

Nos. 14-2051 and 14-2148

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

HUNTINGTON INGALLS INCORPORATED

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS**

Intervenor

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

**CORRECTED BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Huntington Ingalls, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Decision and Order of the Board issued on

October 3, 2014, and reported at 361 NLRB No. 64. (A. 1814-18).¹ In its Decision and Order, the Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”), by refusing to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL-CIO (“the Union”) as the bargaining representative of a unit of the Company’s employees. (A. 1814-18.) The Union intervened on the side of the Board.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, because the unfair labor practice occurred in Virginia. The Company’s petition for review and the Board’s cross-application were timely filed; the Act places no limit on such filings.

The Board’s unfair labor practice order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 5-RC-16292), which is

¹“A.” refers to the Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Company’s opening brief, and “ABr.” refers to the brief of amici curiae.

reported at 357 NLRB No. 163 (2011). (A. 1241-58.) Pursuant to Section 9(d) of the Act (29 U.S.C. §159 (d)), the record before this Court therefore includes the record in that proceeding. *See also Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) authorizes judicial review of the Board’s actions in a representation proceeding for the limited purpose of deciding whether to “enforce[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board” but does not give the Court general authority over the representation proceeding. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair labor practice case. *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).²

² *But see NLRB v. Lundy Packing Co.* 81 F.3d 25, 26-27 (4th Cir. 1996). *Lundy’s* holding that the Board lacks the authority to resume processing the representation case rests on inapposite cases dealing not with Section 9(d)’s limitations on judicial control over representation cases, but with Section 10(e)’s limitations on the Board’s authority to revisit unfair labor practice issues once they have been considered by a reviewing court. *See, e.g., Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945); *Serv. Emps. Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981). Should the Court disagree with the Board’s unit determination, the Board asks that the case be remanded for further processing consistent with the Court’s opinion. *See NLRB v. Local 347*, 417 U.S. 1, 8 (1974) (holding appeals court should have remanded question of remedy to the Board rather than deciding the issue).

STATEMENT OF THE ISSUES PRESENTED

The ultimate issue in this case is whether the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the Board-certified representative of its employees following a Board conducted election. Resolution of this issue is dependent upon two subsidiary issues:

1. Whether the Board properly considered this case anew and resolved the merits of the unfair labor practice allegations.
2. Whether the Board acted within its discretion in determining that a unit of radiological and other technicians who perform a safety function at the Company's nuclear shipbuilding facility constitutes an appropriate unit for collective bargaining, and therefore properly found that the Company violated the Act by refusing to bargain.

STATEMENT OF THE CASE

The Company refused to recognize and bargain with the Union after the Board certified the Union as the exclusive bargaining representative of a unit of approximately 140 radiological control technicians ("RCTs"), 3 calibration technicians, 20 laboratory technicians, and 60 RCT trainees, all of whom work in the Company's E85 Radiological Control Department in the Nuclear Services

Division (“E85 RADCON”).³ The Board found that the Company’s refusal was unlawful. (A. 1814-18.) Before the Court, the Company contends that the Board lacked jurisdiction to issue its Decision and Order in this case. Thus, if the Court rejects the Company’s challenge to the validity of the Board’s Order, and upholds the Board’s determination that the bargain unit is appropriate, the Order is entitled to enforcement.

I. THE BOARD’S FINDINGS OF FACT

A. The Company’s Operations and Organization

The Company, formerly Northrop Grumman Shipbuilding, operates a shipyard in Newport News, Virginia, where it employs 18,500 individuals, and constructs, refuels, and overhauls nuclear-powered aircraft carriers and submarines for the U.S. Navy. Constructing a vessel takes about 6 years, and is a complex endeavor involving thousands of employees. After several years of service, a nuclear-powered carrier or submarine must be refueled and overhauled, which takes the Company up to 3 and 1/2 years to complete, and involves refueling the ship’s nuclear reactor. (A. 1241, 1250; 21, 78, 82, 84, 86-87, 111, 114, 247-49.) A substantial proportion of the Company’s shipyard is also engaged in non-nuclear construction work. (A. 1246, 1254, 1256-57; 242.)

³ E85 RADCON also includes approximately 15 dosimetry techs and approximately 18 health physics techs. Neither party seeks to include these employees in the unit. (A. 1252.)

The Company has organized its operations into several divisions. The Nuclear Services Division has numerous departments, and each department has its own supervisory hierarchy. (A. 1250; 29, 239-42.) As is relevant to the present case, the RCTs, calibration technicians, laboratory technicians, and RCT trainees in the E85 RADCON department are the employees in the unit that the Board found appropriate. (A. 1241, 1250, 1816-17; 1261.)

B. Overview of the Company's Work Force

The Company classifies approximately 2,400 of its employees as technical employees. Technical employees perform non-manual work requiring some sort of specialized training. (A. 1241, 1250-51; 81,155.) The Company groups its technical employees in the following job classifications: RCTs, quality inspectors, test technicians, engineering technicians, dimensional control technicians, laboratory technicians, chemical handlers, and calibration technicians. (A. 1241 & n.2, 1250-51; 81.) All technical employees are salaried and receive the same benefits. (A. 1251; 42, 134, 250.)

C. To Ensure Employees' Radiological Safety, and To Comply with Radiological Protocols, the Company Employs RCTs Located Exclusively in E85 RADCON

As noted above, as part of its operations, the Company constructs, refuels, and overhauls nuclear-powered aircraft carriers and submarines. The power source for these vessels is an onboard nuclear reactor. Construction and refueling work

can generate radiation and contaminated radiological materials. Therefore, the Company must maintain proper safety and comply with relevant protocols. (A. 1253; 88, 102-03.) Radiological oversight is required about 4 to 6 months before the Company finishes building a carrier, and 2 months before the Company finishes building a submarine. And it is typically necessary from the beginning of the refueling process. (A. 1250; 103, 111.)

The Company follows an overall radiological control philosophy called “As Low as Reasonably Achievable,” or ALARA. Having RCTs in place who function independently to ensure radiological safety and oversight—as the Company does—is a core component of ALARA. The Company’s E85 RADCON department, with approximately 140 RCTs, provides radiological oversight at the shipyard that is independent of both production and quality control. (A. 1241; 104, 743-44.)

RCTs ensure that employees working in radiological areas follow the requirements of the Company’s radiological control program. To accomplish this, they maintain radiological control areas, where they determine whether employees should be allowed to enter and they screen those entering. They also perform radiological surveys, which involves testing for contaminants. (A. 1241, 1253; 44-46, 49, 52-53, 97, 104, 106, 172, 968.) RCTs are uniquely trained and qualified to

perform their radiological control tasks, and they use specialized equipment and tools. (A. 1253; 44, 50, 55-57, 1006-17.)

D. The E85 RADCON Department Also Includes Laboratory Technicians, Calibration Technicians, and RCT Trainees, Whose Work Supports RCTs

The E85 RADCON department also includes approximately 20 laboratory technicians, 3 calibration technicians, and 60 RCT trainees. These employees essentially provide support for the RCTs' work. Thus, all of these employees, along with the RCTs, are in the same department, work under the same supervisory hierarchy, and work toward achieving radiological safety at the shipyard.

Laboratory technicians test samples collected by RCTs, calibration technicians calibrate RCTs' tools, and RCT trainees perform some of the same tasks RCTs perform. (A. 1242, 1252-53; 54, 99-100, 170-71.) All of these employees are qualified to use the specialized tools RCTs use. (A. 1315; 54, 916-17.)

E. RCTs' Work Contacts with Other Technical Employees Are Infrequent

As stated above, RCTs screen all employees who seek entry to radiological control areas. These work-related contacts are generally brief and limited to screening and monitoring. RCTs have the greatest degree of work-related contact with production and maintenance employees and other non-technical employees. (A. 1254, 1257; 217, 967-69, 971, 973.)

At certain stages during refueling overhauls and during the final months of new ship construction, RCTs have some increased contact at control points with other technical employees—mostly quality inspectors and test techs, but also designers and engineering techs. RCTs’ contact with all employees—including technical employees—at control points is brief and involves screening and monitoring them, not working together to perform technical or production-related jobs. (A. 1242, 1254; 49, 111, 469, 534, 536-37, 971, 1063.)

II. THE BOARD PROCEEDINGS

A. The Representation Proceeding

The Union petitioned the Board to represent the RCTs in E85 RADCON. (A. 1240-50; 1.) In the alternative, the Union agreed to proceed to an election in a departmental unit of all technical employees in E85 RADCON. (A. 1249-50 & n.4.) The Company argued that the smallest appropriate unit had to include all of its 2,400 technical employees. (A. 1333.)

Following a hearing, the Board’s Regional Director for Region 5 (“RD”) issued a Decision and Direction of Election (“DDE”), on May 29, 2009, finding that a unit consisting of RCTs, calibration technicians, lab technicians, and RCT trainees in E85 RADCON, was appropriate for purposes of bargaining. Specifically, the RD, applying the standard described *TRW Carr Division*, 266 NLRB 326 (1983), and related cases (A. 1249-58, 1293-1320), found that the

above-mentioned employees in E85 RADCON had a community of interest sufficiently distinct from other technical employees at the Company's shipyard, such that the technical employees in E85 RADCON constituted an appropriate unit as a subset of the Company's 2,400 technical employees. *See TRW Carr*, 266 NLRB at 326 n.4 (a subset of an employer's technical employees is appropriate "only when the employees in the requested unit possess a sufficiently distinct community of interest apart from other technicals to warrant their establishment as a separate appropriate unit").

The Company requested Board review of the DDE, contending that, under *TRW Carr* and related cases, an appropriate unit must include all 2,400 technical employees. The Board granted the request for review on July 30, 2009, and reaffirmed the order granting review on August 27, 2010. (A. 1240; 1322-23.)

While the decision on review was pending, the Board, on August 26, 2011, issued its decision in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077 (2011), *enforced sub. nom. Kindred Nursing Centers East v. NLRB*, 727 F.3d 552 (6th Cir. 2013). In *Specialty*, the Board clarified the standard for determining the showing that is required when an employer seeks to expand a unit composed of a readily identifiable group (based on job classifications, departments, functions, work locations, skills, or similar factors) that shares a community of interest. Under that standard, an employer

seeking to expand the unit must demonstrate that employees in the larger unit “share an overwhelming community of interest with those in the” otherwise appropriate unit. *Specialty Healthcare*, 2011 WL 3916077, at *17.

On December 30, 2011, the Board issued a Decision on Review and Order, affirming the RD’s finding in this case that the unit is appropriate. The Board (Chairman Pearce, Members Becker and Hayes) found that, under the *Specialty Healthcare* standard, the unit is appropriate. (A. 1241-44.) The Board also found, as an alternative basis for its conclusion, that the unit is appropriate under the standard applied in *TRW Carr* and related cases. (A. 1244-46 & n.8.)

The unit employees voted for representation in a Board-conducted election, and the Board’s Regional Director for Region 5 subsequently certified the Union as their exclusive representative for purposes of collective bargaining. (A. 1260-61.)

B. The Initial Unfair Labor Practice Proceeding

Following the Board’s certification of the Union, the Company refused to comply with the Union’s bargaining request in order to contest the validity of the certification. The Union filed a charge, and the Board’s Acting General Counsel issued a complaint alleging that the Company’s refusal was unlawful. (A. 1814.)

On August 14, 2012, the Board (Chairman Pearce and Members Hayes and

Griffin) issued a Decision and Order granting the motion for summary judgment, finding that the Company's refusal to bargain was unlawful. (A. 1402-04.)

C. The Prior Appeal and the Supreme Court's *Noel Canning* Decision

Following the Board's April 18 Decision and Order, the Company petitioned for review and the Board cross-applied to this Court for enforcement. (Case Nos. 12-1000 and 12-2065.) After briefing and oral argument, the Court, on July 17, 2013, denied enforcement and vacated the Board's Order, even though it concluded that substantial evidence supported the Board's unfair labor practice findings. *NLRB v. Enterprise Leasing Company-Southeast, LLC, and Huntington Ingalls Inc. v. NLRB*, 722 F.3d 609, 614-20 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 2902 (2014) (citing *Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013), *affirmed on other grounds*, 134 S. Ct. 2550 (2014)). The sole basis for the Court's denial of enforcement of the Board's Order, was that because "the President's three January 4, 2012 appointments to the Board were not made during an intersession recess," those appointments "were invalid from their inception." *Id.* at 660. The panel majority thus held that the Board's decision "must be vacated" because, when the Board order issued, "the Board lacked a quorum of three members." *Id.* (citing *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-88 (2010) (holding that two-member quorum of a three-member panel delegated all of the Board's

powers could not continue to exercise that delegated authority after the third Board member's appointment expired).

The Board filed a petition for rehearing for the limited purpose of requesting that the Court modify its order to include language explicitly remanding the case to the Board for further proceedings consistent with the Court's decision. (A. 1415-22.) In its petition, the Board stated that although it was requesting the inclusion of explicit remand language to avoid the possibility of needless litigation concerning the issue, in its view, even without such language, the Court's decision clearly contemplated the possibility of further proceedings before a properly constituted Board. (A. 1417-18.) The Court denied the petition without explanation. (A. 1590-92)⁴ Thereafter, the Board filed a petition for writ of certiorari on the recess appointment issue.

On June 24, 2014, the Supreme Court issued *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that the January 2012 appointments were invalid. The Supreme Court then denied the Board's petition for writ of certiorari.

III. THE BOARD'S DECISION AND ORDER AFTER THE SUPREME COURT'S *NOEL CANNING* DECISION

In an August 14, 2014 letter, the Board's Executive Secretary notified the parties that, in view of the determination that the Board panel that had previously

⁴ The Court also denied the Union's petition for rehearing. (A. 1593-94.)

decided the case was not properly constituted, it would “consider the case anew and . . . issue a decision and order resolving the complaint allegations.” (A. 1814; 1807-08.)⁵ On August 26, 2014, the Company filed a letter objecting to any further action by the Board, asserting that absent a remand from the Court, the Board lacked jurisdiction over the case. (A. 1814; 1809-10.)

On October 3, 2014, the Board (Chairman Pearce, Members Hirozawa and Johnson) issued its Decision and Order, granting the General Counsel’s motion for summary judgment. (A. 1814-18.) The Board first found that it could consider the case anew after the Court denied enforcement because “[t]he clear import of the [C]ourt’s decision denying enforcement, along with the Supreme Court’s *Noel Canning* decision, is that no validly constituted Board has ruled on the General Counsel’s motion for summary judgment.” (A. 1814.) Accordingly, the Board concluded (A. 1814) that the General Counsel’s motion was “still pending before the Board, and the Board is free to address it.” In so finding, the Board noted (A. 1815) that consideration of the case anew was consistent with the treatment by the courts of appeals of other cases in which enforcement was denied for lack of a Board quorum at the time of the original decision.

⁵ At that time, the Board was composed of five Presidentially-appointed, Senate-confirmed members, having regained a quorum in August 2013. *See The National Labor Relations Board Has Five Senate Confirmed Members*, NLRB Office of Public Affairs (Aug. 12, 2013), <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members>.

Addressing the motion for summary judgment, the Board first concluded that the Company's contentions about *Specialty Healthcare* were untimely, because the Company could have raised these arguments in a motion for reconsideration of the Board's December 30, 2011 representation decision, but did not do so. (A. 1815-16.) The Board further stated that, in any event, the Company's contentions about *Specialty Healthcare* were without merit. (A. 1816.)

The Board also concluded that "[a]ll representation issues raised by the [Company] were or could have been litigated in the prior representation proceeding," and that the Company did "not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding." (A. 1816.) Accordingly, the Board granted the motion for summary judgment and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (A. 1816-17.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A. 1817.) Affirmatively, the Order directs the Company to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to post and electronically distribute an

appropriate remedial notice to employees. (A. 1817-18.)

SUMMARY OF ARGUMENT

1. The Board properly found that the Court's denial of enforcement of the April 2012 Decision and Order did not prevent the Board from deciding this case anew. In denying enforcement, the Court relied solely on its holding that the Board's recess appointments were invalid and therefore the Board was improperly constituted at the time it issued the Decision and Order. Interpreting the Court's mandate as permitting further proceedings in these circumstances fully comports with the treatment in the courts of appeals of other cases in which enforcement was denied for lack of a Board quorum, and with principles governing the reasonable and equitable interpretation of mandates. The Board's view is also supported by the decisions of every court, including this one, that have permitted a properly constituted Board to address the merits of the unfair labor practice allegations in proceedings after *New Process* and *Noel Canning*. The Company's assertion that the now properly constituted Board should be precluded from resolving the underlying unfair labor practice dispute relies on a litany of distinguishable cases and conflicts with both reasonable and equitable principles governing the interpretation of mandates. Accordingly, the Board properly interpreted the Court's mandate and decided this case anew.

2. The employees in the Company's E85 RADCON department, who perform the safety monitoring function at the nuclear shipbuilder, chose union representation. The Company refused to bargain because it insisted that the bargaining unit must include all of its facility's 2,400 technical employees. But the Board acted well within its discretion in certifying the unit. Before the Court, the Company's opening brief does not challenge the Board's finding that under the *TRW Carr Division*, 266 NLRB 326 (1983), line of cases—which pre-dated *Specialty Healthcare* and which the Company argued in the administrative proceeding applied—a unit of the technical employees in the E85 RADCON department was an appropriate unit. The Company, therefore, has waived any challenge to that finding.

Instead, the Company asserts without supporting argument that the analytical framework the Board described in *Specialty Healthcare & Rehab Ctr. of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077 (2011), *enforced sub. nom. Kindred Nursing Ctrs. East v. NLRB*, 727 F.3d 552 (6th Cir. 2011), is inconsistent with the Act. The Board's decision did start by applying that framework, but then applied the *TRW Carr* line of cases as urged by the Company, and upheld the RADCON department unit, a result which the Company no longer even disputes. In any event, the Court should not consider the Company's attacks on *Specialty Healthcare* because the Company failed to timely raise them to the Board in the

representation proceeding or even to include them in its opening brief. Further, Huntington is simply incorrect in contending that *Specialty Healthcare* and its progeny have overruled the *TRW Carr* line of cases, but even if that line of cases were overruled, the fact remains that the appropriateness of the Company's unit was analyzed under the *TRW Carr* line of cases pressed to the Board by the Company. Finally, it is well established that turnover since the election, in a bargaining unit that remains appropriate, is not a basis for undoing the bargaining relationship that the employees chose in that election.

ARGUMENT

I. THE BOARD PROPERLY CONSIDERED THIS CASE ANEW AND RESOLVED THE MERITS OF THE UNFAIR LABOR PRACTICE ALLEGATIONS

As the Board (A. 1814) stated, “[t]he threshold issue is whether, in light of the denial of enforcement, the Board may consider this case anew.” Following the Court’s denial of enforcement, the Board’s task was to construe the decision and judgment “in light of the principle that a mandate is to be interpreted reasonably and not in a manner to do injustice.” *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962 (per curiam) (quoting *Wilkinson v. Mass Bonding & Ins. Co.*, 16 F.2d 66, 67 (5th Cir. 1926)); accord *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 225-28 (1947); *United States v. Bell Petroleum Services, Inc.*, 64 F.3d 202, 204 (5th Cir.

1995); *Phillips Petroleum Corp. v. FERC*, 902 F.2d 795, 798 (10th Cir. 1990); *Little v. United States*, 794 F.2d 484, 489 n.3 (9th Cir. 1986).

In performing this task, the Board was mindful of the instruction that “[i]nterpretation of an appellate mandate entails more than examining the language of the court’s judgment in a vacuum.” *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1478 (Fed. Cir. 1998). The Board concluded (A. 1814-15) that this Court’s decision was not a final resolution of the unfair labor practice issues and should not be interpreted as terminating further proceedings before the Board. As we show below, the Board properly construed the mandate as permitting it to resolve the unfair labor practice allegations. There is no merit to the Company’s argument (Br. 8-9, 13-31) that the Court’s order denying enforcement deprived the Board of jurisdiction to decide this case with a properly constituted Board panel.

It is well established that an appellate mandate is reasonably construed to govern only what “was actually decided.” *Exxon*, at 1478. As noted above (pp. 12-13), the sole basis of the Court’s denial of enforcement was its conclusion that the appointments of three of the Board members in January 2012 were invalid, and that the Board therefore lacked a quorum when it issued the Order. *Enterprise Leasing*, 722 F.3d at 612-13, 631-60.

As the Board explained (A. 1814), the Court’s opinion and judgment denying enforcement were not based upon the Court’s adversely resolving the unfair labor practice issues raised in the General Counsel’s complaint and litigated in the unfair labor practice proceedings. To the contrary, in an effort to resolve this case on non-constitutional grounds, the Court first reviewed the merits of the unfair labor practice findings, and concluded that substantial evidence supported the Board’s findings. *Enterprise Leasing*, 722 F.3d at 612-31. Accordingly, the Court reached the constitutional recess appointment issue and—solely on that basis—vacated the Board’s order and denied enforcement. 722 F.3d at 660. Because the Court denied enforcement solely on the ground that the order before it had been issued by improperly appointed Board members, the Board reasonably concluded that the Court’s mandate was not intended to terminate further proceedings before the Board now that new members have been validly appointed. As the Board found (A. 1814), “[t]he clear import” of the Court’s decision and the Supreme Court’s decision in *Noel Canning* is that “no validly constituted Board has ruled on the General Counsel’s motion for summary judgment,” and therefore, that motion is “still pending before the Board, and the Board is free to address it.”

The Board’s conclusion is in accord with the how other circuits construed similar mandates denying enforcement after *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-88 (2010), set aside orders issued by a two member Board panel on

the ground that the two panel members lacked authority to issue decisions after the term of the third member on the panel had expired. As the Board recognized (A. 1815), the decision of the Eighth Circuit in *NLRB v. Whitesell*, 638 F.3d 883 (2011), is the most instructive in calling attention to the difference between denying enforcement on the merits and denying enforcement because the panel that issued a decision lacked authority to bind the Board.

In *Whitesell*, the Eighth Circuit relied on the Supreme Court's decision in *New Process* to deny enforcement of an order issued by the improperly constituted two-member Board. The court did not remand, but it thereafter denied the employer's mandamus petition to block the Board from considering the case anew, as did the Court in the instant case. Subsequently, in reviewing the new final order issued by a validly constituted Board, the Eighth Circuit squarely held that its prior order denying enforcement did not prevent the properly constituted Board from considering the case. *Whitesell*, 638 F.3d at 888. Responding to virtually the same arguments as the Company makes here, the court explained that its prior denial was based only on the composition of the two-member Board, not the merits of the unfair labor practice issues, and that its order denying enforcement "without reference to remand" did "*not* preclude the Board, now properly constituted, from considering this matter anew and issuing its first valid decision." *Id.* at 889 (emphasis added).

Likewise, as the Board observed (A. 1815 and n.6) and the *Whitesell* court discussed, the Second Circuit in *NLRB v. Domsey Trading Corp.*, 383 F. App'x 46, 47 (2d Cir. 2010), when it denied enforcement of a two-member Board order pursuant to *New Process*, “anticipated further proceedings before the Board and that a new petition for enforcement would be filed.” *Whitesell*, 638 F.3d at 889 (noting that after a validly constituted Board panel reconsidered the case, the Second Circuit reviewed the merits of the Board’s decision in *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011)). Accordingly, where, as here, a court determines that no proper Board quorum has decided the merits, a remand need not be explicitly ordered for the Board to consider the case anew because the court’s mandate is reasonably construed to permit a properly constituted Board to decide the case. *Whitesell*, 638 F.3d at 889.

The Court’s denial of the Board’s rehearing petition does not undermine the Board’s interpretation of the mandate. As the Board explained (A. 1815), its petition stated the Board’s view that even absent a remand, the Court’s decision clearly contemplated the possibility of further proceedings before a properly constituted Board. The Court denied the petition without explanation. Accordingly, relying on cases holding that no inference can be drawn from petitions for rehearing or clarification denied without explanation, the Board reasonably concluded (A. 1815, n.4) that the Court’s summary denial did not signal

an intention to foreclose further Board proceedings. In this respect, as the Board noted (A. 1815, n. 5), the Eighth Circuit's decision in *Whitesell* is again instructive. Like this Court, the Eighth Circuit had previously issued a summary denial of a post-decisional motion by the Board for remand or clarification, but nonetheless read its mandate to allow the Board to decide that case anew.

The Company is wrong when it claims (Br. 19-25) that the Board's construction of this Court's mandate is inconsistent with *NLRB v. Lundy Packing Co.*, 81 F.3d 25 (4th Cir. 1996), and similar cases holding that where a court's mandate ends the case, the case is over. *See e.g., Int'l Union of Mine, Mill & Smelter Workers, Local 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335 (1945), *W.L. Miller v. NLRB*, 988 F.2d 834 (8th Cir. 1993), *Service Employees Int'l. Union Local 250 v. NLRB*, 640 F.2d 1042 (9th Cir. 1981). In *Lundy*, this Court held that its order denying enforcement of a Board order without providing for a remand prevented the Board from further processing the case. *Lundy*, 81 F.3d at 26. However, as the Board noted (A. 1815, n.7), *Lundy* is distinguishable. In *Lundy*, the Court had initially denied enforcement based on its rejection of the Board's unfair labor practice findings entered by a properly constituted Board. *See NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995). In contrast, as the Board explained here (A. 1815, n. 7), "decisively, the court's denial of

enforcement of the prior order was not a final judgment on the merits of the case.” (citing *Whitesell*, 638 F.3d at 889).

All of the other cases cited by the Company are similarly distinguishable because the court, after considering and ruling on the merits, set aside or enforced a final order issued by a properly constituted Board. See, e.g., *Int’l Union of Mine, Mill & Smelter Workers, Local 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent proof of fraud or mistake, the Board is not entitled to have a court-enforced order vacated almost 2 years later so that it can enter a new remedial order that in retrospect it decides is more appropriate); *W.L. Miller v. NLRB*, 988 F.2d 834, 837 (8th Cir. 1993) (once court enforces Board order on the merits, Board lacks authority to reopen proceeding to award additional relief); *Service Employees Int’l. Union Local 250 v. NLRB*, 640 F.2d 1042, 1045 (9th Cir. 1981) (Board lacks jurisdiction to adjudicate claim, the merits of which were implicitly rejected by earlier court decision).

In short, all the cases the Company relies upon are distinguishable on the ground that in those cases enforcement was denied after an authoritative consideration of the merits. Here, by contrast, the Court denied enforcement because the order before the Court was issued by officials that the Court found to have been improperly appointed. That distinction makes all the difference. A judicial determination that an order had not been issued by a properly constituted

tribunal means that the merits of the case have yet to be authoritatively decided. That is exactly how the Board construed the mandate here. And, as noted above, the Eighth Circuit in *Whitesell* agreed with the Board's construction of its similar mandate.⁶

Unable to square its position with *Whitesell*, the Company unconvincingly attacks (Br. 26-28) that decision.⁷ It first claims (Br. 26-27) that the *Whitesell*

⁶ This view is supported by the common law proposition that “dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim.” *Costello v. United States*, 365 U.S. 265, 285 (1961); accord *Hughes v. United States*, 71 U.S. (4 Wall) 232, 237 (1866) (“In order that a judgment may constitute a bar to another suit, it must be . . . determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.”), quoted in *Costello*, 365 U.S. at 286; *FTC v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977) (“An order has no res judicata significance unless it is a final adjudication of the merits of an issue.”); *Madden v. Perry*, 264 F.2d 169, 175 (7th Cir. 1959) (“At common law a dismissal on a ground other than the merits would not constitute res judicata in a later case.”).

⁷ The Amicus asserts (ABr. 19-21) that *Whitesell* is distinguishable because that case was decided after the Supreme Court decided *New Process*, but here the Court's decision issued before *Noel Canning*. It therefore claims that the Board cannot “rely” on *Noel Canning* and its subsequent procedural history as a basis to consider the case anew. Here, however, the Board is not relying on *Noel Canning* except to the extent that decision led the Supreme Court to deny certiorari and to uphold the Court here. What is similar, and important in this case, and in *Whitesell*, is that both decisions rest solely on the finding by the court that there was not a quorum.

court did not distinguish or address relevant authority such as *Eagle-Picher*, or even Section 10(e) itself.

Although *Whitesell* did not explicitly address *Eagle-Picher* and related cases, it was not required to, given that those cases were distinguishable. In addition, those cases were fully presented and briefed to the court (*see NLRB v. Whitesell*, Eighth Cir. Case No. 10-2934, ECF Entry ID 3712382 at *36-38 (employer brief filed 10/12/2010); ECF Entry ID 3723703 at *43-45 (Board brief filed 11/12/2010)) and thus “are to be taken as covered by the court’s decision though not mentioned in the opinion.” *Com. of Pa. v. Brown*, 373 F.2d 771, 777 (3d Cir. 1967) (citing *Bingham v. United States*, 296 U.S. 211, 218-19 (1935)).

Moreover, the Company is factually incorrect in claiming that the Eighth Circuit did not address how its decision comported with Section 10(e) of the Act in its *Whitesell* decision. As the Board noted (A. 1815), *Whitesell* specifically relies on Section 10(e):

In the prior action, the only question presented was whether to enforce the NLRB’s order. Relying on the *New Process* decision, we denied the application for enforcement because the prior NLRB decision, reached while there were only two members of the Board, was invalid. On that issue, our decision is final. *See* 29 U.S.C. Section 160(e).

Whitesell, 638 F.3d at 889.

The Company’s remaining challenge (Br. 27) to *Whitesell* is that it is inconsistent with the Eight Circuit’s prior panel decision in *W.L. Miller*, 988 F.2d

834 (8th Cir. 1993), and therefore not binding precedent even in the Eighth Circuit. *W.L. Miller*, however, is readily distinguishable from *Whitesell* (and the instant case), because it involved a Board order enforced on its merits. *See* above pp. 20-22.) Accordingly, *Whitesell* is inescapably on all fours with this case and stands as precedent in the Eighth Circuit and persuasive authority for this Court.⁸

The Company's primary remaining argument against the Board's authority to decide the case anew (Br. 14-19) is that the so-called "plain" text of Section 10(e) undermines the Board's interpretation of the Court's mandate. The Company's assertion, however, rests on a distinction between denying enforcement and remanding that lacks any basis in the text of Section 10(e). After a court has completed its review of the merits, the plain language of Section 10(e) only gives the court the options to "enter a decree enforcing, modifying and enforcing as so modified or setting aside in whole or in part the order of the Board." 29 U.S.C. Section 160(e). In other words, the plain language of the statute makes no provision for a final decree remanding the case to the Board. *See Ford Motor Co.*

⁸ The Company also claims (Br. 27-28) that the Second Circuit's *Domsey* decision, cited by the *Whitesell* court and the Board here, has no bearing because the initial decision in *Domsey* contained language in addition to its denial of enforcement that could be read to contemplate future Board proceedings. However, the relevant similarity shared by *Domsey*, *Whitesell*, and this case is that in each initial court decision, the court's denial of enforcement without explicitly providing for a remand did not preclude further action by the Board.

v. NLRB, 305 U.S. 364, 373 (1939) (explaining that an order to remand is an exercise of a court’s equity powers). A court that strictly adhered to the limited options given by the statute’s literal language thus would never use the word “remand” but instead explain that its setting aside of the Board’s order was without prejudice to the Board’s resuming consideration of the case with a properly constituted panel. That, in essence, is what the Eighth Circuit held was the meaning of its *Whitesell* decree. *See* above pp. 20-22. The same is true here.⁹

Nor is there merit to the Company’s argument (Br. 13, 15-16) that the Board’s actions are inconsistent with the language of Section 10(e) that “[u]pon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final” Here, as discussed above, pp. 20-22, with respect to *Whitesell*, there is no question that the Court’s prior judgment was final with respect to the issue that it decided—that the Board was improperly constituted

⁹ The Company also contends (Br. 15-17) that the Board’s interpretation of the Court’s mandate is “all but eviscerated” by Section 10(e)’s language providing additional evidence to be taken before the Board “if either party applies to the court for leave to adduce additional evidence” (*see* 29 U.S.C. Section 10(e)). But the Company’s formalistic argument, which maintains that Congress provided for remand in that one instance and that one instance only, flies in the face of *Ford Motor*. As discussed above, the Supreme Court in that case recognized that a court possesses equitable remand authority apart from any explicit statutory authorization. Thus, the statute’s provision for parties to request the taking of additional evidence does not indicate that Congress intended to limit the court’s inherent remand authority in other circumstances. Indeed, courts routinely remand to administrative agencies absent a party’s request, and for reasons other than the need for adducing additional evidence.

when it issued the order before the Court. The Company mistakenly construes (Br. 9, 16, 17, 24-26) the Board's interpretation of the Court's mandate as improperly creating a prohibited "implied exception" to Section 10(e). But all the Board did here was to reasonably construe the Court's "judgment and decree" itself as contemplating further Board action under the circumstances. In this context, the Court's "judgment and decree" enabled the Board to continue processing the case after the Court's mandate relinquished its exclusive jurisdiction. Nothing about the Board's interpretation is inconsistent with the plain language of Section 10(e) cited above.

The Court should also reject the Company's construction of the mandate as precluding further Board proceedings because it would result in injustice. (Br. 28-31.) *See Bailey v. Henslee*, 309 F.2d at 844 (mandate is to be interpreted reasonably and not to do injustice). Under the Company's view, the parties—through no fault of their own and unlike every party to have previously come before the Board—would not be entitled to a decision by a properly constituted Board. The Board's interpretation of the Court's mandate avoids injustice to the parties and to the employees whose rights are at issue. *See Laclede Gas Co. v. NLRB*, 421 F.2d 610, 617 (8th Cir. 1970) ("[t]he interest of the . . . employees in having the issue resolved on an appropriate theory of law is an important one"); *Cf. NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263-66 (1969) (consequences of

Board’s internal delay should not fall on victims of unfair labor practices). As the Seventh Circuit recognized under comparable circumstances, “[t]he parties are entitled to a decision on the merits of their case by a properly constituted panel of the NLRB prior to appellate review.” *New Process Steel, L.P. v. NLRB*, 08-3517, 2010 WL 4137308, at *1 (7th Cir. Aug. 3, 2010) (remanding *New Process* following the Supreme Court’s decision).

As a general rule, an appellate court’s finding of legal error does not “foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.” *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); accord *S. Prairie Constr. Co. v. Local No. 627, Int’l Union of Operating Eng’rs*, 425 U.S. 800, 803-06 (1976); *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901). Indeed, cutting off a ruling on the merits of the dispute would be contrary to the great weight of authority of the circuit courts (including this one) establishing the propriety of a properly constituted Board deciding anew unfair labor practice cases that were pending in court when *New Process* issued, including cases that had been argued and even decided.¹⁰ The Court’s citation (722 F.3d at 660) to *New Process Steel, L. P. v.*

¹⁰ See, e.g., *Allied Mech. Servs. v. NLRB*, Case Nos. 08-1213, 08-1240 (D.C. Cir. Sept. 20, 2010), on remand 356 NLRB No. 1 (2010), *enforced*, 668 F.3d 758 (D.C. Cir. 2012); *Northeastern Land Servs., Ltd. v. NLRB*, Case No. 08-1878 (1st Cir. July 30, 2010), on remand 355 NLRB 1154 (2010), *enforced*, 645 F.3d 475 (1st

NLRB, 560 U.S. 674 (2010), in its decision denying enforcement strongly suggests that this Court contemplated this case to be treated similarly to those cases that were denied enforcement following *New Process*.

Moreover, after *Noel Canning*, all of the circuit courts, including another panel of this one, *see, e.g., NLRB v. Nestle Dreyer's Ice Cream Co.*, Case No. 12-1783 (4th Cir. July 29, 2014) (vacating and remanding), have found it appropriate for a properly constituted Board to resolve unfair labor practice cases that were pending

Cir. 2011); *County Waste of Ulster, LLC v. NLRB*, Case Nos. 09-1038, 09-1646 (2d Cir. July 1, 2010), on remand 355 NLRB 413 (2010), *enforced*, 665 F.3d 48 (2d Cir. 2012); *J.S. Carambola v. NLRB*, Case Nos. 08-4729, 09-1035 (3d Cir. July 1, 2010), on remand 356 NLRB No. 23 (2010), *enforced*, 457 F. App'x 145 (3d Cir. 2012); *Diversified Enters., Inc. v. NLRB*, Case Nos. 09-1464, 09-1537 (4th Cir. July 23, 2010), ECF No. 66, on remand 355 NLRB 492 (2010), *enforced*, 438 F. App'x 244 (4th Cir. 2011); *Bentonite Performance Mineral, LLC v. NLRB*, Case No. 09-60034 (5th Cir. June 22, 2010), on remand 355 NLRB 582 (2010), *enforced*, 456 F. App'x 2 (D.C. Cir. 2012); *Galicks, Inc. v. NLRB*, Case Nos. 09-1972, 09-2141 (6th Cir., June 24, 2010), ECF No. 80, on remand 355 NLRB 366 (2010), *enforced*, 671 F.3d 602 (6th Cir. 2012); *NLRB v. Spurlino Materials, LLC*, Case Nos. 09-2426, 09-2468 (7th Cir., July 8, 2010), ECF No. 28, on remand 355 NLRB 409, *enforced*, 645 F.3d 870 (7th Cir. 2011); *Leiferman Enters., LLC v. NLRB*, Case Nos. 09-3721, 09-3905 (8th Cir. July 8, 2010), on remand 355 NLRB 364 (2010), *enforced*, 649 F.3d 873 (8th Cir. 2011); *NLRB v. Legacy Health Sys.*, Case No. 09-73383 (9th Cir., July 9, 2010), ECF No. 19, on remand 355 NLRB 408 (2010), *enforced*, 662 F.3d 1124 (9th Cir. 2011); *Teamsters Local Union No. 523 v. NLRB*, 624 F.3d 1321 (10th Cir. 2010), on remand 357 NLRB No. 4 (2011), *enforced*, 488 F. App'x 280 (10th Cir. 2012); *CSS Healthcare Servs., Inc. v. NLRB*, Case Nos. 10-10568, 10-10914 (11th Cir. July 16, 2010), on remand 355 NLRB 472 (2010), *enforced*, 419 F. App'x 963 (11th Cir. 2011).

in court when *Noel Canning* issued.¹¹ The Company’s construction of the Court’s mandate would unjustly deny the parties a resolution of this case and inexplicably conflict with the resolution of similarly-situated cases. The Company’s construction also unjustifiably attributes to the Court an intent to depart from the normal and usual course of judicial proceedings in circumstances where the decision below was rendered by an improperly constituted panel.¹²

¹¹ See e.g., *Oak Harbor Freight Lines Inc. v. NLRB*, Case Nos. 12-1226, 12-1358, 12-1360 (D.C. Cir. August 1, 2014); *NLRB v. Instituto Socio Economico Comunitario, Inc.*, Case No. 13-1688 (1st Cir. October 3, 2014); *NLRB v. Dover Hospitality Servs., Inc.*, Case No. 13-2307 (2d Cir. July 2, 2014); *NLRB v. Salem Hosp.*, Case No. 12-3632 (3d Cir. July 3, 2014); *Dresser-Rand Co. v. NLRB*, Case No. 12-60638 (5th Cir. July 23, 2014); *Little River Band of Ottawa v. NLRB*, Case Nos. 13-1464, 13-1583 (6th Cir. Aug. 13, 2014); *Contemporary Cars, Inc. v. NLRB*, Case Nos. 12-3764, 13-1066 (7th Cir. Oct. 3, 2014); *Relco Locomotives, Inc. v. NLRB*, Case No. 13-2722 (8th Cir. July 1, 2014); *DirectTV Holdings, LLC v. NLRB*, Case Nos. 12-72526, 12-72639 (9th Cir. July 2, 2014); *Int’l Union of Operating Eng’rs, Local 627 v. NLRB*, Case Nos. 13-9547, 13-9564 (10th Cir. July 2, 2014); *NLRB v. Gaylord Chem. Co.*, Case Nos. 12-15404, 15690 (11th Cir. Aug. 13, 2014).

The Amicus suggests (ABr.15) that because the Supreme Court in *Noel Canning* did not remand the case, the Board has no blanket authority to consider this case anew. The Board, however, does not contend that *Noel Canning* provided such blanket authority. Rather, in an individual case, like here, where this Court’s decision rested solely on a quorum issue like that decided in *Noel Canning*, the Board reasonably interpreted the mandate as permitting the Board to consider the case anew.

¹² See *Nguyen v. United States*, 539 U.S. 69, 83 (2003) (remanding case to court of appeals where panel was improperly constituted; “it is appropriate to return these cases to the Ninth Circuit for fresh consideration . . . by a properly constituted panel”); *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 364 (6th Cir. 1976) (remanding

In light of the above principles, the Company’s remaining claim (Br. 28-30)—that allowing the Board to revisit the case would “punish” the Company because it relied on this Court’s original judgment denying enforcement—rings hollow. The Company could have foreseen further proceedings based on this Court’s denial of enforcement solely on the ground that the Board was improperly constituted, which distinguishes this case from the litany on which it relies. Moreover, the Company was also well aware that the Board intended to decide the case anew, because the Board said as much in its petition for rehearing. The Company’s complaint (Br. 29) that it did not seek Supreme Court review of any portion of the earlier judgment ignores the reality that it can still do so if the Court enforces the Board’s order. The Company points to no harm caused by this wait that is any different from the wait it would have endured if the improperly constituted Board had simply put off a decision in this case until a properly constituted Board could decide it. And, the Company’s citation (Br. 28, 30) to concerns that the *Eagle Picher* Court had about allowing a decree to be reopened “years later” are inapplicable here, because, there, a properly constituted Board had already secured a decision on the merits and then later sought to revise it.¹³

case for “complete consideration by a duly constituted panel of the Board”); *KFC Nat’l Mgmt. Corp. v. NLRB*, 497 F.2d 298, 307 (2d Cir. 1974).

¹³ Contrary to Amicus’ hyperbole (ABr 21-23), the Board’s interpretation of the Court’s mandate here does not constitute a “rule” that would “seriously interfere”

In sum, interpreting the Court’s mandate as permitting further proceedings before the Board fully comports with principles governing the reasonable and equitable interpretation of mandates. In contrast, the Company’s cribbed reading relies on readily distinguishable cases and conflicts with both legal and equitable principles. Therefore, the Board properly considered this case anew.

II. THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT A UNIT OF RADIOLOGICAL AND OTHER TECHNICIANS WHO PERFORM A SAFETY FUNCTION AT THE COMPANY’S NUCLEAR SHIPBUILDING FACILITY CONSTITUTES AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED THE ACT BY REFUSING TO BARGAIN

Section 8(a)(5) of the Act makes it unlawful for an employer “to refuse to bargain collectively with the representative of [its] employees.” 29 U.S.C. § 158(a)(5). The Company does not dispute that it refused to bargain with the Union. Rather, it contends (Br. 2-4) that the bargaining unit was inappropriate because it did not include all of the Company’s technical employees.

with companies’ ability to run their businesses. As discussed above, the Board’s interpretation of the mandate gives the parties their first decision on the merits by a properly constituted Board, an outcome to which all parties—and future parties to Board proceedings—are entitled. Contrary to the claims of the Company and Amicus, the valid finality concerns precluding the Board from re-litigating decisions on the merits by a properly constituted panel do not apply when a properly constituted Board has yet to issue a decision on the merits.

A. The Court Gives Considerable Deference to the Board's Finding of an Appropriate Unit

Section 9(a) of the Act provides that a union will be the exclusive bargaining representative if chosen “by the majority of the employees in a unit appropriate for” collective bargaining. 29 U.S.C. § 159(a). Section 9(b) authorizes the Board to “decide in each case whether, in order to assure the employees the fullest freedom in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” *Id.* § 159(b). The focus of the Board’s determination begins with the unit sought by the petitioner, because, under Section 9(d) of the Act, “the initiative in selecting an appropriate unit resides with the employees.” *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077, at *15, *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). The Supreme Court, in construing that section, has stated that the determination of an appropriate unit “lies largely within the discretion of the Board, whose decision, if not final is rarely to be disturbed” *South Prairie Constr. Co. v. Operating Eng’rs, Local 627*, 425 U.S. 800, 805 (1976); *accord Fair Oaks Anesthesia Assoc., P.C. v. NLRB*, 975 F.2d 1068, 1071 (4th Cir. 1992). Further, “the Board is possessed of the widest possible discretion in determining the appropriate unit.” *See, e.g., Sandvik*

Rock Tools, Inc. v. NLRB, 194 F.3d 531, 534 (4th Cir. 1999); *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir. 1978).

Section 9(b), however, does not direct the Board how it is to decide in a given case whether a particular grouping of employees is appropriate.

Accordingly, the Board's selection of an appropriate unit "involves of necessity a large measure of informed discretion." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947).

In deciding whether a group of employees constitutes an appropriate unit, the Board focuses on whether the employees share a "community of interest." *Specialty Healthcare*, 2011 WL 3916077, at *15; accord *Sandvik*, 194 F.3d at 535. Under the *Specialty Healthcare* framework, the Board first determines whether the petitioned-for unit is composed of a readily identifiable group that shares a community of interest. If the petitioned-for unit meets this test, the Board turns to the second part of the *Specialty Healthcare* framework, which clarifies that it becomes the burden of the employer seeking to expand such a unit to demonstrate that the employees in its proposed larger unit "share an overwhelming community of interest" with those in the otherwise appropriate unit. *Specialty Healthcare*, 2011 WL 3916077, at *15. As the Board stated in *Specialty Healthcare*, "it cannot be that the mere fact that [the petitioned-for unit of employees] also share a

community of interest with additional employees [thereby] renders the smaller unit inappropriate.” *Specialty Healthcare*, 2011 WL 3916077, at *15.¹⁴

Nothing in the Act requires “that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be ‘appropriate.’” *See, e.g., Overnite Transp. Co.*, 322 NLRB 723 (1990); *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950). The Supreme Court has stated that “employees may seek to organize ‘a unit’ that is ‘appropriate’—not necessarily the single most appropriate unit.” *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991). Because a unit need only be *an* appropriate unit, it “follows inescapably” that simply demonstrating that another unit would also be appropriate “is not sufficient to demonstrate that the proposed unit is inappropriate.” *Specialty Healthcare*, 2011 WL 3916077, at *15.

¹⁴ The Sixth Circuit, in enforcing *Specialty Healthcare*, found that the overwhelming community of interest standard “is not new” to unit determinations. *Kindred*, 727 F.3d at 561. The Board has applied it many times over the years. *See, e.g., Academy LLC*, 27-RC-8320, Decision and Direction of Election, at 12 (2004) (rejecting petitioned-for unit because additional employees “share an overwhelming community of interest” with the petitioned-for unit), available at www.nlr.gov/case/27-RC-008320; *Laneco Constr. Sys., Inc.*, 339 NLRB 1048, 1050 (2003) (rejecting argument that additional employees “shared such an overwhelming community of interests with” the petitioned-for unit); *Lodgian, Inc.*, 332 NLRB 1246, 1255 (2000) (including concierges in the unit because they “share an overwhelming community of interest with the employees whom the Petitioner seeks to represent”). Moreover, prior to *Kindred*, the D.C. Circuit had also approved the test in *Blue Man Vegas v. NLRB*, 529 F.3d 417, 419 (D.C. Cir. 2008).

Further, “[i]n many cases, there is no ‘right unit’ and the Board is faced with alternative appropriate units.” *Corrie Corp. of Charleston v. NLRB*, 375 F.2d 149, 154 (4th Cir. 1967); *see also Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 618 (4th Cir. 2002); *Arcadian Shores*, 580 F.2d at 119. It is within the Board’s discretion to select among different potential groupings of employees in determining an appropriate unit. *See Fair Oaks Anesthesia Assocs., P.C. v. NLRB*, 975 F.2d 1068, 1071 (4th Cir. 1992).

Therefore, an employer challenging the Board’s unit determination “has the burden to prove that the bargaining unit selected is ‘utterly inappropriate.’” *Sandvik*, 194 F.3d at 534 (citation omitted). “A unit is truly inappropriate if, for example, there is no legitimate basis upon which to exclude certain employees from it.” *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008); *accord Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). If the objecting party shows that excluded employees “share an overwhelming community of interest” with the employees in the otherwise appropriate unit, then there is no legitimate basis to exclude them. *Blue Man Vegas*, 529 F.3d at 421.

B. The Board’s Resolution of the Unit Determination

In the instant case, the Board concluded, on two alternative grounds, that the unit sought by the Union was appropriate. The Board initially found the E85

RADCON unit appropriate under the framework described in *Specialty Healthcare*. Under that framework, the Board first determined the employees within E85 RADCON were a readily identifiable group that shared a community of interest. The Board explained that they “share a unique function – to provide independent oversight of radiation exposure. . . .” (A. 1243.) And, more specifically, the Board detailed that: “They all work in the same department under common supervision. Their work has a shared purpose and is functionally integrated. RCT’s monitor employees and collect samples when appropriate; they rely on lab techs to analyze the samples they collect; and calibration techs keep the RCTs’ instruments in proper working order.” (*Id.*) The Board also relied on the fact that “RCT trainees assist RCTs and operate limited control checkpoints as they learn the job[,]” and that “[m]any of the E85 lab techs used to be RCTs.” (*Id.*)

The Board then turned to the second part of the *Specialty Healthcare* framework, which places the burden on the employer seeking to expand such a unit to demonstrate that the employees in its proposed larger unit “share an overwhelming community of interest” with those in the otherwise appropriate unit. *Specialty Healthcare*, 2011 WL 3916077, at *15. Here, the Board found that the Company failed to meet that burden. The Board found that RCTs were sufficiently distinct from the other technical employees that the Company would add to the unit because “RCTs’ job function is to ensure workplace safety and control radioactive

contamination at the shipyard.” (A. 1244.) The Board explained that this is “a task distinct from the production-oriented jobs of technical employees outside of E85 RADCON.” (*Id.*) The Board therefore found that the RCTs are not “functionally integrated into the production work flow of the shipyard, but instead have an independent oversight role.” (*Id.*) Moreover, the Board emphasized that “at times, RCTs’ role is actually in conflict with the production and quality control goals of other technical employees, as when they order work stopped due to radioactive contamination or other worksite irregularities.” (*Id.*)

After applying *Specialty Healthcare* to evaluate the appropriateness of the proposed E85 RADCON unit, the Board acknowledged that prior to that decision it had “arguably” developed a distinct test for unit determinations affecting technical employees that survived *Specialty Healthcare*. (A. 1244).¹⁵ The Board, quoting *TRW Carr Division*, 266 NLRB 326, 326 n.4 (1983), concluded that a subset of an employer’s technical employees is appropriate “*only* when the employees in the requested unit possess a *sufficiently distinct community of interest apart from other*

¹⁵ In *Specialty Healthcare*, the Board noted that over time it had developed certain “special industry and occupation rules in the course of adjudication,” and that it did not intend its *Specialty Healthcare* framework to disturb such special occupation rules. *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 13, n. 29. The Board explained here that it did not need to decide “whether a distinct test exists for technical employees or whether such a test constitutes a ‘special occupation rule’ as contemplated in *Specialty Healthcare*,” because it reached the same result under the technical line of cases. (A. 1244-45.)

*technical*s to warrant their establishment as a separate appropriate unit.” (A. 1244 (emphasis in the original).)

Accordingly, and indeed as urged by the Company as the only way of deciding the unit determination in this case (A. 1244), the Board applied the *TRW Carr* line of cases to the proposed E85 RADCON unit. In disagreement with the Company, the Board found the unit also appropriate under that line of cases. Specifically, the Board concluded (A. 1244-46, 1256, 1258) that the E85 RADCON departmental unit of technical employees constituted a functionally distinct grouping with a “sufficiently distinct” community of interest to warrant a separate unit for the purposes of bargaining. (A. 1245.)

As the Board found (A. 1245, 1256):

- The RCTs perform—with the integrated support of calibration technicians, laboratory technicians, and RCT trainees in E85 RADCON—the unique function of providing independent radiological oversight at the shipyard. No employees outside of E85 RADCON perform that task.
- The E85 RADCON technical employees were distinct from other technical employees because they possess unique skills, have distinct job functions, are qualified to use specialized tools and equipment,

have separate supervision, and do not temporarily interchange with other technical employees.

- The E85 RADCON technical employees' work contacts with other technical employees, and their level of functional integration, "is not so substantial as to negate their separate and distinct community of interest."
- RCTs' work contacts with technical employees outside E85 RADCON are limited to subjecting them to the same radiological screening that other employees receive.
- Employees in technical classifications outside of E85 RADCON perform tasks that are directly related to production, as opposed to radiological safety, and the E85 RADCON technical employees are not part of the production work flow. (A. 1245, 1256-57.)

Thus, even applying the *TRW Carr* line of cases, the Board found the technical employees in E85 RADCON perform a radiological safety function that is sufficiently distinct from all other employees at the shipyard to warrant their having a separate unit.

C. The Company's Current Challenge to the Board's Unit Determination Must Be Rejected

The Court's prior decision found that the Board's decision under the *TRW Carr* line of cases "is supported by substantial evidence." *Enterprise Leasing Co.*,

722 F.3d at 628. The Company (Br. 37) “does not ask the Court to go back and reverse its *TRW* analysis.” Indeed, there would be little support for such a request, given the disinclination of other circuits to revisit their earlier merit determinations in analogous circumstances following *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-88 (2010). See, e.g., *NLRB v. Northeastern Land Servs., Ltd.*, 645 F.3d 475, 478 (1st Cir. 2011); *Sheehy Enterprizes, Inc. v. NLRB*, 431 F. App’x 488, 489 (7th Cir. 2011); *NLRB v. Snell Island SNF LLC*, 451 F. App’x 49, 51 (2d Cir. 2011); see also, *Teamsters Local Union No. 523 v. NLRB*, 488 F. App’x 280, 284 (10th Cir. 2012). Moreover, by failing to challenge the Board’s finding that the technical unit is appropriate under the *TRW Carr* line of cases, the Company has waived any such challenge. See *Schlossberg v. Barney*, 380 F.3d 174, 182 n.6 (4th Cir. 2004) (arguments not raised in a party’s opening brief are deemed waived); accord *U.S. v. Hudson*, 673 F.3d 263, 268 (4th Cir. 2012); *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991).

Instead, the Company argues (Br. 35-36, 40-44) that *Specialty Healthcare* and cases decided subsequent to the Board’s certification of the unit in this case overruled the *TRW Carr* line of cases. Based on that claim, the Company asserts that the unit determination here must be analyzed under *Specialty Healthcare*, making it necessary for the Court to determine whether *Specialty Healthcare* is consistent with the Act. The Company, however, makes no argument in its brief

specifically challenging either *Specialty Healthcare* or its application here. The Board's position is that *Specialty Healthcare* clarified longstanding Board law and was well within the Board's discretion. See *Kindred Nursing Centers East*, 727 F.3d 552. Nevertheless, as we show, the Company has failed to preserve any attack on *Specialty Healthcare* and its application in this case, and, in any event, its predicate argument—that the technical line of case it relied on before the Board has been overruled—is mistaken.

1. This Court cannot consider the Company's attack on *Specialty Healthcare* because, as the Board stated, the Company did not timely raise those challenges to the Board. Under the Board's rules, "a party must raise all of his available arguments in the representation proceeding." *Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008) (collecting cases); *George Washington University v. NLRB*, 2006 WL 4539237 (D.C. Cir. 2006).

Here, the Company could have, but did not, raise its challenges to *Specialty Healthcare* in the representation proceeding. As the Board explained (A. 1815-16), following the issuance of the Decision on Review and Order—which applied the Board's *Specialty Healthcare* decision—the Company failed to take the opportunity, under Section 102.65(e)(1)-(2) of the Board's Rules and Regulations (29 C.F.R. § 102.65(e)(1)-(2)), to file a motion for reconsideration of the Board's Decision on Review and Order raising arguments about the Board's *Specialty*

Healthcare decision. Instead, the Company first raised its claims about *Specialty Healthcare* in the unfair labor practice case. That was too late under the Board's procedures.

Judicial enforcement of the settled rule that a party must raise all available arguments in the representation proceeding accords with the basic principle that “[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *U.S. v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952), *quoted in Pace Univ.*, 514 F.3d at 24. *See also* Section 10(e) of the Act, 29 U.S.C. § 160(e), which provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” *See Pace Univ.*, 514 F.3d at 24 (citing 29 U.S.C. § 160(e)). Because the Company failed to raise its concerns in “the time appropriate under [the Board’s] practice” (*L.A. Tucker Truck Lines*, 344 U.S. at 37), its contentions about *Specialty Healthcare* were, as the Board found (A. 1816), “untimely raised.” Accordingly, those claims cannot be considered on review. *L.A. Tucker Truck Lines*, 344 U.S. at 36-37. *See also Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 265 (4th Cir. 2000).

2. Further, the Company waived any challenge to either *Specialty Healthcare* or its application here by not arguing it in its opening brief. *See Schlossberg*, 380 F.3d at 182 n.6 (arguments not raised in a party’s opening brief are deemed waived); *accord Hudson*, 673 F.3d at 268 (4th Cir. 2012); *Frigid Storage, Inc.*, 934 F.2d at 509; *SEC v. Banner Fund Int’l.*, 211 F.3d 602, 613-14 (D.C. Cir. 2000). Rather than briefing the issue, the Company urged the Court to order supplemental briefing. The Company, however, provided no reason why it should be permitted to ignore the requirement that it present all of its argument in its opening brief. *See* Federal Rule of Appellate Procedure 28(a)(8)(A). *See also United States v. Bales*, 813 F.2d 1289, 1297 (4th Cir.1987) (noting that the Courts of Appeals “have stated that arguments incorporated by reference need not be considered on appeal”.)

3. There is no need to examine separately the unit determination under *Specialty Healthcare*. Even if the Court were to set aside that determination, the *TRW Carr* line of cases—on which the Company exclusively relied before the Board—would come into play and be dispositive. As noted above, the Company (Br. 37) does not now contest the Board’s conclusion that the petitioned-for unit is appropriate when applying that line of cases to the facts of this case.

4. Finally, the Company errs in arguing (Br. 40) that cases decided since the Board’s unit determination decision in this case show that the Board “has used the

Specialty standard” to overrule the technical precedent the Company relied on to oppose the bargaining unit in this case. The Company points to (Br. 40) only one post-*Specialty Healthcare* case that involves technical employees—*Benteler Automotive Corp.*, Case No. 25-RC-135839 (Nov. 25, 2014), 2014 WL 6682361—and that case does not support the Company’s claim. There, the union had proposed a unit that included some of the employer’s technical employees and some non-technical employees. 2014 WL 6682361, at *1. The Board’s Regional Director found the union’s proposed unit inappropriate. In the absence of an alternative unit proposed by the union, the Regional Director evaluated, and found appropriate, the employer’s proposed unit. *Id.* See *PJ Dick Contracting*, 290 NLRB 150, 151 (1988) (if the union’s proposed unit is inappropriate, the employer’s proposals are then scrutinized). On review, the union, for the first time, proposed the alternative of a unit of all the employer’s technical employees. The Board specifically refused to pass on the union’s technical-employee unit because the union had not originally advanced that unit as an alternative, and upheld the employer’s proposed unit as had the Regional Director. *Id.* Thus, since no traditional *TRW Carr* technical-employee unit was put forth for the Board to review, *Benteler Automotive* does not stand for the proposition that a technical unit is no longer appropriate under *Specialty Healthcare*. While the Board did note that the employer’s proposed unit was appropriate under *Specialty Healthcare*, it did

not, as the Company suggests (Br. 40), overrule, or even comment on, the *TRW Carr* line of cases.

In any event, the Company's reliance on cases issued since the unit determination decision in this case is beside the point. The fact remains that here the Board explicitly analyzed the unit determination under the *TRW Carr* line of cases. That is the line of cases that the Company argued to the Board contained the appropriate test; the Board found the unit appropriate under that test; and the Company no longer challenges the Board's finding under that test.

D. The Board's Certification of the Election Is Not Undermined by a 15% Increase in the Size of the Unit and a 50% Employee Turnover Since the Election

Finally, the Company argues (Br. 31-35) that the Court should refuse to enforce the Board's bargaining order because, since the time of the election, the unit has grown in size to 252 from 220, and of the 220 who were eligible to vote only 103 remain employees. But it "is well settled that post-election turnover is an insufficient ground to set aside an election." *Pearson Education, Inc. v. NLRB*, 373 F.3d 127, 133 (D.C. Cir. 2004). *See NLRB v. Best Products Co.*, 765 F.2d 903, 914 (9th Cir. 1985); *Avis Rent-A-Car System, Inc.*, 285 NLRB 1032, 1022 (1987), *enforced mem.*, 849 F.2d 599 (3d Cir. 1988); *R & S Truck Body Company, Inc.*, 334 NLRB No. 58 at n.2, 2001 WL 721412 n.2 (2001). Indeed, even an incremental doubling in the size of the bargaining unit, along with 100 percent

turnover, is not the kind of change that alters the ongoing validity of a Board certification. *NLRB v. Action Automotive, Inc.*, 853 F.2d 433, 434 (6th Cir. 1988).

The Company argues otherwise by relying on cases (Br. 30-33) that have used turnover to question bargaining orders that specifically did not involve, as here, a bargaining order that flowed only from the certification of election results in a unit that continues to be appropriate. As the D.C. Circuit has emphasized, turnover is not something that affects the ongoing validity of Board bargaining orders that flow only from the certification of election results. *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002). *Accord Pearson Education, Inc. v. NLRB*, 373 F.3d 127, 133 (D.C. Cir. 2004).

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD

May 2015

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

No. 14-2051

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14-2148

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(s) Linda Dreeben

Attorney for National Labor Relations Board

Dated: May 8, 2015

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

HUNTINGTON INGALLS INCOPORATED)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 14-2051
)	14-2148
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	5-CA-81306
)	
and)	
)	
INTERNATION ASSOCIATION OF)	
MACHINISTS & AEROSPACE WORKERS)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2015, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated at Washington, DC
this 8th day of May, 2015