

Nos. 08-1162 & 08-1214

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL NO. 1996

Intervenor

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

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC ON BEHALF OF
THE NATIONAL LABOR RELATIONS BOARD

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INTRODUCTORY STATEMENT

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and this Court, the National Labor Relations Board (Board) respectfully petitions for rehearing, and suggests rehearing en banc, of a panel decision by this Court (Chief Judge Sentelle, Circuit Judge Tatel, and Senior Circuit Judge Williams). The panel held that, unless the Board has three sitting members, it cannot issue decisions, despite having delegated all powers to a three-member Board group, two members of which are a statutory quorum. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, ___ F.3d ___, 2009 WL 1162574 (D.C. Cir. May 1, 2009).

1. The exceptionally important question presented here is whether the Board decisions issued since December 28, 2007—more than 25 of which are now pending before this Court—are invalid because issued by a two-member Board quorum. The panel’s refusal to give effect to the plain language of Section 3(b) of the National Labor Relations Act (29 U.S.C. 153(b)), which authorizes decisions by a two-member quorum under specified conditions satisfied in this case, conflicts with the decisions of two other circuits. *New Process Steel v. NLRB*, ___ F.3d ___, 2009 WL 1162556 (7th Cir. 2009); *Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *reh’g denied* (May 20, 2009).

2. Rehearing is also warranted to secure and maintain uniformity of this Court’s decisions which heretofore have construed the quorum requirements of

federal administrative agencies in a manner consistent with the prevailing common-law quorum rule that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body. *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 n.2 (D.C. Cir. 1996); *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983). The panel’s failure to discern the common-law principles underlying those cases, and to apply them in this case, has deprived the Board and the public of the benefit of the two-member quorum provision that Congress wrote into the National Labor Relations Act (NLRA) to enable the Board more effectively to resolve industrial disputes.

STATEMENT OF THE CASE

1. In 1935, Congress established the Board to resolve representational disputes and remedy unfair labor practices burdening interstate commerce. Congress originally provided for a Board of three members, two of whom “shall, at all times, constitute a quorum.” 49 Stat. 449, 451. That two-member quorum provision enabled the Board to issue decisions with only two sitting members.

In 1947, in the course of enlarging the Board’s unfair labor practice jurisdiction, Congress increased the Board to five members (61 Stat. 136, 139), and amended Section 3(b) of the NLRA to provide, in pertinent part, as follows:

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

constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. . . . [29 U.S.C. § 153(b).]

As enacted, Section 3(b) represented a compromise between the House proposal that would have retained the original three-member Board and a two-member quorum provision (H.R. 3020, 80th Cong. § 3 (1947)), and the Senate proposal which sought to double the Board's capacity by enlarging the Board to seven members and authorizing the Board to operate in groups of three in which two Board members would constitute a quorum. S. Rep. 80-105, at 8, 19 (1947).

Since 1947, most Board decisions have been decided by groups of three Board members pursuant to Section 3(b). Until recently, there have been few occasions for courts to consider the meaning of the two-member quorum option in Section 3(b). A handful of cases where a two-member quorum issued a decision when a third member was recused were not challenged on the ground that participation of a third Board member was necessary. *See, e.g., G. Heileman Brewing Co.*, 290 NLRB 991, 991 & n.1 (1988), *enforced* 879 F.2d 1526 (7th Cir. 1989). In the one case where the issue was raised—where it was alleged that two members issued a decision after the third member resigned—the Ninth Circuit held that it was not legally determinative whether the resigning member had participated in the decision, stating that “the decision would nonetheless be valid

because a ‘quorum’ of two panel members supported the decision.” *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982).

In more recent years, the Board, like other agencies, has faced the challenge of operating with multiple vacancies and preparing for the possibility of having only two sitting members. In response, the Board solicited a legal opinion from the United States Department of Justice’s Office of Legal Counsel (OLC) concerning whether, if a quorum of the Board were to delegate its powers to a group of three pursuant to Section 3(b)’s delegation provision, the only two remaining Board members, as a two-member quorum, could continue to issue Board decisions after the third member of the group departed. Consistent with the statutory analysis set forth in *Photo-Sonics*, the OLC determined that the Board had such authority, because the two-member quorum provision constituted an express exception to the three-member-quorum provision. *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (Mar. 4, 2003).

2. Pursuant to Section 3(b) and the OLC memo, the four members of the Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board’s powers to a group of three members: Members Liebman, Schaumber and Kirsanow. When, 3 days later, Member Kirsanow’s recess appointment expired,¹ Members Liebman and

¹ Member Walsh’s recess appointment also expired on December 31, 2007.

Schaumber, as a two-member quorum, continued to exercise the powers they were delegated to hold jointly with Member Kirsanow. Since then, this two-member quorum has issued over 300 Board decisions.

3. The panel held that Section 3(b)'s provision that "three members of the Board shall, *at all times*, constitute a quorum of the Board" (29 U.S.C. § 153(b), emphasis added) prohibits the Board from acting in any capacity when it has fewer than three sitting members, despite Section 3(b)'s express exception that provides for a quorum of two members when the Board has delegated its authority to a three-member group. The panel concluded that the two-member quorum provision that applies to a three-member "group" is not an exception to the three-member quorum requirement for the "Board." *See* 2009 WL 1162574, at *4. Rather, the panel stated that Congress' use of the two different object nouns—"group" and "Board"—indicates that each quorum provision is independent from the other, and thus the two-member quorum provision does not eliminate the requirement of a three-member quorum "at all times." *Id.*

ARGUMENT

1. The panel's decision is in conflict with decisions of the Seventh Circuit and the First Circuit, which hold that the plain meaning of Section 3(b) authorizes a two-member quorum of a three-member group to issue Board decisions, even when, as here, the Board has only two sitting members. *See New*

Process Steel, 2009 WL 1162556, at *4 (“As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text.”); *Northeastern Land Servs.*, 560 F.3d at 41 (“the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of [S]ection 3(b)”). *Accord Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982).

The panel’s contrary interpretation fails to give Section 3(b)’s critical terms “except” and “quorum” their ordinary and usual meaning, thereby violating the cardinal canon of statutory construction “that courts must presume a legislature says in a statute what it means and means in a statute what it says there.”

Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992). *See also Flores-Figueroa v. United States*, 129 S.Ct. 1886, 1890 (May 4, 2009) (applying “ordinary English” to determine meaning).

The ordinary meaning of the word “except” is “with the exclusion or exception of.” *Webster’s New World College Dictionary* (4th ed. 2008). 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

that applies when the Board has delegated its powers to a three-member group is an *exception* to the requirement of a three-member quorum “at all times.” In holding that the words “at all times” require the existence of a three-member quorum even when the Board has delegated its institutional powers to a three-member group, the panel has refused to give full effect to the express exception providing that, in those very circumstances, two Board members “shall constitute a quorum.”

The all-pervading assumption underlying the panel’s refusal to acknowledge Section 3(b)’s plain meaning is that it would be anomalous for Congress to use the statutory rubric “at all times . . . except” if Congress intended that there be some times when the general requirement of a three-member quorum would not apply. The panel’s assumption is groundless. In other statutes, as in Section 3(b), Congress has also used that same statutory rubric to state a true exception to a general rule. *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). In refusing to give effect to Section 3(b)’s two-member quorum exception, the panel not only has refused to give plain statutory language its normal effect but also has failed to consider Congress’ practice in crafting statutory exceptions.

The panel also fails to give the word “quorum” its ordinary meaning. “Quorum” means “the minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted.” *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (quoting H. Robert, *Robert's Rules of Order* 16 (rev. ed. 1981)). Under the panel’s construction of Section 3(b), however, the actual presence of a two-member quorum of the Board, possessed of all the Board’s powers by a valid delegation, is *never* a sufficient number to transact business unless there is also a third sitting Board member.

The panel correctly states that Congress intended that “each quorum provision is independent from the other” (2009 WL 1162574, at *4), but the panel flouts that clear intent by denying Section 3(b)’s two-member quorum provision *any* truly independent role. Rather, under the panel’s construction, whether a two-member Board quorum is ever a legally sufficient number to decide is made wholly *dependent* on the availability of a three-member quorum. In so holding, the panel has violated a cardinal principle of statutory construction—one it purports to accept (2009 WL 1162574, at *3)—that “‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

In addition to failing to give the words “except” and “quorum” their ordinary meaning, the panel also fails to read those words in the context of Section 3(b)’s textually interrelated delegation provision, which authorizes three or more Board members to delegate “any or all” of the Board’s powers to a group of three members, two members of which “shall constitute a quorum.” The panel mistakenly holds that this language expresses a distinction between the “Board” itself, which at all times must have a quorum of three to operate, and a “group;” it further states that “[t]he establishment of a two-member quorum of a subordinate group does not logically require any change in the provision mandating a three-member quorum for the Board as a whole.” 2009 WL 1162574, at *4.

The panel’s conclusion ignores the plain language of Section 3(b)’s delegation provision, which provides for the Board’s delegation to a group of “any or all of the powers which [the Board] may itself exercise.” Where, as here, the Board has exercised its statutory authority to delegate all its powers to a three-member group, that group, possessing all the Board’s powers, acts as the Board when exercising those delegated powers. And two members of that group constitute a quorum for legally transacting business. *Northeastern Land Servs.*, 560 F.3d at 41 (“the Board’s delegation of *its institutional power* to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)” (emphasis supplied)).

In sum, to interpret Section 3(b) to authorize a two-member Board quorum of a properly-constituted, three-member group to issue Board decisions gives the words of Section 3(b) their ordinary meaning and intended significance. That interpretation of Section 3(b) does not, as the panel asserts, “def[y] logic” or permit the Board to “circumvent” the three-member quorum requirement. 2009 WL 1162574, at *4. Rather, that interpretation implements the statutory mechanism Congress created for the Board, in the exercise of its discretion, to deliberately and consciously delegate “all of its powers” to a group of three members, two of whom constitute a quorum.

2. The panel’s decision erroneously departs from principles that the Supreme Court and this Court have previously recognized should govern the construction of the quorum and vacancy provisions applicable to federal administrative agencies. 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 Interstate Commerce Commission (ICC)).

At common law, the power held by a public board was held “not individually but collectively” (*Commonwealth ex rel. Hall v. Canal Comm’rs*,

9 Watts 466, 471, 1840 WL 3788, at *5 (Pa. 1840)), and “considered joint and several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at *16 (W.Va. 1875). Under the majority view, 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*, 30 Colo. 439, 442-43, 71 P. 365 (1902).

This Court recognized the relevance of these common-law quorum principles in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), when it observed that the common-law rule likely permits “a quorum made up of a majority of those members of a body *in office* at the time.” *Id.* at 582 n.2 (emphasis in original). With that common-law principle as a backdrop, the Court held that, in the absence of any countermanning 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 and orders when only two of its five authorized seats were filled.²

² As support, the Court cited *Swedback v. Olsen*, 107 Minn. 420, 120 N.W. 753 (1909), which explained that: “where powers, to be exercised as a continuous public trust or duty, are confided to designated persons, the discharge of the public duty or trust is not to be interrupted or fail, through the death, absence, or inability of any of the persons to whom the exercise of it is intrusted, provided there is a sufficient number to confer together.” *Id.* at 754.

The panel deemed *Falcon Trading* inapplicable to the present case on the ground that, unlike the NLRA, the SEC’s authorizing statute had no quorum provision, and therefore the SEC could exercise its statutory authority to create its own quorum rule. The panel overlooked that the same common-law principles that supported this Court’s upholding the SEC’s two-member quorum rule also inform the proper construction of the two-member quorum provision in Section 3(b) of the NLRA. As stated in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), “[w]here Congress uses terms that have accumulated settled meaning under . . . common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.” *Id.* at 329.

Thus, the common-law principles this Court applied in *Falcon Trading* apply as well in interpreting the quorum provisions Congress enacted in the NLRA. Consistent with those principles, Section 3(b) authorizes the Board, when it has a quorum of at least three members, to delegate all its powers to a three-member group, two members of which “shall constitute a quorum.” 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.³

³See *New Process Steel v. NLRB*, ___ F.3d ___, 2009 WL 1162556, at *6 (7th Cir. 2009) (reading *Falcon Trading* to support the Board’s authority to issue decisions pursuant to Section 3(b) two-member quorum provision).

The panel further erred in failing to perceive that the common-law quorum rule imbedded in Section 3(b)'s express exception for Board groups is similar to the quorum rule upheld in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir 1983). There, this Court recognized that the ICC's enabling statute not only permitted that 11-member agency to "carry out its duties in [d]ivisions consisting of three [c]ommissioners," but also provided that "a majority of a [d]ivision is a quorum for the transaction of business." *Id.* at 367 n.7. Based on that provision, the Court held that an ICC decision participated in and issued by only two of the three division members was valid. *Id.* The panel here failed to recognize that Section 3(b) is directly analogous to the ICC statute and similarly allows the Board to delegate its powers to groups, two members of which constitute a quorum.

The panel compounded its failure to interpret Section 3(b) in light of applicable common-law quorum principles by construing the statute instead in light of private-law principles "of agency and corporation law." 2009 WL 1162574, at *4. Specifically, the panel erroneously concluded that the three-member group to which a Board quorum delegated all of the Board's powers was an "agent" of the Board. *See id.* (citing Restatement (Third) of Agency § 3.07(4) (2006) for the proposition that "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended"). That is plain error. "Agency" is defined as "the fiduciary relationship that arises when

one person (“the principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests consent or otherwise consents so to act.” *Id.*, § 1.01. The delegation of institutional powers to the three-member group authorized by Section 3(b) does not create any kind of “fiduciary” relationship and does not involve the three-member group acting on “behalf” of the Board or under its “control.” Instead, the Board members in the group have been jointly delegated all of the Board’s institutional powers, and thus are fully empowered to exercise them, not as Board agents, but as the Board itself.

The panel’s misapprehension concerning the governing common-law principles also led it unwarrantedly to disregard the teaching of *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983). There, the Court properly rejected reliance on the principles of agency and private corporation law erroneously invoked by the panel here. The Court discerned that the delegation and vacancies provisions of the federal statute at issue demonstrated that Congress intended that certain operations of a public agency should continue to function in circumstances where a private body might be disabled. *Id.* at 1343 n.30. Similarly, in this case, the plain meaning of Section 3(b)’s delegation, vacancy, and quorum provisions manifests Congress’ intent that three or more members of the Board should have the option to delegate the Board’s powers to a

three-member group, knowing that an imminent vacancy “shall not impair the right of the remaining members to exercise all the powers of the Board” and that “two members shall constitute a quorum of any group” so designated. As the Office of Legal Counsel properly concluded, construing Section 3(b)’s plain language to permit the two-member quorum to continue to exercise the Board’s powers that were properly delegated to the three-member group “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.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court rehear this case and suggests rehearing en banc. After rehearing, the Court should enter a judgment enforcing the Board’s order in full.

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May 2009

ADDENDUM

H

United States Court of Appeals,
 District of Columbia Circuit.
 LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC., Petitioner
 v.
 NATIONAL LABOR RELATIONS BOARD, Respondent.
 Nos. 08-1162, 08-1214.

Argued Dec. 4, 2008.
 Decided May 1, 2009.

Background: Employer petitioned for review of an order of the National Labor Relations Board (NLRB) and NLRB cross-petitioned for enforcement of order.

Holding: The Court of Appeals, Sentelle, Chief Judge, held that delegated three-member panel with only two-member quorum lacked authority to issue order given lack of quorum of Board as a whole.

Petition for review granted.

West Headnotes

[1] Labor and Employment 231H ↪ 1794

231H Labor and Employment
 231HXII Labor Relations
 231HXII(I) Labor Relations Boards and Proceedings
 231HXII(I)9 Hearing
 231Hk1794 k. Administrative Officers.
 Most Cited Cases
 National Labor Relations Board's (NLRB) delegated three-member panel, which had two-member quorum, lacked authority to issue order on behalf of the Board the moment the Board's membership as a whole dropped below three-member quorum requirement. National Labor Relations Act, § 3(b), 29 U.S.C.A. § 153(b).

[2] Statutes 361 ↪ 206

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k204 Statute as a Whole, and Intrinsic Aids to Construction
 361k206 k. Giving Effect to Entire Statute. Most Cited Cases
 A cardinal principle of statutory interpretation requires the Court of Appeals to construe a statute so that no provision is rendered inoperative or superfluous, void or insignificant.
 Charles P. Roberts, III, argued the cause for petitioner. With him on the briefs was Clifford H. Nelson, Jr.

James B. Coppess argued on the cause for intervenor. With him on the brief was James D. Fagan, Jr.

Ruth E. Burdick, Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were Julie Broido, Supervisory Attorney, and Jacob Frisch, Attorney. Ronald Meisburg, General Counsel, John E. Higgins, Jr., Deputy General Counsel, John H. Ferguson, Associate General Counsel, and Linda Dreeben, Deputy Associate General Counsel also entered an appearance.

Before: SENTELLE, Chief Judge, TATEL, Circuit Judge, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Chief Judge SENTELLE.

SENTELLE, Chief Judge.

*1 Laurel Baye Healthcare of Lake Lanier, Inc. petitions for review of an order of the National Labor Relations Board finding that Laurel Baye engaged in unlawful labor practices, and imposing a remedy. The Board cross-petitions for enforcement of the

order. Unlike the typical petition for review of an NLRB order, Laurel Baye does not advance allegations of error in the Board's findings, conclusions, or remedies, but rather challenges the authority of the Board to enter the order at all, as the Board had only two members and therefore did not meet the statutory Board quorum requirement of three members. The Board argues that because the Board itself had earlier delegated all of its authority to a three-member panel of which the two remaining Board members constituted a quorum, that quorum of the delegee panel had the authority to enter the order. Because we agree with Laurel Baye that the Board's purported order was beyond its lawful authority, we rule that the purported order is without force, deny the Board's cross-petition for enforcement, and remand the matter for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum.

I. BACKGROUND

A. Legal Background

The National Labor Relations Act (NLRA), now codified as 29 U.S.C. §§ 151-169 (2008), originally provided that the National Labor Relations Board (Board) would consist of three members. *See* Act of July 5, 1935, ch. 372, § 3(a), 49 Stat. 449, 451 (amended 1947). As subsequently amended and at all times relevant to the current proceeding, the NLRA provides that "the Board shall consist of five instead of three members." 29 U.S.C. § 153(a). Section 3(b) of the NLRA states, in relevant part, that:

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 sen-

tence hereof.

29 U.S.C. § 153(b).

This section encompasses four provisions. First, the delegation provision states that "[t]he Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." *Id.* Second, the vacancy provision provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." *Id.* Third, the Board quorum provision states that "three members of the Board shall, at all times, constitute a quorum of the Board." *Id.* Finally, the delegee group quorum provision states that "two members shall constitute a quorum of any [three-member] group [to which the Board delegated its powers pursuant to the delegation provision.]" *Id.*

B. Factual Background

*2 This case arises out of unfair labor practice charges brought in 2005 by Intervenor, United Food and Commercial Workers Union Local 1996 (United), and the General Counsel of the Board against Petitioner Laurel Baye Healthcare of Lake Lanier, Inc. (Laurel Baye). On July 12, 2006, after a hearing, an administrative law judge issued a proposed decision and order concluding that Laurel Baye had committed violations of sections 8(a)(1) and (a)(5) of the NLRA. Laurel Baye filed with the Board exceptions to the ALJ's decision, which the Board accepted on September 7, 2006.

Between the time that the ALJ issued his decision and the time that the Board took up review of Laurel Baye's exceptions to the decision the previously-five-member Board underwent a series of dramatic personnel changes. On December 16, 2007, Board Chairman Robert J. Battista's term expired, leaving four members on the Board. On December 20, 2007, the remaining four members of the Board (Wilma Liebman, Peter Schaumber, Peter Kirsanow, and Dennis Walsh) unanimously voted

to delegate all of its powers to a three-member group consisting of Board members Liebman, Schaumber and Kirsanow, effective December 28, 2007.

The purpose of this delegation of power was simple and transparent. According to the Board's minutes on that day, this action was done in anticipation "that in the near future [the Board] may for a temporary period have fewer than three Members," because the recess appointment terms for Members Walsh and Kirsanow were set to expire on December 31, 2007. The Board was of the view that "this action will permit the remaining two Members to issue decisions and orders in unfair labor practice and representation cases after [the] departure of Members Kirsanow and Walsh, because the remaining Members [Liebman and Schaumber] will constitute a quorum of the three-member group [under section 3(b) of the NLRA]." In addition to its own interpretation of the statutory text, the Board relied on the legal analysis set forth in a March 4, 2003 Memorandum Opinion issued by the Office of Legal Counsel of the U.S. Department of Justice. In its Memorandum Opinion, OLC concluded, as did the Board, that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." *Quorum Requirements*, 2003 WL 24166831 (Mar. 4, 2003).

On December 31, 2007, the recess appointments of Members Walsh and Kirsanow expired. Since January 1, 2008, the Board has functioned with the two remaining members, Liebman and Schaumber, who acted as a two-member quorum of the three-member delegee group created by the Board's December 20, 2007, action. On February 29, 2008, Members Liebman and Schaumber issued a Decision and Order adopting the ALJ's rulings, findings and conclusions, and adopting the ALJ's recommended Order in full (with only inadvertent errors corrected). This Decision and Order was issued under the two members' authority as a two-person quorum of the three-member group designated by

the Board. Kirsanow, by that time no longer a member of the Board, did not take part in hearing or resolving this case at all.

*3 Laurel Baye petitions this Court for review of the Board's decision. In so doing, "Laurel Baye does not challenge the merits of the Board's unfair labor practice findings or its remedy." Rather, Laurel Baye contends that the two members of the Board lacked the power to issue a Decision and Order in this case. The Board cross-petitions for enforcement of its unfair labor practice order.

II. ANALYSIS

This case concerns the interplay of the delegation, vacancy, and quorum provisions of section 3(b) of the NLRA, and requires us to determine whether, under these provisions, the two-member delegee group consisting of Members Liebman and Schaumber could lawfully issue an order finding that Laurel Baye engaged in unfair labor practices. Laurel Baye challenges both the legitimacy and continuing nature of the Board's delegation. The Board counters that its actions give effect to every provision within section 3(b). Specifically, the Board posits that there is a general quorum requirement of three members, except where powers have been delegated to a group of three, in which case the two-member delegee group quorum provision and the vacancy provision allow the remaining two members of the Board to continue to act as a delegee group.

Laurel Baye argues for the invalidity of the Board's action under two rationales. First, it contends that the Board has no authority to delegate its power to a three-member group that it knows will be acting as a two-member group due to expected term expiration. In Laurel Baye's view, the Board's delegation cannot stand because it is simply a sham. The second formulation of Laurel Baye's argument is that even if the Board could make the initial delegation, that delegation cannot survive the loss of a quorum on the Board itself. Because we find the

second formulation of the argument convincing, we pretermitted the first.

[1][2]“A cardinal principle of interpretation requires us to construe a statute ‘so that no provision is rendered inoperative or superfluous, void or insignificant.’” *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C.Cir.1998) (quoting *C.F. Commc'ns Corp. v. FCC*, 128 F.3d 735, 739 (D.C.Cir.1997)). The Board's interpretation of section 3(b), however, violates this principle of statutory interpretation by eschewing various portions of the statutory language. Specifically, the Board's position ignores the requirement that the Board quorum requirement must be satisfied “at all times.” 29 U.S.C. § 153(b) (emphasis added). Moreover, it ignores the fact that the Board and delegee group quorum requirements are not mutually exclusive. The delegee group quorum provision's language does not eliminate the requirement that a quorum of the Board is three members. Rather, it states only that the quorum of any three-member *delegee group* shall be two. *Id.* The use of the word “except” is therefore present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value. *See id.* The Board quorum requirement therefore must still be satisfied, regardless of whether the Board's authority is delegated to a group of its members. Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, “at all times,” satisfied. *Id.* But the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied.

*4 Indeed, if Congress intended a two-member Board to be able to act as if it had a quorum, the existing statutory language would be an unlikely way to express that intention. The quorum provision clearly requires that a quorum of the Board is, “at all times,” three members. 29 U.S.C. § 153(b). A modifying phrase as unambiguous as this denotes

that there is no instance in which this Board quorum requirement may be disregarded. Contrary to the Board's contentions, Congress did not intend to use the delegee group quorum provision as an exception to the requirement that the Board quorum requirement must be met “at all times.” Though the delegee group quorum provision is preceded by the prepositional phrase “except that,” *id.*, Congress's use of differing object nouns within the two quorum provisions indicates clearly that each quorum provision is independent from the other. The establishment of a two-member quorum of a subordinate group does not logically require any change in the provision mandating a three-member quorum for the Board as a whole. In fact, it does not seem odd at all that a sub-unit of any body would have a smaller quorum number than the quorum of the body as a whole. Quorums, after all, are usually majorities. A majority of three is smaller than a majority of five. It therefore defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum “at all times” would in the same sentence allow the Board to reduce its operative quorum to two without further congressional authorization. Congress provided unequivocally that a quorum of the Board is three members, and that this requirement must be met at all times. The delegee group quorum provision does not eliminate this requirement.

The strained interpretation by the Board is contrary to basic tenets of agency and corporation law. As the Restatement (Third) of Agency sets forth, an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended. Restatement (Third) of Agency § 3.07(4) (2006). An agent's delegated authority is also deemed to cease upon the resignation or termination of the delegating authority. 2 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 504 (2008); *see Emerson v. Fisher*, 246 F. 642, 648 (1st Cir.1918) (holding that a corporate treasurer's resignation terminated any authority delegated by the treasurer to other individu-

als). Moreover, as Fletcher notes, a delegating board of directors's powers are suspended whenever the board's membership falls below a quorum. *See* 2 Fletcher Cyclopaedia of the Law of Corporations § 421 ("If there are fewer than the minimum number of directors required by statute, [the remaining directors] cannot act as a board."). In the context of a board-like entity, a delegee's authority therefore ceases the moment that vacancies or disqualifications on the board reduce the board's membership below a quorum. It must be remembered that the delegee committee does not act on its own behalf. The statute confers no authority on such a body; it only permits its creation. The only authority by which the committee can act is that of the Board. If the Board has no authority, it follows that the committee has none. The delegee's authority to act on behalf of the Board therefore ceased the moment the Board's membership dropped below its quorum requirement of three members.

*5 We reach this conclusion despite the Board's contention that this court has permitted other agencies to continue to function with fewer than a majority of their membership positions filled. Specifically, the Board cites to two cases from this court: *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C.Cir.1983), and *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C.Cir.1996).

In *Yardmasters*, we held that the two sitting members of the National Mediation Board (NMB) could properly delegate the NMB's powers to one of the members, despite the fact that one of the two delegating members resigned later that day, thereby leaving a single NMB member to conduct the NMB's business. *Yardmasters*, 721 F.2d at 1342-45. The Board argues that our reasoning in *Yardmasters* enables the Board to take action to continue to operate. In *Yardmasters*, we noted that if the NMB "can use its authority to delegate in order to operate more efficiently, then *a fortiori* the Board can use its authority in order to continue to operate when it otherwise would be disabled." *Id.* at 1340 n. 26. Similarly, the Board argues that allowing the

Board to act to preserve its continuity would give effect to the language and purpose of the NLRA. After all, the Board contends, the inclusion of the delegation provision was designed to ensure that the Board was able to operate more efficiently. Moreover, the NLRA was designed to prevent "industrial strife." 29 U.S.C. § 151. As a result, the argument goes, the NLRB's reliance on a combination of its delegation, vacancy, and quorum provisions to ensure that it would continue to operate despite upcoming vacancies was consistent with the purpose of the NLRA, and was therefore proper.

We are unmoved. Our reasoning in *Yardmasters* does not apply to this case. In that case, we went to great lengths to note the "narrowness of our holding." *Yardmasters*, 721 F.2d at 1344. We expressly noted that our holding governed only whether the NMB was able to delegate its authority to a single NMB member. *See id.* at 1344-45. Further, we stressed that the holding was not meant to extend to agencies such as the NLRB, in light of the fact that the NLRB was "principally engaged in substantive adjudications [concerning] unfair labor practices [and] enforc[ing] individual rights...." *Id.* at 1345. We conclude that *Yardmasters'* reasoning is limited to its statutory context. Therefore, the principle set forth in *Yardmasters* that an agency board's delegation of power is "not affected by changes in personnel" due to it being "[i]nstitutional" in nature does not apply here. *Id.* at 1343. In response to the dissent's concerns that the court's validation of the NMB's delegation could lead to abuse of power, the *Yardmasters* court specifically stressed the fact that the NMB's functions were entirely unlike the functions of the National Labor Relations Board, which "adjudicate[s] unfair labor practices [and] seek[s] to enforce individual rights under the Act." *Yardmasters*, 721 F.2d at 1345. We emphasized that "the [NMB's] role is perhaps best illustrated by its critical duty ... of notifying the President that a labor dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service.'" *Id.* (quoting 45

the term of one member. The determination of that issue is not necessary to our decision, given that we have determined that the lack of a quorum on the Board as a whole is the determining factor. Concededly, the Board prevailed before the First Circuit on facts parallel to those before us. But the First Circuit did not decide the same issue. In any event, the First Circuit's decisions are not binding precedent upon us. We are bound only by the decisions of our circuit and the Supreme Court. This is in keeping with the Supreme Court's recognition that each court of appeals has a duty to resolve the rules independently of each other. *See United States v. Mendoza*, 464 U.S. 154, 160, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." (citing *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n. 26, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977))).

III. CONCLUSION

Finally, we acknowledge that the case before us presents a close question, and that neither OLC's interpretation nor the Board's desire to continue to function is entirely indefensible. Both were undoubtedly born of a desire to avoid the inconvenient result of having the Board's adjudicatory wheels grind to a halt. Nevertheless, we may not convolute a statutory scheme to avoid an inconvenient result. Our function as a court is to interpret the statutory scheme as it exists, not as we wish it to be. Any change to the statutory structure must come from the Congress, not the courts. U.S. Const. art. I, § 1. Perhaps a properly constituted Board, or the Congress itself, may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating the rump panel's previous decisions, including the case before us. *See, e.g., FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C.Cir.1996) (affirming properly reconstituted FEC Board's ratification remedy for its unconstitutional membership).

In the meantime, however, because we determine that the Board was not properly constituted and it did not have the authority to issue the order before us, we grant the petition of Laurel Baye Healthcare and order that the decision of the NLRB be vacated, and the case remanded for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum. We also deny the Board's cross-petition for enforcement of its invalid order.

So ordered.

C.A.D.C., 2009.

Laurel Baye Healthcare of Lake Lanier, Inc. v. N.L.R.B.

--- F.3d ---, 2009 WL 1162574 (C.A.D.C.), 186 L.R.R.M. (BNA) 2417

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Commercial Workers International Union, Local No. 1996, has intervened on appeal in support of the Board.

B. Rulings Under Review

The ruling of the Board under review is *Laurel Baye Healthcare of Lake Lanier, LLC*, 352 NLRB No. 30, 2008 WL 593779 (Feb. 29, 2008).

C. Related Cases

This case has not previously been before this or any other court.

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