IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 14-60796

ENTERGY MISSISSIPPI, INCORPORATED,

Petitioner – Cross Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent – Cross Petitioner

PETITION FOR PANEL REHEARING BY PETITIONER/CROSS-RESPONDENT, ENTERGY MISSISSIPPI, INCORPORATED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Benjamin H. Banta of Entergy Services, Inc., counsel for the Petitioner – Cross Respondent in this appeal, Entergy Mississippi, Inc. Entergy Services, Inc. is a wholly-owned subsidiary of Entergy Corporation and is an affiliate of Entergy Mississippi, Inc.
2. Linda Dreeben, counsel for the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.
3. Entergy Corporation, which is the parent corporation of Entergy Mississippi, Inc., which, in turn, is the Petitioner – Cross Respondent in this appeal.

4. Entergy Mississippi, Inc., the Petitioner – Cross Respondent in this appeal.

5. Jill A. Griffin, counsel for the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.

6. Elizabeth Ann Heaney, counsel for the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.

7. International Brotherhood of Electrical Workers, Local Unions 605 and 985, AFL-CIO-CLC, the Intervenor in this appeal.

8. Nora Leyland of Sherman, Dunn, Cohen, Leifer & Yellig, P.C., counsel for the Intervenor in this appeal, the International Brotherhood of Electrical Workers, Local Unions 605 and 985, AFL-CIO-CLC.

9. M. Kathleen McKinney, Regional Director of Region 15 of the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.

10. The National Labor Relations Board, the Respondent – Cross Petitioner in this appeal.

11. Sarah Voorhies Myers of Chaffe McCall, L.L.P., counsel for the Petitioner – Cross Respondent in this appeal, Entergy Mississippi, Inc.

12. G. Phillip Shuler, III of Chaffe McCall, L.L.P., counsel for the Petitioner – Cross Respondent in this appeal, Entergy Mississippi, Inc.

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QUESTION PRESENTED FOR PANEL REHEARING

This matter involves a petition for review by Petitioner/Cross-Respondent, Entergy Mississippi, Incorporated ("Entergy"), and a cross-petition for enforcement of an order of the National Labor Relations Board ("the Board") concerning the status of a certain group of Entergy's employees – dispatchers – under the National Labor Relations Act, 29 U.S.C. §§ 151-169. On March 3, 2016, after briefing and oral argument, this Court filed its Opinion, affirming in part and reversing in part the Board's decision as follows:

> There is substantial evidence to support the Board's determination that dispatchers do not "responsibly direct" field employees or "assign" them to a "time" or "significant overall duty." But the Board **ignored** evidence that arguably shows that dispatchers "assign" field employees to "locations" using "independent judgment." We affirm in part and reverse in part the Board's decision that dispatchers are not supervisors.
>
> * * *
>
> The Board **ignored significant portions of the record** that show how dispatchers arguably exercise independent judgment when deciding how to allocate Entergy's field workers.
>
> * * *
>
> [T]he evidence discussed above arguably shows that dispatchers "assign" field employees to places by exercising "independent judgment." Yet the Board **ignored** this evidence when explaining its reasoning. Decisions by the Board that **ignore** a relevant portion of the record cannot survive substantial evidence review. Accordingly, we reverse the Board's decision that dispatchers do not exercise "independent judgment" when assigning employees to locations and remand for further proceedings on this narrow question.

* * *

> We REVERSE the Board's determination that dispatchers do not "assign" field employees to "places" through the exercise of "independent judgment" and we REMAND for further proceedings. The Board cross-appeals, asking this court to enforce its order. Because we hold the Board erred, we DENY the Board's request for enforcement.

(Doc. No. 00513297166, Slip Opinion pp. 9, 12, 14, and 16) (internal citations omitted) (emphasis added).

Entergy now respectfully asks the Panel to grant a limited rehearing under Fed. R. App. P. 40 to consider the following issue in its Opinion and to partially reverse its Judgment Enforcing an Order of the Board entered on September 30, 2016:

1. Whether the Panel erred by ordering this case to be remanded to the Board to determine – for a second time, and after incredibly delay – whether dispatchers use "independent judgment" when assigning field employees to locations. The Board has already been presented ample evidence of dispatchers' independent judgment, yet the Board *ignored* that evidence and, thus, does not deserve any remand.

STATEMENT OF THE CASE

This case has a long and tortuous procedural history spanning more than thirteen years – all without final resolution. The procedural history and facts of this matter are set forth in pages 1-10 of this Court's Opinion (Document

00513297166), as well as pages 3-10 of Entergy's Original Brief (Document 00512978895).

ARGUMENT

I. The Panel erred in ordering remand of this case to the Board to determine – for the second time – whether dispatchers use "independent judgment" when assigning field employees to locations.

This Court dedicated nearly three pages of its Opinion to specifying the litany of record evidence supporting the conclusion that dispatchers exercise independent judgment when assigning field employees to a place – including, without limitation, the extensive testimony from union manager, Albert May, detailing the numerous factors dispatchers consider in assigning field employees during multiple outage situations. (Doc. No. 00513297166, Slip Opinion, pp. 12-14.) Yet, as this Court recognized, all of this evidence was "ignored" by the Board when reaching its conclusory determination that dispatchers do not exercise independent judgment in assigning field employees to locations. (*Id*.) Although the Board had every opportunity to consider this evidence of dispatchers' independent judgment, it failed (or refused) to do so. And, as a result, this Court held that the Board's determination that dispatchers lacked "independent judgment" when assigning employees to locations could not survive substantial evidence review. (*Id*. at p. 14.) Despite recognizing these serious errors by the Board, the Court then remanded this narrow issue back to the Board for further

consideration. (*Id*.) Entergy respectfully asserts that remand of this issue to the Board is unwarranted, inappropriate, and unduly prejudicial to Entergy – for the specific reasons detailed herein.

A. In similar cases where the Board ignored evidence of "independent judgment," the Fifth Circuit and other appellate courts have consistently vacated orders by the Board and held that employees were statutory supervisors – without remand.

The statutory provisions which permit the Board to petition a court of appeals for an enforcement order (29 U.S.C. § 160(e)) and permit any party to seek review of a final order of the Board by a court of appeals (29 U.S.C. § 160(f)) do not require remand. And appellate courts, including the Fifth Circuit, reviewing petitions from the Board and parties pursuant to these statutory provisions routinely grant a party's petition for review, vacate the Board's order, and deny enforcement of the Board's order – all without ordering remand and allowing the Board an unwarranted second bite at the apple. *See, e.g., DirecTV Holdings, L.L.C. v. NLRB,* 650 F. App'x 846, 852-53 (5th Cir. 2016) (noting that the ALJ and Board ignored evidence concerning five employees presented by DirecTV and granting DirecTV's petition for review, denying the Board's petition for enforcement, and setting aside the Board's order – without remand).[1]

[1] *See also NLRB v. Int'l Bhd. of Teamsters, Local 251*, 691 F.3d 49, 60 (1st Cir. 2012) (noting that the Board "ignored evidence of the surrounding circumstances" and "revers[ing] the Board's decision" – without remand); *Tri-State Health Serv. v. NLRB*, 374 F.3d 347, 356 & n.11, 357 (5th Cir. 2004) (holding that the Board "erred in failing to consider" and "ignoring altogether evidence" and granting the petition for review, vacating the Board's opinion, dismissing charges

Furthermore, in cases remarkably similar to the present matter – where the Board ignored evidence of employees' "independent judgment" when concluding that the employees were not statutory supervisors – appellate courts have simply vacated the Board's order without ordering remand and held that the employees did, indeed, exercise the requisite "independent judgment" to qualify as statutory supervisors. *See, e.g., GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 409, 412 (6th Cir. 2013) (noting that the Board's "failure to acknowledge" certain evidence "does not support the Board's decision that RNs at the Center lack authority to discipline CNAs using their independent judgment" and granting the Center's petition for review, vacating the Board's order, and denying the Board's cross-application for enforcement – without remand); *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332, 1339, 1350 (11th Cir. 2012) (noting that the "the Board again disregards compelling and uncontradicted evidence" and testimony that LPNs exercised independent judgment as statutory supervisors and granting Lakeland's petition for review, denying the Board's cross-petition for enforcement,

against the petitioner, and denying the Board's cross-petition for enforcement – without remand); *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 516 (7th Cir. 2003) (finding that "the Board or ALJ simply ignored strains of evidence that did not mesh with their ultimate conclusions" and granting Sears's petition for review and denying the Board's enforcement order – without remand); *Cleveland Constr. v. NLRB*, 44 F.3d 1010, 1016 (D.C. Cir. 1995) (holding that the Board's "ignoring of evidence on this and other factors of the precedentially dictated test compel us to set aside the Board's action in this case" and granting the petition for review, vacating the Board's opinion, and denying the Board's application for enforcement – without remand); *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262, 1274 (4th Cir. 1994) (noting that "the Board has ignored uncontradicted evidence in the record which clearly negates the inference which the Board has attached to these facts" and granting the petitioner's petition for review, setting aside the decision of the Board, and denying the Board's enforcement order – without remand).

and vacating the Board's decision – without remand); *Grancare, Inc. v. NLRB*, 137 F.3d 372, 375-76 (6th Cir. 1998) (finding that the Board "ignored substantial evidence" of a nurse's authority and responsibility as statutory supervisor to direct aides and granting Heritage's petition for review, holding nurses to be statutory supervisors, denying the Board's cross-petition for enforcement, and vacating the Board's order – without remand); *Me. Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 363, 366 (1st Cir. 1980) (noting "[t]here is considerable evidence of the [shift operating supervisors'] supervisory status which the Board either ignored completely or downplayed to an unjustified extent" and granting the petition for review, denying the Board's application for enforcement of its order, and holding that the shift operating supervisors were statutory supervisors – without remand).

The Fifth Circuit itself has denied enforcement of an order by the Board and held employees to be statutory supervisors, without ordering remand, upon finding that the Board ignored testimony of "independent judgment" and other evidence of employees' supervisory status. *NLRB v. McCullough Envtl. Servs.*, 5 F.3d 923 (5th Cir. 1993). In *McCullough*, the Board determined that lead operators of the McCullough water treatment facility were not statutory supervisors. But, on review on the Board's decision, this Court held that the Board ignored record evidence and testimony to reach its conclusion. This Court specifically noted, for example, that while the Board held that lead operators were not responsible for the

performance of other employees, the Board ignored testimony from a lead operator that he was solely responsible for the operation of the plant during an eight-hour shift. *Id*. at 940-41 & n.26. Additionally, although the Board determined that lead operators did not exercise "independent judgment" by citing to the testimony of two witnesses who claimed that they could not assign overtime work, the Fifth Circuit noted that the Board ignored contrary testimony from a third witness and "ignore[d] the nature of McCullough's operations." *Id*. at 942 & n.29. Accordingly, the Fifth Circuit denied the Board's application to enforce its order and instead held – without ordering remand – that these lead operators were statutory supervisors to be excluded from the bargaining unit. *Id*. at 944.[2]

The present matter is decidedly similar to *McCullough*, other precedent from this Court, and the numerous cases from other appellate courts. Just as the Board in *McCullough* selectively cited to evidence that operators lacked "independent judgment" and ignored testimony from a witness that he could approve overtime pay for employees, the Board in this case summarily determined that dispatchers lacked "independent judgment" and "ignored significant portions of the records [including from Union Manager, Albert May] that show how dispatchers arguably exercise independent judgment when decided how to allocate Entergy's field

[2] *See also, Entergy Gulf Sts., Inc. v. NLRB*, 253 F.3d 203, 211 (5th Cir. 2001) (reversing Board's order that Entergy's operations coordinators did not qualify as statutory supervisors and holding that operations coordinators did responsibly direct field workers with independent judgment and were statutory supervisors – without remand).

workers." (Doc. No. 00513297166, Slip Opinion p. 12.) Therefore, like the Fifth Circuit in *McCullough* (and the other appellate courts in *Springfield*, *Lakeland*, *Grancare*, and *Yankee Atomic*) simply found employees to be statutory supervisors based upon the entire record and did not allow the Board to re-consider evidence that it had previously ignored, this Panel should hold that Entergy's dispatchers were statutory supervisors who exercised "independent judgment" when assigning employees to locations – without ordering remand.

In support of its decision to remand, this Panel cited to a single Fifth Circuit decision – *Amoco Prod. Co. v. NLRB*, 613 F.2d 107 (5th Cir. 1980) – which is decidedly distinguishable. (Doc. No. 00513297166, Slip Opinion p. 12.) In *Amoco*, the Fifth Circuit rejected the petitioner's claim because the record was insufficient to determine what facts the Board relied upon in making its decision, and the court remanded the case to provide the Board with an opportunity to clarify the record. In reaching its original decision, the Board had adopted the ALJ's findings of fact and conclusions of law, which the court noted were "obscure." 613 F.2d at 110. Based on the record, the Fifth Circuit could only "precariously assume" which statements were relied upon as findings of fact and was left "confused as to both the legal and factual bases of the Board's decision." *Id*. at 111.

Unlike the "obscure" record in *Amoco* which left the Fifth Circuit "confused" as to the evidence presented and relied upon by the Board, there is nothing confusing or obscure about the evidence before the Board in this matter. As this Court correctly recognized and detailed in nearly three pages of its Opinion, the Board was presented with a litany of specific evidence and simply ignored the portions – such as testimony from a union manager, evidence showing that dispatchers' judgment in allocating field workers is guided by discretionary factors, and evidence that dispatchers exercise discretion and judgment when assigning crews to trouble spots, prioritizing problems, and determining whether to hold out personnel and/or call out additional personnel – which did not support its conclusory findings. (Doc. No. 00513297166, Slip Opinion p. 12.) While remand may be appropriate in instances such as *Amoco* where it is unclear what evidence the Board considered and based its decision upon, remand is decidedly inappropriate in cases like this one where the Board was clearly presented with, but willfully ignored, contrary evidence and testimony.

Indeed, the Board itself apparently found the evidence presented to be sufficient since it has, at no point, ever requested that the matter be remanded for further consideration or additional findings. Pursuant to 29 U.S.C. § 160(e), the Board could have requested a remand of this matter. But it never did so. Because the Board failed to timely request remand, this Panel should adhere to the

precedent established by the Fifth Circuit and other appellate courts in substantially similar cases and should simply vacate the Board's order and hold that Entergy's dispatchers were statutory supervisors who exercised the requisite "independent judgment."

B. Remand is further unwarranted and inappropriate because the Board failed to acknowledge specific evidence of "independent judgment" in its brief and should be prevented from raising such waived arguments for the first time on remand.

The First Circuit's opinion in *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1 (1st Cir. 2015), which was expressly cited to and relied upon in this Court's opinion, is further analogous and instructive in undercutting remand to the Board. (Doc. No. 00513297166, Slip Opinion pp. 9, 14.) Similar to the present matter, the *NSTAR* court considered whether certain employees of an electrical and gas company qualified as statutory supervisors under the National Labor Relations Act. Like Entergy's dispatchers, the NSTAR employees were responsible for monitoring transmission systems, de-energizing electrical equipment in order to perform maintenance operations, reacting to unforeseen events that disrupted transmission systems, and ensuring that scheduled maintenance work could be performed as needed. *Id*. at 7-8. And, like the present matter, the Board in *NSTAR* considered, among other arguments, whether these employees were statutory supervisors who exercised "independent judgment" to assign field workers to a location. *Id*. at 12-

14. In examining this "independent judgment," the Acting Regional Director for the Board specifically found that:

> [I]n multiple outage situations [electrical transmission system supervisors or TSSs] prioritize trouble cases, and based upon the status of a case, can route field employees from one trouble case to another trouble case. In prioritizing such cases, the TSSs consider such things as the number of customers affected, the size of the customer, and the weather.

Id. at 14 & n.13. However, the Acting Regional Director concluded that assignments resulting from these prioritization decisions did not require the use of "independent judgment" because they were "controlled by detailed instructions." *Id*.

The First Circuit cast doubt on the Board's conclusion, noting that "[i]t is not immediately clear to us how judgment of the type described by the Acting Regional Director's finding regarding prioritization of trouble spots could be circumscribed by detailed instructions." *Id*. But since NSTAR's brief presented no evidence or argument that this finding by the Acting Regional Director demonstrated that the TSSs exercised independent judgment in such circumstances, the First Circuit ruled that "NSTAR had failed to show that any assignments the TSSs made by designating an employee to a place required the exercise of independent judgment." *Id*. at 14. The First Circuit then granted the Board's application for enforcement and denied NSTAR's cross-petition for

review – expressly finding that NSTAR had waived its right to assert on remand what it had not raised in its brief. *Id*. at 26.

Similar to *NSTAR*, the Board in this case failed to acknowledge certain evidence of "independent judgment" in its brief and should be prevented from raising such waived arguments for the first time on remand. In its brief, Entergy explicitly cited to the very evidence of independent judgment that this Court recognized was ignored by the Board. (Doc. No. 00512978895, pp. 48-51.) For example, in its brief, Entergy argued and cited to evidence showing that dispatchers exercise independent judgment when assigning crews to trouble spots, prioritizing problems, and determining whether to hold out personnel and/or call out additional personnel. (*Id*. at p. 50.) Entergy further cited to specific testimony from the union manager stating that dispatchers must weigh "a lot of information" when assigning employees to locations. (*Id*. at p. 51.) As this Panel later recognized it its Opinion, Entergy's brief noted that "the Board's opinion fail[ed] to consider – much less analyze" any of this evidence of "independent judgment." (*Id*.)

The Board's brief – like its original opinion – failed to explain, or even acknowledge, how this specific evidence of dispatchers' discretion and judgment could fail to establish "independent judgment" when assigning employees to locations. (Doc. No. 00513015370, at pp. 38-42.) Instead, the Board chose to

ignore this evidence – first in its original opinion and then in its brief before this Court – thereby waiving its right to later consider and rebut such evidence. Therefore, like the First Circuit in *NSTAR* did not allow remand and did not permit NSTAR to assert arguments on "independent judgment" that it had not raised in is brief, this Court should find that the Board has failed to consider and rebut specific evidence of independent judgment and should decline to allow the Board an unwarranted (and unasked for) second chance to assert these waived arguments on remand.[3]

C. Remand is further unwarranted and inappropriate given the Board's repeated and inordinate history of delay.

As a point of equity, Entergy asserts that remand is especially unwarranted given the Board's unreasonable **thirteen-year delay** in determining the

[3] Declining remand to prevent an unwarranted second bite of the apple – especially on an issue that the Board ignored evidence of at the NLRB stage and also in its brief to this Court – is a tactic that has been recognized and employed by the Board itself. *See, e.g., Laborers Local 190 (VP Builders, Inc.),* 355 NLRB 532, 534 (2010) (declining to remand case for ALJ to address a theory because doing so would give "the General Counsel an unwarranted 'second bite of the apple' by permitting litigation of an issue that he has effectively chosen not to pursue"); *Paul Mueller Co.*, 332 NLRB 1350, 1350-51 (2000) (declining to give General Counsel a "second bite of the apple" through remand that would have effectively permitted litigation of a theory General Counsel had ignored or disclaimed). And appellate courts have similarly refused to permit remand and allow a party an unwarranted second bite of the apple to consider and counter evidence that was previously introduced. *See, e.g., Bloom v. Hartford Life & Accident Ins. Co.,* 558 F. App'x 854, 856-57 (11th Cir. 2014) ("[W]e decline plaintiff's invitation to remand for a second bite at the apple."); *United States v. Dagostino*, 520 F. App'x 90, 92 (3d Cir. 2013) (recognizing that courts may permit remand where a party "did not have a fair opportunity to fully counter [a party's] evidence," but refusing to remand where "[t]he Government had a fair opportunity to submit evidence of the victim's loss, and to allow the Government to submit new evidence on remand would grant it a second bite at the apple") (internal quotations and citations omitted).

supervisory status of Entergy's dispatchers. This case originated more than a decade ago in 2003, when Entergy first filed a unit-clarification petition, lawfully seeking to remove the dispatchers from the bargaining unit. What proceeded was a series of repeated and inordinate delays by the Board[4] – all of which has hindered Entergy as it attempted to deal with the uncertainty of the dispatchers' status and has caused actual prejudice to Entergy because the Union can unjustly claim additional liability. To permit remand of this issue back to the Board, again, is unduly prejudiced and unjust in light of the unique delay in this case.

CONCLUSION

For the foregoing reasons, Entergy respectfully asks the Panel to grant rehearing, to partially reverse its Judgment enforcing an Order of the Board, to vacate the Board's determinations concerning dispatchers' use of "independent

[4] Following a hearing in 2003 and the Board's acceptance of the case for review in 2004, the Board waited more than two years before doing anything – and, at that time, it merely remanded the case back to Region 15 for further consideration in light of the *Oakwood Healthcare*, 348 N.L.R.B. 686 (2006) trilogy. Again, after a hearing in 2006 and supplemental briefing, the Board accepted the case for review on April 11, 2007. But the Board did nothing for nearly five years (!), before finally issuing a decision on December 30, 2011. Even following this decision, however, the Board's pattern of delay continued while it defended (for four years) President Obama's invalid recess appointments to the Board. And even after the Supreme Court unanimously ruled unconstitutional these appointments with its *Noel Canning* decision, the Board continued their delay tactics by insisting that the case be remanded back to the Board for consideration, instead of allowing this Court to immediately consider the merits of the case as urged by EMI in accordance with this Court's decision in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) and various decisions of other Courts of Appeals. *See, e.g., NLRB v. Enter. Leasing Co. Southeast, L.L.C.*, 722 F.3d 609, 660 (4th Cir. 2013), *cert. denied* No. 13-671, 2014 U.S. LEXIS 4689 (2014); *NLRB v. New Vista Nursing & Rehab.*, 719 F.2d 203, 244 (3d Cir. 2013). These delays were completely unnecessary and caused the case to languish for, cumulatively, several more years.

judgment" when assigning field employees, and to grant Entergy's petition on these limited issues – without remand.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. Rules 25.2.1 and .13, I certify that any required privacy redactions have been made; the electronic submission is an exact copy of the paper document; and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Pursuant to 5th Cir. Rule 40, I certify that this petition for panel rehearing complies with the 15-page limit of Fed. R. App. P. 40(b) and Fifth Circuit 40.3 because it does not exceed 15 pages in length, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 software in Times New Roman 14-point font.

I understand that a material misrepresentation in completing this certificate or circumvention of the type-volume limits in Fed. R. App. 32(a)(7) may result in the Court striking the petition and imposing sanctions against the person signing the brief.

/s/ Sarah Voorhies Myers
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CERTIFICATE OF SERVICE

I hereby certify on November 14, 2016, that a true and correct copy of this document was served via electronic means through transmission facilities from the Court upon those parties authorized to participate and access the Electronic Filing System for this Court in the above-captioned action:

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-60796

United States Court of Appeals
Fifth Circuit
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ENTERGY MISSISSIPPI, INCORPORATED,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner

Petition for Review and Cross Petition for Enforcement
of an Order of the National Labor Relations Board

Before BENAVIDES, CLEMENT, and HIGGINSON, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Petitioner Entergy Mississippi, Incorporated ("Entergy") is a power utility company. This case concerns the status of a certain group of Entergy's employees—dispatchers—under the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151-169.

Dispatchers use various information systems to monitor the flow of electricity through Entergy's grid. The Supervisory Control and Data Acquisition ("SCADA") system "provides dispatchers with data concerning the load, voltage, and amps on breakers and circuits in the substations." *Entergy*

APPENDIX A

Miss., Inc., Case No. 15-UC-149, slip op. at 4 (N.L.R.B. Feb. 7, 2007), http://apps.nlrb.gov/link/document.aspx/09031d458001c0bf (*Entergy I*). SCADA alerts dispatchers when a circuit experiences a sudden change in voltage or when a breaker trips. Upon hearing an alarm, dispatchers turn to the Automated Mapping and Facilities Management ("AM/FM"), which provides a visual map of the transmission and distribution lines in the system. *Id.* AM/FM monitors customers' calls regarding outages and predicts the device that has malfunctioned in the area of the outage. *Id.*

One of the dispatchers' most important duties is "switching." *Id.* at 5. "Switching is the sequential opening and closing of switches in the transmission and distribution system to isolate a section of power lines and to interrupt the flow of electricity so that field employees can perform routine maintenance or repair a section of line that has been damaged." *Id.* Dispatchers "draft switching orders, which are step-by-step procedures to open and close switches." *Id.* When an unexpected outage occurs, dispatchers contact field employees in the affected area and "dictate each step in the switching sequence." *Id.* "[T]he field employees write down each step as dictated by the dispatcher. The field employees then read each step of the switching sequence to the dispatchers to ensure its accuracy." *Id.* Dispatchers are also responsible for issuing clearance orders. *Id.* at 9. A clearance order signifies to field employees that electrical flow has been interrupted in a line or piece of equipment and it is safe to work on. *Id.*

Dispatchers also "call-out" field employees to work on trouble cases. *Id.* at 11. When SCADA alerts a dispatcher that an outage has occurred, the dispatcher can assign a field employee to go diagnose and correct the problem. During weather events or on weekends and holidays—when dispatchers often manage operations without much supervision—dispatchers can call field workers from the on-call list to dispatch to trouble areas. If multiple trouble

events occur at once, dispatchers have to identify the highest priority events, decide how many field workers to call-up from the on-call list, and allocate the available field workers to correct the problems.

In 2003, Entergy filed a petition with respondent National Labor Relations Board (the "Board"), arguing that dispatchers are supervisors under Section 2(11), 29 U.S.C. § 152(11). *Id.* at 2. The NLRA guarantees "employees" the right to unionize and appoint a bargaining representative. 29 U.S.C. § 157. It also requires employers to bargain with the workers' representatives. *Id.* § 158(a)(5). To ensure that unions stay loyal to workers' interests, Section 2(3), § 152(3), excludes "supervisors" from the class of "employees" guaranteed the right to unionize and bargain. In other words, by urging that dispatchers were "supervisors," Entergy sought to remove dispatchers from the local union.

The Board held a hearing in 2003, and an ALJ issued an opinion in 2004 denying Entergy's petition. *Entergy I*, at 2. Entergy filed a request for review with the Board, which was granted. *Id.* In 2006, with Entergy still waiting for the Board to hear its appeal, the Board decided *In re Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006), in which it applied the supervisor definition to nurses based on their authority to assign employees using independent judgment. The Board remanded Entergy's petition for the ALJ to reconsider the case in light of *Oakwood*. The ALJ published *Entergy I* in 2007, holding once again that dispatchers are not supervisors under Section 2(11). *See id.* at 34. Entergy again filed a petition for review. The Board affirmed the ALJ's decision. *Entergy Miss., Inc.*, 357 N.L.R.B. No. 178 (Dec. 30, 2011) (*Entergy II*).

About the same time that Entergy first filed its petition to reclassify dispatchers as supervisors, it demanded that intervenor International Brotherhood of Electrical Workers, AFL-CIO, Local Unions 605 and 985 (the "Unions") remove all references to dispatchers from the collective-bargaining agreement. *Entergy Miss., Inc.*, 361 N.L.R.B. No. 89, at *4 (Oct. 31, 2014)

(*Entergy III*). In 2006, Entergy refused the Unions' request to bargain over the dispatchers' terms and conditions of employment. *Id.* at *5. Pursuant to the Unions' complaints, the Board's Acting General Counsel filed a charge against Entergy, contending that it had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5). *Entergy III*, at *1. The Board's General Counsel moved for summary judgment based on the Board's decision in *Entergy II*. *Id.* In 2014, the Board granted summary judgment and held that Entergy had violated Section 8(a)(1) and (5). *Id.* at *2-3, 5. This appeal followed.

I.

We accord *Chevron* deference to the Board's reasonable interpretations of ambiguous provisions in the NLRA. *See NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984)). We will affirm the Board's legal conclusions "if they have a reasonable basis in the law and are not inconsistent with the Act." *Valmont Indus. v. NLRB*, 244 F.3d 454, 464 (5th Cir. 2001).

We will affirm the Board's factual conclusions if they are "reasonable and supported by substantial evidence on the record considered as a whole." *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003) (quoting *Valmont*, 244 F.3d at 463). "Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. It is more than a mere scintilla, and less than a preponderance." *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656 (5th Cir. 2012) (emphasis omitted) (quoting *Spellman v. Shalala*, 1 F.3d 357, 360 (5th Cir. 1993)). "In determining whether the Board's factual findings are supported by the record, we do not make credibility determinations or reweigh the evidence." *NLRB v. Allied Aviation Fueling of Dall. LP*, 490 F.3d 374, 378 (5th Cir. 2007). And "[r]ecognizing the Board's expertise in labor law, [we] will defer to plausible inferences it draws from the evidence, even if we might reach a contrary result were we deciding the case

de novo." *Valmont*, 244 F.3d at 463 (quoting *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185 (5th Cir. 1998)).

"Whether an employee is a supervisor is a question of fact." *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 208 (5th Cir. 2001). "Because of the 'infinite and subtle gradations of authority' within a company, courts normally extend particular deference to NLRB determinations that a position is supervisory." *Id.* (quoting *Monotech of Miss. v. NLRB*, 876 F.2d 514, 516 (5th Cir. 1989)).

II.

A.

Entergy argues that the Board's ruling lacks a reasonable basis in law because it is inconsistent with the Board's earlier decisions and with opinions from other circuits. The Board contends that its decision is reasonable because it relies on *Oakwood*. We agree with the Board and hold that its decision has a reasonable legal basis.

1.

Section 2(11), 29 U.S.C. § 152(11), which governs this appeal, defines "supervisor" as:

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

The Supreme Court has interpreted Section 2(11) as setting forth a three-part test:

> Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer."

Kentucky River, 532 U.S. at 713 (quoting *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573-74 (1994)). The party asserting supervisory status has the burden of proof. *Id.* at 711-12. This case turns on the meaning of "assign," "responsibly to direct," and "independent judgment" in Section 2(11).

2.

"Assign," "responsibly to direct," and "independent judgment" as used in Section 2(11) are all ambiguous. *Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 n.2, 855 n.3 (3d Cir. 2011) (holding that all three phrases are ambiguous); *see Health Care*, 511 U.S. at 579 (stating in dicta that the latter two phrases are ambiguous). Because *Oakwood* supplies reasonable interpretations of those terms, we owe deference to it.

Entergy contends that the Board has "waffled on the issue of whether utility-industry Dispatchers are supervisors," and thus, that this court owes little deference to the Board's recent interpretations of Section 2(11). But the Supreme Court recently clarified that federal courts must defer even to new, course-reversing agency positions when "the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency *believes* it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *accord Handley v. Chapman*, 587 F.3d 273, 282 (5th Cir. 2009).

Considering whether *Oakwood* satisfies the *Fox* test, we note first that Entergy essentially concedes that *Oakwood*'s interpretation of Section 2(11) is permissible under the statute. One need look no further than the thorough and well-reasoned opinion itself to discern that the Board's interpretation is reasonable. *See Oakwood*, 348 N.L.R.B. at 689-94. The Board explained that it adopted its new interpretations of Section 2(11) to further its mandate to protect workers, to faithfully follow the dictates of Congress and the courts, and to "provid[e] meaningful and predictable standards for the adjudication of

future cases and the benefit of the Board's constituents." *Id.* at 688. These are sufficient reasons to justify the Board's new approach. And there is no doubt that the Board intended *Oakwood* to mark a change in its application of Section 2(11). *See id.* ("[W]e herein adopt definitions for the terms 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act.").

Because *Oakwood* satisfies both the *Chevron* and *Fox* standards, we defer to it when considering the Board's action.

3.

Entergy argues that the Board's ruling lacks a reasonable basis in law because—though the facts and law are the same as in *Gulf States*—the Board reached a contrary conclusion in this case. The Board contends that *Oakwood* changed the law by adding an adverse consequence requirement, and that this development explains the different outcome. The Board has the better argument.

In *Gulf States*, we considered whether electrical utility operations coordinators "responsibly direct[ed] others with independent judgment" and thus qualified as statutory supervisors. 253 F.3d 203, 209 (5th Cir. 2001). In defining "responsibly direct," we relied on *NLRB v. KDFW-TV, Inc., a Div. of Times Mirror Corp.*, 790 F.2d 1273, 1278-79 (5th Cir. 1986) and found that "[t]o direct other workers responsibly, a supervisor must be answerable for the discharge of a duty or obligation or accountable for the work product of the employees he directs." *Gulf States*, 253 F.3d at 209 (internal quotation marks and citation omitted).

This definition was later expanded by the Board in *Oakwood*, which held that to be "responsible" under Section 2(11), a putative supervisor "must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks

performed by the employee are not performed properly." 348 N.L.R.B. at 692. Under this rule, the Board crafted a three-part test for determining whether a putative supervisor "responsibly directs" an employee:

> [T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Id.

Entergy argues that *Oakwood* simply adopted the *Gulf States* rule. Although *Oakwood* adopted the general "accountability" standard set out in *KDFW-TV*, it did not simply co-opt this court's existing law. *See Oakwood*, 348 N.L.R.B. at 691-92. Rather, it added to the "accountability" standard in at least two ways. *See* 348 N.L.R.B. at 691-92. First, *Oakwood* made clear that the putative supervisor must be potentially liable not only for his own failures, but also for the failures of his subordinates. *See* 348 N.L.R.B. at 692; *see also, e.g., In re Croft Metals, Inc.*, 348 N.L.R.B. 717, 722 (2006) (interpreting *Oakwood* and holding that movant showed accountability where the "record reveals that the Employer has disciplined lead persons by issuing written warnings to them because of the failure of their crews to meet production goals or because of other shortcomings of their crews"). By adopting this requirement, the Board hewed to the First Circuit's position in *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994), an opinion that *Gulf States* called into doubt, *see* 253 F.3d at 210.

Second, *Oakwood* required those attempting to prove supervisor status to "show[] that there is a prospect of adverse consequences for the putative supervisor" because of the actions of subordinates. 348 N.L.R.B. at 692; *see also, e.g.*, *In re I.H.S. Acquisitions No. 114, Inc. d/b/a Lynwood Manor*, 350

N.L.R.B. 489, 490-91 (2007) (interpreting *Oakwood* to require specific evidence of actual or possible adverse consequences).

This change in controlling law explains the different outcomes in the two cases. In *Gulf States*, this court did not require the movant to prove that the putative supervisors were potentially liable for the subordinates' mistakes. But following *Oakwood*, the Board required Entergy to prove that dispatchers could be liable for the actions of field employees.[1] And there is substantial evidence to support the Board's decision. *See Entergy II*, at *7. Because the Board's ruling has a reasonable legal basis, we affirm.

B.

The party alleging supervisory status bears the burden of proving that it exists by a preponderance of the evidence. *Oakwood*, 348 N.L.R.B. at 694. Entergy argues that there is not substantial evidence to support the Board's ruling that dispatchers are not supervisors. Specifically, Entergy contends that it proved that dispatchers "responsibly direct" field employees, "assign" them, and use "independent judgment" in performing both functions. There is substantial evidence to support the Board's determination that dispatchers do not "responsibly direct" field employees or "assign" them to a "time" or "significant overall duty." But the Board ignored evidence that arguably shows that dispatchers "assign" field employees to "locations" using "independent judgment." We affirm in part and vacate in part the Board's decision that dispatchers are not supervisors.

[1] Every circuit court that has interpreted *Oakwood* has read it to require responsibility for others' actions. *See NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 10 (1st Cir. 2015); *Avista Corp. v. NLRB*, 496 F. App'x 92, 93 (D.C. Cir. 2013) (per curiam); *Lakeland Health Care Assoc's, LLC v. NLRB*, 696 F.3d 1332, 1353 (11th Cir. 2012); *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 596 (7th Cir. 2012); *Mars Home for Youth*, 666 F.3d at 854.

1.

We first address the Board's holding that dispatchers do not "responsibly direct" field employees. *See Entergy II*, at *7-9. Again, *Oakwood* provides that a putative supervisor does not "responsibly direct" a subordinate unless the supervisor has the authority to direct the subordinate's work and take corrective action when necessary, and the supervisor could be held liable for the subordinate's performance of his job. 348 N.L.R.B. at 692.

Applying *Oakwood*, the Board held that Entergy failed to show that dispatchers "responsibly direct" field employees because the evidence showed "that the dispatchers are accountable for their own work, i.e., their own failures and errors, and not those of the field employees." *Entergy II*, at *8. Entergy asserts that "the record contains numerous situations in which Dispatchers were disciplined solely because of errors made by field employees under their supervision." But the two examples it offers provide no support for the claim. Entergy points to testimony about a dispatcher named White. White correctly instructed a field employee to flip a specified switch, but the employee flipped the wrong one. White's supervisor testified that he did not plan to discipline White until he admitted that "[w]hen [he] was talking to [the field employee], [he] could feel that [the employee] was uncomfortable." The supervisor testified that he "coached and counseled" White—a form of discipline—because he knew the field employee was unprepared but proceeded anyway. The supervisor stated that "even though the switchman was the one who admitted that he made the error, [he] nonetheless held the dispatcher accountable."

The Board's acting regional director, who sat as the ALJ, refused to credit this testimony. As the ALJ noted, the manager "claims that he gave [White] a coaching and counseling session, but he acknowledges that he did not place a memo in the dispatcher's personnel file concerning the dispatcher being counseled for the performance of the field employee." Noting that

Entergy's disciplinary policy requires managers to document coaching and counseling sessions, the ALJ stated that he was "not convinced that the evidence establishes that the dispatcher actually received any degree of discipline." The ALJ's determination is entitled to deference. *See Carey Salt Co. v. NLRB*, 736 F.3d 405, 410 (5th Cir. 2013) (explaining that an ALJ's credibility determination, "adopted by the Board, merits special deference" (internal quotation mark and citation omitted)).

Entergy also points to testimony about an incident where a dispatcher's and field employee's joint error caused a major outage. But the testimony makes clear that the dispatcher was punished because he had a document containing necessary information, yet he failed to consult it. The testimony does not show that dispatchers are held liable for field employees' mistakes.

In sum, substantial evidence supports the Board's determination that dispatchers are accountable only for their own mistakes. And under *Oakwood*, this is sufficient to show that dispatchers do not "responsibly direct" field employees.

2.

We next address the Board's holding that dispatchers do not "assign" field employees, or do not exercise "independent judgment" when doing so. *See Entergy II*, at *9-12.

In *Oakwood*, the Board "construe[d] the term 'assign' to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." 348 N.L.R.B. at 689. The Board interpreted "independent judgment" to refer to an individual "act[ing], or effectively recommend[ing] action, free of the control of others and form[ing] an opinion or evaluation by discerning and comparing data." *Id.* at 692-93. The Board further explained that "a judgment is not independent if it is dictated or

controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Id.* at 693. "On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.* The Board also reasoned that "[t]he authority to effect an assignment, for example, must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Id.*

The Board applied *Oakwood* when deciding *Entergy II*. *See id.* at *7. The Board assumed that dispatchers "assign" field employees to a place. *Id.* at *9-10. But it held that dispatchers do not exercise "independent judgment" because they "utilize a computer program that notifies them of trouble spot locations, and usually assign to trouble spots employees already assigned to that specific area." *Id.* at *10. In other words, the Board found that the dispatchers' job requires nothing more than reading a trouble report on a computer screen, looking at a list to determine the on-call worker for the relevant area, and telling the responsible worker to head to the location.

Although we give significant deference to the Board's factfindings, "[o]ur deference . . . has limits." *Carey Salt*, 736 F.3d at 410. "[A] decision by the Board that 'ignores a portion of the record' cannot survive review under the 'substantial evidence' standard." *Id.* (quoting *Lord & Taylor v. NLRB*, 703 F.2d 163, 169 (5th Cir. 1983)); *see Amoco Prod. Co. v. NLRB*, 613 F.2d 107, 111-12 (5th Cir. 1980) (holding that remand is appropriate when the Board fails to adequately explain the factual basis for its opinion).

The Board ignored significant portions of the record that show how dispatchers arguably exercise independent judgment when deciding how to allocate Entergy's field workers. Albert May, a union manager, testified that when there are simultaneous outages, dispatchers "decide which trouble to

handle first." After a dispatcher has sent a field employee to one location, he "ha[s] authority to redirect that person to another case of trouble." And "if there is more trouble than that one [field employee] can handle," the dispatcher "would decide to call out additional [field employees]." These decisions, in part, are guided by "standard operating procedure" and "if conflicts arise, then the dispatchers would consult an [operations coordinator] or a network manager to determine if [certain responses are] possible to do or not." Although the operating guidelines and union-generated on-call lists dictate which field employees will be on-call at any given time, those agreements "don't tell the dispatcher when or how many people to dispatch or when to hold [field employees] over [their regular shift]." The dispatcher seems to "decide how many troublemen or servicemen [are] necessary to handle . . . multiple cases of trouble."

Evidence in the record shows that dispatchers' judgment about how to allocate Entergy's field workers is guided by a range of discretionary factors. Dispatchers appear to prioritize outages affecting industrial customers that have special contracts with Entergy. Yet if an outage occurred at night or on a holiday when an industrial customer's factory was not operating, dispatchers might be expected to prioritize another customer instead. Dispatchers also apparently prioritize outages affecting customers with "special medical needs," along with prioritizing outages that affect large numbers of residential customers. If simultaneous outages of each type occur, there is no simple rule to guide the dispatcher's decision in who to help first. In sum, at times, a dispatcher may have to decide whether to send "[his] one crew" to a trouble location "with the most customers on it," to "the one that's got the hospital out," or to "the plastics plant that needs to be picked up."

Dispatchers apparently weigh other factors as well. There is evidence that they juggle logistical considerations, such as deciding whether a field

employee can complete a quick repair at a trouble spot that is along the way to an outage affecting a high-priority client. Dispatchers arguably must also consider whether a particular outage is likely to cause property damage to Entergy's facilities. And where, for example, an unrepaired outage from the previous day elevates the risk posed by a new outage, the dispatcher likely re-prioritizes given the facts on the ground.

Despite this complexity, "there are no standard operating procedures within Entergy for what is to be turned on — which kind of account's [sic] to be turned on first." "There is no handbook, guidelines or documents." *Id.* Dispatchers apparently learn how to prioritize clients "through the mentoring process."

Considering the interpretations announced in *Oakwood*, the evidence discussed above arguably shows that dispatchers "assign" field employees to places by exercising "independent judgment." Yet the Board ignored this evidence when explaining its reasoning. Decisions by the Board that ignore a relevant portion of the record cannot survive substantial evidence review. *See NSTAR Elec. Co.*, 798 F.3d at 13 n.10. Accordingly, we vacate the Board's decision that dispatchers do not exercise "independent judgment" when assigning employees to locations and remand for further proceedings on this narrow question.

3.

The Board held that dispatchers do not "assign" field workers to a time, that is, "to remain on the job at the end of their 8-hour shift to perform an overtime assignment." *Entergy II*, at *12.

The Board reasonably discredited the testimony of three Entergy employees, who haltingly testified that dispatchers have the authority to require field workers to stay on-duty. *See Entergy II*, at *10-11. The Board focused instead on the testimony of a dispatcher who stated that he "[did]n't

have the authority to force [a field employee] to stay." *Id.* at *11. Inferring from this statement that managers never told dispatchers that they had the power to order field workers to work overtime, the Board held that no such power was likely ever delegated. *Id.* at *11-12. The Board's legal reasoning is permissible and its factual determinations are supported by substantial evidence.

The Board held that dispatchers do not "assign" field workers to "significant overall duties." *Id.* at *12. In *Oakwood*, the Board held that assigning an employee "to certain significant overall tasks (e.g., restocking shelves) would generally qualify as 'assign' within [its] construction." 348 N.L.R.B. at 689. On the other hand, "choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" *Id.* Citing *Oakwood*, the Board reasoned that dispatchers do not assign field employees to a new, overall duty, but merely direct them to perform an ad hoc task before returning to their normal duties. *Entergy II*, at *12. Here too, the Board's legal reasoning is permissible and its factual determinations are supported by substantial evidence. We affirm.

* * *

The Board's legal reasoning is permissible and its rulings, in large part, are supported by substantial evidence. But the Board ignored significant evidence suggesting that dispatchers "assign" field employees to "places" using "independent judgment." Accordingly, we affirm in part, vacate in part, and remand for further proceedings on the narrow question of whether the dispatchers exercise independent judgment in assigning field employees to places.

C.

Entergy argues that the doctrine of laches bars the Board from recouping money damages in this action. We disagree.

In *Nabors v. NLRB*, 323 F.2d 686 (5th Cir. 1963), this court held that the United States and its agencies are not subject to the defense of laches when enforcing a public right. *Id.* at 688. The court further held that when the Board brings an enforcement action under the Act, it acts in the public interest, even when it obtains money damages on behalf of private persons. *Id.* at 688-89. *Nabors* remains good law. *See, e.g.*, *Matter of Fein*, 22 F.3d 631, 634 (5th Cir. 1994) (holding that laches may not be asserted against the government when it acts in its sovereign capacity); *United States v. Arrow Transp. Co.*, 658 F.2d 392, 395 (5th Cir. 1981) ("The law remains unchanged: laches is unavailable as a defense against the United States in enforcing a public right."). We deny Entergy's laches defense.

III.

For the reasons explained, we AFFIRM the Board's decision in all but one respect. We VACATE the Board's determination that dispatchers do not "assign" field employees to "places" through the exercise of "independent judgment" and we REMAND for further proceedings. The Board cross-appeals, asking this court to enforce its order. Because we hold the Board erred, we DENY the Board's request for enforcement.