

Nos. 09-1692, 09-1730

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

SPE UTILITY CONTRACTORS, LLC

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**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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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 SPE Utility Contractors, LLC (“SPE”) to review an Order issued against it by the National Labor Relations Board (“the Board”) and on the Board’s cross-application for enforcement of its

Order. The Board's Decision and Order was issued on March 30, 2009, and is reported at 353 NLRB No. 123. (D&O1-7,A8-15.)¹

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act" or "the NLRA"), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the unfair labor practices having occurred in Michigan. The Board's Order is a final order within the meaning of Section 10(e) and (f) of the Act and, as shown below, pp. 14-43, was validly issued by a two-member quorum of a properly constituted three-member group within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).

SPE filed its petition for review on May 28, 2009. (A15.) The Board filed its cross-application for enforcement on June 4, 2009. (A17.) Section 10(e) and (f) of the Act place no time limits on such filings.

¹ "A" refers to the appendix filed with SPE's initial brief ("Br"), and "SA" refers to the supplemental appendix filed with the Board's answering brief. "D&O" refers to the Board's Decision and Order; "Tr" refers to the transcript of the hearing below; "GCX" refers to the exhibits introduced at the hearing by the Board's General Counsel, and "JX" refers to the joint exhibits introduced at the hearing by the parties. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

ORAL ARGUMENT STATEMENT

The Board believes that oral argument would materially assist the Court in considering the issue of the authority of the two-member Board quorum, a question of first impression before this Court (Issue One). The Board notes, however, that the violations found by the Board (Issue Two) involve the application of well-settled law to established facts.

STATEMENT OF THE ISSUES PRESENTED

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

2. Whether substantial evidence supports the Board's finding that SPE violated Section 8(a)(4) and (1) of the Act by discharging Linda Leuch for pursuing her unfair labor practice claim before the Board.

STATEMENT OF THE CASE

This case arose out of another unfair labor practice proceeding before the Board in which the complaint alleged that SPE had unlawfully laid off Leuch. Shortly before the hearing in that case, SPE's CEO stated his intent to discharge Leuch to "stop the backpay" she might receive. The day before she was scheduled

to testify, SPE discharged her and later confirmed that this had been done “because of” her unfair labor practice case.

Accordingly, acting on unfair labor practice charges filed by Leuch, the Board’s General Counsel issued a complaint alleging that SPE had violated Section 8(a)(4) and (1) of the Act (29 U.S.C. § 158(a)(4) and (1)) by discharging Leuch for pursuing her unfair labor practice claim before the Board. After a hearing, the administrative law judge found that SPE had violated the Act as alleged (D&O1-7,A8-13) and SPE filed exceptions. The Board (Chairman Liebman and Member Schaumber) affirmed the administrative law judge’s findings and conclusions and adopted his recommended order. (D&O1,A8.)

STATEMENT OF FACTS

I. THE BOARD’S FINDINGS OF FACT

A. Background; SPE’s Operations and Linda Leuch’s Position

SPE is located in Port Huron, Michigan, and it constructs, maintains, and repairs power lines for electrical utility companies across the United States. It maintains a small staff of employees at its Michigan office and obtains its field employees from the hiring halls of Local 339, International Brotherhood of Electrical Workers (“the Union”). During the relevant time periods, Michael Moriarty was SPE’s President and David Postill was its CEO. (D&O3,A10;Tr347-

49,A171-74(Moriarty).) Kurt Satryb was its Vice President in charge of its Florida operations until July 31, 2007. (D&O3,A10;Tr106,A107(Satryb).)

SPE hired Linda Leuch as its office manager in September 2003. (D&O3,A10;Tr 180-84,324,A139-43,168(Leuch).) She handled accounts receivable and customer billing, and reported directly to CEO Postill, who reviewed and approved her work. (D&O3,A10;Tr187-88,207,210-12, 241-43,254,SA212-15,232-34(Leuch).)

B. SPE Sends Leuch to Work On-Site in Florida and Other Locations to Support its Hurricane-repair Work in 2004 and 2005

Leuch typically performed her clerical duties at SPE's Michigan headquarters. However, after the occurrence of major hurricanes in 2004, Leuch worked on-site in Florida for several weeks to assist in SPE's hurricane-repair work for Florida Power & Light ("FPL"). (D&O3,A10;Tr 225-28,SA224-27(Leuch).) Postill knew of, and approved, Leuch's billing FPL for her work in Florida. (D&O4,A11;Tr226-29,SA225-28(Leuch).) When FPL complained, Postill met with FPL officials on May 2, 2005, and explained that billing FPL for Leuch's time spent on location was appropriate. (D&O4,A11;Tr 231,240,SA230-31(Leuch).) Postill followed up that meeting with a June 24, 2005 e-mail to FPL, in which he further defended SPE's decision to bill FPL for Leuch's time in Florida. (D&O4,A11;Tr240,SA231(Leuch),GCX16,SA192.)

In September 2005, SPE sent Leuch to Jackson, Mississippi to assist in its reconstruction work in the aftermath of Hurricane Katrina. (D&O4-5,A11-12;Tr244-49,SA235-40(Leuch).) SPE instructed Leuch to set up a Vonage phone account at a trailer being used as a temporary company office. (*Id.*) She paid for this service with her company-issued credit card. (D&O5,A12;Tr 247-49,SA238-40(Leuch).) She returned to SPE's Michigan headquarters in mid-September. (*Id.*)

From time to time, including during the Hurricane Katrina repair work in 2005, Postill directed Leuch to make advance payments to subcontractors.² (D&O5,A12;Tr254-56,SA242-44(Leuch).) Leuch only made such payments with Postill's authorization. (*Id.*)

Prior to October 2005, Leuch paid office staff, including herself and Postill's mother-in-law, for 16-hour shifts. (D&O4,A11;Tr 241-43,SA232-44(Leuch).) Postill was aware of this practice at that time, and such payments were typically only made with his prior approval. (*Id.*) Moreover, to the extent that any such payments had occurred without his prior approval, Postill confirmed that he had spoken with Leuch regarding this matter by October 2005. (D&O4,A11;Tr 61-67,A77-83(Postill).)

² This involved paying the subcontractors certain amounts before they were due under the "pay-when-paid" clause of their contracts, that is, before SPE had itself been paid by the customer.

In October 2005, Leuch was transferred to an accounts receivable position in SPE's Michigan office. However, she continued to perform the same duties as before, that is, she handled accounts receivable and prepared billings for customers, including FPL, until her layoff on December 20, 2006.

(D&O4,A10;Tr184-87,A143-46(Leuch),Tr93-98,SA194-99(Postill).) As before, Leuch's billing and other work was cleared by CEO Postill. (A10;Tr 187-88,207,A146-47,SA212(Leuch).)

During 2005 and 2006, certain disputes involving SPE's billing of FPL were brought to Postill's attention. (D&O2,5,A9,12;Tr 60,80-85,A76-77,96-101(Postill),Tr136,A125,Tr158-62,SA207-11(Satryb),Tr210-15,301,SA213-18,251(Leuch).) In early 2006, SPE and FPL began to negotiate over their billing dispute. (*Id.*) Leuch, acting under Postill's direction, worked on these reconciliation efforts. (D&O2,A9;Tr160-61,SA209-10(Satryb),Tr210-15,300-01,SA213-18,251(Leuch).)

C. The Union is Certified; After SPE Lays Leuch Off in December 2006, the Union Files Charges on Her Behalf; a Board Hearing is Set for August 2007

On August 14, 2006, the Union was certified as the collective-bargaining representative of SPE's clerical employees, including Leuch, who was an alternate union steward. (D&O3,A10;Tr181,289,A140,SA245(Leuch).) SPE and the Union

began to negotiate over a collective-bargaining agreement in October 2006, but failed to reach an agreement. (D&O3,A10.)

Leuch was laid off on December 20, 2006. (D&O3,A10.) Thereafter, the Union filed a series of charges that claimed, among other things, that SPE had violated the Act by offering employees a financial incentive in exchange for their assistance in terminating the Union's status as the employees' bargaining representative, and by laying off Leuch without first bargaining with the Union. (D&O1n.2,A8n.2;JX 1,A55,GCX8,A36.) On June 27, 2007, after issuing a complaint against SPE, the Board's Regional Director issued an Order, rescheduling the hearing on these charges from June 27 to August 8, 2007. (*Id.*)

D. In July 2007, CEO Postill Tells Then-VP Satryb that SPE Will Have To Terminate Leuch "To Stop the Back Pay" She Might Receive In the Board Hearing; SPE Terminates Leuch on August 7, the Day Before She Is Scheduled to Testify at that Proceeding

In late July 2007, about 2 weeks before Leuch was scheduled to testify before an administrative law judge in support of the Union's charge against SPE, Postill and Satryb were discussing the office employees. Postill brought up Leuch and stated that, as directed by SPE's lawyers, he "probably would have to fire her because it would stop the back pay" that she might receive if SPE "lost the lawsuit" before the Board. (D&O4,A11;Tr 113,115-16,118,150,SA200-06(Satryb).)

On July 23, Company President Moriarty sent Leuch a letter demanding that she appear at SPE's office on July 30 to discuss unspecified billing "omissions" that related to negotiating settlements with FPL and another client.

(D&O4,A11;GCX 9,A37.) Leuch's mother had passed away in July and Leuch received SPE's letter on July 25, while she was in the midst of making funeral arrangements. On July 26, company in-house counsel Tom D'Luge, a friend of Leuch's mother, spoke with Leuch at her mother's wake. (D&O4,A11;Tr 216-19,SA219-23(Leuch).) When Leuch remarked on the "meanness" of sending the July 23 letter at the time of her mother's death, D'Luge replied that "the timing was unfortunate," but that SPE needed to do it because of the "upcoming trial" before the Board. (*Id.*)

On July 30, Leuch responded by fax stating that SPE's July 23 letter had arrived while she was arranging her mother's funeral and that she could not appear on the requested date "due to a previous appointment regarding the upcoming trial." (D&O4,A11;GCX12,A39,Tr 217,SA220(Leuch).) On August 2, Moriarty sent Leuch a second letter that repeated the substance of his prior letter and demanded that Leuch appear for the same purpose on August 6, which was 2 days before her scheduled Board testimony. (D&O4,A11;GCX13,A40.) On August 6, Leuch responded by fax that she would "be unable to appear at [SPE's] office due

to a previous appointment regarding the upcoming [August 8] trial.”

(D&O4,A11;GCX14,A41.)

On August 7, the day before Leuch was scheduled to testify, Moriarty sent Leuch a letter informing her that she was being discharged for failing to meet with company managers on previous dates regarding four issues: (1) improperly billing FPL for her work in Florida; (2) paying staff for 16-hour shifts; (3) improper use of the Vonage account after her layoff; and (4) payments to subcontractors beyond the amount due under the pay-when-paid clauses. (D&O4,A11;GCX15,A43.) SPE claimed these allegations were substantiated by Leuch’s refusal to meet with company officials and justify her actions. (*Id.*) SPE did not, however, offer Leuch any alternative dates for the meeting. (*Id.*)

On August 8 and 9, Leuch testified at the Board hearing.³ On August 14, she sent a fax to SPE denying its allegations against her. (D&O4,A11;GCX17,A45.) On the evening of August 16, Postill called Leuch at home and apologized, stating that his lawyers had made SPE send the July 23 letter demanding her presence, and the August 7 letter discharging her, “because it was in preparation for the trial.” (D&O4,A11;Tr 340-41,SA252-53(Leuch).)

³ An administrative law judge found that SPE had unlawfully laid off Leuch, but the Board reversed that finding on the due process grounds that the violation found by the judge had not been clearly pled in the complaint and fully litigated. *See SPE Utility Contractors, LLC*, 352 NLRB 787 (2008).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Schaumber) found, in agreement with the administrative law judge, that SPE violated Section 8(a)(4) and (1) of the Act (29 U.S.C. § 158(a)(4) and (1)) by discharging Leuch for pursuing her claim before the Board.

(D&O1&n.3,A8&n.3.) The Board ordered SPE to cease and desist from the conduct found unlawful and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights.

Affirmatively, the Board ordered SPE to remove from its files any reference to the unlawful discharge of Leuch; to notify Leuch that the discharge will not be used against her in the event of recall; and to post copies of an appropriate notice.

(D&O6,A13.)

STATEMENT OF STANDARD OF REVIEW

Section 10(e) of the Act (29 U.S.C. § 160(e)) makes the Board's factual findings conclusive if supported by substantial evidence on the record as a whole. A reviewing court "may [not] displace the Board's 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). The "substantial evidence" standard is satisfied if "it would have been possible for a reasonable jury to reach the Board's conclusion."

Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359, 366-67 (1998).

With respect to credibility in particular, this Court has consistently held that it is “in no position to substitute” its judgment for the Board’s. *Colfor, Inc. v. NLRB*, 678 F.2d 655, 656 (6th Cir. 1982). *See also NLRB v. Baja’s Place*, 733 F.2d 416, 421 (6th Cir. 1984) (credibility resolutions of an administrative law judge “who has observed the demeanor of the witness” are not normally disturbed). Accordingly, credibility determinations are only overturned in those rare instances where they “overstep the bounds of reason,” and are “inherently unreasonable” or “self contradictory.” *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 366 (6th Cir. 1984); *accord Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1199 (6th Cir. 1996).

Where the decision of a case turns on construction of a provision of the Act, a two-step approach is required. If “Congress has directly spoken to the precise question at issue,” then “the court, as well as the [Board], must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). But, “if the [Act] is silent or ambiguous with respect to the specific issue,” then “a court may not substitute its own construction . . . for a reasonable interpretation made by the [Board].” *Id.* at 843, 844. *Accord Quick v. NLRB*, 245 F.3d 231, 241 n.7 (3d Cir. 2001).

SUMMARY OF ARGUMENT

1. Chairman Liebman and Member Schaumber, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order. Their authority to issue Board decisions and orders under such circumstances is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable situations under other federal administrative agency statutes, and administrative-law and common-law principles. SPE's contrary argument must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and a misunderstanding of the statute governing federal appellate panels, which has no application to the Act.

2. The Board reasonably found that SPE violated Section 8(a)(4) of the Act by discharging Leuch for pursuing her claim before the Board. This finding is well supported by (1) credited testimony showing that SPE expressly announced its unlawful motive when its CEO stated that it would have to discharge Leuch to "stop the backpay" she might receive if she prevailed in her pending Board case; (2) the striking timing of SPE's discharge of Leuch on the eve of her testimony before the Board; and (3) SPE's subsequent confirmation of its unlawful reason, when Postill told Leuch that she had been discharged "because of" the Board

hearing. Moreover, SPE's unlawful motive for the discharge is confirmed by its reliance on the pretext that it discharged Leuch solely for failing to attend two meetings, which she told SPE she could not attend due to her preparation for the Board hearing. Because the credited testimony proves SPE's unlawful motive and its pretextual reason for the discharge, it must attack the Board's choice of which witnesses to believe. However, SPE fails to meet its burden of showing that those credibility determinations "overstep the bounds of reason."

ARGUMENT

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

Chairman Liebman⁴ and Member Schaumber, as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009) ("*New Process*"), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009) ("*Northeastern*"), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-0213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009)

⁴ On January 20, 2009, President Obama designated Member Liebman as Chairman of the Board. See BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

(“*Snell Island*”), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328).⁵ *But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) (“*Laurel Baye*”), *petition for cert. filed*, ___U.S.L.W.__(U.S. Sept. 29, 2009) (No. 09-377) (discussed below). As we now show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), is consistent with Section 3(b)’s legislative history, and is supported by cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. SPE’s contrary argument (Br16-28) 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 statute governing federal appellate panels, which has no application to the Act.

⁵ The issue was argued before the Eighth Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291, on June 9, 2009, and the Fourth Circuit in *Narricot Industries, L.P. v. NLRB*, Nos. 09-1164 and 09-1280, on September 23, 2009. It has also been briefed in the Third Circuit in *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729 and 09-1035, *St. George Warehouse, Inc. v. NLRB*, Nos. 08-4875, 09-1269, and *Racetrack Food Services, Inc. v. NLRB*, Nos. 09-1090, 09-1509; the Fourth Circuit in *McElroy Coal Company v. NLRB*, Nos. 09-1332, 09-1427; the Fifth Circuit in *Bentonite Performance Mineral LLC v. NLRB*, No. 09-60034, and *NLRB v. Coastal Cargo Co.*, No. 09-60156; the Eighth Circuit in *NLRB v. American Directional Boring, Inc.*, No. 09-1194; the Ninth Circuit in *NLRB v. UFCW Local 4*, No. 09-70922, and *NLRB v. Barstow Community Hosp.*, No. 09-70771; and the Tenth Circuit in *Teamsters, Local 523 v. NLRB*, Nos. 08-9568 and 08-9577.

A. Background

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

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

Pursuant to these provisions, the four members of the Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a group of three members: Liebman, Schaumber and Kirsanow. After the recess appointments of Members Kirsanow and Walsh expired three days later, the two remaining members, Liebman and Schaumber, continued to exercise the delegated powers they held jointly with Member Kirsanow, consistent with the express language of Section 3(b) that a vacancy "shall not impair the right of the remaining members to exercise all of the powers of the Board," and that "two members shall constitute a quorum" of any group of three members to which the Board has delegated its powers. Since January 1, 2008, this two-member quorum has issued over 350 published

decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.⁶

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

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

⁶ On May 19, 2009, it was reported that the two-member quorum had issued approximately 409 decisions, published and unpublished. *See BNA, Daily Labor Report*, No. 94, at p. A-7 (May 19, 2009). The published decisions include all of Volumes 352 NLRB (146 decisions), 353 NLRB (132 decisions), and 354 NLRB (91 decisions as of October 7, 2009).

(“any interpretation of [the statute] that makes one of its provisions irrelevant is presumptively incorrect”); *United States v. Caldwell*, 49 F.3d 251, 251 (6th Cir. 1995) (“The statute is read as a whole and construed to give each word operative effect.”)

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

As both the First and Seventh Circuits have concluded, the plain meaning of Section 3(b) authorizes a two-member quorum of a properly-constituted, three-member group to issue decisions, even when, as here, the Board has only two sitting members. *See New Process*, 564 F.3d at 845 (“As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text.”); *Northeastern*, 560 F.3d at 41 (“the Board’s delegation of its institutional power to a panel that ultimately consisted

of a two-member quorum because of a vacancy was lawful under the plain text of [S]ection 3(b)").

As those decisions recognize, the three provisions of Section 3(b), in combination, authorized the Board's action here. When the then-four-member Board delegated all of its authority to a three-member group of the Board in December 2007, it did so pursuant to the first provision. When the term of one of those members (as well as that of the fourth sitting Board member) expired on December 31, 2007, the remaining two members constituted a quorum of the group to which the Board's powers had been lawfully delegated. Consistent with Section 3(b)'s second and third relevant provisions identified above, those "two members" then continued to exercise the previously delegated powers, and their authority to do so was "not impair[ed]" by a vacancy in the other positions on the Board. 29 U.S.C. 153(b). The validity of the Board's actions thus follows from a straightforward reading of the Act.⁷

⁷ In our view, Congress' intention is clear, and "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. However, in *Snell Island*, 568 F.3d at 424, the Second Circuit found that Section 3(b) does not have a plain meaning, but that the Board's reasonable interpretation of Section 3(b) is entitled to deference. If this Court, like the Second Circuit, should find that Section 3(b) is susceptible to different reasonable interpretations, then the Court should find, in agreement with the Second Circuit, that the Board's view is entitled to deference. See *Barnhart v. Walton*, 535 U.S. 212, 214-15 (2002) (If statute is ambiguous, agency's interpretation must be sustained unless it "exceeds the bounds of the

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

permissible.") (citing *Chevron*, 467 U.S. at 843, and *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

The Board delegation at issue here, at a minimum, reflects a reasonable construction of Section 3(b) that is consistent with its legislative history, and furthers the overall purpose of the Act to avoid "industrial strife." 29 U.S.C. § 151. The fundamental point is that courts should prefer a permissible construction that permits an agency to continue to carry out its public function. *See Snell Island*, 568 F.3d at 424 (commending the Board for its "conscientious efforts to stay 'open for business'"). *Accord Falcon Trading Group, Ltd. v. NLRB*, 102 F.3d 579, 582 n.3 (1996); *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335, 1340 n.26 (D.C. Cir. 1983). Thus, under any standard of deference, the Board's reasonable interpretation should be respected by this Court.

within the meaning of Section 3(b). *See* QUORUM REQUIREMENTS, Department of Justice, OLC, 2003 WL 24166831 (Mar. 4, 2003).

SPE relies (Br26-27) on the D.C. Circuit’s decision in *Laurel Baye*. That decision, however, is based on a strained reading of Section 3(b) that does not give operative meaning to all of its relevant provisions. *Laurel Baye*, 564 F.3d at 472-73, held that Section 3(b)’s provision—that “three members of the Board shall, *at all times*, constitute a quorum of the Board” (29 U.S.C. § 153(b)), emphasis added)—prohibits the Board from acting when it has fewer than three sitting members, despite Section 3(b)’s express exception that provides for a quorum of two members when the Board has delegated its powers to a three-member group. The court concluded that the two-member quorum provision is not in fact an exception to the three-member quorum requirement, because Congress’ use of the two different object nouns, “Board” and “group,” indicates that each quorum provision is independent of the other, and the two-member quorum provision does not eliminate the requirement that there be a three-member quorum present “at all times.” *Id.* at 473.

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

U.S. 249, 253-54 (1992); *see Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1890-91 (2009) (applying “ordinary English” to determine statutory meaning). The ordinary meaning of the word “except,” where, as here, it is used as a conjunction attaching a subordinate clause modifying a main clause, is “[e]xcepting; if it be not that; unless.” *Webster’s New International Dictionary* 608 (2d ed. 1945). Thus, in ordinary English usage, the statement in Section 3(b)—that “three members of the Board shall, at all times, constitute a quorum of the Board, *except* that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof” (emphasis added)—denotes that the three-member quorum rule applies at all times unless the Board has delegated its powers to a three-member group, in which case two members constitutes a quorum.

In other words, the full Board must have three or more participating members in order to take any action, including to delegate any of its powers to a group of three of its members. And that delegee group in turn must have at least two participating members in order to exercise any of the powers delegated to it. But where, as here, the Board previously delegated all of its powers to a three-member group, any two members of that group constitute a quorum and may continue to exercise the delegated powers. The legality of such actions does not depend on whether the Board as a whole also has a quorum, because the Board has

already delegated its full authority to the delegee group, which appropriately acts through a quorum of two members.

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

of Education shall “maintain and preserve *at all times* the confidentiality of any program review report . . . *except that* the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review”) (emphasis added).

The D.C. Circuit also failed to give the word “quorum” its ordinary meaning. By definition, “quorum” means “[s]uch a number of officers or members of any body or association as is competent by law or constitution to transact business.” *Webster’s New International Dictionary* 1394 (2d ed. 1945). See *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (“quorum” means “the minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted,” quoting ROBERT’S RULES OF ORDER 16 (rev. ed. 1981)); see also *Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2d 1196, 1202 (7th Cir. 1980) (“A ‘quorum’ is ‘[s]uch a number of the officers or members of any body as is, when duly assembled, legally competent to transact business.’”) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2046 (2d ed. 1937)). Section 3(b)’s establishment of two members as a quorum of a delegee group denotes that the group may legally transact business with two of its members. Under the reasoning of the *Laurel Baye* decision, however, the presence of a two-member quorum of a delegee group possessed of all the Board’s powers is never in itself sufficient to

permit the legal transaction of business by that group unless there also happens to be a third sitting Board member.⁸ That reading untethers the quorum requirement for the full Board from the purpose of a quorum provision—namely, to set the minimum *participation* level required before a body may take action. Under the D.C. Circuit’s reading, the full Board quorum provision in Section 3(b) establishes a minimum *membership* level for the full Board that must be satisfied in order for a delegee group to act, even though the non-group members of the full Board would not participate in the delegee group’s action.

The *Laurel Baye* court also misconstrued the delegation provision and the related two-member quorum provision by distinguishing “the Board” from “any group,” so that no group may act unless the Board itself has three members. *Laurel Baye*, 564 F.3d at 473. That conclusion ignores that Congress did not use the nouns “group” and “Board” to signify that a group could not function if there were fewer than three sitting Board members. Rather, Section 3(b) authorizes the Board to delegate all its powers to a three-member group in a manner that the group, possessing all the Board’s powers, is empowered to bind the Board as an institution through a two-member quorum comprised of the only two sitting

⁸ The D.C. Circuit’s construction, as the Seventh Circuit aptly noted, appears to sap the quorum provision of meaning, “because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.” *New Process*, 564 F.3d at 846 n.2.

Board members. See *Northeastern*, 560 F.3d at 41 (upholding “the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum” (emphasis added)).

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

As shown, the meaning of statutory language cannot be determined by considering particular terms in isolation, but must take into account the intent and design of the entire statute. See *Terrell v. United States*, 564 F.3d. 442, 451 (6th Cir. 2009). Thus, ascertaining that meaning often requires resort to historical materials, including legislative history. See *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 578 (1995).

A brief history of the Board’s operations and of the legislation that ultimately became Section 3(b) confirms that Section 3(b) authorizes the Board to adjudicate cases with a two-member quorum. In the Wagner Act of 1935, which created a three-member Board, Section 3(b), 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.”⁹ Pursuant to that two-member

⁹ 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).

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.¹⁰ *See, e.g., NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.¹¹ 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.¹²

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

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

¹¹ *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).

¹² *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.

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.¹³ The Senate bill's preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity of viewpoint in deciding cases, contrary to the suggestion of one Senator.¹⁴ 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."¹⁵ 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."¹⁶ *See Snell Island*, 568 F.3d at 421

¹³ S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

¹⁴ Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

¹⁵ S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

¹⁶ 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 ("ICC") and the Federal Communications

(Congress added Section 3(b)'s delegation provision “to enable the Board to handle an increasing caseload more efficiently”) (quoting *Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981)). The Conference Committee accepted, without change, the Senate bill's delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members.¹⁷

Despite having only two additional members, rather than four as proposed by the Senate, the new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee created by Title IV of the Taft-Hartley Act to study labor relations issues¹⁸ reported to Congress the following year:

Section 3(a) of the [A]ct increased the membership of the Board from three to five members, and authorized it to delegate its powers to any three of such members. Acting under this authority, the Board in January 1948,

Commission (“FCC”). At that time, both the FCC and ICC statutes 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).

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

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

established five panels for consideration of cases. Each of the Board members acts as chairman of one panel, and serves on two additional panels. Decisions in complaint cases arising under the Taft-Hartley law, and in representation matters involving novel or complicated issues, are still made by the full Board. A large majority of the cases, however, are being determined by the three-member panels.

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948). In this way, the Board implemented Congress' intent that the Board exercise its delegation authority to increase its casehandling efficiency.¹⁹

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

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

¹⁹ 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's statement).

New Process, 564 F.3d at 847.

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

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

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

As the Supreme Court explained in *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967), Congress enacted statutes creating administrative agencies against the backdrop of the common-law quorum rules applicable to public bodies, and

these common-law rules were written into the enabling statutes of several agencies, including the Board. *Id.* at 183-86 (also identifying the ICC).²⁰

At common law, the power held by a public board was held “not individually but collectively” (*Commonwealth ex rel. Hall v. Canal Comm’rs*, 9 Watts 466, 471, 1840 WL 3788, at *5 (Pa. 1840)), and “considered joint and several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at *16 (1875). Consistent with those principles, the majority view of common-law quorum rules was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body (*see Ross v. Miller*, 178 A. 771, 772 (N.J. Sup. Ct. 1935) (collecting cases)), even where that majority represented only a minority of the full board. *See, e.g., People v. Wright*, 71 P. 365 (Colo. 1902) (where city council was composed of 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

²⁰ In *Flotill*, the Supreme Court held that where only three commissioners of the five-member FTC participated in a decision, a 2-1 decision was valid, recognizing the common-law rule that “in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” 389 U.S. at 183 & n.6 (collecting cases). The Court concluded that “[w]here the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.” *Id.* at 183-84.

remaining members).²¹ By providing for an express two-member-quorum exception to Section 3(b)'s three-member-quorum requirement where the Board has delegated its powers to a three-member group, Congress enabled the Board to continue to exercise its powers through a quorum number identical to that called for under the common-law rule that a majority of remaining members constitute a quorum.

Giving effect to Section 3(b)'s plain language produces a result that is consistent with what Congress has authorized in similar statutes, enacted like the NLRA against the backdrop of common-law quorum rules applicable to public agencies. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), the D.C. Circuit, recognizing the relevance of these common-law principles, held that, in the absence of any countermanding provision in its authorizing statute, the Securities and Exchange Commission ("SEC") lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions when only two of its five authorized seats were filled. *Id.* at 582 and n.2

The common-law principles cited in *Falcon Trading* apply in interpreting the quorum provisions of the NLRA, even though, unlike the NLRA, the SEC's

²¹ Cases which appear to run counter to the common-law rules involve specific quorum rules dictated by statute or ordinance. *See, e.g., Gaston v. Ackerman*, 6 N.J. Misc. 694, 142 A. 545 (Sup. Ct. 1928) (three of five members were insufficient for a quorum because "the ordinance under which the meeting was held provided that a quorum shall consist of four members").

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

The common-law quorum rule is reflected in the authorizing statutes of other administrative agencies. *See Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980) (when only 6 of the 11 seats on the ICC were filled, a majority of the commissioners in office constituted a quorum and could issue decisions); *Michigan Dep’t of Transport. v. ICC*, 698 F.2d 277, 279 (6th Cir. 1983) (when 7 of the 11 seats on the ICC were vacant, a decision issued by the remaining 4 commissioners was valid); *cf. Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983) (based on provision permitting 11-member agency to “carry out its duties in [d]ivisions consisting of three [c]ommissioners,” but also providing that “a majority of a [d]ivision is a quorum for the transaction of business,” ICC

decision participated in and issued by only two of the three division members was valid).

In *Laurel Baye*, the D.C. Circuit compounded its failure to interpret Section 3(b) in light of applicable common-law quorum principles by invoking instead private-law principles “of agency and corporation law” to hold that the three-member group to which four Board members delegated all of the Board’s powers was an “agent” of the Board, whose delegated authority terminated when the delegator’s authority was suspended. 564 F.3d at 473 (citing RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006) for the proposition that “an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended”). SPE echoes this argument (Br21-22), citing the same agency principle in support of its contention that when Member Kirsanow left the Board, “the three-member group no longer existed and, therefore, was incapable of continuing to exercise the powers.”

In so reasoning, both SPE and the D.C. Circuit fail to heed the warning of the very treatises they cite—namely, that governmental bodies are often subject to special rules not applicable to private bodies.²² *See Railroad Yardmasters of Am.*

²² *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

v. Harris, 721 F.2d 1332, 1343, n.30 (D.C. Cir. 1983) (recognizing that the Railway Labor Act’s delegation and vacancies provisions incorporated principles different from those of the private law of agency and corporations). The delegation, vacancy, and quorum provisions in Section 3(b) of the NLRA on their face manifest Congress’ intent that the Board continue to function in circumstances where a private body might be disabled. As the OLC recognized, Section 3(b)’s plain language is properly understood to permit the two-member quorum to continue to exercise the Board’s powers that were delegated to the three-member group, because so construing Section 3(b) “would not confer power on a number of members smaller than the number for which Congress expressly provided in setting the quorum.” 2003 WL 24166831, at *3. Both SPE and the *Laurel Baye* court err in failing to recognize that the two-member Board quorum that decided this case possesses all of the Board’s institutional powers as a result of a valid delegation to a three-member group, and that Section 3(b) authorized them to exercise those powers, not as Board agents, but as Board principals acting for the Board itself.

at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government.”

E. The Two-Member Quorum Has Authority To Decide All Cases Before The Board

SPE contends (Br23-24) that the federal law governing the composition of three-judge appellate panels (28 U.S.C. § 46) should be imported to the NLRA to control the Board's exercise of its delegation authority. It claims (Br24) that there is "no meaningful distinction" between 28 U.S.C. § 46 and Section 3(b) of the Act. To the contrary, the two statutes have sharp distinctions, and application of the federal judicial statute to the Board would improperly override congressional intent and interfere with the option Congress provided for the Board to fulfill its agency mission through a 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 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)).

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

SPE’s position is not aided by its reliance (Br23) on *Nguyen v. United States*, 539 U.S. 69 (2003). Instead, that case further demonstrates why construing Section 3(b) to incorporate restrictions found in federal judicial statutes would constitute legal error. *Nguyen* illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b). *See New Process*, 564 F.3d at 847-48. In *Nguyen*, the Court held that the judicial panel statute requires that a case must be assigned to three Article III judges, that the presence of an Article IV judge on the panel meant that it

was not properly constituted, and that the two Article III judges on the panel could not issue a valid decision, even though Section 46(d) provides that two Article III judges constitute a quorum. *See* 539 U.S. at 82-83. However, the three-member group of Board members to which the Board delegated all of its powers *was* properly constituted pursuant to Section 3(b), and thus nothing in the Court’s *Nguyen* opinion—even if it were applicable—would prevent the two-member quorum from continuing to exercise those powers. *See Snell Island*, 568 F.3d at 419 (three-member panel that took effect on December 28, 2007, was properly constituted). Indeed, *Nguyen* specifically stated that two Article III judges “would have constituted a quorum if the original panel had been properly created” 539 U.S. at 83. That is analogous to the situation here.²³

SPE also argues (Br25) that three Board members must be assigned to a case in order to allow for “adequate discourse and review in the decision making process,” citing *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132 (1947). *Ayrshire*, however, is another case that illustrates the differences between the statutes authorizing the creation of judicial panels and Section 3(b). In *Ayrshire*, the Court held that a full complement of three judges was necessary to enjoin the enforcement of ICC orders because Congress, in the Urgent Deficiencies Act, had

²³ The *Nguyen* Court’s further concern that the deliberations of the two-judge quorum were tainted by the participation of a judge not qualified to hear the case (*see* 539 U.S. at 82-83) is wholly inapplicable here.

specifically directed that such cases “shall be heard and determined by three judges,” and made “no provision for a quorum of less than three judges.” 331 U.S. at 137. By contrast, in enacting Section 3(b), Congress specifically provided for a quorum of two members, and did not provide that if the Board delegates all its powers to a three-member group, all three members must participate in a decision.

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

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

SPE attacks (Br19-21) the Board’s delegation of authority as “fictional” (Br24) on the ground that the Board was aware that Member Kirsanow’s departure was imminent and that the delegation would soon result in the Board’s powers being exercised by a two-member quorum. Rejecting that argument, the Second Circuit aptly recognized that the anticipated departure of one member of the group

“has no bearing on the fact that the panel was lawfully constituted in the first instance.” *Snell Island*, 568 F.3d at 419.

Indeed, as both the Seventh and the First Circuits observed, similar actions taken by federal agencies to permit the agency to continue to function despite vacancies have been upheld. *See New Process*, 564 F.3d at 848; *Northeastern*, 560 F.3d at 42. As noted, in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d at 582 & n.3, after the five-member SEC had suffered two vacancies, the remaining three sitting members promulgated a new quorum rule so the agency could continue to function with only two members. In upholding both the rule and a subsequent decision issued by a two-member SEC quorum, the D.C. Circuit declared the rule “prudent,” because “at the time it was promulgated the [SEC] consisted of only three members and was contemplating the prospect it might be reduced to two.” *Id.*

Likewise, in *Yardmasters*, 721 F.2d at 1335, the D.C. Circuit upheld the delegation of powers by the two sitting members of the three-member National Mediation Board (“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 *Yardmasters* decision was distinguishable because it involved only the issue of “whether the NMB was able to delegate its authority to a single NMB member.” *Laurel Baye*, 564 F.3d at 474. SPE also advances (Br21) that same distinction. While it is true that the cases are distinguishable, the critical distinction noted by SPE and the court in *Laurel Baye* actually points directly to the greater strength of the Board’s case. In *Yardmasters*, the court faced the question whether an agency that acts principally in a non-adjudicative capacity could continue to function when its membership fell short of the quorum required by its authorizing statute. *See* 721 F.2d at 1341-42. That problem is not presented here. Here, unlike *Yardmasters*, the statutory requirements for adjudication are satisfied because Section 3(b) expressly provides that two members of a properly-constituted, three-member group is a quorum. Therefore, in contrast to the one-member problem at issue in *Yardmasters*, the presence of the Board quorum that adjudicated this case “‘is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.’” *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (quoting ROBERT’S RULES OF ORDER 3, p. 16 (1970)).

G. SPE's Policy Attacks on the Board's Authority Are Misdirected

SPE suggests (Br25) that allowing two Board members to decide cases would lead to an “undue concentration” of decisionmaking power. This is nothing more than an 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. SPE 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. 27 n.10. 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.

Equally misdirected is SPE's policy concern (Br26) that permitting a two-member Board quorum to decide cases could lead to abuses if there were a “political imbalance” among the two remaining Board members. The D.C. Circuit rejected a similar policy argument in the ICC context. In *Nicholson v. ICC*, 711 F.2d at 367 n.7, the petitioner complained that a large number of vacancies on the ICC had caused a political imbalance that rendered it inappropriate for the agency

to decide cases. In response, the D.C. Circuit simply pointed out that “nothing in the Interstate Commerce Act requires a [d]ivision of the [ICC] to be politically balanced.” *Id.* The NLRA also contains no such political balance requirement.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT SPE VIOLATED SECTION 8(a)(4) AND (1) OF THE ACT BY DISCHARGING LINDA LEUCH FOR PURSUING HER CLAIM BEFORE THE BOARD

A. Section 8(a)(4) Protects Those Who Participate in Board Proceedings

Section 8(a)(4) of the Act (29 U.S.C. § 158(a)(4)) expressly prohibits an employer from discharging or otherwise discriminating against an employee “because [she] has filed charges or given testimony under [the Act].” In enacting Section 8(a)(4), Congress recognized that the Board cannot initiate its own processes, but is instead “dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge.” *Nash v. Florida Industrial Commission*, 389 U.S. 235, 235, 238 (1967). Because the Board cannot prevent and remedy unfair labor practices unless employees are willing to participate in its proceedings, “Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board.” *Id.* This “complete freedom is necessary . . . ‘to prevent the Board’s channels of information from being dried up by employer intimidation of prospective complainants. . . .’” *NLRB v.*

Scrivener, 405 U.S. 117, 122 (1972). Accordingly, Section 8(a)(4) is broadly read to protect a wide array of employee participation in Board proceedings, including employees who are scheduled to testify before the Board, and employees on whose behalf charges have been filed. *See Scrivener*, 405 U.S. at 122; *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 116 (6th Cir. 1987); *NLRB v. Overseas Motor, Inc.*, 721 F.2d 570 (6th Cir. 1983).

In Section 8(a)(4) cases, the Board applies the test for determining unlawful motivation that the Supreme Court approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397, 401-03 (1983), and which the Board first articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980) (“*Wright Line*”), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). *See Grand Rapids Die Casting Corp.*, 831 F.2d at 116; *Vokas Provision Co. v. NLRB*, 796 F.2d 865, 872 (6th Cir. 1986). Under that test, if substantial evidence supports the Board’s finding that retaliatory considerations were a “motivating factor” in the employer’s adverse action, the Board’s conclusion that the action was unlawful must be affirmed, unless the record, considered as a whole, compels acceptance of the employer’s affirmative defense that the same action would have been taken even in the absence of animus toward the protected activity.²⁴ *Transportation*

²⁴ It is settled that SPE must prove its affirmative defense by a preponderance of the evidence. *Transportation Management Corp.*, 462 U.S. at 395, 397-403;

Management Corp., 462 U.S. at 395, 397-403. *Accord W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995).

In addition, if the record shows that the reason advanced by the employer for the adverse action was a pretext, that is, the reason did not exist or was not in fact relied upon, the inquiry ends; there is no remaining basis for finding that the employer would have taken the adverse action even in the absence of the employee's protected activity. *Wright Line*, 215 NLRB at 1084. *Accord Republic Tool & Die Co. v. NLRB*, 680 F.2d 463, 465 (6th Cir. 1982); *NLRB v. Talsol Corporation*, 155 F.3d 785, 797 (6th Cir. 1998). Indeed, the employer's reliance on a false motive supports the finding that the real motive was an unlawful one. *See Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

The Board may rely on circumstantial as well as direct evidence to determine the employer's motive. Factors relevant to a finding of unlawful motivation include the employer's expressed hostility toward protected activity, knowledge of the employees' protected activity, the timing and abruptness of the adverse action in relation to employees' protected activity, and inconsistencies between the proffered reason for the discharge and other actions of the employer. *W.F. Bolin Co.*, 70 F.3d at 871; *NLRB v. A & T Mfg. Co.*, 738 F.2d 148, 150 (6th Cir. 1984); *Overseas Motor, Inc.*, 721 F.2d at 571. Because the employer's

Overseas Motor, Inc., 721 F.2d at 571. SPE therefore errs in claiming (Br45) that it need only "produce, not prove" its affirmative defense.

motivation is a question of fact, the Board's finding in that regard should be upheld so long as it is supported by substantial evidence on the record as a whole, even if "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, 487-88 (1951). *Accord W.F. Bolin Co.*, 70 F.3d at 870.

B. Substantial Evidence Supports the Board's Finding that Leuch's Discharge Was Unlawfully Motivated By Her Participation In a Board Proceeding

The Board found (D&O1&n.3,A8&n.3) that SPE unlawfully discharged Leuch for pursuing her claim before the Board. That finding is amply supported by undisputed facts, credited testimony, and well-settled law, and must, therefore, be affirmed.

It is undisputed that SPE knew that Leuch would soon testify in a Board hearing in support of the allegation that she had been unlawfully laid off by SPE. Direct, credited evidence establishes the link between her discharge and her participation in that proceeding. Specifically, the credited testimony shows that while Leuch's testimony was looming in the weeks before the Board hearing, Company CEO Postill stated that he "would have to fire her because it would stop the back pay" she could receive if SPE "lost the lawsuit" before the Board. This statement--combined with carrying it out by discharging Leuch the day before she testified, then telling her the next week that she had been discharged "because of"

the hearing--is conclusive evidence that Leuch was unlawfully discharged because of her participation in a Board hearing. It is also conclusive evidence that SPE's claims that it discharged her for failing to show up at two meetings while she was preparing for the hearing were mere pretext.

SPE's announcement of its unlawful motive leaves no doubt that the Board properly found a Section 8(a)(4) violation. As shown, the credited testimony is that in late July, shortly before Leuch was scheduled to testify on August 8, CEO Postill told then-VP Satryb that he "would have to fire" Leuch to "stop the back pay" she could receive if she prevailed in the Board proceeding. (D&O4,A11;Tr 115-116,150,SA200-06(Satryb).) It is settled that an employer's stated desire to "get rid of" an employee because of her protected conduct is tantamount to "an outright confession of unlawful discrimination." *L'Eggs Products, Inc. v. NLRB*, 257 F.2d 88, 92 (9th Cir 1980). Here, as the Board cogently explained (A8n.3), SPE's admitted desire to discharge Leuch to curtail the back pay she might receive if she won her Board case is tantamount to discharging her for pursuing her case at all. SPE's discharge of Leuch because of her participation in the Board hearing is the very essence of a Section 8(a)(4) violation. Indeed, there is no doubt that allowing an employer to rid itself of an employee simply because she might have a successful claim before the Board would undermine "the integrity of the Board's

process” and deter employees from participating in that process. *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972).

Moreover, the striking timing here--SPE discharged Leuch on the day before she testified in the Board hearing--confirms SPE's prior announcement of its unlawful reason for the discharge. It is settled that the Board may find an unlawful motive where the employee was discharged close to the time that she engaged in protected activity. *See NLRB v. Overseas Motor, Inc.*, 721 F.2d 570 (6th Cir. 1983) (Section 8(a)(4) violation supported by chronological nexus between discharge and participation in Board proceeding); *accord NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (“[t]iming alone” may suggest an unlawful motive for an employer's adverse action). In fact, SPE reiterated its unlawful reasons the week after terminating Leuch, when CEO Postill told Leuch that his lawyers had made him discharge her “because of” the August 8 hearing. (D&O4,A11;Tr 340-41,SA252-53(Leuch).)

SPE's purported justification for discharging Leuch was pretextual. Specifically, its claim (D&O2,4,A9,11) that it discharged Leuch solely for failing to meet to discuss customer-billing issues on July 30 and August 6, only days before the hearing, is belied by the credited testimony that SPE stated its intent to discharge Leuch to limit potential back pay resulting from the Board proceeding, and then implemented the discharge the day before her testimony.

Indeed, the pretextual nature of SPE's claim is also confirmed by its utter failure to specify what billing issues, exactly, it needed to discuss with Leuch. Thus, while SPE initially demanded that she meet regarding unspecified accounting "omissions" about which she might "provide information" (D&O4,A11;GCX9,12,A37,40), it did not enumerate its alleged four specific areas of concern until its discharge letter. (D&O4,A11;GCX15,A43.) Moreover, as the Board reasonably found, the timing of the proposed meetings in July and August of 2007 is suspicious because SPE was aware of those four billing issues long before Leuch's December 2006 layoff. (D&O4-6,A11-13;Tr60-67,A76-83(Postill),Tr231,240-43,254,SA230-34,242(Leuch).) If SPE truly sought to gather information on those 2-year-old billing issues, then it would make little sense to fail to offer Leuch even one date that would avoid a conflict with her preparation in the upcoming Board proceeding.

C. SPE's Arguments Are Without Merit

SPE launches three meritless attacks on the Board's findings. The first involves an attack on the credited testimony, which fails because there is no evidence to support its claim that the Board overstepped "the bounds of reason." Second, SPE disputes that its proffered justification of discharging Leuch for failing to meet about billing issues was pretextual. Again, this claim is premised on an unsuccessful attack on the judge's credibility findings, including the judge's

crediting of testimony showing that Postill previously knew of, and approved, Leuch's billing. Third, SPE's attack on the Board's Section 8(a)(4) analysis fails because it relies on plain misstatements of basic Section 8(a)(4) law.

1. SPE fails to meet its heavy burden in seeking to overturn the Board's reasonable credibility determinations

Because the credited testimony was that SPE announced an unlawful motive for Leuch's discharge, SPE attacks the Board's choice of whom to believe. SPE faces an uphill battle. This Court has consistently held that it is "in no position to substitute" its judgment for the Board's. *Colfor, Inc. v. NLRB*, 678 F.2d 655, 656 (6th Cir. 1982). *See also NLRB v. Baja's Place*, 733 F.2d 416, 421 (6th Cir. 1984) (credibility resolutions of an administrative law judge "who has observed the demeanor of the witness" are not normally disturbed). Accordingly, credibility determinations are only overturned in those rare instances where they "overstep the bounds of reason," and are "inherently unreasonable" or "self contradictory." *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 366 (6th Cir. 1984); *accord Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1199 (6th Cir. 1996). Moreover, deference to the Board's findings is particularly appropriate where the "record is fraught with conflicting testimony and essential credibility determinations have been made." *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985). As we now show, SPE fails to meet its heavy burden.

SPE bottoms its attack on the claim (Br30) that the Board, in assessing credibility, simply ignored critical record evidence without providing any explanation.²⁵ This claim does not withstand scrutiny. Indeed, SPE ignores how the judge, in a separate, two-page section devoted to witness credibility (D&O2-3,A9-10), carefully explained why Postill and the other witnesses SPE wishes to rely on were not believable, taking into consideration their demeanor, evasiveness, and inconsistency.

As to Postill, for example, the judge carefully detailed (D&O2-5,A9-12) his vague, evasive, and contradictory testimony regarding why, after being aware of certain billing and accounting issues since well before Leuch's December 2006 layoff, he suddenly needed to meet with her to discuss them in late July 2007, just as she was preparing to testify before the Board. For example, his lack of credibility is typified by his claim that Leuch had paid staff for 16-hour shifts without his knowledge (D&O4,A11;Tr 61-67,A76-83), which conflicts with both his admission that he knew in 2005 that she was paying herself and his mother for such shifts, and Leuch's credited testimony that such payments were only made with his prior approval. (D&O4,A11;Tr 61-67,A76-83 (Postill),Tr241-43,SA232-34(Leuch).) Likewise, Postill's assertion (D&O4,A11) that he needed further

²⁵ Indeed, the cases cited by SPE (Br29-30) demonstrate that the Board knows how to evaluate record evidence, and when appropriate, overturn credibility resolutions that ignore record evidence.

information in July 2007 from Leuch regarding her billing FPL for her time in Florida in 2005, conflicted with credited testimonial and documentary evidence that he had previously approved of that billing and even defended it to FPL. (D&O4,A11;Tr226,231,240,SA225,230-31(Leuch),GCX16,SA192.)

SPE's belated attempt to rehabilitate Postill's credibility ignores the Board's fundamental role in examining conflicting stories and determining which to believe. Here, SPE does little more than recite (Br35) Postill's discredited story that he waited until July 2007 to call Leuch in because, he claims, additional billing errors had "surfaced" after her layoff. As shown, however, the credited testimony presented a different story, in which Postill had long been aware of, and had approved, Leuch's billing practices. While SPE may craft an alternative view of who should be believed, that is a far cry from showing, as it must, that the judge's credibility determinations are "inherently unreasonable."

Likewise, SPE woefully misconstrues the judge's findings when it offers this Court the hyperbole (Br30-31) that the judge exhibited "judicial bias" and "outright hostility" to Postill, and even "demoniz[ed]" him while engaging in an "extreme assassination" of his character. To the contrary, no bias is shown by the judge's use of the standard vocabulary of credibility determinations to describe Postill's testimony as "vague," "evasive," and "contradictory," particularly given how, as shown, those characterizations are supported by the record. Likewise,

while SPE would naturally prefer that the Board believe its witnesses, “it is not necessarily bias for an ALJ to credit all of the witnesses on one side of a dispute and none on the other.” *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 479 (7th Cir. 1994).

SPE continues to ignore the judge’s careful findings when it attacks (Br36) the judge’s decision to believe Satryb’s testimony (Tr116,118,150,SA200-06) that Postill told him that SPE would have to discharge Leuch to curtail the back pay that she might receive in the Board hearing. The judge acknowledged that Satryb contacted an attorney about a possible action regarding his departure from SPE, but also noted that Satryb had continued to work for SPE in another capacity. Thus, the judge reasonably found that Satryb “might naturally have countervailing reasons to testify for or against [SPE].” (D&O2,A9.) And, as the judge noted (*id.*), Satryb’s lack of bias in favor of Leuch was shown by his having recommended that she be discharged prior to her December 2006 layoff.²⁶ Importantly, Satryb was corroborated by Leuch’s credited testimony (Tr217-20,340-341,SA220-23,252-53) that Postill and company counsel D’Luge each made similar statements to her.

²⁶ Moreover, SPE’s attack on Satryb’s credibility is dubious given how it relies (Br33) on his testimony to support its defense.

Finally, SPE offers no basis for overturning the Board’s reasonable decision to credit Leuch’s testimony. SPE relies on the false premise (Br36) that Leuch’s credibility here should be governed by the Board’s determination of her credibility in a different case. Rather, the Board properly assessed Leuch’s credibility based on her testimony solely in this case, because it is “generally inappropriate” for an administrative law judge “to rely on credibility findings in another case.” *Local Union No. 3 and Nixdorf Computer Corporation*, 252 NLRB 539, 539 n.1 (1980).²⁷

2. SPE’s Attack on the Board’s Pretext Finding Fails

Next, SPE attacks (Br39-45) the judge’s decision to reject, as pretextual, SPE’s claim that it discharged Leuch for failing to attend two meetings shortly before her Board testimony. SPE asserts (Br39) that the judge disregarded its claim that it discharged Leuch solely for failing to meet about billing issues and erroneously focused on the merits of those billing issues. SPE is simply wrong.

The judge explicitly recognized, “at the outset,” that SPE’s “sole proffered basis for the discharge was her failure to meet and provide information, not her

²⁷ Nor should Leuch have been discredited merely because (Br36) she used colorful language in letters to and phone conversations with SPE. Rather, the relevant point is that she was composed and forthright on the stand. Moreover, SPE fails to put those letters and conversations in context. Leuch was, after all, responding to how SPE had demanded that she appear to explain unspecified “omissions,” and then discharged her, while she was in the midst of arranging her mother’s funeral and preparing to testify before the Board.

conduct in any of the matters it wished to discuss with her.” (D&O2,A9.) The judge then properly assessed that claim in light of the credited evidence, including that the parties agreed that there were billing conflicts and SPE was trying to resolve them. However, the credited testimony also showed that SPE had known of these billing issues since 2005. Thus, in analyzing SPE’s claim that Leuch’s failure to meet shortly before the hearing was the reason for her discharge, the judge properly looked into SPE’s alleged need for holding those meetings precisely at that time.

Specifically, the judge looked at whether the need to resolve those long-term issues suddenly became so pressing in the days before the hearing that SPE discharged the one person, Leuch, who could shed light on those problems, because she failed to show up at the appointed time. The judge reasonably concluded (D&O5-6,A12-13) that SPE’s proffered explanation for the discharge was pretextual given credited testimony that SPE (1) had long been aware of the billing issues, but had not seized upon them as a reason to call Leuch in until she was about to testify against SPE; (2) repeatedly announced another motive for discharging Leuch (to curtail her potential back pay in the Board proceeding); and

(3) discharged Leuch the day before she testified without offering a single, alternative meeting date that would avoid conflicting with her testimony.²⁸

3. SPE Misstates Basic Section 8(a)(4) Law

The remainder of SPE's brief (Br45-47) simply misstates basic Section 8(a)(4) law. It claims (Br46), for example, that Section 8(a)(4) requires proof of "anti-union motivation." In fact, a Section 8(a)(4) violation is established where, as here, the evidence supports a finding that the employee was discharged for pursuing a claim before the Board. *See Vokas Provision Co. v. NLRB*, 796 F.2d 865, 871 (6th Cir. 1986).

Next, SPE claims (Br47) that there is no support for finding a Section 8(a)(4) violation if it "terminates an employee prior to his or her participation in a Board proceeding." SPE errs if it believes that it can lawfully take adverse action against an employee before she participates in order to discourage her from participating. In any event, Leuch participated in the Board proceedings before she was discharged, namely, the Union had filed charges on her behalf, she was named in the complaint, and she was scheduled to testify in the Board proceedings on

²⁸ SPE distorts the record when it claims (Br44) that Leuch "chose to ignore the meeting requests." Rather, it is undisputed (*see* p. 9) that Leuch responded to each such request with a letter stating that she could not attend due to "a previous appointment regarding the upcoming [Board] trial."

those charges. It is settled (*see* cases cited at pp.44-45) that an employer violates Section 8(a)(4) by discharging an employee for such conduct.

SPE's last suggestion (Br47), that no authority supports finding a Section 8(a)(4) violation when an employee is discharged to "curtail" her potential back pay in a Board case, ignores fundamental Section 8(a)(4) policies. As the Board reasonably explained (A8n.3), discharging Leuch to curtail the back pay she might receive if she won her case is tantamount to discharging her for pursuing her case in the first place, which is the essence of a Section 8(a)(4) violation. Indeed, the core Section 8(a)(4) policy of ensuring that employees remain willing to participate in Board proceedings (*NLRB v. Scrivener*, 405 U.S. 117, 122 (1972)) would be nullified if, as SPE suggests, it could lawfully discharge anyone who might have a successful claim, because they might prevail before the Board and receive back pay.

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD	* Board Case No.
	* 07-CA-50767
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,930 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 9th day of October, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2009, I electronically filed the foregoing Board's brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system on the following counsel at the address listed below:

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