

Nos. 09-3234 & 09-3423

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

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

**GRAPETREE SHORES, INC. d/b/a
DIVI CARINA BAY RESORT**

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT AND
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and the cross-petition of Grapetree Shores, Inc. d/b/a Divi Carina Bay Resort (“the Company”) to review, an Order that the Board issued against the Company on April 10, 2009, and reported at 353

NLRB No. 131. (A 3-5.)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”), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) and, as shown below, pp. 17-39, 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)).

As the Board’s unfair labor practice order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding (Board Case No. 4-RC-20265) 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). Under Section 9(d), the Court has jurisdiction to review the Board’s actions in the representation proceeding 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 rulings of the Court. *See Freund Baking Co.*, 330

¹ “A” refers to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

NLRB 17, 17 n.3 (1999); *River Walk Manor, Inc.*, 293 NLRB 383, 383 (1989); *Medina County Publications*, 274 NLRB 873, 873 (1985).

The Board filed its application for enforcement on July 31, 2009, and the Company filed its cross-petition for review on August 17, 2009. Both were timely; the Act places no time limit on the institution of proceedings to enforce or review Board orders. This Court has jurisdiction over both under Section 10(e) and (f) of the Act because the unfair labor practices arose in the U.S. Virgin Islands.

STATEMENT OF THE ISSUES PRESENTED

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

2. Whether substantial evidence supports the Board's findings underlying its certification of the Union's election victory, and therefore whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union following its certification by the Board as exclusive-bargaining representative.

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Virgin Islands Workers Union (“the Union”) as the certified collective-bargaining representative of an appropriate unit of the Company’s employees. In the underlying representation proceeding, the Board overruled the Company’s challenge to the eligibility of an employee whose vote was potentially determinative of the election’s outcome, and also overruled the Company’s allegations of election misconduct as lacking sufficient evidentiary support. (A 16-38.) The Company has refused to bargain with the Union to challenge its election victory. The pertinent facts follow.

STATEMENT OF THE FACTS

I. THE BOARD’S FINDINGS OF FACT

A. The Representation Case Proceeding

On June 1, 2007, the Union filed with the Board’s Regional Office in Puerto Rico a petition seeking an election to represent a unit consisting of the production and maintenance employees at the Company’s resort hotel and casino operated in Christiansted, St. Croix, U.S. Virgin Islands. (A 21-22 & n.4.) Pursuant to the parties’ stipulation, the Board conducted an election among the approximately 110 employees in the petitioned-for unit. The tally of ballots showed that 45 votes

were cast for, and 43 against, representation by the Union. There were seven challenged ballots, a number sufficient to influence the election's outcome.

(A 22.) Both parties also filed election objections alleging that the other had engaged in acts of misconduct that were sufficient to have influenced the election's outcome. Simultaneously, the Union filed unfair labor practice charges alleging that the Company's election misconduct also violated the Act. (A 20-21.)

On September 19, the Board's Regional Director issued a report disposing of five ballot challenges and ordering that a hearing be held to resolve the challenges to the two remaining ballots. The Regional Director also directed a hearing on two of the Union's election objections and five of the Company's, dismissing the rest. (A 20-21; 61-73.)

B. Following a Hearing, an Administrative Law Judge Finds that Employee Felicia Dixon Was Eligible to Vote and Overrules the Company's Election Objections

After a consolidated hearing on the representation- and unfair-labor-practice case issues, a Board administrative law judge issued a Decision, Order and Direction resolving the remaining challenges, the election objections, and the unfair-labor-practice allegations. As relevant here—all other issues are not before the Court—the judge rejected the Company's challenge to the potentially-determinative ballot cast by employee Felicia Dixon and also overruled the Company's election objections. (A 18 n.6., 28-30, 32-36.)

1. The judge's finding that Felicia Dixon had not been discharged and, therefore, was eligible to vote as an employee on disability leave

Felicia Dixon, a housekeeping employee who had served as a union observer in a previous Board election, injured her right shoulder in June 2006 while working in the hotel's new wing, where she was required to lift particularly heavy doors. She went on disability leave at that time and returned to work in November 2006. Before going on a 2-week vacation in late December of that year, Dixon presented her supervisor a doctor's note requesting that Dixon be put on "light-duty" due to continued shoulder problems. Dixon returned to work on January 7 and, after working 3 hours, was directed to report to the office. There, she was handed a letter that stated that the Company had no light-duty assignments at that time and was therefore placing her on injury leave, effective immediately. Dixon then applied for and received disability benefits and remained on disability leave through the time of the election. (A 117-26.)

As the judge found, under settled Board policy,² Dixon was eligible to vote as an employee on disability leave unless the Company could establish that her employment had been terminated prior to the election. (A 29.) The Company claimed that Dixon had been discharged prior to the election pursuant to an extant

² See *Home Care Network, Inc.*, 347 NLRB 859, 859 (2006) (reaffirming the Board's rule as articulated in *Red Arrow Freight Lines*, 278 NLRB 965, 965 (1986)).

company policy mandating discharge after 6 months on disability leave, but the judge discredited the Company's testimony. The Company rested its entire case upon the testimony of the resort's general manager, Richard Patrick Henry, which the judge found untenable. (A 29-30.) As the judge explained, Henry's claim that the Company discharged Dixon was undermined by his own testimony that no one had ever told Dixon about her alleged discharge and by the fact that the Company's own records contained not a single entry memorializing such an occurrence. To the contrary, the weekly list of housekeeping employees posted by the Company at the beginning of the very week that the election was held included Dixon's name and reported her as "out." (A 29; 118, 130-32, 154, 180-81.)

The judge also emphasized that Henry could not produce any evidence, documentary or oral, to corroborate his claim that the Company actually had any policy requiring discharge after 6 months of disability leave. As the judge explained, the only piece of evidence the Company could offer to justify its claim that such a policy existed was a copy of a draft collective-bargaining agreement the Company had unsuccessfully negotiated with a prior union. However, as the judge emphasized, Henry was forced to concede that the agreement had never even been executed, much less implemented, and that the provision, which dealt only with "layoff and recall" issues, by its express terms only provided for a loss of seniority after 6 months, not the penalty of discharge. Despite Henry's testimony to the

contrary, the judge reasoned that the two were not the same thing. (A 29-30; 143-47, 150, 184-85.).

Having discredited Henry, the judge found that Dixon was eligible to vote and directed that her ballot be opened and counted. (A 30.)

2. The judge's finding that the Company failed to produce sufficient evidence to prove its allegations of objectionable conduct

The Company also argued that the election results should be discarded because union supporter Lucy Edward allegedly made threatening remarks to banquet employee Phyllis Blackman and 6 of her coworkers during the 2 weeks immediately prior to the election. At the hearing, the Company produced testimony from only one witness, Blackman, to support its assertions. However, as the judge emphasized, Blackman began her testimony with what amounted to a direct refutation of the Company's claim—she answered “no” when asked if Edward had engaged her in any conversation about the Union prior to the election, and then testified that she was unaware even that Edward had any connection with the Union. (A 32; 88.)

The judge further found that, in ensuing testimony, Blackman only identified Edward as among a group of employees, “most” of whom Blackman testified “would throw words at us” about the Union. But Blackman never identified a specific instance in which Edward herself made a specific remark,

threatening or otherwise, on that subject to Blackman and her coworkers. In this context, the judge concluded that Blackman's testimony was inadequate to satisfy the Company's burden to substantiate its election objections with reliable evidence. (A 31-32.)

The Company's remaining objection alleged that Edward walked into the lunchroom while a different group of employees was present and, raising both hands above her head, loudly declared, "I does thank God I don't come to work with a gun because I will kill a lot of people and they will be sorry.'" (A 34.) The Company did not offer live testimony to support this allegation, which Edward vehemently denied, but instead relied on word-for-word identical affidavits from two employees. (A 189-92.) The judge concluded that, while Edward was less than an ideal witness on this point, the Company's decision to rely exclusively on affidavit evidence was fatal. (A 35.) Specifically, the judge found that the identical wording of the affidavits "detract[ed] somewhat from their weight" and that the failure of the affiants to take any action consistent with their identical assertions, namely, that "I firmly believe that she meant that she wanted to shoot openly anti-Union employees," by, for example, contacting company management or the police, made their affidavits particularly suspect. (A 34-35.)

3. The judge's Direction that a revised tally be conducted

Having overruled the Company's election objections, the judge directed that the four challenged ballots, including the ballot cast by Dixon, be comingled, opened, and counted, and that, if the tally showed that the Union had won, that it be certified as the employees' exclusive representative. The Company filed timely exceptions to the judge's decision finding Dixon eligible and overruling its election objections.

C. The Board's Decision in the Representation Case; The Revised Tally of Ballots Shows a Union Victory

On July 30, 2008, the Board (Chairman Schaumber and Member Liebman) issued a Decision, Order, and Direction in which it adopted the judge's findings and direction with certain limitations. The Board sustained the judge's finding that the Company failed to support its election objections with competent evidence and, having agreed that the objections should be overruled on that basis, found it unnecessary to pass on any alternative grounds for overruling those objections. Further agreeing with the judge, the Board directed the Regional Director to open the ballots cast by the four challenged voters, including Dixon, whom the judge had found eligible and to serve upon the parties a revised tally. (A 16-18.)

On August 8, the Regional Director opened and commingled the ballots, and issued a revised tally showing that the Union won the election by a vote of 46 to 45. On August 18, the Regional Director certified the Union as the exclusive

representative of the Company's "full-time and regular part-time production and maintenance employees, including food and beverage, kitchen, housekeeping, maintenance, front desk, communications, bell and guest services, gift shop, activities and grounds [employees]." (A 4; 196.)

D. The Unfair Labor Practice Proceeding: The Company Refuses to Bargain and the Union Files Charges

Thereafter, on December 17, 2008, the Union requested that the Company bargain and provide pertinent bargaining information. By letter dated December 22, 2008, the Company refused the information request and stated that it would not recognize and bargain with the Union. The Union then filed an unfair labor practice charge.

Based upon the Union's charge, on January 28, 2009, the Board's General Counsel issued an unfair labor practice complaint, alleging that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and, provide requested and pertinent bargaining information to, the Union. (A 3.) The Company filed an answer admitting its refusal to bargain but contending that the Union's certification was impaired for the reasons advanced in the representation proceeding. On February 19, 2009, the General Counsel filed a motion for summary judgment, the Board issued a notice to show cause, and the Company filed a response raising the same defenses as in its answer. (A 3.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On April 10, 2009, the Board (Chairman Liebman and Member Schaumber) issued a Decision and Order granting the General Counsel's motion for summary judgment and finding that the Company's refusals to bargain and to provide the Union with requested bargaining information violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 3-4.) The Board's Order requires the Company to cease and desist from refusing to bargain with the Union and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A-5.) Affirmatively, the Board's Order requires the Company to provide the Union with the requested bargaining information and to bargain with the Union, upon request, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (A 5-6.)

STANDARD OF REVIEW

As to the threshold jurisdictional issue presented here—the Company's challenge to the authority of the Board to act—the law is settled that where an issue 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 Def. 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). Rather, the Court must accept the Board’s conclusions of law if they are based upon a “reasonably defensible” construction of the Act. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). *Accord NLRB v. Local Union No. 103, Iron Workers*, 434 U.S. 335, 350 (1978); *St. Margaret Mem’l Hosp. v. NLRB*, 991 F.2d 1146, 1151 (3d Cir. 1993).

As to the merits of the Board’s unfair labor practice findings, those findings are reviewable under the familiar substantial evidence standard. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion”). Here, however, the challenges to the Board’s findings turn on questions of credibility, which require a far more deferential standard: “credibility determinations should not be reversed unless inherently incredible or patently unreasonable.” *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718 (3d Cir. 2001) (quoting *NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1351 (9th Cir. 1994)); *ABC Trans-National Transport, Inc. v. NLRB*, 642 F.2d 675, 684-86 (3d Cir. 1981).

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 consistent with Section 3(b)'s history and general background principles governing the operation of government agencies. The Company'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 is otherwise meritless.

2. The Company's defense of its refusal to bargain following the Union's certification consists, in the main, of a frontal assault on the administrative law judge's credibility determinations, which the Board affirmed. Given the deference due to such findings on review, the Company's attacks must fail.

First, the Company's claim that employee Dixon had been discharged and, thus, was not eligible to vote, turns on testimony that the administrative law judge, as affirmed by the Board, discredited as untenable. The Company produced not a stitch of evidence to corroborate Company General Manager Henry's improbable claim that Dixon had been discharged pursuant to a rule requiring termination of employees after 6 months on disability leave. Indeed, Henry conceded that rule

had not been committed to writing and, insofar as appears, was known only to him. Henry conceded that Dixon had never been informed that she had been discharged and that the Company's records contained not a single entry of such an occurrence.

The document that Henry put forth as memorializing a rule providing for discharge after an employee had been on leave for 6 months did nothing of the sort, but rather was a stale draft collective-bargaining agreement that had never been implemented. Even if that agreement had been implemented, it only called for a loss of seniority after 6 months of disability leave, not discharge. Finally, the Company's suggestion that the Court reject the Board's well-settled *Red Arrow* rule remarkably fails to even mention that this Court embraced the Board's *Red-Arrow* rule almost 15 years ago in *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598 (3d Cir. 1996).

Next, the Board properly found that the Company presented no competent or credible evidence sufficient to prove either allegation of election misconduct by union supporter Lucy Edward. The law is clear that a party seeking to upset the results of a secret ballot election bears a heavy burden, which the judge correctly found was not met here.

The judge reasonably concluded that Banquet Employee Phyllis Blackman—the Company's lone witness supporting its claim that Edward had threatened Blackman and six of her coworkers—effectively denied the allegation

at the beginning of her testimony: She answered a question about whether Edward had engaged her in conversation about the Union with a stark “No.” And, while Blackman later testified that Edward was among a *group* of employees who allegedly harassed Blackman about the union election, Blackman never put any specific words in any employee’s mouth, and her general testimony about what had been said was, as the judge found, a complete “muddle” that lacked detail, consistency, and coherence.

The Company’s remaining contention that Edward allegedly made an antiunion threat of violence was inexplicably supported by no live testimony whatsoever. Rather, the Company relied on identically worded affidavits that the judge found raised more questions than they answered and declined to credit. At the same time, Edward denied the allegation on the stand, subject to cross-examination. Given that the very reason that the Board holds hearings is to permit the finder of fact to assess witness demeanor and determine whether a witness’s testimony can hold up under scrutiny, the Company cannot fault the judge for declining to find merit in an allegation of election misconduct based solely upon out-of-court declarations.

ARGUMENT

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

Chairman Liebman and Member Schaumber, as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order. The First, Second, Fourth, Seventh, and Tenth Circuits have upheld the authority of the two-member quorum to act. *See Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Indus. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S.Ct. 488 (U.S. Nov. 2, 2009) (No. 08-1457); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328). The D.C. Circuit has issued the only contrary decision. *See Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). On

November 2, 2009, the Supreme Court granted a writ of certiorari on the issue in *New Process* to resolve this issue.³

The authority of the two-member quorum to issue Board decisions and orders is provided for in the express terms of Section 3(b), and is consistent with Section 3(b)'s history and general background principles governing the operation of government agencies. The Company's contrary argument (Br 24-45) must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and is otherwise meritless.

A. Background

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

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times,

³ The Supreme Court has scheduled argument in *New Process* for March 23, 2010. The issue has previously been briefed, in full, to this Court in *J.S. Carambola, LLP v. NLRB*, No. 08-4729, *St. George Warehouse, Inc. v. NLRB*, No. 08-4875, and *Racetrack Food Services, Inc. v. NLRB*, No. 09-1090. In *St. George Warehouse*, this Court advised the parties by letter dated November 2, 2009, that the panel would hold its decision pending the Supreme Court's decision in *New Process*.

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 500 decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.⁴

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

In determining whether Section 3(b) expresses Congress' clear intent to grant the Board the option of operating the agency through a two-member quorum

⁴ On November 12, 2009, it was reported that the two-member quorum had issued approximately 538 decisions, published and unpublished. *See* Susan J. McGolrick, 'We're Poised for Changes' in Labor Law, *Chairman Liebman Says at ABA Conference*, Daily Labor Report (BNA), No. 216, at p. C-3 (Nov. 12, 2009). The published decisions are reported in 352 NLRB (146 decisions), 353 NLRB (132 decisions), 354 NLRB (129 decisions), and 355 NLRB (15 decisions as of February 28, 2010).

of a properly delegated, three-member group, the Court should apply “traditional principles of statutory construction.” *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 123 (1987). This process begins with looking to the plain meaning of the statutory terms. *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 155 (3d 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 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 Vill., Inc.*, 503 U.S. 30, 36 (1992); *see Kaufman*, 561 F.3d at 155.

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

As the First, Fourth and Seventh Circuits have properly concluded, the plain meaning of Section 3(b) authorizes a two-member quorum of a properly

constituted, three-member group to issue decisions, even when, as here, the Board has only two sitting members. *See Narricot*, 587 F.3d at 659; *New Process*, 564 F.3d at 845; *Northeastern*, 560 F.3d at 41. When the then-four-member Board delegated all of its authority to a three-member group of the Board in December 2007, it did so pursuant to the first provision. When the term of one of those group members (along with the term of the fourth sitting Board member) expired on December 31, 2007, the remaining two members constituted a quorum of the group to which the Board's powers had been delegated. Consistent with Section 3(b)'s second and third relevant provisions identified above, those "two members" then continued to exercise the delegated powers, and their authority to do so was "not impair[ed]" by vacancies in the other Board positions. 29 U.S.C. 153(b). The validity of the Board's actions thus follows from a straightforward reading of Section 3(b).⁵

⁵ In the Board's view, Congress' intent is clear, and "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Def. Council*, 467 U.S. 837, 842-43 (1984). However, in *Snell Island*, 568 F.3d at 424, and *Teamsters*, 590 F.3d 850-52, the Second and Tenth Circuits held that Section 3(b) does not clearly indicate Congress' intent, but that the Board's reasonable interpretation of Section 3(b) is entitled to deference. If this Court similarly should find Section 3(b) susceptible to more than one construction, then the Court should also conclude that the Board's view is entitled to deference. At the very least, the judgment of the Board as to the meaning of the statute it enforces is entitled to the kind of deference owed to agency actions having persuasive authority. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness

Moreover, as the Fourth Circuit (*Narricot*, 587 F.3d at 659), the Seventh Circuit (*New Process*, 564 F.3d at 846), and the First Circuit (*Northeastern*, 560 F.3d at 41-42) have noted, two persuasive authorities provide additional support for this reading of Section 3(b). First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), where the Board had four sitting members, the Ninth Circuit held that Section 3(b)'s two-member quorum provision authorized a three-member group to issue a decision even after one panel member had resigned. The court held that it was not legally determinative whether the resigning Board member participated in the decision, because "the decision would nonetheless be valid because a 'quorum' of two panel members supported the decision." *Id.* at 123. Second, the United States Department of Justice's Office of Legal Counsel, in a formal opinion, has concluded that the Board possesses the authority to issue decisions with only two of its five seats filled, where the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b).

evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."'). Among other things, the Board's considered construction is consistent with the text of the statute, as well as with the legislative history of Section 3(b)'s quorum provisions, and the overall purpose of the NLRA to promote labor peace and the free flow of commerce. *See* pp. 28-32, *infra*; S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947), *reprinted in* NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 414 (1948); *see also* *Snell Island*, 568 F.3d at 424 (commending the Board for its "conscientious efforts to stay 'open for business'").

See QUORUM REQUIREMENTS, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (Mar. 4, 2003).

The Company relies heavily (Br 24, 26, 29-30, 33) on the D.C. Circuit’s decision in *Laurel Baye* for its contrary view. The *Laurel Baye* decision, however, is based on a strained reading that does not give operative meaning to all of Section 3(b)’s relevant provisions. In *Laurel Baye*, the D.C. Circuit held that Section 3(b)’s quorum provision—that “three members of the Board shall, *at all times*, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof” (29 U.S.C. § 153(b), emphasis added)—does not authorize the Board from adjudicating cases without at least three sitting Board members, even if the Board had previously delegated its full powers to a three-member group and the two current members constitute a quorum of that group. 564 F.3d at 472-73.

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

exclusion of; leaving or left out; excepting.” WEBSTER’S NEW INTERNATIONAL DICTIONARY 608 (2d ed. 1945). Thus, in ordinary English usage, the statement in Section 3(b)—that “three members of the Board shall, at all times, constitute a quorum of the Board, *except* that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof” (emphasis added)—denotes that the two-member quorum rule for a group to which the Board has delegated powers is an exception to the general three-member quorum rule for the full the Board.

In other words, the full Board must have at least three participating members to delegate powers to a group and, in turn, that delegee group must have at least two participating members to exercise the delegated powers. Accordingly, where, as here, the Board has delegated all of its powers to a three-member group, any two members of that group may constitute a quorum and may continue to exercise the delegated powers. Once a delegation of the Board’s full powers has been made to the group, the continued exercise of the delegated powers by a quorum of the group does not depend on whether the full Board itself retains a quorum. *See Narricot*, 587 F.3d at 659-60.

Although the D.C. Circuit in *Laurel Baye* purported to apply the rule that a statute should be construed so that “no provision is rendered inoperative or superfluous, void or insignificant,” 564 F.3d at 472, the court in fact treated

Section 3(b) as though it did not contain the word “except.” The court reasoned that “the word ‘except’ is . . . present . . . only to indicate that the delegee group’s ability to act is measured by a different numerical value” than the larger Board’s ability to act. *Id.* But Congress could have accomplished that result by leaving out the word “except” altogether and instead setting forth two independent clauses or sentences, the first stating that “three members of the Board shall, at all times, constitute a quorum of the Board,” and the second stating that “two members shall constitute a quorum of any group designated pursuant to [the delegation clause].” 29 U.S.C. 153(b). *See Narricot*, 587 F.3d at 660. Rather than doing that, Congress linked the two clauses with a comma and the word “except,” which means that the special quorum rule in the second clause constitutes an exception to the general quorum rule in the first. *See id.* Indeed, Congress has used the construction “at all times . . . except” in other statutes to accomplish exactly what it did here—to provide that a general rule should apply at all times except in the instances specified. *See, e.g.*, 20 U.S.C. § 1099c-1(b)(8) (Secretary of Education shall “maintain and preserve *at all times* the confidentiality of any program review report . . . *except* that the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review”) (emphasis added).⁶

⁶ *Accord* 42 U.S.C. § 4954 (a) (full-time commitment of VISTA volunteer “shall

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)). Section 3(b)’s establishment of two members as a quorum of a delegee group denotes that the group may legally transact business where two of its members are participating. Under the reasoning of *Laurel Baye*, however, the presence of a two-member quorum of a group possessed of all the Board’s powers is never in itself sufficient to permit the legal transaction of business by that group unless there also happens to be a third sitting Board member.⁷ That reading untethers the quorum

include a commitment to live among and at the economic level of the people served . . . *at all times* during their periods of service, *except* for periods of authorized leave”) (emphasis added); 4 U.S.C. § 6, Historical Note, Proclamation No. 4064 (“the flags of the United States displayed at the Washington Monument are to be flown *at all times* during the night and day, *except* when the weather is inclement”) (emphasis added).

⁷ 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.

requirement for the full Board from the purpose of a quorum provision—namely, to set the minimum *participation* level required before a body may take action. Under the D.C. Circuit’s reading, the full Board quorum requirement in Section 3(b) establishes a minimum *membership* level for the full Board that must be satisfied for a delegee group to act, even though the non-group member or members of the full Board would not participate in the delegee group’s action.

The *Laurel Baye* court also misconstrued the delegation provision and the related two-member quorum provision by distinguishing “the Board” from “any group,” so that no group may act unless the Board itself has three members. *Laurel Baye*, 564 F.3d at 473. That conclusion ignores that Congress did not use the nouns “group” and “Board” to signify that a group could not function if there were fewer than three sitting Board members. Rather, Section 3(b) authorizes the Board to delegate all its powers to a three-member group in a manner that the group, possessing all the Board’s powers, is empowered to bind the Board as an institution through a two-member quorum comprised of the only two sitting Board members. *See Northeastern*, 560 F.3d at 41 (upholding “the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum”).

The Company also argues (Br 30-34) that once Member Kirsanow’s appointment expired, the existence of the three-member group could not continue

to exist “in perpetuity.” (Br 34.) Rejecting that argument, the Fourth Circuit observed that such a “reading of [Section] 3(b) would turn the two-member quorum provision on its head [because] [i]f the loss of one member of a three-member group automatically caused the group to cease to exist, then a two-member quorum would *never* suffice.” *Narricot*, 587 F.3d at 660 (emphasis in original). Further, as the court concluded, that argument was “entirely inconsistent with [Section] 3(b)’s ‘vacancy’ provision, which specifies that a “vacancy in the Board”—or, necessarily, a three-member group acting with the full powers of the Board—“shall not impair the right of the remaining members to exercise all of the powers of Board.” *Id.*

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

Because Section 3(b)’s language is clear, there is no need to consult its history. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 539 (2004). Nevertheless, that history confirms the plain meaning of the statutory text: that a two-member quorum of a three-member group to which the Board has legally delegated all of its powers may continue to operate when those two members are the only sitting members of the Board.

In the Wagner Act of 1935, which created a three-member Board, Section 3(b) provided only: “A vacancy on the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and two members of

the Board shall, at all times, constitute a quorum.”⁸ 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.⁹ *See, e.g., NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), enforcing 35 NLRB 621 (Sept. 23, 1941).

Although the Company argues (Br 26-29) that a two-member quorum may never exercise all of the Board’s institutional powers or decide cases without a third sitting member, the 1947 Congress showed no concern about the Board’s regular manner of deciding cases when it considered the Taft-Hartley amendments. Indeed, the House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board’s powers.¹⁰

⁸ *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).

⁹ The Board had only two members during three separate periods between 1935 and 1947: from September 1 until September 23, 1936; from August 27 until November 26, 1940; and from August 28 until October 11, 1941. *See 2d Annual Report, NLRB*, at 7; *6th Annual Report*, at 7 n.1; *7th Annual Report*, at 8 n.1. Contrary to the Company’s assertions (Br 10, n.5), those two-member Boards issued 3 published decisions in 1936 (2 NLRB 198-240); 237 published decisions in 1940 (all of 27 NLRB, and 28 NLRB 1-115); and 224 published decisions in 1941 (35 NLRB 24-1360 and 36 NLRB 1-45).

¹⁰ *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.

The Senate bill, while proposing to enlarge the Board and amend the quorum provision, was careful to do so in a manner that explicitly preserved the Board's ability to exercise its powers through a two-member quorum. Thus, the Senate bill would have expanded the Board to seven members, four of whom would be a 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.¹¹ 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.¹² Rather, the Senate Committee on Labor expressed the concern that the Board was taking too long to decide cases. Explaining that "[t]here is no field in which time is more important, the Committee proposed expansion of the Board to "permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage."¹³ 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,

¹¹ S. 1126, 80TH CONG. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

¹² Remarks of Sen. Ball, 93 CONG. REC. 4433 (May 2, 1947).

¹³ S. REP. NO. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

and accordingly may accomplish twice as much.”¹⁴ See *Snell Island*, 568 F.3d at 421 (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 agreed, as a compromise, to a Board of five members but accepted, without change, the Senate bill’s delegation and two-member quorum provisions, thereby preserving the Board’s ability to act through two members even as an expanded Board.¹⁵ Had Congress been dissatisfied with the Board’s practice of operating through two-member quorums, it could have eliminated the Board’s authority to do so when amending the statute. Instead, Congress preserved the Board’s authority to act through a two-member quorum whenever the Board exercised its delegation authority.

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

¹⁴ Remarks of Sen. Taft, 93 CONG. REC. 3837 (Apr. 23, 1947), 2 *Leg. Hist. 1947*, at 1011.

¹⁵ 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.

commission.¹⁶ Similarly, the statute governing the Interstate Commerce Commission (ICC) at that time provided that a “majority of the Commission” (then nine members) constituted a quorum, but authorized the commission to delegate any of its work to divisions consisting of no fewer than three members, a majority of whom constituted a quorum.¹⁷

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

The Company urges this Court (Br 30-33) to interpret Section 3(b)—indeed, to override its plain language—by borrowing selected common-law rules governing private corporations and private agency relationships. Those rules, the Company contends (Br 33), would dictate that, at the moment the authority of the Board as a whole expired (*i.e.*, when the Board lost its three-member quorum), the Board’s prior delegation of authority to the group also lapsed and no group continued in existence. *See Laurel Baye*, 564 F.3d at 473 (asserting that an agent’s delegated authority “terminates when the powers belonging to the entity that bestowed the authority are suspended”). But the rules on which the Company relies do not govern the continuing validity of lawful government actions. Rather,

¹⁶ *See* Communications Act of 1934, ch. 652, §§ 4-5, 48 Stat. 1066.

¹⁷ *See* Transportation Act of 1940, ch. 722, § 12, 54 Stat. 913-914; *Nicholson v. ICC*, 711 F.2d 364, 366 n.7 (D.C. Cir. 1983) (holding that an ICC decision in which only two of the three commissioners in a division participated was validly issued by a quorum of the assigned division).

Section 3(b)'s special group quorum provision is fully consistent with the background rules governing the operation of government agencies.

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

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

relationships to serve as default rules for public entities. As the Court noted in *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967), when an agency’s enabling statute is silent on the matter, quorum rules governing federal agencies are derived from the common law of *public* bodies. *Id.* at 183-84 & n.6 (collecting cases). *Accord Yardmasters*, 721 F.2d at 1343, n.30 (recognizing that the Railway Labor Act’s delegation and vacancies provisions incorporated principles different from those of the private law of agency and corporations). Indeed, even the agency and corporations treatises on which the Company relies note that governmental bodies are often subject to special rules not applicable to private bodies. *See* FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2, at 6 (2006) (distinguishing between private and municipal corporations, stating that “the law of municipal corporations [is] its own unique topic,” and concluding that “[a]ccordingly, this treatise does not cover municipal corporations.”); RESTATEMENT (THIRD) OF AGENCY 6 (2006) (noting in its introduction that it “deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government”). Moreover, when a delegee group possessed of all of the Board’s powers acts, it is acting as the Board, not as an agent of the Board.¹⁸

¹⁸ The relevant background common-law quorum rule is that “a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body.” *Flotill*, 389 U.S. at 183 & n.6; *cf. Assure Competitive Transp., Inc.*

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

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

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

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

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

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

The Company attacks (Br 24-26) the Board's delegation of authority, referring to it as a "sham" (Br 25), on the ground that the Board was aware that Member Kirsanow's departure was imminent and that the delegation would soon result in the Board's powers being exercised by a two-member quorum, which the Company claims (Br 30-33) was a distortion of the meaning of Section 3(b)'s delegation provision. Rejecting that argument, the Second Circuit aptly recognized that the anticipated departure of one member of the group "has no bearing on the fact that the panel was lawfully constituted in the first instance" through the Board's lawful delegation process. *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*, 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. While it is true that the cases are distinguishable, something the Company strenuously asserts (Br 36-39), the critical distinction noted by the court in *Laurel Baye* actually points directly to the greater strength of the Board’s case. In *Yardmasters*, the court faced the question whether an agency that acts principally in a non-adjudicative capacity could continue to function when its membership fell short of the quorum required by its authorizing statute. *See* 721 F.2d at 1341-42. That problem is not presented here. Here, unlike *Yardmasters*, the statutory

requirements for adjudication are satisfied because Section 3(b) expressly provides that two members of a properly constituted, three-member group is a quorum.

Therefore, in contrast to the one-member problem at issue in *Yardmasters*, the presence of the Board quorum that adjudicated this case “‘is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.’” *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (quoting ROBERT’S RULES OF ORDER 3, p. 16 (1970)).

II. THE BOARD REASONABLY CERTIFIED THE UNION, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION FOLLOWING THAT CERTIFICATION

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the duly certified collective-bargaining representative of an appropriate unit of its employees. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967); *North American Directory Corp. v. NLRB*, 939 F.2d 74, 76 (3d Cir. 1991); *NLRB v. ARA Services, Inc.*, 717 F.2d 57, 59 (3d Cir. 1983) (en banc).¹⁹ In the present case, the Company admits (Br 6) its

¹⁹ Section 8(a)(5) 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 his employees.” Section 8(a)(1) of the Act (29 U.S.C. § 158(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” of the Act. Section 7 of the Act (29 U.S.C. § 157), in turn, guarantees employees “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain

refusal to bargain but contends that the Board improperly certified the Union in the underlying representation proceeding. Accordingly, if the Company's attacks on the Board's certification of the Union fail, and they must, then the Company's refusal to bargain was unlawful and the Board is entitled to enforcement of its Order. *See Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 600-01, 610 (3d Cir. 1996).

A. Applicable Principles

As the Supreme Court has long recognized, Congress entrusted the Board with a "wide degree of discretion in establishing the procedure and 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). That discretion necessarily encompasses the development and application of Board rules defining voter eligibility and the determination of election misconduct that could warrant a new election.

The party claiming that an employee should have been deemed ineligible to vote or that election misconduct occurred that interfered with employee free choice—here, the Company—bears the burden of proof. *See, for example, Cavert*

collectively through representatives of their own choosing" An employer who violates Section 8(a)(5) also commits a "derivative" violation of Section 8(a)(1). *See generally NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262, 265 n.1 (3d Cir. 1941).

Acquisition Co. v. NLRB, 83 F.3d 598, 607 (3d Cir. 1996); *St. Margaret Memorial Hosp. v. NLRB.*, 991 F.2d 1146, 1156 (3d Cir. 1993). Moreover, there is a strong presumption that the results of an election are valid, and a party claiming otherwise has an especially heavy burden. *See NLRB v. Mattison Machine Works*, 365 U.S. 123, 123-24 (1961) (per curiam).

Here, the Board properly discredited the testimony upon which the Company relied to support its claims that employee Dixon was ineligible to vote and that election misconduct occurred. The Company has not shown that those credibility resolutions should be disturbed on review, and, accordingly, the Company's challenges to the Board's certification of the Union, and to the ensuing unfair labor practice findings against the Company, must fail.

B. Applying Established Board Doctrine, the Board Reasonably Concluded That Felicia Dixon was Presumptively Eligible to Vote as an Employee on Disability Leave and that the Company Failed to Rebut that Presumption By Proving that Dixon Had Been Discharged

The Board has long adhered to the bright line rule that an employee on sick or disability leave "is presumed to continue in . . . [employee] status unless and until the presumption is rebutted by an affirmative showing that the employee has been discharged or has resigned." *Red Arrow Freight Lines*, 278 NLRB 965, 965 (1986). *Accord Home Care Network, Inc.*, 347 NLRB 859, 859 (2006); *Supervalu, Inc.*, 328 NLRB 52, 52 (1999); *Vanalco, Inc.*, 315 NLRB 618, 618 (1994). The

Red Arrow test’s bright-line rule—allowing employees on medical leave to vote unless the evidence shows that they have been discharged or quit, rather than asking whether their medical condition might one day permit a return to work—“avoids unnecessary litigation and ‘endless investigation into states of mind or future prospects.’” *Home Care Network, Inc.*, 347 NLRB at 859 (quoting *Vanalco, Inc.*, 315 NLRB at 618 n.4). The courts of appeals—including this Court—repeatedly have embraced the Board’s rule. *See Abbott Ambulance of Illinois v. NLRB*, 522 F.3d 447, 450-51 (D.C. Cir. 2008); *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 602-07 (3d Cir. 1996); *NLRB v. Newly Weds Foods*, 758 F.2d 4, 7-10 (1st Cir. 1985); *Medline Industries, Inc. v. NLRB*, 593 F.2d 788, 790 (7th Cir. 1979).

The Company argues (Br 46-47) that statutory interests would be better served by a more nuanced rule that turns on a fact-intensive inquiry into whether the employee “has a reasonable expectation of returning to work.” Yet, in so arguing, it flatly ignores this Court’s approval of the Board’s *Red Arrow* rule as a proper exercise of the Board’s discretion. *Cavert Acquisition*, 83 F.3d at 602. Accordingly, the Company’s suggestion, based on nothing more than the views of a dissenting Board member, that this Court should scrap the *Red Arrow* rule in favor of a “reasonable expectation of return” test, should be rejected as inconsistent with the settled law of the circuit. *See* Third Cir. I.O.P. 9.1 (“It is the

tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels.”).

Thus, all that remains of the Company’s argument that Dixon should have been deemed ineligible to vote is the Company’s claim that, pursuant to *Red Arrow*, Dixon had been discharged. However, as discussed earlier, the sole evidence the Company produced to support this claim was expressly discredited by the administrative law judge, and affirmed by the Board, in a well-reasoned decision.

The Company’s entire case rested upon the improbable testimony of Resort General Manager Henry that the Company discharged Dixon pursuant to a supposed rule requiring automatic termination after 6 months of disability leave that, insofar as appears, nobody else had ever heard of. That claim, of course, became all the more improbable, as the judge emphasized (A 29), in light of Henry’s admission that Dixon herself had not been informed of her alleged discharge. Nor did the Company’s own records contain a single mention of the alleged discharge. Indeed, the company official responsible for housekeeping apparently was unaware of any such action regarding Dixon, as he included her name on the housekeeping roster he posted the week of the election. And, Henry’s inability even to state the date on which Dixon was discharged—as the judge noted, the best he could do was to provide two possible dates (A 30; 122)—was

emblematic of a company claim that the judge reasonably concluded was spun of whole cloth.

Moreover, not only was there no evidence that Dixon had been discharged, but also there was no evidence that the Company had ever promulgated the rule calling for the discharge of an employee on disability leave after 6 months, as Henry claimed. Although the Company insists (Br 49) that the Board was obliged to accept Henry's claim that he never bothered to memorialize the rule in writing, the judge reasonably rejected Henry's testimony as just so much doublespeak. The record shows that the Company maintained an employee "Handbook" and "rules and regulations" (A 189), but Henry never attempted to explain why, if such a policy had been adopted, it had not been committed to writing. Nor was there any evidence of the Company terminating any employee prior to Dixon pursuant to this "policy."

To the extent Henry relied upon a provision in a collective-bargaining agreement that had never been executed or implemented, the judge properly rejected that evidence as non-probative. He rightfully emphasized that the contract provision Henry noted only governed seniority as it pertained to layoff and recall priorities, and then only provided for the loss of seniority, not discharge, for an employee's "[f]ailure to work for the Employer for a period of six (6) consecutive months." (A 29; 185.) In the absence of a stitch of evidence to corroborate a

single word that Henry had said, the judge reasonably declined to accept Henry's explanation that the Company had automatically discharged Dixon after 6 months of disability leave. The Board therefore reasonably concluded that, under *Red Arrow*, Dixon remained eligible to vote as an employee on disability at the time of the election.

C. The Board Reasonably Concluded that Employee Phyllis Blackman's Testimony Lacked Sufficient Detail and Reliability to Constitute Adequate Proof that Union Supporter Edward, or Anyone Else, Made Threats Against Antiunion Voters

In its objections, the Company alleged that union supporter Lucy Edward made several threatening comments to a group of banquet employees prior to the election. The Board reasonably found that the Company failed to introduce sufficient credible evidence to prove these election objections and properly upheld the election results.

Specifically, the Company asserted that Edward irreparably interfered with the election by telling banquet employees that they were to blame for an earlier union election defeat and that they would see what would happen to them if the Union lost the current election. The Company chose to prove its case through a lone witness, banquet employee Phyllis Blackman, whose testimony the administrative law judge, affirmed by the Board, found inadequate to prove that Edward or anyone else had made such a remark.

As the judge emphasized, Blackman all but eliminated herself as a witness in support of the Company's allegations when she answered with a simple, "No," when counsel asked at the outset, "[D]id you ever have any conversations with Ms. Edward concerning . . . the Union." (A 13-14; 88.) Indeed, while Blackman went on to identify Edward as among a *group* of employees whom she said made remarks that she and her coworkers regarded as threatening, Blackman never testified that *Edward* made any specific remarks that would support the Company's objection.

To the contrary, the judge reasonably found that Blackman's testimony as to what the generalized employee group had said was a confused and conflicted "muddle" that completely failed to prove the Company's case. (A 14; 89.) As the judge emphasized, Blackman confined herself to the broadest generalities, mentioning no names of anyone but Edward and herself, and speaking only of what the collective "they" had said. (A 88-90.) Blackman made no effort to identify specific incidents and how events might have unfolded—whether the offending employees all were speaking in unison or just at the same time, or whether any, Edward included, might have been silent during key aspects of exchanges Blackman recounted in the most general terms imaginable.

In fact, the sum total of Blackman's testimony as to what was said consisted of two conflicting answers. The first of which, while somewhat supportive of the

Company's objections, was difficult to parse—Blackmun testified that “they said the union is coming back and we should [b]e with the union didn't get in the first time and if we don't let them in this time, we will see.” (A 89.) Blackman's ensuing attempt to clarify what was said had greater clarity but effectively undermined the Company's claim—Blackman testified this time that “they've been telling us . . . the Union is coming back and they know the last—we's the one that get the union not to be there and if we get them there this time, we will see.” (A 90.)

The Company never attempted to secure from Blackman a clarification of which version was correct, much less to provide sufficient specifics to form a coherent picture of what allegedly occurred. Nor did the Company offer any explanation for failing to provide substance to its case by calling any of the other six banquet employees, none of whom Blackman identified in her testimony. Thus, the judge was left with two generalized statements from the same witness about what had been said by prounion employees which could not have been further apart in their import—one which might be parsed to constitute an accusation that something was said to convey an unspecified threat if the Union lost and the other a clear account establishing nothing more than that the employees had made a permissible solicitation of prounion votes by telling employees that they would see how much good the Union would do if it won. In

this context, the Board reasonably affirmed the judge’s conclusion that Blackman’s testimony was unreliable and failed to prove that Edward made threatening remarks.

D. The Board Reasonably Concluded that Two Affidavits in Lieu of Live Testimony Were Inadequate to Prove the Company’s Remaining Objections

Next, the Company alleged that Edward interfered with the election by saying, “I does thank God I don’t come to work with a gun because I will kill a lot of people and they will be sorry.” Inexplicably, however, to prove this allegation, the Company relied exclusively on affidavits from two witnesses, neither of whom was alleged to have been unavailable to testify in person, and offered no live testimony. On this thin record, the Board reasonably refused to disturb the election results.

The Board, adopting the judge’s decision, had strong reasons for declining to credit those out-of-court declarations against Edward’s live testimony denying the allegations. As the judge emphasized, the affidavits, which likely were crafted by someone other than the affiants themselves, raised more questions than they answered. Both affidavits report that the affiant somehow interpreted Edward’s supposed comment—“I does thank God I don’t come to work with a gun because I will kill a lot of people and they will be sorry”—as a threat against employees with an antiunion bent. On their face, however, the affidavits do not state that Edward

made the alleged comment in reference to the Union in any way, nor do they state how either affiant knew that Edward had any connection to the union effort. More to the point, as the judge emphasized, each affiant's identical assertion—"I firmly believe that she meant that she wanted to shoot"—begged the question why, if they thought that Edward was about to go on a shooting rampage, neither reported the alleged threat to company officials or the police. (A 34-35.)

The Company argues (Br 56) that the Board was required to credit the affidavits because counsel for the General Counsel stipulated that the witnesses, if called, would testify consistently with the affidavits they had signed. Stipulating that the witnesses would testify consistently with their affidavits, however, does not mean that they would have been credible or stood up to cross-examination. At the hearing, the judge expressed skepticism over the Company's decision to refrain from introducing live testimony (A 132-33), which he explained in his decision: "[S]ince neither witness took the stand, there was no opportunity to address the possibility that, as employees of the [Company], they felt pressured to sign declarations that were favorable to [the Company]." (A 35.)

Thus, in these circumstances, the judge reasonably declined to credit the out-of-court affidavits "over the [disavowal] Edward provided during her live testimony," a disavowal from "a somewhat, though not highly, credible witness." (A 34-35.) *See NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir.

1950) (“nothing is more common in all kinds of judicial decisions than to believe some and not all” of a witness's testimony) (Hand, J.), *vacated and remanded on other grounds*, 340 U.S. 474 (1951). Indeed, it was precisely because of judicial resistance to the Board’s now-discarded rule permitting Regional Directors to make credibility resolutions on the basis of affidavits, that the Board adopted its current rule requiring a hearing so that live testimony can be evaluated—exactly the circumstances presented here. *See NLRB v. ARA Services, Inc.*, 717 F.2d 57, 70-78 (1983) (en banc) (dissenting opinion).²⁰ The Board therefore reasonably concluded that the Company’s unexplained failure to call the declarants to testify was fatal to the Company’s case. (A 34-35.)

Finally, while the Company argues (Br 58-59) that Edward was the Union’s agent and that the conduct it alleged—but failed to prove—was objectionable under established election standards, the Board expressly found it unnecessary to

²⁰ To the extent that the Company suggests (Br 56) that the declarants were unavailable at the time of the hearing, the record contains no support for that claim. Counsel made no representation at the hearing that those witnesses were unavailable, but rather proposed that the Company was prepared to dispose of live testimony if the Union stipulated that the employees would have testified consistent with their affidavits. (A 157-59.) Nor was there any reason why the Company could not have produced live testimony from any of the other 12-13 employees whom the declarations stated were present when the alleged remarks were made. (A 190, 192.)

address either issue in light of the judge's credibility findings. (A 18 n.6.) Thus, the Company's arguments on these points are not before this Court.²¹

²¹ If the Court concludes that the Company proved that Blackman made the alleged comments, it should remand the case to the Board to pass on the judge's alternative findings. As he explained in his opinion, the judge found that, even if Edward was regarded as an agent and the Company's evidence was credited, neither of the incidents constituted objectionable interference requiring a new election. (A 32-33, 35-36.)

CONCLUSION

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

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Petitioner/Cross-Respondent	*	
	*	Nos. 09-3234,
v.	*	09-3423
	*	
GRAPETREE SHORES, INC.,	*	Board Case No.:
d/b/a DIVI CARINA BAY RESORT	*	24-CA-11101
	*	
Respondent/Cross-Petitioner	*	

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REQUIREMENT AND CONTENT AND VIRUS SCAN REQUIREMENT**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 12,394 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Office Word 2003. Board counsel certifies that the contents of the pdf file containing a copy of the Board's brief that was filed with the Court is identical to the hard copy of the Board's brief filed with the Court and served on petitioner, and was scanned for viruses using Symantec Antivirus Corporate Edition, program 10.0.2.2000 version March 14, 2010 rev.3, and according to that program, was free of viruses.

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Dated at Washington, DC
this 22nd day of March 2010

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	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

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

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