

08-4729, 09-1035

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

J.S. CARAMBOLA, LLP

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ROBERT J. ENGLEHART

Supervisory Attorney

DAVID A. SEID

Attorney

RUTH E. BURDICK

Attorney

National Labor Relations Board

1099 14th Street, N.W.

Washington, D.C. 20570

(202) 273-2978

(202) 273-2997

RONALD MEISBURG

General Counsel

JOHN E. HIGGINS, JR.

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

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**BRIEF FOR
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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of J.S. Carambola, LLP (“the Company”) to review and set aside, and on the cross-application of the National Labor Relations Board (“the Board” or the “NLRB”) to enforce, a Board order finding that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”, or the “NLRA”) by

failing to recognize and bargain with the Our Virgin Islands Labor Union (“the Union”).

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)). The Board’s Decision and Order issued on September 17, 2008, and is reported at 353 NLRB No. 8 (2008) (A 13-15).¹ Because the Board’s Order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 24-RC-8577), the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board’s actions in the representation case solely for the purpose of “enforcing, modifying or setting aside in whole or in part the [unfair labor practice] order of the Board.” 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 Court’s rulings. *See Freund Baking Co.*, 330 NLRB 17 n.3 (1999) (citing cases).

The Company filed its petition for review on December 8, 2008. (A 1.) The Board filed its cross-application for enforcement on January 5, 2009. (A 8-9.)

¹ “A” references are to the joint appendix. References preceding a semicolon are to the Board’s findings; those following a semicolon are to the supporting evidence.

Those filings were timely because the Act imposes no time limits on proceedings for the review or enforcement of Board decisions. The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the Board's Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). However, because the Company challenges the Board's Order on that basis, that question is now presented for decision.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted within the full powers of the Board in issuing the Board's Order in this case.

2. Whether substantial evidence supports the Board's decision to overrule the Company's election objection alleging improper pro-union activity by supervisors, and therefore properly 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 a unit of its employees.

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified collective-bargaining

representative of an appropriate unit of employees at its Hotel and Resort located in St. Croix, USVI.² The Company (Br 8) does not dispute that it refused to bargain. It contests the Union's certification on two grounds. First, that the Board had no authority to issue a decision with only two sitting members. Second, that the Board erred by overruling, after a hearing, its election Objection 3. Relevant portions of the procedural history of the case before the Board are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

The Company operates a Hotel and Resort in St. Croix, VI. (A 16(f).) On September 20, 2007, the Union filed a representation petition with the Board seeking to represent a unit of the Company's employees at its St. Croix facility. (A 16(d); 34.)

On October 25, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election among the designated employees. The tally of ballots showed that, of approximately 78 eligible employees, 36 cast ballots for the Union and 27 against it, with no challenged ballots. (A 16(d); 35-39). The Company filed five timely objections to the election, but submitted evidence only

² The bargaining unit includes "[a]ll full time and regular part-time employees including cooks, bartenders, housekeeping and laundry workers, receptionists, waiters, waitresses, and maintenance workers" (A 14.)

on Objection 3, in which it claimed that the Union interfered with the election by having pro-union supervisors “campaigning on behalf of the Union including soliciting the signing of authorization cards, instructing to attend union meetings and making other pro-union statements that would tend to threaten or coerce employees.” (A 16(e); 105-07.)

After reviewing the Company’s evidence in support of its objections to the election, the Board’s Regional Director issued her Report on Objections in which she directed that a hearing be held on Objection 3, and determined that the remaining objections be overruled. (A 40-44.) On December 18, the Board’s Regional Office conducted a hearing to receive evidence on Objection 3. (A 16(e).)

Thereafter, the Board’s hearing officer issued a Report and Recommendation on Objections in which she recommended overruling Objection 3 and certifying the Union. The hearing officer found that kitchen employee Lauritz Thompson, the only person alleged to have engaged in improper pro-union conduct by allegedly telling employees, “If you don’t vote for the Union you are a stupid ass,” was not a statutory supervisor, and that even if he was, he did not engage in any objectionable conduct that would warrant overturning the election. (A 16(d)-(x).) The Company had terminated Thompson after he declined

to write a statement admitting that he had engaged in union activity. (A 16(o)-(p); 285-95, 411.)

The Company filed timely exceptions to the hearing officer's recommendation. Thereafter, on May 28, 2008, the Board (Members Liebman and Schaumber) adopted the hearing officer's recommendations and certified the Union. (A 16(a)-(c).) The Board found it "unnecessary to pass on Thompson's supervisory status[. . .] agree[ing] with the hearing officer that, even assuming Thompson was a supervisor, his [alleged] statement was not objectionable." (DCR, A 88.)³

B. The Unfair Labor Practice Proceeding

After the Board's certification issued, the Company refused to bargain with the Union. (A 14; 94, 100.) Based upon the Union's unfair labor practice charge, a complaint issued alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (29 U.S.C. §158(a)(5) and (1).) (A 92-96.) The Company admitted its refusal to bargain, but disputed the validity of the Union's certification as the employees' bargaining representative. (A 100.) In light of the

³ Since the Company did not file exceptions with the Board to the Regional Director's overruling of Company Objections 1, 2, 4, and 5, it is barred from challenging those findings. 29 U.S.C. § 160(e). See *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982); *NLRB v. FES, a Div. of Thermo Power*, 301 F.3d 83, 89 (3d Cir. 2002).

Company's admission that it refused to bargain with the Union, the Board's General Counsel filed a motion for summary judgment, and a notice to show cause why the General Counsel's motion should not be granted. (A 13; 26-33.) The Company filed a response, arguing that the Board should not grant summary judgment because the Board had improperly certified the Union as the exclusive bargaining representative in the underlying representation proceeding. (A 13; 164-75.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On September 17, 2008, the Board (Chairman Schaumber and Member Liebman) issued its Decision and Order, granting the General Counsel's motion for summary judgment, because all issues were or could have been litigated in the prior representation proceeding, and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act. 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.) Affirmatively, the Order directs the Company to bargain with the Union upon request, embody any understanding reached in a signed agreement, and post an appropriate remedial notice to employees. (A 3-5.)

The Company then filed a motion for reconsideration and memorandum in support. (A 176-77.) On October 17, the Board issued an order denying the Company's motion. (A 16.)

STATEMENT OF RELATED CASES

This case has not previously been before this Court and Board counsel is not aware of any related case pending before this or any other court.

STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

Congress has entrusted to the Board the task of deciding representation questions under the Act and has given the Board a "wide degree of discretion" to establish the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). *Accord NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 795 (3d Cir. 1999).

"There is a strong presumption that an election conducted by the [B]oard reflects the employees' true desires regarding representation." *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997). *Accord Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). Thus, the party seeking to overturn a Board-conducted election has the burden to establish that the election was not fairly conducted. *See NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961); *Dayton Hudson Dept. Store Co. v. NLRB*, 79 F.3d 546, 550 (6th Cir. 1996). That burden is a heavy one, requiring a showing that a "fair and free choice by the

employees was impossible.” *Zieglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1105 (3d Cir. 1981).

Parties objecting to the conduct of elections often argue, as here (Br 43-44), that elections must occur under “laboratory conditions.” Yet, this Court recognizes that if an election was set aside whenever it failed to achieve “perfection,” “the employees’ choice of representative might never be accomplished, because a never-ending series of challenges to elections could be foreseen.” *Id.* Accordingly, the Court will accept less-than-perfect conditions in the election process unless “coercive conduct has poisoned the fair and free choice” of employees and the conditions have “become so tainted that employees may have based their vote not upon conviction, but upon fear or upon other improperly induced consideration.” *Id.*

In determining whether a particular incident so disrupted an election as to warrant setting the election aside, a court must satisfy itself that the Board’s determination regarding the impact of the incident at issue is supported by substantial evidence on the record as a whole. *Jamesway Corp. v. NLRB*, 676 F.2d 63, 69 (3d Cir. 1982); *Zieglers Refuse Collectors*, 639 F.2d at 1105. Under that standard, the Board’s findings are conclusive if they represent a “choice between two fairly conflicting views, even though the court would justifiably have made a

different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

In particular, “credibility determinations should not be reversed unless inherently incredible or patently unreasonable.” *St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 298 (3d Cir. 2008) (citation omitted).⁴

SUMMARY OF ARGUMENT

The Company’s contention that the Board’s Order was not issued by a quorum of the Board must be rejected. Chairman Schaumber and Member Liebman, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board’s Order. Their authority to issue Board decisions and orders under such circumstances is provided for in the express terms of Section 3(b), and is supported by Section 3(b)’s legislative history, cases involving comparable situations under other federal administrative agency statutes, and administrative-law and common-law principles. In contrast, the Company’s

⁴ Although the above-referenced case--in which this Court has discussed in detail the standard used to review credibility determinations--refers to the findings of an administrative law judge in unfair labor practice cases, decisions make clear that courts accord the same sort of deference to the Board-approved findings of hearing officers in election-objection cases. See *NLRB v. Mickey’s Linen & Towel Supply, Inc.*, 460 F.3d 840, 842 (7th Cir. 2006); *Health Care and Retirement Corp. of America v. NLRB*, 255 F.3d 276, 282 (6th Cir. 2000); *Albertson’s Inc. v. NLRB*, 161 F.3d 1231, 1236 (10th Cir. 1998); *Amalgamated Clothing & Textile Workers Union-AFL-CIO, CLC v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984).

argument is based on an incorrect reading of Section 3(b) and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

Nor did the Board err by declining to overturn the election based on the evidence of a single pro-union statement by supervisor Lauritz Thompson to employees he did not supervise. For purposes of the decision, the Board assumed that, as alleged, Thompson stated: “If you don’t vote for the Union you are a stupid ass.” The Board reasonably found the statement was not coercive.

The Board also did not abuse its discretion by refusing to permit the Company to subpoena union phone records, including the private phone records of Union President Mario Ricky Brown. Such records would only show that a phone call was made between the Union and a purported supervisor, not that inappropriate conduct occurred. Moreover, the Company was not prejudiced by the Board’s decision because it was permitted to extensively question union witnesses about any contact with purported supervisors.

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

Chairman Schaumber⁵ and Member Liebman, as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order in this case. *New Process Steel, L.P. v. NLRB*, ___ F.3d ___, 2009 WL 1162556 (7th Cir. May 1, 2009); *Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *pet. for rehearing en banc filed* (May 4, 2009).⁶ As we now show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. The Company's contrary argument

⁵ On March 18, 2008, President Bush announced the designation of Member Schaumber as Chairman of the Board. *See* BNA, *Daily Labor Report*, No. 53, at p. A-11 (Mar. 19, 2008). On January 20, 2009, President Obama designated Wilma B. Liebman as Chairman of the Board. *See* BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

⁶ But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, ___ F.3d ___, 2009 WL 1162574 (May 1, 2009) (discussed below). The issue was also argued before the Second Circuit on April 15, 2009, in *Snell Island SNF v. NLRB*, Nos. 08-3822 and 08-4336. This issue has also been fully briefed in the Eighth Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291 (scheduled for oral argument on June 9, 2009), and *NLRB v. American Directional Boring, Inc.*, No. 09-1194; and in the Tenth Circuit in *Teamsters, Local 523 v. NLRB*, Nos. 08-9568 and 08-9577.

must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

A. Background

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

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [29 U.S.C. § 153(b).]

Pursuant to this provision, the four members of the Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a group of three members, Members Liebman, Schaumber and Kirsanow. When, three days later, Member Kirsanow's recess appointment expired,⁷ the two remaining members, Members Liebman and

⁷ Member Walsh's recess appointment also expired on December 31, 2007.

Schaumber, continued to exercise the delegated powers they held jointly with Member Kirsanow, consistent with the express language of Section 3(b) that a vacancy shall not impair the powers of the remaining members and that “two members shall constitute a quorum” of any group of three members to which the Board had delegated its powers. Since January 1, 2008, this two-member quorum has issued almost 300 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.⁸

B. Section 3(b) of the Act, By Its Terms, Provides That a Two-Member Quorum May Exercise the Board’s Powers

In determining whether Section 3(b) of the Act expresses Congress’ clear intent to grant the Board the option of operating the agency through a two-member quorum of a properly delegated, three-member group, the Court should apply “traditional principles of statutory construction.” *NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n. 9 (1984). This process begins with looking to the plain meaning of the statutory terms. *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 155 (3d Cir. 2009);

⁸ On May 4, 2009, it was reported that the two-member Board quorum had issued approximately 400 decisions, published and unpublished. *See* BNA, *Daily Labor Report*, No. 83, at p. AA-1 (May 4, 2009). The published decisions include all decisions in Volume 352 NLRB (146 decisions), Volume 353 NLRB (132 decisions), and Volume 354 NLRB (17 decisions as of May 14, 2009).

Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56, 67 (3d Cir. 2007). The meaning of a term, however, “cannot be determined in isolation, but must be drawn from the context in which it is used.” *Deal v. United States*, 508 U.S. 129, 132 (1993); *see Kaufman*, 561 F.3d at 155. Moreover, “a statute must, if possible, be construed in such a fashion that every word has some operative effect.” *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *see Kaufman*, 561 F.3d at 155 (“When the statutory language is not clear on its face, the statute must be construed to give effect, if possible, to every word and clause.”).

Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate “all of the powers which it may itself exercise” to a group of three or more members; (2) a vacancy provision; and (3) a quorum provision stating that three members shall constitute a quorum, with an express *exception* stating that two members shall constitute a quorum of any three-member group established pursuant to the Board’s delegation authority.

As both the Seventh Circuit and the First Circuit have concluded, the plain meaning of the statute’s text authorizes a two-member quorum of a properly constituted three-member group to issue decisions, even when, as here, the Board has only two sitting members. *See New Process Steel*, 2009 WL 1162556, at *4 (“As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent

vacancy. This indeed is the plain meaning of the text.”); *Northeastern Land Servs.*, 560 F.3d at 41 (“the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)”). As the decisions of both courts recognize, the three provisions of Section 3(b), in combination, authorized the Board’s action here. The Board first delegated all of its powers to a group of three members, as authorized by the delegation provision. As provided by the vacancy provision, the departure of Member Kirsanow after his recess appointment expired on December 31 did not impair the authority of the remaining Board members to continue to exercise the full powers of the Board which they held jointly with Member Kirsanow pursuant to the delegation. And because of the express exception to the three-member quorum requirement when the Board has delegated its powers to a group of three members, the two remaining members constituted a quorum—the minimum number legally necessary to exercise the Board’s powers.

The District of Columbia Circuit’s contrary conclusion is based on a strained reading of Section 3(b) that does not give operative meaning to all of its provisions. In *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 2009 WL 1162574, at *3, the D.C. Circuit held that Section 3(b)’s provision that “three members of the Board shall, *at all times*, constitute a quorum of the Board” (29 U.S.C. § 153(b), emphasis added), prohibits the Board from acting in any capacity

when it has fewer than three sitting members, despite Section 3(b)'s express exception that provides for a quorum of two members when the Board has delegated its authority to a three-member group. The court concluded that the two-member quorum provision that applies to a three-member "group" is not in fact an exception to the three-member quorum requirement for the "Board," because the former applies to a "group" and the latter applies to the "Board." *See* 2009 WL 1162574, at *4. The court held that Congress' use of the two different object nouns indicates that each quorum provision is independent from the other, and thus the two-member quorum provision does not eliminate the requirement of a three-member quorum "at all times." *Id.*

The D.C. Circuit's interpretation completely fails to give the critical terms in Section 3(b) their ordinary and usual meaning, thereby violating the cardinal canon of statutory construction "that courts must presume a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). *See also Flores-Figueroa v. United States*, ___ U.S. ___, 2009 WL 1174852, at *3 (May 4, 2009) (applying "ordinary English grammar" and "ordinary English" to determine the meaning of a statute).

In ordinary English usage, the word "except" means "with the exclusion or exception of." *Webster's Third New Int'l Dictionary* (G & C Merriam 1971). Thus, in ordinary English usage, the statement in Section 3(b)—that "three

members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof”—means that the two-member quorum provision that applies when the Board has delegated its powers to a three-member group is an *exception* to the requirement of a three-member quorum “at all times.” The words “at all times,” therefore, do not carry the weight that the court ascribes to them, and do not require that the Board have a three-member quorum even when it has delegated all its powers to a three-member group.

In addition to failing to give the word “except” its usual meaning, *Laurel Baye* also fails to give proper effect to Section 3(b)’s textually interrelated provisions authorizing three or more members of the Board to delegate all the Board’s powers to a three-member group, two members of which “shall constitute a quorum.” *Laurel Baye* mistakenly holds that this language expresses a distinction between the “Board” itself, which at all times must have a quorum of three to operate, and any “group;” it further states that “[t]he establishment of a two-member quorum of a subordinate group does not logically require any change in the provision mandating a three-member quorum for the Board as a whole.”

Laurel Baye, 2009 WL 1162574, at *4.

The distinction that the *Laurel Baye* court has erroneously drawn between “Board” and “group” is refuted by Section 3(b)’s first sentence, which provides for

the Board's delegation to a group of "any or all of the powers which [the Board] may itself exercise." Where, as here, the Board has delegated all its powers to a three-member group, that group, possessing all the Board's powers, cannot logically be distinguished from the Board itself. *See Northeastern Land Servs.*, 560 F.3d at 41 ("the Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)" (emphasis supplied)). In concluding otherwise, the D.C. Circuit failed to heed its own admonition that "[n]o canon of construction justifies construing the actual statutory language beyond what the terms can reasonably bear." *Amoco Production Co. v. Watson*, 410 F.3d 722, 733-34 (D.C. Cir. 2005).

The *Laurel Baye* court's puzzling conclusion that Congress intended that "each quorum provision is independent from the other," and thus the two-member quorum provision does not eliminate the requirement of a three-member quorum "at all times" (2009 WL 1162574, at *4), denies Section 3(b)'s two-member quorum provision any independent meaning in the sense that "quorum" is conventionally understood. *Laurel Baye* recognizes (2009 WL 1162574, at *6) that the word "quorum" means "the minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted." *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1341 (D.C.

Cir. 1983) (quoting H. Robert, *Robert's Rules of Order* 16 (rev. ed. 1981)). Under *Laurel Baye*'s construction of Section 3(b), however, the actual presence of a two-member quorum of the Board, possessed of all the Board's powers by a valid delegation, is *never* a sufficient number to transact business unless there is also a third member sitting on the Board. The two-member quorum provision, under that misguided construction, is rendered wholly *dependent* on the presence of a three-member quorum. In so holding, the *Laurel Baye* panel has violated a cardinal principle of statutory construction—a principle that it purports to accept (2009 WL 1162574, at *3)—that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (internal quotation marks omitted).

In so reasoning, *Laurel Baye* also fails to give the word “quorum” its normal and usual meaning. In ordinary English usage, a three-member quorum requirement means that three members is the minimum number necessary to participate if business is to be legally transacted. In turn, a two-member quorum requirement means that two members is the minimum number necessary to participate if business is to be legally transacted. *Laurel Baye* mistakenly treats the word “quorum” as if it referred to a minimum number of which the body must be

constituted, rather than a minimum number that must participate if business is to be legally transacted.

Moreover, as both the Seventh Circuit (*New Process Steel*, 2009 WL 1162556, at *5) and the First Circuit have noted (*Northeastern Land Services*, 560 F.3d at 41-42), two persuasive authorities also support the Board's reading of Section 3(b)'s plain text. First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), a case where the Board had four sitting members, the Ninth Circuit held that Section 3(b)'s two-member quorum provision authorized a three-member group to issue a decision even after one panel member had resigned.⁹ In addition, the United States Department of Justice's Office of Legal Counsel ("the OLC") has directly addressed the issue in a formal legal opinion. The OLC concluded that the Board possessed the authority to issue decisions when only two of its five seats were filled, where the two remaining members constituted a quorum of a three-member group within the meaning of Section 3(b). *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

The Company, refusing to give full effect to all of Section 3(b)'s express terms, asks this Court to read into Section 3(b) an implicit minimum number of

⁹ The Company (Br. 26) seeks to distinguish *Photo-Sonics* on its facts, arguing that there three Board members were assigned to the case and participated in the decision. The relevant similarity, however, is that the court held that it was not legally determinative whether the resigning Board member participated in the decision, because "the decision would nonetheless be valid because a 'quorum' of two panel members supported the decision." 678 F.2d at 123.

three sitting members necessary for issuing decisions. Thus, the Company asserts (Br. 15) that, because Section 3(b) only authorizes the Board to delegate its powers to “a group of three or more members,” two members do not constitute a proper panel for issuing decisions. That argument ignores that the Board *did* delegate all its powers to a group of three or more members, that the powers thus delegated were unaffected by the vacancy created by the departure of Member Kirsanow, and that, as a consequence, the two remaining Board members continue to exercise those powers as a quorum of the group. The Company’s argument incorrectly interprets the delegation provision in isolation, and fails to give effect to Section 3(b)’s vacancy and two-member quorum provisions which appear in the same sentence. Indeed, the very effect that Congress intended to safeguard against—that a vacancy would preclude the remaining members from exercising the Board’s powers—would result if, as the Company suggests, Member Kirsanow’s departure disabled the remaining two-member quorum from exercising the Board’s powers.¹⁰ In contrast, the Board’s reading of Section 3(b) gives effect to *each* of those three provisions as they act in combination. That reading supports the conclusion that the Board properly delegated “all of its powers” to a three-member group consisting of Members Liebman, Schaumber and Kirsanow, and that the “vacancy”

¹⁰ *Cf. Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (vacancy provision in Interstate Commerce Act vested the full power of the ICC in fewer than the full complement of commissioners).

provision, in combination with the two-member quorum provision for a three-member group, operates to authorize Members Liebman and Schaumber to act for the Board and issue decisions.¹¹

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

As shown, the meaning of statutory language cannot be determined by isolating particular terms, but must take into account the intent and design of the entire statute. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574, 578 (1995); *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 69 (3d Cir. 2007). Thus,

¹¹ The Company mistakenly argues (Br. 22) that the “vacancy” clause in Section 3(b) cannot authorize two members to act for the Board because it refers only to a single “vacancy,” not multiple “vacancies.” That argument overlooks that, in the construction of federal statutes, “unless context indicates otherwise--words importing the singular include and apply to several persons, parties, or things.” 1 U.S.C. § 1. Moreover, Section 3(b)'s vacancy clause is identical to, and was modeled on, the ICC's vacancy clause which has been interpreted to cover multiple vacancies. *See, e.g., Assure Competitive Transp., Inc.*, 629 F.2d at 473. If Section 3(b) were construed as the Company contends, the Board would be disabled whenever it had only three sitting members, a result wholly at odds with that section's quorum provisions.

The D.C. Circuit, in its *Laurel Baye* decision, acknowledged that the term “vacancy” in Section 3(b) cannot be limited to the singular. *See* 2009 WL 1162574, at *6. The court went on to hold, however, that “it is clear that the vacancy provision allows the Board to function fully with at most two vacancies.” *Id.* This conclusion, however, is based on the court's conclusion that the clause in Section 3(b) providing that “three members of the Board shall, at all times, constitute a quorum,” means that the three-member quorum requirement must always be satisfied. *Id.* As set forth above, this conclusion is faulty because it distorts the plain meaning of the term “quorum,” and refuses to account for the fact that Section 3(b) provides an express *exception* to the three-member quorum requirement when the Board's powers have been delegated to a group.

ascertaining that meaning often requires resort to historical materials, including legislative history. *Gustafson*, 513 U.S. at 578.

A brief history of the Board's operations and of the legislation that ultimately became Section 3(b) of the Act confirms that Congress intended for the Board to have the power to adjudicate cases with a two-member quorum. In the Wagner Act of 1935, which created a three-member Board, Section 3(b), in its entirety, provided: "A vacancy on the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and two members of the Board shall, at all times, constitute a quorum."¹² Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued 464 published decisions with only two of its three seats filled.¹³ See, e.g., *NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).

¹² See Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 449, reprinted in 2 *NLRB, Legislative History of the National Labor Relations Act, 1935* (hereinafter "*Leg. Hist. 1935*"), at 3272 (1935).

¹³ The Board had only two members during three separate periods between 1935 and 1947: from August 31 until September 23, 1936; from August 27 until November 26, 1940; and from August 27 until October 11, 1941. See *2d Annual Report, NLRB*, at 7; *6th Annual Report*, at 7 n.1; *7th Annual Report*, at 8 n.1. Those two-member Boards issued 224 published decisions (reported at 35 NLRB 24-1360 and 36 NLRB 1-45) in 1941; 237 published decisions (including all decisions reported in 27 NLRB and those decisions reported at 28 NLRB 1-115) in 1940; and 3 published decisions (reported at 2 NLRB 198-240) in 1936.

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.¹⁴ In 1947, however, when Congress was considering the Taft-Hartley amendments, the original two-member quorum provision was not a matter of concern. Indeed, the House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.¹⁵

The Senate bill, while proposing to enlarge the Board and amend the quorum requirement, was careful to do so in a manner that explicitly preserved the Board's authority to exercise its powers through a two-member quorum. Thus, the Senate bill would have expanded the Board to seven members, four of whom would be a quorum. However, that same bill authorized the larger Board to delegate its powers "to any group of three or more members," two of whom would be a quorum.¹⁶ The Senate bill's preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity of

¹⁴ See James A. Gross, *The Reshaping of the NLRB: National Labor Policy in Transition, 1937-1947* (1981); Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (1950).

¹⁵ See H.R. 3020, 80th Cong. § 3 (1947), reprinted in *1 NLRB, Legislative History of the Labor Management Relations Act, 1947* (hereinafter "*Leg. Hist. 1947*"), at 171-72 (1948); H.R. Rep. No. 80-3020, at 6, *1 Leg. Hist. 1947*, at 297.

¹⁶ S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

viewpoint in deciding cases, contrary to the suggestion of one Senator.¹⁷ Rather, as the Senate Committee on Labor explained, the proposed expansion of the Board was designed to “permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage.”¹⁸ Senator Taft similarly stated that the Senate bill was designed to “increase[] the number of the members of the Board from 3 to 7, in order that they may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much.”¹⁹ *See Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981) (recognizing Congress’ purpose “to enable the Board to handle an increasing caseload more efficiently”). The Conference Committee accepted, without change, the Senate bill’s delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members.²⁰

¹⁷ Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

¹⁸ S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

¹⁹ Remarks of Sen. Taft, 93 Cong. Rec. 3837 (Apr. 23, 1947), *2 Leg. Hist. 1947*, at 1011. The three-member groups that the Senate proposed for the NLRB were similar to the three-member divisions that Congress had previously enacted for the Interstate Commerce Commission (“the ICC”) and the Federal Communications Commission (“the FCC”). Both the FCC and ICC statutes identically provided that “[t]he Commission is . . . authorized . . . to divide [its] members . . . into . . . divisions, each to consist of not less than three members. . . .” 48 Stat. 1068; Act To Provide for the Termination of Federal Control of Railroads, ch. 91, § 431, 41 Stat. 492. *See Eastland Co. v. FCC*, 92 F.2d 467, 469 (D.C. Cir. 1937).

²⁰ 61 Stat. 136, 139 (1947), *1 Leg. Hist. 1947*, at 4-5; H.R. Conf. Rep. No. 80-510, at 36-37 (1947), *1 Leg. Hist. 1947*, at 540-41.

Despite having only two additional members, rather than four as proposed by the Senate, the new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee created by Title IV of the Taft-Hartley Act to study labor relations issues²¹ reported to Congress the following year:

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

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948).²² In this way, the Board

²¹ See 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

²² See also *Labor-Management Relations: Hearings Before J. Comm. on Labor-Management Relations*, 80th Cong. Pt. 2 at 1123 (statement of Paul M. Herzog, Chairman, NLRB) (reporting that “[o]ver 85 percent of the cases decided by the Board in the past 3 months have been handled by rotating panels of 3 Board members” and that the panel system “has added greatly to the Board’s productivity”).

was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.²³

In sum, by authorizing the Board to delegate its powers to a group of three members, two of whom constitute a quorum, Congress enabled the Board to increase its casehandling capacity by operating in groups identical to the original three-member Board. As the Seventh Circuit concluded in rejecting the same contention that the Company advances here (Br.15) that Section 3(b) prohibits the Board from acting unless it has three members:

To the extent that the legislative history points either way . . . , it establishes that Taft-Hartley created a Board that functioned as an adjudicative body that was allowed to operate in panels in order to work more efficiently. Forbidding the NLRB to sit with a quorum of two when there are two or more vacancies on the Board would thus frustrate the purposes of the act, not further it.

New Process Steel, 2009 WL 1162556, at *6.

In practical terms, the Act's two-member quorum provision authorized the Board's new three-member groups to function as the original three-member Board had done, *i.e.*, to issue decisions and orders with only two seats filled. If Congress were dissatisfied with the consequences of the two-member quorum provision in

²³ The Board continues to decide the overwhelming majority of its cases by means of these three-member panels. See *Thirteenth Annual Report of the NLRB (1948)*, at 8-9; *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, 100th Cong. 45-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman James M. Stephens' statement) ("*1988 Oversight Hearings*").

the original NLRA, it could have changed or eliminated that quorum provision in 1947, when it enacted comprehensive amendments to the Act. Instead, Congress preserved the Board's power to adjudicate labor disputes with a two-member quorum where it had previously exercised its delegation authority. That clear expression of legislative intent controls the meaning of Section 3(b).

D. Construing Section 3(b) in Accord with Its Plain Meaning Furthers the Act's Purpose

As shown, in anticipation of the expiration of the recess appointments of Members Kirsanow and Walsh, the Board delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers. In so doing, the Board acted to ensure that it could continue to issue decisions and fulfill its agency mission through the use of the two-member quorum. The NLRA was designed to avoid "industrial strife," 29 U.S.C. § 151, and an interpretation of Section 3(b) that would allow the Board to continue functioning under the present circumstances would give effect both to the plain language of the Act and its purpose.

The Company (Br. 13) attacks the Board's delegation of authority as a "sham" on the grounds that the Board was aware that Member Kirsanow's departure was imminent and that the delegation would soon result in the Board's powers being exercised by a two-member quorum consisting of Members Liebman and Schaumber. As both the Seventh Circuit and the First Circuit observed,

however, courts have upheld similar actions taken by federal agencies to permit the agency to continue to function despite vacancies. *See New Process Steel*, 2009 WL 1162556, at *6-*7; *Northeastern Land Servs.*, 560 F.3d at 42. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996), after the five-member Securities and Exchange Commission (“the SEC”) had suffered two vacancies, the remaining three sitting members promulgated a new quorum rule so the agency could continue to function if it had only two members. *Id.* at 582 & n.3. In upholding both the rule and a subsequent decision issued by a two-member quorum of the SEC, the D.C. Circuit declared the rule “prudent,” because “at the time it was promulgated the [SEC] consisted of only three members and was contemplating the prospect it might be reduced to two.” *Id.* at 582 n.3. The statutory mechanism used by the Board is different, but the result is the same.

Likewise, in *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335 (D.C. Cir. 1983), the D.C. Circuit upheld the delegation of powers by the two sitting members of the three-member National Mediation Board (“the NMB”) to one member, despite the fact that one of the two delegating members resigned “later that day,” leaving a single member to conduct agency business. The court reasoned that if the NMB “can use its authority to delegate in order to operate more efficiently, then *a fortiori* [it] can use [that] authority in order to continue to operate when it otherwise would be disabled.” *Id.* at 1340 n.26. Similarly, the

Board properly relied on the combination of its delegation, vacancy, and quorum provisions to ensure that it would continue to operate despite upcoming vacancies.

In *Laurel Baye*, the D.C. Circuit noted that its *Railroad Yardmasters* decision was distinguishable because it involved only the issue of “whether the NMB was able to delegate its authority to a single member.” *Laurel Baye*, 2009 WL 1162574, at *5. Similarly, the Company (Br. 22) argues that *Railroad Yardmasters* is distinguishable from this case. It is true that the cases are distinguishable, but the critical distinction noted by the court in *Laurel Baye* actually points directly to the greater strength of the Board’s case. In *Railroad Yardmasters*, the court faced the question whether an agency that acted principally in a non-adjudicative capacity could continue to function when its membership fell short of the quorum required by its authorizing statute. *See* 721 F.2d at 1341-42. That problem is not presented here. Here, unlike *Railroad Yardmasters*, the statutory requirements for adjudication are satisfied because Section 3(b) expressly provides that two members of a properly constituted, three-member group is a quorum.²⁴ Therefore, in contrast to the one-member problem at issue in *Railroad Yardmasters*, the presence of the Board quorum that adjudicated this case ““is a

²⁴ Thus, the Company’s argument (Br. 16) that a quorum does not exist because a “quorum is a subset of a defined group,” and a group of three members does not exist, is misplaced. The Board properly delegated all of its powers to the three-member group, and Section 3(b) expressly states that two members constitute a quorum of that group.

protection against totally unrepresentative action in the name of the body by an unduly small number of persons.” *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (quoting Robert’s Rules of Order 3, p. 16 (1970)).

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

The conclusion that the two remaining members of a three-member group can continue to exercise the powers of the Board that were properly delegated to that three-member group is consistent with established principles of both administrative law and the common law of public entities.

Contrary to the Company’s contention (Br. 17-18), the powers which the Board delegated to the three-member group did not cease to exist after Member Kirsanow’s departure. Under well-settled principles of administrative law, “[i]nstitutional delegations of power are not affected by changes in personnel, but rather continue in effect as long as the institution remains in existence and the delegation is not revoked or altered.” *Railroad Yardmasters*, 721 F.2d at 1343.²⁵

²⁵ The Company argues (Br. 22-23) that *Railroad Yardmasters* does not stand for this proposition because the court in *Yardmasters* relied on a statutory provision in the Railway Labor Act which provides that delegation orders shall continue in effect until otherwise ordered by the National Mediation Board. This argument is clearly without merit, as the court went on to hold:

Indeed, as courts have agreed, “[a]ny other general rule would impose an undue burden on the administrative process.” *Donovan v. Spadea*, 757 F.2d 74, 77 (3d Cir. 1985) (quoting *United States v. Wyder*, 674 F.2d 224, 227 (4th Cir. 1982), and applying the rule that administrative acts continue in effect until revoked or altered).²⁶ Thus, the Board’s December 28, 2007 delegation of powers continued in full force.

In *Laurel Baye*, the D.C. Circuit declined to apply this well-settled administrative law principle to the NLRB on the ground that it was inapplicable once the Board was reduced to two members. Instead, the court cited “basic tenets of agency and corporation law” to hold that “the moment the Board’s membership

Even without this statutory provision, however, the delegation of authority would not have terminated upon Member Brown's resignation. The delegation in this case was institutional rather than personal. Member Brown did not delegate his personal authority to Member Harris. Rather, the Board as a body, acting through a quorum consisting of Members Brown and Harris, delegated institutional powers to Member Harris. Institutional delegations of power are not affected by changes in personnel, but rather continue in effect as long as the institution remains in existence and the delegation is not revoked or altered.

Railroad Yardmasters, 721 F.2d at 1343 (citations omitted).

²⁶ *Accord Donovan v. National Bank of Alaska*, 696 F.2d 678, 682-83 (9th Cir. 1983); *Champaign County, Ill. v. U.S. Law Enforcement Assistance Administration*, 611 F.2d 1200, 1206-07 (7th Cir. 1979); *David B. Lilly Co. v. United States*, 571 F.2d 546, 550 (Ct. Cl. 1978); *see also Office of Thrift Protection v. Paul*, 985 F.Supp 1465 (S.D. Fla. 1997) (“administrative orders ordinarily remain in effect beyond the tenure of the individual who issued them,” quoting *United States v. Messersmith*, 692 F.2d 1315, 1317 (11th Cir. 1982)).

dropped below its quorum requirement of three” all authority previously delegated by the Board to the group ceased. *Laurel Baye*, 2009 WL 1162574, at *4 (citing various legal treatises). In thus giving controlling weight to “basic tenets of agency and corporation law,” the *Laurel Baye* court failed to heed the warning of the treatises upon which it relied that governmental bodies are often subject to special rules not applicable to private bodies.²⁷ One of those special rules is the principle that, as shown, a vacancy in the position of a delegating authority does not invalidate prior delegations of institutional power by that authority.

In any event, by its own terms, *Laurel Baye*’s “no continuing delegation” conclusion is dependent on the validity of its earlier holding that Section 3(b)’s two-member quorum provision is only operational where the Board also has a quorum of three sitting members. If the panel’s initial premise fails, so do conclusions that rest on it. As we show below, *Laurel Baye*’s statutory analysis and its agency analysis both rest on the same legal error.

²⁷ See Fletcher Cyclopedia of the Law of Corporations § 2 (2008) (distinguishing between private and municipal corporations, stating that “the law of municipal corporations [is] its own unique topic,” and concluding that “[a]ccordingly, this treatise does not cover municipal corporations.”). Similarly, Restatement (Third) of Agency (2006), in its introduction, states that it “deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government.” As shown below, however, the Board’s delegation of authority to its own three-member group did not create an agency relationship, so the principles set forth in the Restatement (Third) of Agency simply do not apply.

As shown at pp. 16-21, *Laurel Baye's* construction of Section 3(b) rests in part on a rigid distinction between “the Board” and a three-member “group” that is not supported by the statutory text when read in context and giving full meaning to all related portions of Section 3(b). That text makes clear that, where, as here, the Board has delegated all its powers to the three-member group, that group is indistinguishable from the Board itself. Misapprehending the import of Section 3(b)'s plain language, *Laurel Baye* mistakenly characterized the three-member group as a “subordinate group” in its initial statutory analysis. *Laurel Baye*, 2009 WL 1162574, at *4. The court compounds this mistake in its agency law analysis, by treating the three-member group that was delegated all of the Board's powers as if it were an “agent” of the Board. *See id.* (citing Restatement (Third) of Agency § 3.07(4) (2006) for the proposition that “an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended”). In so reasoning, the court manifested its fundamental misunderstanding of the principles that have long governed this area of the law.

To begin, the three-member group to which the Board delegated all its powers on December 28, 2007, was not the Board's “agent.” Agency is defined as “the fiduciary relationship that arises when one person (“the principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests consent or

otherwise consents so to act.” Restatement (Third) of Agency § 1.01 (2006). The delegation of institutional powers to the three-member group authorized by Section 3(b) of the Act does not create any kind of “fiduciary” relationship and does not involve the three-member group acting on “behalf” of the Board or under its “control.” Instead, this group has been delegated all of the Board’s institutional powers, and thus it is fully empowered to exercise them not as an agent but as co-principals, constituting the Board itself.

The relevant common law principles applicable in this setting are not the law of corporations or agency upon which *Laurel Baye* relies, but the common law relating to public administrative agencies. If the *Laurel Baye* court had properly evaluated the issues based on the common-law quorum rules applicable to public administrative agencies, it would have recognized that a vacancy in the three-member group does not disable the remaining members from acting as the Board, as long as the statutory two-member quorum requirement is met.

There is no doubt that such common-law principles are relevant to construing the Act’s quorum and vacancy provisions. Thus, in *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967), the Supreme Court recognized that Congress enacted statutes creating administrative agencies against the backdrop of common-law quorum rules applicable to public bodies, and indeed, wrote common-law rules into the enabling statutes of several agencies, including the Board. *Id.* at 183-86

(also identifying the Interstate Commerce Commission).²⁸ *Cf. NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (“Where Congress uses terms that have accumulated settled meaning under . . . common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”).

At common law, the power held by a public board was held “not individually but collectively” (*Commonwealth ex rel. Hall v. Canal Comm’rs*, 9 Watts 466, 471, 1840 WL 3788, at *5 (Pa. 1840)), and “considered joint and several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at *16 (W.Va. 1875). Consistent with those principles, the majority view of common-law quorum rules was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body (see *Ross v. Miller*, 178 A. 771, 772 (N.J. Sup. Ct. 1935) (collecting cases)),

²⁸ In *Flotill*, the Supreme Court held that where only three commissioners of the five-member Federal Trade Commission participated in a decision, a 2-1 decision of those three commissioners was valid, recognizing the common-law rule that “in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” 389 U.S. at 183 & n.6 (collecting cases). The Court concluded that “[w]here the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.” *Id.* at 183-84. See also *United States v. Ballin*, 144 U.S. 1, 6 (1892) (“the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body”).

even where that majority represented only a minority of the full board.²⁹ *See, e.g., People v. Wright*, 30 Colo. 439, 442-43, 71 P. 365 (1902) (where city council was composed of 8 aldermen and 1 mayor, and the terms of 4 aldermen expired, vote of two of the remaining aldermen and the mayor was valid because they constituted a quorum of the five remaining members). *See also Lee v. Board of Educ. of the City of Bristol*, 181 Conn. 69, 83-84, 434 A.2d 333, 341 (1980) (where 1 vacancy existed on 6-member board, 3 members could hold hearing as a quorum because they were a majority of the 5 seated members); *State v. Orr*, 61 Ohio St. 384, 56 N.E. 14 (1899) (where 1 vacancy existed on 10-member city council, and statute defined quorum as a majority of all the members, 5 members constituted a quorum because they were a majority of the 9 seated members).³⁰

²⁹ A related common-law rule is the principle that when the law requires that a measure can be passed only by the vote of a certain proportion of the body, that proportion is measured against the number of members of the body who are seated at the time the measure is passed, unless a statutory provision indicates otherwise. *See Peterson v. Hoppe*, 194 Minn. 186, 191, 260 N.W. 215, 218 (1935); *Board of Comm'rs of Salem v. Wachovia Loan & Trust Co.*, 143 N.C. 110, 55 S.E. 442, 443-44 (1906).

³⁰ Cases which, at first, may appear to run counter to the common-law rules are easily reconciled when it is recognized that their holdings are instead controlled by a specific quorum rule dictated by statute or ordinance. *See, e.g., Gaston v. Ackerman*, 6 N.J. Misc. 694, 142 A. 545 (Sup. Ct. 1928) (three of five members were insufficient for a quorum because “[t]he ordinance under which the meeting was held provided that a quorum shall consist of four members.”); *Glass v. Hopkinsville*, 225 Ky. 428, 9 S.W.2d 117 (1928) (state statute required that a school board quorum was a majority of the full board, so five of nine members were needed for a quorum).

That principle is reflected in several court decisions involving federal agencies, which recognize, in a variety of statutory contexts, that decisionmaking by a minority of an agency's total membership is allowable under that agency's authorizing statute.³¹ In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 n.2 (D.C. Cir. 1996), the court observed that the underlying common-law rule likely permits “a quorum made up of a majority of those members of a body *in office* at the time.” With this common-law principle as a backdrop, the court held that, in the absence of any countermanding provision in its authorizing statute, the SEC lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions and orders when only two of its five authorized seats were filled. *Id.* at 582. In declining to read Section 3(b) of the NLRA to permit a similar result, the recent decision of the D.C. Circuit in *Laurel Baye*, 2009 WL 1162574, at *6, failed to recognize that, consistent with the same common law principles for governmental bodies, Section 3(b) similarly authorizes the Board, when it has a quorum of at least three members, to delegate all its powers to a three-member group, two members of which “shall constitute a quorum.”

³¹ See *New Process Steel*, 2009 WL 1162556 at *6: “a number of administrative law opinions hold that a public board has the authority to act despite vacancies because the board, rather than the individual members, has the authority to act, a principle that suggests the NLRB has the authority to act so long as they have satisfied the quorum requirements.”

The Seventh Circuit’s decision in *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980), similarly recognizes the principle of minority decisionmaking. There, the court held that when only 6 of the 11 seats on the Interstate Commerce Commission were filled, 5 commissioners—a majority of the commissioners in office—constituted a quorum and could issue decisions. Similarly, in *Michigan Department of Transportation v. ICC*, 698 F.2d 277 (6th Cir. 1983), the Sixth Circuit held that, when 7 of the 11 seats on the ICC were vacant, a decision issued by the remaining 4 commissioners was valid. *Id.* at 279.

Finally, in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), the D.C. Circuit recognized that the enabling statute of the ICC not only permitted that agency to “carry out its duties in [d]ivisions consisting of three [c]ommissioners,” but also provided that “a majority of a [d]ivision is a quorum for the transaction of business.” *Id.* at 367 n.7. Based on that provision (which is analogous to the two-member quorum provision in the NLRA’s Section 3(b) (see above, p. 26 n.19)), the D.C. Circuit held that an ICC decision participated in and issued by only two of the three commissioners in a division was valid. *Id.*

Contrary to the Company’s argument (Br. 18), construing-Section 3(b) of the NLRA to permit the two-member quorum to continue to exercise the Board’s powers that were properly delegated to the three-member group does not amount to extending the tenure of Member Kirsanow without legal authority. Instead, such a

construction simply gives meaning to all of the provisions of Section 3(b), which expressly provides for a two-member quorum of such a three-member group. This construction is consistent with the common law and court decisions reflecting that common law in the context of federal administrative agencies. The plain language of Section 3(b)—which provides for a two-member quorum as an exception to the three-member quorum provision where the Board’s powers have been delegated to a three-member group—expresses the same common law principle reflected in the above SEC and ICC cases that, when faced with vacancies, public bodies can function through quorums that are less than a majority of the authorized membership of the public body. Accordingly, Section 3(b) should be read in the same manner as the statutes in issue in those cases. As the Office of Legal Counsel concluded—correctly perceiving the true relevance of *Railroad Yardmasters*, 721 F.2d at 1343 to this dispute—construing Section 3(b)’s delegation provisions to permit that result “would not confer power on a number of members smaller than the number for which Congress expressly provided in setting the quorum. The possible abuse of the delegation power that the dissenting judge raised in *Yardmasters*, and the majority sought to avoid, would not arise under the statute governing the Board.” *Quorum Requirements*, 2003 WL 24166831, at *3 (2003).

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

Section 3(b) of the NLRA differs greatly from the statutes governing appellate judicial panels that require the assignment or participation of at least three judges. In fact, as the Seventh Circuit recognized in *New Process Steel*, 2009 WL 1162556, at *6, the statutes have sharp distinctions, and application of the federal judicial statutes to the Board would improperly override express congressional intent and interfere with the option Congress provided for the Board to fulfill its agency mission through a properly constituted, two-member quorum.

Unlike the statutes governing the federal courts, Section 3(b) does not limit the Board's delegation powers to case assignment. Under the express terms of Section 3(b), the Board may delegate "any or all of the powers which it may itself exercise" to a group of three members, who accordingly may act *as the Board itself*. Those powers are not simply adjudicative, but also administrative, and include such powers as the power to appoint regional directors and an executive secretary (see 29 U.S.C. § 154), and the power, in accordance with the Administrative Procedure Act, to promulgate the rules and regulations necessary to carry out the provisions of the NLRA (see 29 U.S.C. § 156).

By contrast, the primary judicial panel statute, in relevant part, is limited to adjudication of cases, providing that a federal appellate court must assign each case that comes before it to a three-judge panel. *See* 28 U.S.C. § 46(b) (requiring "the

hearing and determination of cases and controversies by separate panels, each consisting of three judges”). *See also Murray v. Nat’l Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (relying on legislative history to find that Congress intended 28 U.S.C. § 46(b) to require that, ““in the first instance, all cases would be assigned to [a] panel of at least three judges””) (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)).

The Company argues (Br. 19) that even if the Board could delegate its authority for cases that arose before the terms of Members Kirsanow and Walsh expired, they could not delegate authority to hear cases that arose after they left the Board. This argument misconceives the nature of the Board’s delegation authority. Section 3(b), unlike 28 U.S.C. § 46(b), does not contain an express requirement that particular cases be assigned to particular groups or panels of Board members. Therefore, a delegation of “all the Board’s powers” to a three-member group means that all cases that are pending or may come before the Board are before the group. Thus, the two-member quorum retains the authority to consider and decide those cases, including cases that arose after Members Kirsanow and Walsh left the Board.

The Supreme Court’s decision in *Nguyen v. United States*, 539 U.S. 69 (2003) calls attention to additional reasons why construing Section 3(b) of the NLRA to incorporate restrictions found in federal judicial statutes would constitute

legal error. *Nguyen* illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b) of the NLRA. *See New Process Steel*, 2009 WL 1162556 at *6. In that case, the Court held that the judicial panel statute requires that a case must be assigned to three Article III judges, that the presence of an Article IV judge on the panel meant that it was not properly constituted, and that the two Article III judges on the panel could not issue a valid decision, even though Section 46(d) provides that two Article III judges constitute a quorum. *See* 539 U.S. at 82-83. In so holding, the Court took into consideration that Congress amended the judicial panel statute in 1982 “in part ‘to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels.’” 539 U.S. at 83 (quoting *Murray*, 35 F.3d at 47, citing Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9). No such history underlies Section 3(b). *See* above, pp.23-29. Moreover, the three-member group of Board members to which the Board delegated all of its powers *was* properly constituted pursuant to Section 3(b), and thus nothing in the Court’s *Nguyen* opinion—even if it were applicable—would prevent the two-member quorum from continuing to exercise those powers. Indeed, *Nguyen* specifically stated that two Article III judges “would have constituted a quorum if the original panel had been properly created” 539 U.S. at 83. That is analogous to the situation here. *Cf. United States v. Desimone*, 140 F.3d 457, 458-

59 (2d Cir. 1998) (valid decision was issued by two judges, as quorum of panel properly constituted at its inception, after death of third panel member).³²

Ayrshire Collieries Corp. v. United States, 331 U.S. 132 (1947), is another case that illustrates the stark differences between the statutes authorizing the creation of judicial panels and Section 3(b) of the Act. In *Ayrshire*, the Court held that a full complement of three judges was necessary to enjoin the enforcement of ICC orders because Congress, in the Urgent Deficiencies Act, had specifically directed that such cases “shall be heard and determined by three judges.” 331 U.S. at 137. The Court concluded that Congress “meant exactly what it said” (*id.*), finding it “significant that this Act makes no provision for a quorum of less than three judges.” *Id.* at 138. By contrast, in enacting Section 3(b) of the NLRA, Congress specifically provided for a quorum of two members, and did not provide that if the Board delegates all its powers to a three-member group, all three members must participate in a decision.

G. The Company’s Policy Attacks on the Board’s Authority Are Misdirected

The Company’s claim (Br. 24-25) that there is a danger of abuse if two members of the Board are allowed to make decisions is nothing more than an

³² Also distinct is the *Nguyen* Court’s concern that the deliberations of the two-judge quorum were tainted by the participation of a judge not qualified to hear the case (see 539 U.S. at 82-83), a consideration wholly inapplicable here.

attack on the policy choice that the Taft-Hartley Congress made in 1947 when it authorized the Board to delegate its powers to a three-member group, two of whom shall be a quorum. The Company argues (Br. 25) that allowing two members to decide cases is contrary to congressional intent. The Company overlooks that for the first 12 years of its administration of the NLRA, the Board issued hundreds of decisions in cases decided by two-member quorums at times when only two of the Board's three seats were filled. *See* p. 24 & n.13. If Congress were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have eliminated that quorum provision. Instead, in amending the Act after comprehensive review, the 1947 Congress preserved the Board's option to adjudicate labor disputes with a two-member quorum where it had purposefully exercised its delegation authority. That is the determinative policy consideration that controls this case.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S
DECISION TO OVERRULE THE COMPANY'S OBJECTION
TO THE REPRESENTATION ELECTION ALLEGING
IMPROPER PROUNION CONDUCT BY SUPERVISORS, AND
THEREFORE THE BOARD PROPERLY FOUND THAT THE
COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT
BY REFUSING TO BARGAIN WITH THE UNION**

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." The Company admitted in its answer to the

complaint (A 13; 92-96), and does not deny here, that it refused to bargain after the Board had certified the Union. Accordingly, if the Board reasonably rejected the Company's objection regarding supervisory misconduct, then Board's finding that that the Company violated Section 8(a)(5) and (1) of the Act is entitled to enforcement. *See Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 600-01, 610 (3d Cir. 1996).³³

We show below that the Board reasonably certified the Union because substantial evidence supports the Board's finding that Thompson's conduct did not warrant overturning the election.

A. Applicable Principles

As pertains more particularly to the instant case, the Board in *Harborside Healthcare, Inc.*, 343 NLRB 906, 911 (2004) ("*Harborside*") declared that, "absent mitigating circumstances, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not" and therefore that "that conduct may be objectionable." *Id.* At the same time, the Board made plain that there is nothing the least bit objectionable about noncoercive prounion campaign speech by supervisors

³³ Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7[.]" A violation of Section 8(a)(5) produces a "derivative" violation of Section 8(a)(1). *See NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262, 265 and n.1, 267 (3d Cir. 1941).

because “just as an employer, through its supervisors, can speak against representation . . . , a supervisor can also speak in favor of the union.” *Id.*

Therefore, as long as no promise or threat is implicit in what prounion supervisors say in support of unionization, such comments simply add to the free flow of ideas that has long been recognized as the bedrock of an informed electorate. Indeed, it was precisely to insure that employees will have the opportunity to hear from management representatives about such issues that Congress enacted Section 8(c) of the Act (29 U.S.C. § 158(c)), which guarantees that employers can campaign freely without Board scrutiny as long as what they say carries no implication of reward or punishment based upon how employees react to their views. *See generally, NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 937-38 (3d Cir. 1980).

In the end, the Board in *Harborside* enunciated a multifaceted test to determine whether prounion supervisory conduct upsets the requisite laboratory conditions for a fair election. First, the Board determines “[w]hether the supervisor’s prounion conduct reasonably tended to coerce or interfere with the exercise of employees’ free choice in the election.” *Id.* at 909. To answer that inquiry, the Board will “(a) consider[] the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) . . . the nature, extent, and context of the conduct in question.” *Id.*

If that inquiry concludes that prounion conduct reasonably tended to interfere with the employees' exercise of free choice in the election, the Board turns to the second prong of the test to decide whether the misconduct affected the outcome of the election. In analyzing this, the Board considers "[w]hether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election." *Id.* That question, the Board explained, would be answered "based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct." *Id.*

B. Substantial Evidence Supports the Board's Decision Not To Set Aside the Results of the Election

In its Objection 3, the Company claimed that the Union interfered with the election by having prounion supervisors "campaigning on behalf of the Union including soliciting the signing of authorization cards, instructing to attend union meetings and making other prounion statements that would tend to threaten or coerce employees" (A 16(e); 106). The only supporting evidence the Company provided was a claim that kitchen supervisor Lauritz Thompson told employees: "If you don't vote for the Union you are a stupid ass" (A 16(u)). Evaluating that comment, the Board was fully warranted in finding (A 16(b) n.3), in agreement with the hearing officer, that "even assuming Thompson was a supervisor," and

even assuming he made the alleged statement, notwithstanding the credited evidence to the contrary, his statement “was not objectionable,” because it “could not reasonably have interfered with employee free choice in the election.”

Analyzing Thompson’s statement under *Harborside*’s first prong, which looks to whether coercive conduct occurred, the hearing officer reasonably concluded that, “although it may be offensive, [it] is not by itself of a coercive nature.” (A 16(w) (footnote omitted).) A strong opinion for or against a union, even an offensive one, does not by itself constitute coercive conduct that warrants overturning an election. *See Werthan Packaging, Inc.*, 345 NLRB 343, 343-44 (2005) (supervisor told union supporter that it was in her and “her family’s best interest to vote ‘no’”); *AOTOP, LLC. v. NLRB*, 331 F.3d 100, 104-05 (D.C. Cir. 2003) (union agent told employees that they “‘had to’ vote for the union”); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 329 (5th Cir. 1991) (statement to employee by another employee that “[y]ou know damn well the way you’re supposed to vote”); *NLRB v. Basic Wire Products, Inc.*, 516 F.2d 261, 265 (6th Cir. 1975) (statement by employee to another employee that “she was ‘gonna be sorry’ and would ‘regret it’ if she did not vote for the [u]nion.”) Indeed, the Board’s *Harborside* standard specifically recognizes that a supervisor has the right to express such opinions. 343 NLRB 906, 911.

Thompson's statement stands in sharp contrast to the cases the Company relies on (Br 47), where threatening statements of physical harm or job loss warranted overturning an election. *See NLRB v. Urban Telephone*, 499 F.2d 239, 241-44 (7th Cir. 1974) (employee's statements attributable to union that employees would suffer "smashed faces" and that he would "kick ass" if the union did not win the election); *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436, 439-40, 443, 445-46 (4th Cir. 2002) (union agent threatened employees with loss of job if they did not support the union); *Ziegler's Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1003-04, 1010-11 (3d Cir. 1981) (a 6'7" ex-Marine threatened much smaller employees that they should vote for the union if they knew what was good for them and that they would get their ass kicked if they did not).

In addition, as the Board emphasized (A 16(b) n.3), Thompson's statement, assuming it was made, was made to "some employees whom he did not supervise." Neither of the two people, whom the Company advances as having heard Thompson's statement, heard it directly from Thompson, and more importantly they were not subordinate to Thompson. (A 16(i), (n), (u), 255-56, 258-63, 267-72.) The Board has consistently found that a supervisor's pronoun conduct toward non-subordinate employees is less likely to be objectionable, even when it far more substantial than the alleged conduct here. For example, a supervisor's soliciting of

non-subordinate employees to join the union has been found unobjectionable.³⁴

Because of this distinction, this case is easily distinguishable from the case the Company relies on (Br 47), where supervisors engaged in objectionable conduct by directly soliciting employees whom they supervised.³⁵

Finally, this case is very different factually from *Harborside*, where a supervisor was found to have engaged in objectionable conduct. There, the supervisor repeatedly threatened several employees with job loss if the union lost the election, and pressured employees to attend union meetings and sign union authorization cards. 343 NLRB 906, 909 (2004). Moreover, the supervisor in *Harborside* was a high level supervisor who had significant supervisory authority, including the authority to evaluate employees, directly suspend employees, and effectively recommend termination. *Id.* Here, although the Board assumed that

³⁴ See *NLRB v. Family Fare, Inc.*, 205 Fed Appx. 403, 410-12 (6th Cir. 2006) (supervisors initiated union campaign, recruited others, and “spoke frequently about the union,” but did not solicit any employees they supervised, or engage in “threatening, harassing, or intimidating behavior”); *Mid-Wilshire Healthcare Center*, 349 NLRB 1372, 1372-73 (2007) (supervisor spoke to an employee about the union, kept pro-union paraphernalia in his office, and stood near the polling place); *Northeast Iowa Telephone, Co.*, 346 NLRB 465, 467 (2006) (supervisors attended union meetings, signed authorization cards in front of other employees, and explained the benefits of unionization to employees, but no evidence that they solicited the employees they supervised).

³⁵ *Madison Square Garden Ct.*, 350 NLRB 117, 117-20 (2007) (supervisors led the union organizing effort and solicited employees whom they supervised). See also *SNE Enterprises*, 348 NLRB 1041, 1042-44 (2006) (supervisors did not engage in objectionable conduct by talking about the union, but did engage in objectionable conduct by soliciting employees whom they supervised).

Thompson was a supervisor and found it unnecessary to further examine the issue, there is no suggestion that he would have been a “high level supervisor.” Indeed, General Manager Jacques Baheux (A 16(g); 316-17)—despite his testimony that Thompson recommended discipline—described Thompson’s role as a “mentor” or “coach” because his authority over the 3 to 5 employees he oversaw was more limited to ensuring that they properly prepared food and kept the kitchen clean. That testimony does not suggest that Thompson should be deemed a “high-level” supervisor. *See NLRB v. Family Fare, Inc.*, 205 Fed Appx. 403, 410-11 (6th Cir. 2006) (court, applying *Harborside*, found that supervisors who had some role in discipline and wage increases were not high-level supervisors).³⁶

C. The Company’s Contentions that Thompson Engaged In Objectionable Conduct Are Without Merit

The Company primarily argues that the hearing officer, as upheld by the Board, erred in crediting Thompson’s denial that he made the alleged statement

³⁶ Even assuming Thompson’s alleged statement could have had a tendency to coerce employees, the Company, as the hearing officer noted (A 16(w)), has not shown any evidence that the statement would have met the second prong of *Harborside* by materially affecting the election outcome. Thus, given the margin of victory, the statement would have had to change five votes. Here, the Company has not shown that the statement affected five votes, let alone any vote. Nor has the Company shown that Thompson’s conduct was widespread, widely disseminated, proximate to the election, or that employees would have thought that Thompson was speaking on behalf of the Company. By failing to meet those criteria, the Company has also failed to show how the statement would have had a lingering effect. *See Mid-Wilshire Healthcare Center*, 349 NLRB 1372, 1373 (2007); *Northeast Iowa Telephone Co.*, 346 NLRB 465, 467 (2006).

(Br 45-46), and that the hearing officer erred by finding that Thompson was not a supervisor (Br 27-36). Those arguments, however, ignore the fact that the Board's decision found that, even assuming Thompson was a supervisor and made the alleged statement, he simply did not engage in objectionable conduct. (A 16(b) n.3.)

There is also no merit to the Company's attempt (Br 45-46) to suggest that Thompson engaged in other prounion activity. In addition to Thompson's credited denial (A 16(m)-(p), (u) and n.31; 294-95, 302, 336-37) that he had engaged in prounion activity, his testimony was corroborated by Union President Brown (A 16(b) n.2, (l), (k) and n.12, (u)-(v) and n.30; 203, 205, 215-16, 219-20, 372-73, 377-78), employee Sandra Byrd, who led the organizing effort (A 16(b) n.2, (l), (m), (u), (v) and n.30; 343-48, 350-51), and employee Charmaine Beverly Charles (A 16(b) n.2, (m), (u), (v) and n.30; 357-61, 367-68), who testified that Thompson did not attend union meetings, solicit cards, or talk to employees about the Union.

The hearing officer (A 16(f)), as upheld by the Board (A 16(b) n.2), credited all their testimony. As the hearing officer specifically found (A 16(v)), Thompson "testified in a candid and honest manner," and "consistently," "even though he was called to testify twice under subpoena by both parties." Likewise, the hearing officer found (A 16(v) n.30) that Brown, Byrd, and Charles "testified consistently and without contradictions," and he noted that Byrd and Charles testified contrary

to the Company's position despite being current employees. The Company has not shown any extraordinary basis to reverse these demeanor-based credibility findings (A 16(f)).³⁷

D. The Board Did Not Abuse Its Discretion by Partially Revoking a Company Subpoena and by Declining To Enforce a Subpoena that Sought Union Phone Records

Finally, the Company contends (Br 37-43) that the hearing officer (A 16(k) n.11; 195-201, 394, 404), as upheld by the Board (A 16(b) n.1)), erred by partially revoking a subpoena and declining to enforce a second subpoena that sought union phone records and records from any other phone used by Union President Brown in the months leading up to the election. The Company was seeking evidence of union phone calls to 26 of the Company's purported supervisors and managers, including Thompson.

The Board's decision to revoke a subpoena is reviewed for abuse of discretion. *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153-54 (D.C.

³⁷ The fact that Thompson did not provide the Company with a written statement denying the Company's allegations (Br 45-46) does not constitute an extraordinary circumstance that undermines his credibility. Thompson's testimony (A 16(o)-(p); 285-95) regarding the meeting with company officials, and the Company's own notes of that meeting (A 411), show that the Company was holding a kangaroo court. General Manager Baheux repeatedly accused Thompson of having engaged in undisclosed prounion conduct, and Baheux directed him to write a statement admitting prounion conduct or else be terminated. When Thompson did not provide the Company with the statement it wanted, the Company terminated him.

Cir. 2000); *Dayton Hudson Dept. Store Co. v. NLRB*, 79 F.3d 546, 552 (6th Cir. 1996); *NLRB v. Bancroft Mfg. Co.*, 516 F.2d 436, 446-47 (5th Cir. 1975).

Moreover, a private party who contends that a subpoena has been denied or revoked improperly must “demonstrate prejudicial error.” *NLRB v. Dutch Boy, Inc.*, 606 F.2d 929, 933 (10th Cir. 1979). *Accord NLRB v. Seine and Line Fishermen’s Union of San Pedro*, 374 F.2d 974, 981-82 (9th Cir. 1967). *See also Kux Mfg Co.*, 890 F.2d at 811 (Board’s “disposition of a case will not be disturbed on the basis of alleged procedural irregularities unless the irregularities resulted in actual prejudice to the objecting parties’ interests”).

Here, the Company cannot establish that the Board abused its discretion in revoking the Company’s request for union phone records. Absent any supporting evidence of inappropriate pronoun conduct by supervisors, the Company’s request amounted to a mere fishing expedition for such evidence, something that the Board properly does not allow. *See Speedrack, Inc.*, 293 NLRB 1054, 1057 n.1 (1989); *Burns Security Services, Inc.*, 278 NLRB 565, 566 (1986). *See also NLRB v. Blackstone Mfg. Co.*, 123 F.2d 633, 635 (2d Cir. 1941) (L. Hand, J.) (“While we should indeed be jealous of any denial of process to an employer, the Board is not powerless to prevent itself from being put upon by frivolous and dilatory demands”). As the hearing officer reasonably explained (A 16(k); 223, 229), “at

most the phone records would only establish that a phone call was made, but not the content of the conversation.”

Nonetheless, before partially revoking the Company’s subpoena request, the hearing officer (A 16(k) n.11; 210) did permit the Company to “question[] . . . the witnesses in connection with the phone records and phone calls made by the Union to the individuals listed in the [a]ttachment to the Subpoena and to examine and cross-examine Thompson” Through those questions the Company learned that Union President Brown had one main business phone, and several others primarily for personal use. (A 231.) The Company also learned that, after Brown received the subpoena, he reviewed the Union’s records. Brown’s review established that the Company, which had the responsibility to prepare an *Excelsior* list of eligible voters, had listed Thompson as an eligible voter. Prior to receiving the subpoena with the attached names of purported supervisors, Brown did not know who Thompson was, and had never had any communication with him. (A 16 (j), (k); 212-15, 232-33, 374-78, 414-15.) The Company also learned from Brown that his assistants, Ms. Garnett and Ms. Henry, had called employees on the *Excelsior* list and, unable to reach Thompson, left messages for him. (A 213-15.) That testimony was corroborated by testimony from Henry. And notes taken by Garnett showed that Garnett had left three phone messages for Thompson to contact Henry, but that he did not contact her. (A 247-50, 406-08.) Moreover, a

comparison of the names on Garnett's notes with the *Excelsior* list of eligible voters and the Company's list of purported supervisors, confirms that she only called employees on the *Excelsior* list, and that no other purported supervisors appear on the *Excelsior* list except for Thompson. (A 405-08, 414-15.)

Finally, the Company was also able to question Brown regarding other information requested in the subpoenas. Through that questioning, the Company learned that none of the supervisors for whom the Company had sought information had signed an authorization card; that the Union had no written record of who had attended the three or four union meetings; and that Brown did not recall any of the supervisors or managers named by the Company as having attended a union meeting. (A 16(k); 212, 215-16, 219-21, 368-69.)

CONCLUSION

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

/s/ Robert Englehart

ROBERT ENGLEHART

Supervisory Attorney

/s/ David Seid

DAVID SEID

Attorney

/s/ Ruth Burdick

RUTH BURDICK

Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2941

RONALD MEISBURG

General Counsel

JOHN E. HIGGINS, Jr.

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 14,780 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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

Dated at Washington, DC
this 15th day of May, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by overnight delivery service the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

Christopher J. Moran, Esq.
Oletree, Deakins, Nash, Smoak & Stewart
1600 Market Street, Suite 2020
Philadelphia, PA 19103

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 15th day of May, 2008