority on the ground that the Board was aware that Member Kirsanow's departure was imminent and that the delegation would soon result in the Board's powers being exercised by a two-member quorum, which the Unions claim (Br. 18, 20) was, in effect, an intended "illegal" delegation to a "two-member group[]." Rejecting that argument, the Second Circuit aptly recognized that the anticipated departure of one member of the group "has no bearing on the fact that the panel was lawfully constituted in the first instance" through the Board's lawful delegation process to three-member groups. *Snell Island*, 568 F.3d at 419.

Indeed, as both the Seventh and First Circuits observed, similar actions taken by federal agencies to permit the agency to continue to function despite vacancies have been upheld. *See New Process*, 564 F.3d at 848; *Northeastern*, 560 F.3d at 42. As noted, in *Falcon Trading Group*, 102 F.3d at 582 & n.3, after the five-member SEC had suffered two vacancies, the remaining three sitting members

promulgated a new quorum rule so the agency could continue to function with only two members. In upholding both the rule and a subsequent decision issued by a two-member SEC quorum, the D.C. Circuit declared the rule “prudent,” because “at the time it was promulgated the [SEC] consisted of only three members and was contemplating the prospect it might be reduced to two.” *Id.*

Likewise, in *Yardmasters*, 721 F.2d at 1335, the D.C. Circuit upheld the delegation of powers by the two sitting members of the three-member National Mediation Board (“NMB”) to one member, despite the fact that one of the two delegating members resigned “later that day,” leaving a single member to conduct agency business. The court reasoned that if the NMB “can use its authority to delegate in order to operate more efficiently, then *a fortiori* [it] can use [that] authority in order to continue to operate when it otherwise would be disabled.” *Id.* at 1340 n.26. Similarly, the Board properly relied on the combination of its delegation, vacancy, and quorum provisions to ensure that it would continue to operate despite upcoming vacancies.

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 NMB member.” *Laurel Baye*, 564 F.3d at 474. While it is true that the cases are distinguishable, something the Unions strenuously assert (Br. 17-19), the critical distinction noted by the court in *Laurel*

*Baye* actually points directly to the greater strength of the Board's case. In *Yardmasters*, the court faced the question whether an agency that acts principally in a non-adjudicative capacity could continue to function when its membership fell short of the quorum required by its authorizing statute. *See* 721 F.2d at 1341-42. That problem is not presented here. Here, unlike *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 *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)).

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE UNIONS, WHICH HAD A LABOR DISPUTE WITH EMPLOYERS BRAZEN & GREER AND GEMELLI CONCRETE, VIOLATED SECTION 8(b)(4)(i) AND (ii)(B) OF THE ACT BY TRYING TO ENMESH McCARTHY AND SMITH AND OTHER UNRELATED EMPLOYERS INTO THAT LABOR DISPUTE**

**A. Unions Act Unlawfully When They Picket With the Intent of Drawing Neutral Employers into a Labor Dispute**

The “secondary boycott provisions” of the Act—Section 8(b)(4)(i) and (ii)(B) (29 U.S.C. § 158(b)(4)(i) and (ii)(B))—limit union pressure in a labor dispute to the “primary” employers involved, while shielding from pressure “neutral” or “secondary” employers, with whom the union has no direct labor dispute. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951); *District 30, United Mine Workers of America v. NLRB*, 819 F.2d 651, 655 (6th Cir. 1987). Accordingly, union “conduct violates Section 8(b)(4) [of the Act] if *any* object of that activity is to exert improper influence on secondary or neutral parties.” *Carruthers Ready-Mix, Inc. v. Cement Masons Local Union No. 520*, 779 F.2d 320, 323 (6th Cir. 1985) (citation omitted) (emphasis in the original). *Accord Int’l Union of Operating Engineers, Local 150, AFL-CIO v. NLRB*, 47 F.3d

218, 223 (7th Cir. 1995).<sup>21</sup>

Improper influence includes conduct aimed at forcing neutral employers to cease dealing with the primary employers, *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 611, 631-34 (1967), and conduct aimed at neutral employers to force them to pressure the primary employers, *NLRB v. Local 825, Int'l Union of Operating Engineers*, 400 U.S. 297, 304 (1971). For example, a union acts unlawfully by striking a construction job to force a neutral general contractor into removing nonunion subcontractors from a job. *See Denver Bldg. & Constr. Trades Council*, 341 U.S. at 687-88. That unions have an objective proscribed by Section 8(b)(4)(B) of the Act may be inferred from the “foreseeable consequences” of their conduct, *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 224 (1982), and from the “nature of the acts themselves,” *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 674 (1961).

Often, as in this case, Section 8(b)(4) issues arise in situations that involve picketing at a “common situs.” In those circumstances, because primary and

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<sup>21</sup> Specifically, Section 8(b)(4)(i) and (ii)(B) of the Act (29 U.S.C. § 158(b)(4)(i) and (ii)(B)) forbids unions from “encourag[ing] any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal . . . to perform any services,” and from “threaten[ing] . . . any person engaged in commerce” for the purpose of “forcing or requiring any person . . . to cease doing business with any other person,” with an exception for any “primary” strike or picketing.

neutral employers share a jobsite, the union's right to picket against the primary employer necessarily conflicts with the secondary employer's ability to remain above the fray. In such situations, the union's failure to minimize any secondary effects of its picketing on the neutral provides strong evidence that it unlawfully aimed its picketing at neutral employers to force the neutrals to support the union's objectives. *See Local 98, United Ass'n of Journeymen v. NLRB*, 497 F.2d 60, 65 (6th Cir. 1975).

In determining whether a union has minimized the secondary effects of its picketing at a common situs, the Board uses the criteria first developed in *Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950), and affirmed by the Supreme Court in *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 677 (1961). *See also NLRB v. Nashville Bldg. & Const. Trades Council*, 425 F.2d 385, 390-91 (6th Cir. 1970). Of the four criteria, only two are relevant here. Those two, as summarized by the Supreme Court, require:

- That the picketing take place reasonably close to the situs of the dispute;
- That the picketing clearly disclose that the dispute is only with the primary employer.

*Local 761, Int'l Union of Elec. Workers*, 366 U.S. at 677.<sup>22</sup> Failure to follow the *Moore Dry Dock* criteria creates a rebuttable presumption of unlawful secondary intent. *Id.*

To encourage easier compliance with *Moore Dry Dock*'s requirement that unions conduct their picketing reasonably close to the situs of the dispute, the Board, with Court approval, permits an employer to establish separate entrances—that is, “separate gates”—to the jobsite for the use of primary and neutral employers. *See, for example, NLRB v. Nashville Bldg. & Const. Trades Council*, 425 F.2d 385, 390 (6th Cir. 1970). *Accord Int'l Union of Operating Engineers, Local 150 v. NLRB*, 47 F.3d 218, 223 (7th Cir. 1995). When an employer properly establishes separate gates, unions, as part of their obligation to minimize secondary effects of common situs picketing, must avoid protesting at the jobsite entrances designated for use only by neutral employers and their employees. Absent evidence that the employees or suppliers of the primary employer destroyed the neutrality of the neutral gate by using the neutral gate, union picketing that extends beyond the primary gate to the neutral gate “gives rise to a presumption of illegitimate, secondary intent.” *Int'l Union of Operating Engineers, Local 150*, 47

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<sup>22</sup> Also required, but not at issue here, the union must limit its picketing to times when the dispute is located on the secondary employer's premises, and when the primary employer is engaged in its normal business at the situs. *Local 761, Int'l Union of Elec. Workers*, 366 U.S. at 677.

F.3d at 223. *Accord IBEW, Local 501 v. NLRB*, 756 F.2d 888, 893 (D.C. Cir. 1985).

The distinction between lawful activity against a primary and unlawful activity against a neutral is not always “glaringly bright” and is often marked by “lines more nice than obvious.” *Local 761, Int’l Union of Elec. Workers*, 366 U.S. at 673-74. Drawing that distinction requires a “pragmatic judgment [that] is best made by [the Board, as] the agency which views the battle at first hand.” *Int’l Bhd. of Electrical Workers, Local 480 v. NLRB*, 413 F.2d 1085, 1091 (D.C. Cir. 1969). *Accord Int’l Ass’n of Ironworkers, Local 433 v. NLRB*, 598 F.2d 1154, 1157 (9th Cir. 1979). On appellate review, “[n]ot only are the findings of the Board conclusive with respect to findings of fact in this field when supported by substantial evidence on the record as a whole, but the Board’s interpretation of the Act and . . . application of it in doubtful situations are entitled to great weight.” *NLRB v. Denver Bldg. and Constr. Trades Council*, 341 U.S. at 691-92.

## **B. The Board Reasonably Found that the Unions’ Picketing Had an Unlawful Secondary Intent**

### **1. Introduction**

Substantial evidence supports the Board’s finding that the Unions had a labor dispute at the Marysville site only with employers B&G and Gemelli, but that the Unions failed to make reasonable efforts under *Moore Dry Dock* to limit their

picketing to those primary employers. Therefore, applying well-settled law to essentially uncontroverted facts, the Board properly found that the Unions unlawfully intended their picketing at the Marysville site to enmesh M&S and other neutral employers into their labor dispute with B&G and Gemelli. The Court should enforce the Board's Order.

**2. The Unions' labor dispute at the Marysville site was limited to employers B&G and Gemelli**

As the Board found (A. 9), "it is patently clear" that the Unions' labor dispute with employers at the Marysville site during their June picketing was limited to employers B&G and Gemelli. Contrary to the Unions' discredited assertion that they were picketing the AGC (and thus M&S and other AGC members), substantial evidence demonstrated that the Unions' only beef was with B&G and Gemelli. Therefore, as explained in the next section below (pp. 46-49), the Unions were required to limit their picketing to those two employers.

To begin, the Board properly rejected the Unions' contention that the scope of the labor dispute at the Marysville jobsite not only involved B&G and Gemelli, but also the AGC and the status of a multiemployer bargaining agreement.

Notably, in so arguing, the Unions primarily rely (Br. 30-32, A. 331) on Abatement Coordinator Bartlett's testimony, while ignoring completely that the Board (A. 6 n.2, 7) explicitly discredited Bartlett's testimony. The Unions offer no argument

that the Board’s demeanor-based credibility determination to discredit that testimony had “no rational basis.” *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 484 (6th Cir. 2003) (citation omitted). Moreover, as the Board found (A. 7), “[m]ost salient facts are undisputed” and the “differences in the testimony of the General Counsel’s witnesses . . . and of Bartlett were in details rather than substance.”

That undisputed evidence, including Bartlett’s own admissions, provided overwhelming evidence—let alone substantial evidence—for the Board to find that the Unions’ labor dispute at the Marysville site during the June picketing was limited to employers B&G and Gemelli. Indeed, for the following reasons, the Unions’ suggestion (Br. 31) that it was “unclear” whether M&S and other employers at the site were part of the labor dispute is absurd.

First, as the Unions concede (Br. 28), when they began picketing at the Marysville site in June, B&G and Gemelli, having previously signed independent agreements, were the only two employers at the site who had bargaining relationships with the Unions. M&S was an AGC member, but, as the Board explained (A. 9-10), not a party to the AGC’s multiemployer agreement, or to any independent agreement with the Unions. Indeed, as the Board further explained (A. 9), M&S did not even have any laborers at the Marysville site. Likewise, none of the other employers at the site when the picketing started—Casadei Steel, Delta

Temp, Gillis Electric, Contrast Mechanical, and Port Huron—had a bargaining relationship with the Unions, through either the AGC or an independent agreement.<sup>23</sup>

Second, consistent with the undisputed fact that B&G and Gemelli were the only two employers at the Marysville site during the June picketing who had bargaining relationships with the Unions, Bartlett’s admissions leave no doubt that the Unions’ picketing was inextricably linked to those bargaining relationships—specifically, to the negotiations to replace B&G and Gemelli’s recently-expired independent bargaining agreements. As Bartlett admitted (A. 318), during the picketing, the Unions had no dispute with any employers at the Marysville site except for B&G and Gemelli. And, as Bartlett further admitted (A. 9; 327), the picketing ended after both of those employers had signed new independent bargaining agreements with the Unions.

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<sup>23</sup> The Unions’ claim (Br. 28-29) that they had bargaining relationships at the Marysville site with “[m]any” unspecified members of the AGC multiemployer bargaining association at other unspecified times during the multiyear project is unsubstantiated and, in any event, irrelevant. Because, even if the Unions, at some undisclosed point during the Marysville project, had bargaining relationships with employers who were signatory to the multiemployer AGC agreement, they do not dispute that they had no such relationships at the Marysville site during the June picketing.

Third, the Unions' actions are entirely consistent with Bartlett's admissions that the Unions' dispute only concerned the negotiations with B&G and Gemelli, not the status of the multiemployer bargaining agreement with the AGC. For instance, the picketing began on June 5, after the bargaining agreements between the Unions and B&G and Gemelli had expired. Then, after B&G signed a new agreement around June 24, the Unions added Gemelli's name to the picket signs, indicating that the remaining dispute focused only on Gemelli. Finally, on June 26, when the picketing stopped, Bartlett informed M&S Project Superintendent MacAskill that "Gemelli signed and we're all set" (A. 8; 265-66), thereby confirming that the Unions had stopped picketing because Gemelli had signed a new independent bargaining agreement with the Unions, not because of the alleged resolution of the multiemployer agreement between the Unions and the AGC. Indeed, the picket signs, contrary to the Unions' bold assertion (Br. 30, 31), never referred to the AGC.

In sum, Bartlett's admissions, in conjunction with the surrounding evidence, provide ample support for the Board's finding that, whatever dispute the Unions allegedly had with AGC, their labor dispute at the Marysville site concerned only their negotiations with employers B&G and Gemelli.

**3. Applying well-settled law, the Board properly determined that the Unions' picketing had a secondary objective**

Since the Unions' labor dispute at the Marysville site was limited to employers B&G and Gemelli, Board law, with judicial approval, required the Unions to limit their picketing at the Marysville site to those two employers. *See* pp. 39-40, above. Yet, as the Unions concede (Br. 32), they "did not limit their picketing" to B&G and Gemelli. Indeed, as the Board (A. 10) reasonably found, the Unions failed in two ways to limit their picketing as required by *Moore Dry Dock*. The Unions' failure to circumscribe their picketing to B&G and Gemelli, per *Moore Dry Dock*, created a rebuttable presumption that the Unions intended to pressure neutral employers at the Marysville site to take sides in their dispute with B&G and Gemelli.

As an initial matter, the Unions failed to comply with *Moore Dry Dock's* requirement that they "clearly disclose that the dispute was only with . . . primary employer[s]" B&G and Gemelli. *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 677 (1961). Rather, from the first day of picketing on June 4 until shortly before the last day of picketing on June 25, the picket signs simply stated: "No Contract/No Work/Laborers Local #1075." The signs did not refer to B&G or Gemelli, or, for that matter, *any* employer. Only toward the end of the picketing, after B&G was no longer involved in a labor dispute with the Unions because it

had signed a new bargaining agreement, did the Unions add Gemelli to the picket signs.

The Unions' failure to ever identify B&G, and to only identify Gemelli immediately before Gemelli signed a new agreement, warranted the Board's finding (A. 10) that from June 4 (not June 9, as the Unions suggest (Br. 29-30)) the "picketing failed to meet *Moore Dry Dock* on this basis," and reflected an unlawful objective. Indeed, the "Board has consistently required that picketing signs clearly identify the employer being picketed," and held that when unions fail to comply with that "affirmative obligation," they create a presumption of an unlawful objective. *Service Employees Local 87 (Pacific Telephone)* 279 NLRB 168, 174-75 (1986) (and cases cited). *Accord Laborers Int'l Union, Local No. 389*, 287 NLRB 570, 573-74 (1987). *See generally, Abreen Corp. v. Laborers' Int'l Union*, 709 F.2d 748, 755-56 (1st Cir. 1983).

Further buttressing the Board's finding that the Unions had an unlawful objective, the Unions also failed to comply with *Moore Dry Dock's* requirement that they picket "reasonably close to the situs" after M&S set up a separate entrance for employees of B&G and Gemelli. *Local 761, Int'l Union of Elec. Workers*, 366 U.S. at 677. Rather, despite the Unions undisputedly knowing by June 8 of the second entrance—gate A, effective June 9 for the exclusive use of "primary" employers B&G and Gemelli—they simply ignored that entrance.

Instead, the Unions continued to picket at the original gate, gate B, which was now for the exclusive use of the neutral employers who had no labor dispute with the Unions. Indeed, from June 9 until the picketing ended on June 25, the Unions continued to picket at or near the original entrance—gate B— but never at or near the second entrance—gate A. The Unions even rebuffed a specific request by M&S to move the picketing to the gate designated for employees of B&G and Gemelli.

The Unions’ conscious decision to ignore the entrance designated for employees of B&G and Gemelli, but instead to continue their picketing at the entrance designated for all other employers, fully warranted the Board’s conclusion (A. 10) that the Unions’ actions were “a further reflection of an unlawful secondary objective under *Moore Dry Dock*.” In similar situations, the Courts of Appeals have also found unlawful secondary objectives in a union’s failure to respect a reserve gate. *See Int’l Union of Operating Engineers, Local 150 v. NLRB*, 47 F.3d 218, 224 (7th Cir. 1995) (presumption of unlawful secondary intent when union’s picketing deliberately ignored primary gate to instead picket at the neutral gate); *see generally Local 98 United Ass’n of Journeymen Etc. v. NLRB*, 497 F.2d 60, 63, 65 (6th Cir. 1974) (union held in contempt of Court’s order to cease and desist from secondary conduct when it continued picketing at the neutral rather than primary gate).

In sum, the Unions' failure to clearly identify the parties to the labor dispute, and their subsequent failure to picket at the entrance designated for use by the parties to the labor dispute, created a strong presumption that their picketing had an unlawful secondary objective to pressure neutral employers at the Marysville job site to support the Unions in their disputes with B&G and Gemelli.

**4. The Unions did not rebut the presumption that their picketing had an unlawful secondary objective**

The Board (A. 10) also reasonably found that the Unions failed to rebut the presumption of unlawful secondary objective. Although the Unions' main argument for rebutting the presumption is difficult to discern, it seemingly centers on a non-existent credibility dispute, an incorrect statement of the law, and factual assertions without record support. As such, the Court should reject the Unions' claims.

First, the Unions' argument (Br. 35-39) that they rebutted any presumption of secondary objective because the picketers did not engage in verbal harassment or physical misconduct fails on both the facts and the law. On the facts, the Unions attempt to raise the specter of a credibility challenge; however, the Board (A. 8) *agreed* with the Unions that the picketers engaged in no misconduct beyond the picketing itself. Nor, on the law, was the Board required to find any such additional misconduct. Rather, picketing itself "constitutes unlawful secondary

boycott activity” if “any” object—as it was here—is a prohibited secondary object. *District 29, United Mine Workers of America v. NLRB*, 977 F.2d 1470, 1471 (D.C. Cir. 1992). *Accord Carruthers Ready-Mix, Inc. v. Cement Masons Local Union No. 520*, 779 F.2d 320, 323 (6th Cir. 1985). Therefore, when unions, as here, aim their picketing at neutral employers, they act unlawfully, regardless of whether the picketing is peaceful or fails to cause any work stoppages. *See, for example, Electrical Workers, Local 501 v. NLRB*, 341 U.S. 694, 696, 700-03 (1951) (single picketer who engaged in peaceful picketing); *see also Soft Drink Workers, Local 812 v. NLRB*, 657 F.2d 1252, 1256 (D.C. Cir. 1980) (peaceful picketing by groups of 6 to 16 individuals); *Atlanta Typographical U. No. 48*, 180 NLRB 1014, 1014-15 (1970) (picketing by groups of two to four individuals; no work stoppages or interruption of deliveries); *Twin City Carpenters District Council*, 167 NLRB 1017, 1020 (1967) (picketing by single individual; no work stoppages or interruptions of deliveries), *enforced*, 422 F.2d 309 (5th Cir. 1970).

Second, also specious is the Unions’ suggestion (Br. 36) that their picketing had no secondary intent because it had no impact on the neutral employers. On the contrary, the picketing led employees of some of the neutral employers who had no labor dispute with the Unions to honor the picket line for 1 day, and for some of those employees to not return to work for another 5 days. And, the actions of those

unionized employees were a foreseeable consequence of the Unions' failure to limit the object of the labor dispute on their picket signs to B&G and Gemelli.<sup>24</sup>

Third, the Unions' remaining arguments in support of their claim that they rebutted the presumption of an unlawful objective are not only void of any evidentiary support, but also are contrary to undisputed record evidence. For example, the Unions (Br. 31-32) offer no record support for the assertion that they only continued to picket at the gate for neutral employers because the primary gate was not functional. Also absent record support is the Unions' contention (Br. 31) that B&G and Gemelli employees destroyed the integrity of the primary gate by using the gate designated for the neutral employers. The absence of record support for both claims is particularly notable because the undisputed record evidence contradicts them: credited testimony and exhibits establish that M&S spent a considerable sum of money to create a functional entrance for the exclusive use of employees of B&G and Gemelli that was the same size as the original entrance. (A

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<sup>24</sup> Because picketing can have an unlawful objective regardless of whether it causes any work stoppages, the absence of any work stoppages among the neutral employers after M&S established the second gate has no relevance here. Rather, as shown above, the Board's finding that the picketing continued to have a secondary intent was amply demonstrated by the Unions' continued picketing at the gate designated for the neutral employers, and their failure to name any party with which they had a dispute until the picketing had almost ended.

8; 150-53, 160, 163, 229-32, 260-61, 263.) Nor is there any affirmative evidence that the gate designated for B&G was not operational, or that during the picketing, employees of B&G and Gemelli used the gate designated for all other employers.

Fourth, the Unions offer no record support for the claim (Br. 31-32, 34-35) that their unlawful picketing stopped around June 22 because they ceased picketing the neutral gate and began picketing at the reserve gate designated for B&G and Gemelli. To the contrary, as the Unions' brief simultaneously concedes (Br. 32), Bartlett's testimony makes "clear" that the Unions "did not limit their picketing." Indeed, as Bartlett conceded at the hearing (A. 326), the picketers never picketed at the entrance designated for B&G and Gemelli, but instead continued to picket at the original entrance, now designated as the entrance for employees of all other employers. Consistent with Bartlett's admissions, the credited testimony of the General Counsel's witnesses (A. 6 n.2, 7, 8; 244-45, 247-51, 280-82, 314-15) and several photos (A. 154-55) demonstrate that the picketers continued to unlawfully picket at the gate designated for all employers other than B&G and Gemelli.<sup>25</sup>

Finally, the Unions' suggestion (Br. 29-30) that they did not violate the Act because the unlawful picketing stopped before the Board's General Counsel issued

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<sup>25</sup> That the picketers also congregated under a tree (Br. 8) hardly advances the Union's position. As Bartlett admitted (A. 154, 322-23), the tree was located closer to the primary gate than to the neutral gate.

his unfair labor practice complaint is frivolous. The Board's understandably taking a few weeks to investigate M&S's unfair labor practice charge and thereafter to issue a complaint suggests that the Unions ended their unlawful picketing once it had its desired impact and before the Board's complaint issued.

Regardless, the Unions offer no support, nor could they, for the illogical proposition that their conduct was not unlawful simply because it stopped while the General Counsel was still investigating whether to issue a complaint alleging that their picketing was unlawful. To the contrary, as the Supreme Court has long recognized, the Board "is not barred from granting appropriate remedies by the fact that the challenged conduct has ceased." *Liner v. Jafco, Inc.*, 375 U.S. 301, 307 (1964). Because, as the Supreme Court has further explained, "[a] Board Order imposes a continuing obligation, and the Board is entitled to have the resumption of the unfair labor practice barred by an enforcement decree." *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567-68 (1950). *Accord NLRB v. Heck's Inc.*, 369 F.2d 370, 371 (6th Cir. 1966) ("Abandonment of an unfair labor practice does not cause the proceeding to become moot.").

In sum, the Board's determination that the Unions failed to rebut the presumption that the picketing had an unlawful intent is not, as the Unions claim (Br. 11), "largely based on [the Board's] credibility determinations," but rather, as the Board noted (A. 7), based on "undisputed" and "salient facts" regarding the

nature of the labor dispute and the picketing. Accordingly, because the Unions' picketing was exactly the type of secondary conduct that Section 8(b)(4) was designed to prevent, this Court should enforce the Board's finding that the Unions committed an unfair labor practice.

**CONCLUSION**

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

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May 2010

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

LOCAL 1075, LABORERS' INTERNATIONAL )  
UNION OF NORTH AMERICA AND )  
MICHIGAN LABORERS' DISTRICT COUNCIL )  
 )  
Petitioner/Cross-Respondent ) Nos. 10-1075, 10-1157  
 )  
 )  
v. ) Board Case No.  
 ) 7-CC-1831  
NATIONAL LABOR RELATIONS BOARD )  
 )  
Respondent/Cross-Petitioner )  
 )

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,648 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC  
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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

LOCAL 1075, LABORERS' INTERNATIONAL	:
UNION OF NORTH AMERICA AND	:
MICHIGAN LABORERS' DISTRICT COUNCIL	:
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Petitioner/Cross-Respondent	:
	: Case Nos. 10-1075, 10-1157
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NATIONAL LABOR RELATIONS BOARD	:
	:
Respondent/Cross-Petitioner	:

**CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that the following participant in the case is a registered CM/ECF user and that service will be accomplished by the CM/ECF system.

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