Nos. 09-1164 & 09-1280

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NARRICOT INDUSTRIES, L.P.
Petitioner/Cross-Respondent

and

SHIRLEY MAE LEWIS AND HENRY VAUGHAN
Intervenors

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

MEREDITH L. JASON
Supervisory Attorney

KELLIE ISBELL
Attorney

National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570
(202) 273-2945
(202) 273-2482

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Narricot Industries, L.P. ("Narricot") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against Narricot. The Board found that Narricot provided unlawful assistance in the initiation and

circulation of a decertification petition, promised employees a wage increase if the United Brotherhood of Carpenters and Joiners of America, Carpenters Industrial Council, Local 2316 ("the Union") were decertified, and solicited employees to withdraw from union membership and revoke their dues checkoff. (JA 392.)[1]

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a) ("the Act" or "NLRA"). The Court has jurisdiction over this proceeding under Section 10(e) of the Act, 29 U.S.C. § 160(e), because the unfair labor practices occurred in Boykins, Virginia, and Murphreesboro, North Carolina, and because the Board's Order is a final order issued by a properly constituted, two-member Board quorum within the meaning of Section 3(b) of the Act, 29 U.S.C. § 153(b). However, because Narricot challenges the authority of the two-member Board quorum, that question is now presented for decision.

The Board's Decision and Order issued on January 30, 2009, and is reported at 353 NLRB No. 82. (JA 390-409.) Narricot filed its petition for review on February 9, 2009. The Board filed its cross-application for enforcement on March 5, 2009. On May 11, 2009, the Court granted Shirley Mae Lewis and Henry

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[1] "JA" references are to the joint appendix, "SA" references are to the supplemental appendix filed with the Board's brief, "Br." references are to Narricot's opening brief, and "I." references are to Intervenors' opening brief. When a record citation contains a semicolon, references preceding it are to the Board's findings, and references following it are to the supporting evidence.

Vaughan ("Intervenors") leave to intervene. The petition and the cross-application are timely; the Act places no limit on the time for filing such actions.

STATEMENT OF THE ISSUES PRESENTED

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

2. Whether substantial evidence supports the Board's findings that Narricot violated Section 8(a)(1) of the Act by providing unlawful assistance to a decertification petition, which tainted that petition, and by engaging in other coercive conduct, and, therefore, that Narricot violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union based on that petition and by unilaterally changing employees' terms and conditions of employment.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that Narricot unlawfully assisted a decertification effort, solicited an employee to sign a petition to remove the Union, solicited employees to withdraw their union membership and revoke dues checkoff, and promised employees a pay increase if they removed the Union as bargaining representative. The complaint also alleged that Narricot unlawfully withdrew recognition from the

Union and unilaterally implemented changes in wages, benefits, and other conditions of employment. (JA 393-94.)

Following a hearing, an administrative law judge found that Narricot violated Section 8(a)(1) and (5) of the Act. (JA 407-08.) Narricot filed exceptions to the judge's decision with the Board. (JA 390.) Because there was no specific complaint allegation, the Board reversed the judge's finding that human resources manager Kris Potter unlawfully promised wage and benefit increases to employee Anja Baumann. (JA 391 n.8.) The Board also reversed the judge's finding that supervisor Tim Beals provided unlawful assistance by failing to remove a decertification petition from the employee break room. (JA 391 n.9.) The Board otherwise affirmed the findings of the judge and adopted her recommended remedy, with modifications. (JA 392.) The facts supporting the Board's Order are summarized below; the Board's Conclusions and Order are described thereafter.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; Narricot's Operations

Narricot manufactures items made from woven fabric at its plants in Boykins, Virginia, and Murphreesboro, North Carolina. (JA 394; 32.) The Union has represented employees at the Boykins facility since 1976; the collective-bargaining agreement was expanded to cover employees at the Murphreesboro facility in 2005. (JA 394; 31, 34.) The Union represents about 329 employees at the two facilities; approximately 15 of them work at Murphreesboro. (JA 394; 32.) The most recent collective-bargaining agreement expired on October 2, 2007. (JA 394.)

The International Textile Group ("ITG") acquired Narricot's Boykins and Murphreesboro facilities in 2007. Most of ITG's other facilities are non-union. (JA 394.) After the acquisition, ITG hired Kris Potter as human resources ("HR") manager with responsibility for the non-union South Hill facility, as well as the Boykins and Murphreesboro facilities. (JA 394; 164.)

B. The Union Requests Bargaining for a New Contract; an Employee Asks about Ousting the Union; HR Manager Potter Responds by Creating a Decertification Petition

In July 2007, the Union requested negotiations over a new collective-bargaining agreement, and the parties began negotiating. (JA 394; 220.) In late

July or early August, employee Henry Vaughan approached Potter and asked how to get rid of the Union. (JA 400; 202.) Potter said he did not know and would get back to him. (JA 400; 202.) A week or two later, Vaughan was summoned to Potter's office and given a decertification petition prepared by the corporate HR department. (JA 394; JA 37, 50, 221, SA 10.) Potter told Vaughan that 220 signatures were needed to decertify the Union. (JA 400; SA 9.)

Vaughan asked other employees to sign the petition, including Anja Baumann, an HR intern from Germany. (JA 395.) Baumann told Vaughan she wanted to learn more about the issue because the situation with unions was different in Germany, and she "didn't really understand." (JA 395; 57.) Vaughan told her to see Potter if she wanted to know more. (JA 395; 56-57.)

Baumann told Potter she had just signed a petition and was interested in learning about what she had signed. (JA 395; 59.) Potter responded that Narricot's employees were represented by the Union, which cost Narricot money. (JA 395; 58-60.) He then told her that the union contract was ending, and "we need about 200 signatures" by October to decertify the Union. (JA 395; 60, 80.) Potter gave her a copy of the decertification petition and a list of employees. (JA 401-02, 405; 59-60, 94-95.)

Baumann took the employee list home and retyped it, organizing employees by department and shift to make it easier for her to solicit signatures. (JA 395; 61.)

Baumann made copies of the petition on one of Narricot's copiers and began soliciting signatures. (JA 395.) To start conversations with employees, she said she was "working on an HR project." (JA 395; 62.) She also told employees that workers at South Hill had gotten a raise and that ITG's benefits would not come to Boykins "as long as the Union is in here." (JA 66-67.) Baumann solicited signatures for 4 hours a day for more than a week, going to work an hour early and leaving an hour late to collect signatures from employees on all three shifts. (JA 395; 66.) Narricot paid Baumann overtime for her additional work soliciting signatures. (JA 395; 86.)

At Potter's direction, Baumann returned the signed petitions to him in the HR office, at the end of the workday. (JA 395; 43, 65.) Potter responded, "good, go on," or "good, good job." (JA 395; 81.) After 2 or 3 days, Potter began telling Baumann "we need more signatures." (JA 395; 65, 80.) Baumann collected signatures until employees stopped speaking with her and refused to sign the petition. (JA 395; JA 81, SA 6.)

At one point, employee Katrina Powell, who had previously signed Baumann's petition, approached Baumann and asked how to remove her signature. (JA 396; 63-64.) Baumann directed her to see Potter because he had the petitions. (JA 396; 64.)

When asked by employee Brenda Fields why she was collecting signatures, Baumann responded that she was "doing the job she was told to do by [] Potter." (JA 396; 144.) Baumann also told employee Willie Mitchell that she had paperwork that management had asked her to get employees to sign to get rid of the Union. (JA 396; 128-29.)

Potter also gave a copy of the petition to employee Shirley Lewis, and directed her along with Vaughan and Baumann to return the signed petitions to him. (JA 390, 396; 41-43, 196-98.) As Potter received the signed petitions, he compared the petitions with a list of employees and checked off the names that appeared on the petitions. (JA 396; SA 3.) He then reported to corporate HR that he was "gathering" employee signatures and that he had 212. (JA 398; JA 49, SA 4, 5.)

Supervisor Eric Hayes allowed employee Shelton McGee to put a copy of the petition in the "supervisors' office," an office shared by three supervisors, including Hayes. (JA 397; JA 193-94, SA 8.) McGee placed the petition on Hayes's desk. (JA 397; 193-94.) The petition remained on the desk for several days, and Hayes knew employees were going into the office to sign it. (JA 397; 194.) McGee returned the petition to Potter. (JA 41.)

Hayes approached employee Mitchell during work and said "there was a petition going around" and that "if you want to sign it, it's in the office." (JA 397;

127.) Hayes then told Mitchell "if you . . . sign it and get rid of the Union, you ought to get more money." (JA 397; 127.)

C. Narricot Solicits Employees to Withdraw their Union Membership and Revoke Dues Checkoff

In July, four employees at the Murphreesboro facility asked supervisor Tim Beals how to resign their union memberships. (JA 397; 173, 183.) He said he would get back to them. (JA 397; 174.) Beals called HR; HR told him there were two dates on which employees could resign membership, and that a certified letter had to be sent to the Union and Narricot. Beals relayed this information to the employees. (JA 397-98; 174.)

In September, Boykins supervisor Danny Mallon arrived at the Murphreesboro facility with three membership resignation letters and placed them on Beals's desk. (JA 398; 178-79, 184-85.) The letters were prepared and typed; the employees had only to sign their names and date the letter. (JA 399; 319-20.) The letters included a place to write in a certified mail number. (JA 399; 319-20.)

Neither Beals nor the employees had requested the letters; an assistant in HR created the resignation letters at Potter's direction. (JA 398; 40, 178-79, 184-85.) Beals gave the employees the letters and said "this is the document [] you all wanted." (JA 181.) The employees signed the letters in Beals's presence. (JA 180.) Beals took the signed letters back to the Boykins facility. (JA 398; 175.) Once Beals returned the signed letters to the Boykins HR department, Narricot

filled in the certified mail number, mailed the letters via certified mail, and paid the certified mail charges. (JA 398; JA 51, 112, 119, SA 2.) Narricot did the same with a fourth resignation letter prepared by Narricot and signed by employee Philip Bell. (JA 397-98; 222.)

Also in September, Boykins employee Edna Worrell asked employee Vaughan how to resign her union membership. (JA 398; 136.) Vaughan told her to see Potter. (JA 398; 136-37.) Worrell subsequently changed her mind about resigning and did not talk to Potter. Nevertheless, Potter approached her and asked, "Don't [you] need to see [me]?" (JA 398; 137.) Worrell asked whether Potter meant about the Union, and Potter said yes. (JA 398; 137.) When Worrell explained that she was going to stay in the Union, Potter asked whether she was "going to stay in and govern [herself]" and said "the rules would still be the same." (JA 398; 138.) Potter then told her that she had only a limited time to "sign the paper" and that Christine Murphy, Potter's secretary, had the paper in her office. (JA 398; 138.)

D. Narricot Withdraws Recognition from the Union and Unilaterally Changes Employees' Terms and Conditions of Employment

Narricot withdrew recognition from the Union on October 2, 2007. (JA 390; 224.) In November, Narricot gave employees their first raise in 4 years. (JA 407; JA 21, SA 7.) Narricot also eliminated double overtime premium pay, and

changed the health and welfare benefit plan, the holiday schedule, and the 401(k) plan. (JA 407; 21-22.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Liebman and Member Schaumber) found, in agreement with the administrative law judge, that Narricot violated Section 8(a)(1) of the Act by providing unlawful assistance to employees seeking to decertify the Union, including creating the decertification petition; promising a wage increase if the Union were decertified; soliciting employees to sign the decertification petition; and soliciting and assisting employees to sign letters revoking their union membership and dues checkoff. (JA 390-92.) The Board further found, also in agreement with the judge, that Narricot violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the Union, and by unilaterally changing several terms and conditions of employment without first notifying and bargaining with the Union. (JA 390-91 & n.11.)

The Board's Order requires Narricot to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (JA 408.) Affirmatively, the Order directs Narricot to: recognize and, on request, bargain with the Union as the exclusive representative of the employees, and embody any understanding reached in a signed agreement;

rescind any or all of the unilateral changes to employees' terms and conditions of employment, upon the request of the Union; and post a remedial notice. (JA 408-09.)

STANDARD OF REVIEW

The Board's findings of fact are "conclusive" under Section 10(e) of the Act, 29 U.S.C. § 160(e), if supported by substantial evidence on the record considered as a whole. *See Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 351 (4th Cir. 2001). Thus, a reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Grinnell Fire Prot. Sys. Co. v. NLRB*, 236 F.3d 187, 195 (4th Cir. 2000).

Further, this Court will not disturb credibility determinations absent "extraordinary circumstances." *WXGI, Inc. v. NLRB*, 243 F.3d 833, 842 (4th Cir. 2001); *see also USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 107 (4th Cir. 2000). Those circumstances are limited to rare instances in which "a credibility determination is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all." *WXGI*, 243 F.3d at 842 (citations and quotation marks omitted). Under that standard, an agency's fact finding should be

reversed only if the record "compels" a contrary conclusion. *INS v. Elias Zacharias*, 502 U.S. 478, 481 n.1, 483-84 (1992).

Finally, the Board's legal determination is "entitled to considerable deference" and must be upheld if it is reasonable and consistent with the policies of the Act. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979); *accord Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 273 (4th Cir. 2003). The Board's construction of the Act "should not be rejected merely because the courts might prefer another view of the statute." *Ford Motor*, 441 U.S. at 497.

SUMMARY OF ARGUMENT

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. Their authority to issue Board decisions and orders under such circumstances is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable situations under other federal administrative agency statutes, and general principles of administrative and common law. In contrast, Narricot's challenge is based on an incorrect reading of Section 3(b) and a misunderstanding of the statute governing federal appellate panels, which has no application to the Act.

Narricot's other challenges to the Board's Order similarly fail. Narricot provided direct assistance to the decertification effort, including creating the petition, providing copies to employees, soliciting an employee to sign the petition, and promising a pay raise if the Union were decertified. In addition, Narricot engaged in other coercive conduct, including soliciting employees to resign from the Union. It is well settled that such direct participation and unlawful assistance by an employer in a decertification campaign will taint the employer's reliance upon the resulting petition. Moreover, the Board's causation test articulated in *Master Slack Corp.*, 271 NLRB 78 (1984), is inapplicable because it addresses the very different question of whether an employer's prior, unremedied unfair labor practices later contributed to an erosion of union support among employees. As such, Narricot's challenge to the Board's finding of taint must be rejected, and the Board's Order should be enforced.

ARGUMENT

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

Chairman Liebman[2] 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 in this case. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009) ("*New Process*"), *petition for cert. filed*, __U.S.L.W. __ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Servs., v. NLRB*, 560 F.3d 36 (1st Cir. 2009) ("*Northeastern*"), *reh'g denied* (May 20, 2009); *Snell Island SNF LLC v. NLRB*, __ F.3d __, 2009 WL 1676116 (2d Cir. June 17, 2009) ("*Snell*"). *But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for reh'g filed* (May 27, 2009), *and response filed* (June 16, 2009), Nos. 08-1162, 08-1214 (discussed below) ("*Laurel Baye*").[3] As we show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b), and

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[2] On January 20, 2009, President Obama designated Wilma B. Liebman as Board Chairman. *See* BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

[3] The issue was argued before the Eighth Circuit on June 9, 2009, in *NLRB v. Whitesell Corp.*, No. 08-3291. The issue has been briefed in the Third Circuit in *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729 and 09-1035; the Eighth Circuit in *NLRB v. American Directional Boring, Inc.*, No. 09-1194; and the Tenth Circuit in *Teamsters, Local 523 v. NLRB*, Nos. 08-9568, 08-9577.

is supported by Section 3(b)'s legislative history, cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. Narricot's contrary argument must be rejected because it is based on an incorrect reading of Section 3(b) which fails to give meaning to all of its relevant provisions, and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

A. Background

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

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

Pursuant to this provision, the four members of the Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a group of three members, Members

Liebman, Schaumber and Kirsanow. When, three days later, Member Kirsanow's recess appointment expired,[4] the two remaining members, 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 powers of the remaining members and that "two members shall constitute a quorum" of any group of three members to which the Board had delegated its powers. Since January 1, 2008, this two-member quorum has issued over 300 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.[5]

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

In determining whether Section 3(b) of the Act expresses Congress' intent to grant the Board the option of operating the agency through a two-member quorum of a properly designated, three-member group, the Court should apply "traditional principles of statutory construction." *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987); *Chevron, U.S.A., Inc. v.*

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[4] Member Walsh's recess appointment also expired on December 31, 2007.

[5] *See* BNA, *Daily Labor Report*, No. 83, at p. AA-1 (May 4, 2009) (reporting that the two-member Board quorum had issued approximately 400 decisions, published and unpublished). The published decisions include all decisions in Volumes 352 NLRB (146 decisions), 353 NLRB (132 decisions), and 354 NLRB (33 decisions as of June 17, 2009).

Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 843 n.9 (1984). This process begins with looking to the plain meaning of the statutory terms. *See Dotson v. Pfizer, Inc.*, 558 F.3d 284, 301 n.8 (4th Cir. 2009); *Ayes v. United States Dept. of Veterans Affairs*, 473 F.3d 104, 108 (4th Cir. 2006). The meaning of a statutory 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 Ayes*, 473 F.3d at 108. Moreover, "a statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *accord PSINet, Inc. v. Chapman*, 362 F.3d 227, 232 (4th Cir. 2004).

Section 3(b) consists of three parts: (1) a grant of authority to the Board to delegate "all of the powers which it may itself exercise" to a group of three or more members; (2) a statement that vacancies shall not impair the authority of the remaining members of the Board to operate; and (3) a quorum provision stating that three members shall constitute a quorum, with an express *exception* stating that two members shall constitute a quorum of any three-member group established pursuant to the Board's delegation authority.

As the Seventh Circuit and the First Circuit concluded, the plain meaning of the statute's text authorizes a two-member quorum of a properly constituted, three-member group to issue decisions, even when, as here, the Board has only two

sitting members. *See New Process*, 564 F.3d at 845 ("As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text."); *Northeastern*, 560 F.3d at 41 ("the Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)"). As both decisions recognize, Section 3(b)'s delegation, vacancy, and quorum provisions, in combination, authorized the Board's action here. The Board first delegated all of its powers to a group of three members, as authorized by the delegation provision. As provided by the vacancy provision, the departure of Member Kirsanow after his recess appointment expired on December 31 did not impair the right of the remaining Board members to continue to exercise the full powers of the Board which they held jointly with Member Kirsanow pursuant to the delegation. And because of the express exception to the three-member quorum requirement when the Board has delegated its powers to a group of three members, the two remaining members constituted a quorum—the minimum number legally necessary to exercise the Board's powers.

Moreover, the Seventh Circuit (*New Process*, 564 F.3d at 846) and the First Circuit (*Northeastern*, 560 F.3d at 41-42), both noted that two persuasive authorities provide additional support for this reading of Section 3(b)'s plain text.

First, in *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), where the Board had four sitting members, the Ninth Circuit held that Section 3(b)'s two-member quorum provision authorized a three-member group to issue a decision even after one panel member had resigned. The court held that it was not legally determinative whether the resigning Board member participated in the decision, because "the decision would nonetheless be valid because a 'quorum' of two panel members supported the decision." *Id.* at 123. Second, the United States Department of Justice's Office of Legal Counsel ("OLC"), in a formal opinion, concluded that the Board possessed the authority to issue decisions with only two of its five seats filled, where the two remaining members constituted a quorum of a three-member group within the meaning of Section 3(b). *See Quorum Requirements,* Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

The D. C. Circuit's contrary conclusion is based on a strained reading of Section 3(b) that does not give operative meaning to all of its relevant provisions. In *Laurel Baye*, 564 F.3d at 472-73, the D.C. Circuit held that Section 3(b)'s provision that "three members of the Board shall, *at all times*, constitute a quorum of the Board" (29 U.S.C. § 153(b), emphasis added), prohibits the Board from acting in any capacity when it has fewer than three sitting members, despite Section 3(b)'s express exception that provides for a quorum of two members when

the Board has delegated its powers to a three-member group. The court concluded that the two-member quorum provision that applies to a three-member "group" is not in fact an exception to the three-member quorum requirement for the "Board," because the former applies to a "group" and the latter applies to the "Board." *See id.* at 473. The court stated that Congress' use of the two different object nouns indicates that each quorum provision is independent from the other, and thus the two-member quorum provision does not eliminate the requirement that there be a three-member quorum present "at all times." *Id.*

The D.C. Circuit's interpretation fails to give the critical terms of Section 3(b) their ordinary and usual meaning, thereby violating the cardinal canon of statutory construction "that courts must presume a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see Flores-Figueroa v. United States*, ___ U.S. ___, 129 S.Ct. 1886, 1890-91 (May 4, 2009) (applying "ordinary English" to determine the meaning of a statute).

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."

Laurel Baye's refusal to give full effect to this express exception is based on an assumption 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. That assumption is erroneous. *Laurel Baye* ignores that, 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).

Laurel Baye 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) ("*Yardmasters*") (quoting ROBERT'S RULES OF ORDER 16 (rev. ed. 1981)). Under the court's construction of Section 3(b), however, the actual presence of a two-

member quorum, 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 *Laurel Baye* court correctly states that Congress intended that "each quorum provision is independent from the other" (564 F.3d at 473), but then flouts that clear intent by denying Section 3(b)'s two-member quorum provision *any* truly independent role. Rather, under the court's construction, whether a two-member quorum is ever a legally sufficient number to decide a case is wholly *dependent* on the presence of a three-member quorum.[6] In so holding, the court violated a cardinal principle of statutory construction 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)).

Laurel Baye also fails to read the words "except" and "quorum" in the context of Section 3(b)'s textually interrelated provisions authorizing three or more Board members to delegate "any or all" of the Board's powers to a three-member group, two members of which "shall constitute a quorum." The court mistakenly

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[6] *See New Process*, 564 F.3d at 846 n. 2 ("[The employer's] reading, on the other hand, appears to sap the quorum provision of any meaning, because it would prohibit a properly constituted panel of three members from proceeding with a quorum of two.")

distinguishes "the Board" and "any group" so that no "group" can continue to act if the membership of "the Board" falls below three members. *Laurel Baye*, 564 F.3d at 473. That conclusion ignores that where, as here, the Board has delegated all its powers to a three-member group, that group, possessing all the Board's powers, cannot logically be distinguished from the Board itself. *See Northeastern*, 560 F.3d at 41 (upholding "the Board's delegation of *its institutional power* to a panel that ultimately consisted of a two-member quorum" (emphasis added)).

Narricot asserts (Br. 53) that, when Member Kirsanow's appointment expired, a "group of three" no longer existed and thus the two remaining members could no longer constitute a quorum of that group. That argument ignores that the Board delegated all its powers to a group of three members, and that the authority of the remaining members to exercise the Board's powers as a two-member quorum was unaffected by the vacancy created by Member Kirsanow's departure. Indeed, the effect that Congress intended to safeguard against—that a vacancy would preclude the remaining members from exercising the Board's powers—would result if, as Narricot suggests, Member Kirsanow's departure disempowered the remaining two-member quorum.[7] In contrast, the Board's reading of Section

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

3(b) properly gives full effect to the delegation, vacancy, and quorum provisions as they act in combination.

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

The meaning of statutory language, as noted, cannot be determined by isolating particular terms, and must take into account the intent and design of the entire statute. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574, 578 (1995); *In re Apex Exp. Corp.*, 190 F.3d 624, 641 (4th Cir. 1999). Thus, ascertaining that meaning often requires resort to historical materials, including legislative history.

A brief history of the Board's operations and of the legislation that ultimately became Section 3(b) of the Act confirms that Congress intended for the Board to have the power to adjudicate cases with a two-member quorum. In the Wagner Act of 1935, which created a three-member Board, Section 3(b), in its entirety, provided: "A vacancy on the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and two members of the Board shall, at all times, constitute a quorum."[8] Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal

[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).

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).

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.[10] In 1947, however, when Congress was considering the Taft-Hartley amendments, the original two-member quorum provision was not a matter of concern. Indeed, the House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers.[11]

The Senate bill, while proposing to enlarge the Board and amend the quorum requirement, explicitly preserved the Board's authority to exercise its powers

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

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

[11] *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.

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.[12] The 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.[13] Rather, as the Senate Committee on Labor explained, the proposed expansion of the Board was designed to "permit [the Board] to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage."[14] *See Snell*, 2009 WL 1676116, at *9 (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

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

[13] Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

[14] S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414. *See* remarks of Sen. Taft, 93 Cong. Rec. 3837 (Apr. 23, 1947), *2 Leg. Hist. 1947*, at 1011. The three-member groups that the Senate proposed for the NLRB were similar to the three-member divisions that Congress had previously enacted for the Interstate Commerce Commission ("the ICC") and the Federal Communications Commission ("the FCC"). Both the FCC and ICC statutes identically provided that "[t]he Commission is . . . authorized . . . to divide [its] members . . . into . . . divisions, each to consist of not less than three members. . . ." 48 Stat. 1068; Act To Provide for the Termination of Federal Control of Railroads, ch. 91, § 431, 41 Stat. 492. *See Eastland Co. v. FCC*, 92 F.2d 467, 469 (D.C. Cir. 1937).

accepted, without change, the Senate bill's delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members.[15]

The new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee created by Title IV of the Taft-Hartley Act to study labor relations issues[16] reported to Congress the following year:

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

Staff of J. Comm. on Labor-Management Relations, 80th Cong., *Report on Labor-Management Relations*, Pt. 3, at 9 (J. Comm. Print. 1948).[17] In this way, the Board

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[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.

[16] *See* 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

[17] *See also Labor-Management Relations: Hearings Before J. Comm. on Labor-Management Relations*, 80th Cong. Pt. 2 at 1123 (statement of Paul M. Herzog, Chairman, NLRB) (reporting that "[o]ver 85 percent of the cases decided by the Board in the past 3 months have been handled by rotating panels of 3 Board

was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.[18]

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

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

New Process, 564 F.3d at 847.

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

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members" and that the panel system "has added greatly to the Board's productivity").

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

were dissatisfied with the consequences of the two-member quorum provision in the original NLRA, it could have changed or eliminated that quorum provision in 1947, when it enacted comprehensive amendments to the Act. Instead, Congress preserved the Board's power to adjudicate labor disputes with a two-member quorum where it had previously exercised its delegation authority.

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

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

Narricot (Br. 53-55) attacks the Board's delegation of authority as a "sham" on the grounds that the Board was aware that Member Kirsanow's departure was imminent and that the delegation would soon result in the Board's powers being exercised by a two-member quorum consisting of Members Liebman and Schaumber. Rejecting that argument, the Second Circuit recognized that the anticipated departure of one member of the group "has no bearing on the fact that

the panel was lawfully constituted in the first instance." *Snell*, 2009 WL 1676116, at *7.

Indeed, as both the Seventh Circuit and the First Circuit 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. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996), after the five-member Securities and Exchange Commission ("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. *Id.* at 582 & n.3. In upholding both the rule and a subsequent decision issued by a two-member quorum of the SEC, the D.C. Circuit declared the rule "prudent," because "at the time it was promulgated the [SEC] consisted of only three members and was contemplating the prospect it might be reduced to two." *Id.* at 582 n.3.

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. It is true that the cases are distinguishable, but the critical distinction noted by the court in *Laurel Baye* actually points directly to the greater strength of the Board's case. In *Yardmasters*, the court faced the question whether an agency that acted principally in a non-adjudicative capacity could continue to function when its membership fell short of the quorum required by its authorizing statute. *See* 721 F.2d at 1341-42. That problem is not presented here. Here, unlike *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)).

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

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

As the Supreme Court explained in *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967), Congress enacted statutes creating administrative agencies against the backdrop of the common-law quorum rules applicable to public bodies, and these common-law rules were written into the enabling statutes of several agencies, including the Board. *Id*. at 183-86 (also identifying the ICC).[19]

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

At common law, the power held by a public board was held "not individually but collectively" (*Commonwealth ex rel. Hall v. Canal Comm'rs*, 9 Watts 466, 471, 1840 WL 3788, at *5 (Pa. 1840)), and "considered joint and several" among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320, 1875 WL 3418, at *16 (W.Va. 1875). Consistent with those principles, the majority view of common-law quorum rules was that vacancies on a public board do not impair a majority of the remaining members from acting as a quorum for the body (see *Ross v. Miller*, 178 A. 771, 772 (N.J. Sup. Ct. 1935) (collecting cases)), 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) (where city council was composed of 8 aldermen and 1 mayor, and the terms of 4 aldermen expired, vote of two of the remaining aldermen and the mayor was valid because they constituted a quorum of the five remaining members).[20]

The D.C. Circuit recognized the relevance of these common-law quorum principles in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), when it

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

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 countermanding provision in its authorizing statute, the SEC lawfully promulgated a two-member quorum rule that would enable the commission to issue decisions and orders when only two of its five authorized seats were filled.

The common-law principles 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. *See New Process*, 564 F.3d at 848 (*Falcon Trading* supports the Board's authority to issue decisions pursuant to Section 3(b)'s two-member quorum provision). The *Laurel Baye* court incorrectly ignored those principles in deeming *Falcon Trading* inapplicable. 564 F.3d at 474-75.

The common-law quorum rule imbedded in Section 3(b)'s express exception for groups is also similar to the quorum rule upheld in *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir 1983). There, the 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.* 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.

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

In *Laurel Baye*, the D.C. Circuit not only failed to interpret Section 3(b) in light of applicable common-law quorum principles, it erroneously cited "basic tenets of agency and corporation law" to hold that "the moment the Board's

membership dropped below its quorum requirement of three" all authority previously delegated by the Board to the group ceased. *Laurel Baye*, 564 F.3d at 473 (citing various legal treatises). In thus giving controlling weight to "basic tenets of agency and corporation law," the *Laurel Baye* court failed to heed the warning of the treatises upon which it relied that governmental bodies are often subject to special rules not applicable to private bodies.[21]

Specifically, the court 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"). "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

[21] *See* FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2 (2008) (distinguishing between private and municipal corporations, stating that "the law of municipal corporations [is] its own unique topic," and concluding that "[a]ccordingly, this treatise does not cover municipal corporations."). Similarly, RESTATEMENT (THIRD) OF AGENCY (2006), in its introduction, states that it "deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government."

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.

Laurel Baye's misapprehension concerning the governing common-law principles also led it unwarrantedly to disregard the teaching of its *Yardmasters* decision. There, the D.C. Circuit properly rejected reliance on the principles of agency and private corporation law it erroneously invoked in *Laurel Baye*. The court in *Yardmasters* discerned that the delegation and vacancies provisions of the federal statute at issue there demonstrated that Congress intended that certain operations of a public agency should continue to function in circumstances where a private body might be disabled. 721 F.2d 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.

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

Narricot argues (Br. 54) that the two-member quorum provision of Section 3(b), like the quorum provisions governing assignment of cases in the federal Circuit Courts, is limited to situations where one member of a panel which has been assigned a particular case dies or is incapacitated before the case issues. Section 3(b) of the NLRA, however, differs greatly from the statutes governing appellate judicial panels that require the assignment or participation of at least three judges.

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

promulgate the rules and regulations necessary to implement the NLRA. *See* 29 U.S.C. §§ 154, 156.

By contrast, the primary judicial panel statute, in relevant part, is limited to adjudication of cases, providing that a federal appellate court must assign each case that comes before it to a three-judge panel. *See* 28 U.S.C. § 46(b) (requiring "the hearing and determination of cases and controversies by separate panels, each consisting of three judges"). *See also Murray v. Nat'l Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (relying on legislative history to find that Congress intended 28 U.S.C. § 46(b) to require that, "'in the first instance, all cases would be assigned to [a] panel of at least three judges'") (quoting Sen. Rep. No. 97-275, 97th Cong., 2d Sess. 9 (1982)).

Moreover, Section 3(b), unlike 28 U.S.C. § 46(b), does not contain an express requirement that particular cases be assigned to particular groups or panels of Board members. Therefore, a delegation of "all the Board's powers" to a three-member group means that all cases that are pending or may come before the Board are before the group. Thus, the two-member quorum retains the authority to consider and decide those cases, including the authority to issue the decision in this case.[22]

[22] Narricot argues (Br. 55 n. 10) that *Northeastern*, 560 F.3d 36, is distinguishable because that case was before the Board prior to the end of Member Kirsanow's appointment, and this case did not come to the Board until after his

The Supreme Court's decision in *Nguyen v. United States*, 539 U.S. 69 (2003), calls attention to additional reasons why construing Section 3(b) of the NLRA to incorporate restrictions found in federal judicial statutes would constitute legal error. *Nguyen* illustrates that the judicial panel statute, 28 U.S.C. § 46, places limitations on the courts that Congress did not place on the Board in enacting Section 3(b) of the NLRA. *See New Process*, 564 F.3d at 847-48. In *Nguyen*, the Court held that the judicial panel statute requires that a case must be assigned to three Article III judges, that the presence of an Article IV judge on the panel meant that it was not properly constituted, and that the two Article III judges on the panel could not issue a valid decision, even though Section 46(d) provides that two Article III judges constitute a quorum. *See* 539 U.S. at 82-83. The three-member group of Board members to which the Board delegated all of its powers, however, *was* properly constituted pursuant to Section 3(b), and thus nothing in the Court's *Nguyen* opinion—even if it were applicable—would prevent the two-member quorum from continuing to exercise those powers. Indeed, *Nguyen* specifically stated that two Article III judges "would have constituted a quorum if the original panel had been properly created . . . ." 539 U.S. at 83. That is analogous to the

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appointment expired. Because all of the Board's powers were delegated to the three-member group, however, the two-member quorum retained the authority to exercise all of those powers, including the authority to decide cases that came to the Board after Member Kirsanow's departure.

situation here. *Cf. United States v. Desimone*, 140 F.3d 457, 458-59 (2d Cir. 1998) (valid decision was issued by two judges, as quorum of panel properly constituted at its inception, after death of third panel member).[23]

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

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

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT NARRICOT VIOLATED SECTION 8(a)(1) OF THE ACT BY PROVIDING UNLAWFUL ASSISTANCE TO THE DECERTIFICATION EFFORT AND ENGAGING IN OTHER COERCIVE CONDUCT, AND, THEREFORE, THAT NARRICOT'S WITHDRAWAL OF RECOGNITION FROM THE UNION VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

A. Introduction

It is undisputed that Narricot withdrew recognition from the Union and thereafter made unilateral changes in employees' terms and conditions of employment. Narricot argues that this conduct did not violate Section 8(a)(5) and (1) of the Act because the employee decertification petition established that the Union had in fact lost the support of a majority of unit employees. The Board, however, found that Narricot's conduct exceeded the bounds of permissible assistance to employees and tainted the decertification petition. Narricot's unlawful conduct included:

- Without being asked to do so by employees, HR manager Potter created the decertification petition.
- Potter gave copies of the petition to employees Vaughan, Lewis, and Baumann.
- Without being asked by the employees, Potter told employees Vaughan and Baumann how many signatures were needed to decertify the Union.
- Potter directed employees Vaughan, Lewis, and Baumann to return the signed petitions to him.

- When employee Baumann returned petitions, Potter told her "good job" or that he needed more signatures.

- Supervisor Hayes allowed an employee to put a copy of the decertification petition on Hayes's desk.

- Hayes told employee Mitchell that employees would get a raise if the Union were decertified and told Mitchell he could sign the decertification petition in Hayes's office.

- After four employees at the Murphreesboro facility asked how to resign their union membership, Potter directed HR to prepare resignation letters.

- A supervisor gave three Murphreesboro employees the resignation letters and waited while they signed the letters. Narricot then mailed the letters by certified mail at its own expense.

- Potter solicited employee Worrell to go to the HR office and sign a resignation letter.

By providing more than "ministerial aid" to the decertification effort, promising a pay raise if the Union were decertified, soliciting an employee to sign the petition, and soliciting employees to withdraw their union membership and revoke dues checkoff, Narricot violated Section 8(a)(1) of the Act, and its conduct tainted the decertification petition. (JA 407.) Thus, Narricot's withdrawal of recognition and subsequent unilateral changes to employees' terms and conditions of employment violated Section 8(a)(5) and (1) of the Act. *See Hancock Fabrics*, 294 NLRB 189, 192 (1989), *enforced mem.*, 902 F.2d 28 (4th Cir. 1990); *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985). *Accord V&S ProGalv v. NLRB*, 168 F.3d 270, 276-77 (6th Cir. 1999).

B. An Employer May Not Lawfully Withdraw Recognition on the Basis of a Petition Signed by a Majority of Employees if the Employer Is Found To Have Directly Participated and Unlawfully Assisted in the Decertification Campaign

Section 7 of the Act, 29 U.S.C. § 157, guarantees employees "the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Once employees have chosen to be represented by a labor organization, Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), requires their employer to recognize and bargain with that union.[24] Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), implements the guarantee of Section 7 by making it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of [their Section 7] rights."

The Board will presume that, once chosen, a union retains its majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-86 (1996). The presumption of majority status is irrebuttable during the term of a collective-bargaining agreement; upon expiration of the collective-bargaining agreement, the

[24] Section 8(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 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]," which includes employees' "right . . . to bargain collectively through representatives of their own choosing," 29 U.S.C. § 157. A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

presumption becomes rebuttable. *Auciello*, 517 U.S. at 785-87. *Accord NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 186 (4th Cir. 2003).

Consistent with these principles, the Board, in *Levitz Furniture Co.*, 333 NLRB 717, 720 (2001), held that an employer may lawfully withdraw recognition from an incumbent union, and defeat the rebuttable presumption of majority support, by showing that the union, in fact, lacked majority support at the time recognition was withdrawn. *See, e.g., NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 259 n.4 (4th Cir. 2008); *Levitz*, 333 NLRB at 717. As this Court has cautioned, however, "an employer . . . withdraws recognition at its peril," because, if the employer fails to prove that the union had, in fact, lost majority support at the time the employer withdrew recognition, then its withdrawal of recognition will have violated the Act. *HQM*, 518 F.3d at 261 (quoting *Levitz*, 333 NLRB at 725).

Generally, a petition signed by a majority of the employees stating that they no longer wish to be represented by the union will suffice to meet the employer's burden, absent countervailing evidence. *See id.; Levitz*, 333 NLRB at 725 n.49. But an employer may not lawfully withdraw recognition in the context of its own unlawful assistance that "taints" the employees' decertification efforts. *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 442 (7th Cir. 1993); *Texaco, Inc. v. NLRB*, 722 F.2d 1226, 1234 (5th Cir. 1984).

An employer provides unlawful assistance, in violation of Section 8(a)(1) of the Act, by "actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative." *Wire Prods. Mfg. Co.*, 326 NLRB 625, 640 (1998), *enforced mem. sub nom. NLRB v R.T. Blankenship & Assocs.*, 210 F.3d 375 (7th Cir. 2000). In determining whether an employer's assistance is unlawful, the Board asks whether the employer's conduct "constitutes more than ministerial aid." *Mickey's Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007) (quoting *Times Herald*, 253 NLRB 524 (1980)). While an employer does not violate the Act by providing merely "ministerial aid," the Board has explained that an employer's "actions must occur in a 'situational context free of coercive conduct.' In short, the essential inquiry is whether 'the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned.'" *Eastern States Optical*, 275 NLRB at 372 (quoting *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967)).

Any decertification petition generated with more than ministerial aid by the employer is necessarily tainted by unfair labor practices and cannot lawfully be relied on to withdraw recognition. *Eastern States Optical*, 275 NLRB at 372. *See also Placke Toyota, Inc.*, 215 NLRB 395, 395 (1974) ("unlawful for [employer] to involve himself in furthering employee efforts directed toward" removing union as

bargaining representative). Moreover, where an employer engages in unlawful conduct "aimed specifically at causing employee disaffection" with a union, that misconduct taints the decertification petition and "bar[s] any reliance" on the petition. *Hearst Corp*., 281 NLRB 764, 764-65 (1986), *aff'd mem*. 837 F.2d 1088 (5th Cir. 1988).

Courts have acknowledged that the Board's rule is well-settled. As one court has explained, "[t]he Board has long taken the view that an employer-assisted decertification petition ought to be canceled and the party returned to the status quo ante. The petition, tainted by the employer's unfair labor practices, is a nullity." *Ron Tirapelli Ford*, 987 F.2d at 442. *See also Texaco*, 722 F.2d at 1235-36 (petition tainted where employer unlawfully assisted its circulation and encouraged employees to sign); *V&S ProGalv*, 168 F.3d at 276-77 (petition tainted where employer asked employee to "see if he could obtain some signatures on it"); *NLRB v. Am. Linen Supply Co.*, 945 F.2d 1428, 1433-34 (8th Cir. 1991) (petitions tainted where employer "actively supported the decertification effort" and solicited signatures). Therefore, a withdrawal of recognition based on a tainted decertification petition violates Section 8(a)(5) and (1) of the Act. *Texaco*, 722 F.2d at 1235-36.

C. The Board Reasonably Determined that the Decertification Petition Was Tainted by Narricot's Unlawful Assistance, Solicitation of Employee Signatures, and Promises Made To Coerce Employees To Sign the Petitions

1. Potter creates a decertification petition, encourages employees to solicit signatures, and directs employees to return signed petitions to him

The Board found (JA 391) that Narricot "provided more than the permissible 'ministerial aid' in the initiation and circulation of the decertification petition." Narricot's conduct not only violated Section 8(a)(1) of the Act, but it also tainted the petition and, therefore, Narricot "could not lawfully rely on it as evidence of the Union's actual loss of majority status privileging [its] withdrawal of recognition." (JA 391.)

The record fully supports the Board's findings (JA 390) that HR manager Potter unlawfully encouraged and assisted the circulation of the decertification petition. As the administrative law judge found, Potter "did far more than simply provide 'ministerial assistance' to employees. He engineered, directed, and supported the petition effort." (JA 402.)

Indeed, the petition itself originated with Potter, not the employees. Potter had HR create the petition in response to employee Vaughan's question about how to oust the Union. Vaughan did not ask that Potter prepare a petition, suggest appropriate wording, or provide copies of a petition. Nevertheless, Potter called Vaughan into his office and gave him the newly company-created petition. Nor, as

the administrative law judge found, "is [there] evidence that Baumann asked for a copy of the petition." (JA 405.) Instead, she simply asked Potter to explain the petition. (JA 395; 58-59.) Potter responded by giving her a petition and a list of employee names.[25] (JA 401-02, 405; 59-60, 94-95.) In addition to providing copies of the petition to Vaughan, Lewis, and Baumann, Potter told Baumann and Vaughan the number of signatures needed to oust the Union and directed the three employees to return the signed petitions to him. (JA 390, 396; JA 41-43, 80, SA 9.)

Furthermore, the employees soliciting signatures clearly viewed Potter as orchestrating the decertification process. When Baumann asked Vaughan about the petition, he directed her to Potter. (JA 395; 56, 93.) Likewise, when employee Powell asked Baumann to remove her name from the petition, Baumann told Powell that Powell had to see Potter. (JA 396; 63-64.) Indeed, Potter admitted directing the employees soliciting signatures to return the signed petitions to him. (JA 390, 396; JA 41, 43, SA 4.) He kept track of the names on the petitions, checked off the employees who signed, and told corporate HR not only that he was

[25] Contrary to Narricot's suggestion (Br. 8, 24-25, 40), the judge explicitly discredited the testimony of both Baumann and Potter that Baumann asked for a list of employees and implicitly discredited Baumann's testimony that she asked for a copy of the petition. (JA 401-02, 405.) Narricot's argument that Potter only responded to Baumann's request is based on discredited testimony, and this Court will not disturb credibility findings without "extraordinary circumstances." *See WXGI, Inc. v. NLRB*, 243 F.3d 833, 842 (4th Cir. 2001).

"gathering" petitions, but also that he had 212 signatures. (JA 398; JA 49, SA 4, 5.) When Baumann returned petitions to his office at the end of each day, he told her "good job" or that he needed more signatures. (JA 395; 81.) Moreover, Baumann told employee Fields that she "was doing the job that she was told to do" by Potter, and told employee Mitchell that she had "paperwork that management had asked [her] to go around to get people to sign in order to eliminate the . . . Union." (JA 396; 128-29, 144.)

Where management officials, as here, "figure[] prominently in the encouragement and solicitation of signatures for a decertification petition," their conduct violates Section 8(a)(1) and taints the decertification petition. *See Boren Clay Prods. Co. v. NLRB*, 419 F.2d 385, 386 (4th Cir. 1970); *accord V&S ProGalv*, 168 F.3d at 276-77 (petition tainted where employer asked employee to get signatures). Furthermore, requests by company officials, like Potter, for employee assistance in gathering more signatures on an antiunion petition "tend to coerce employees in their right to refrain from involvement in the petition campaign." *Transp. Equip. Servs.*, 293 NLRB 125, 134 (1989). In sum, the circumstances show that Potter unlawfully assisted the decertification effort.

No matter who started the decertification effort, where employer assistance exceeds minimal support or ministerial aid, that assistance is unlawful even if it only takes place at a later stage of employee-initiated efforts. *See Indiana Pro-Cal*,

Inc. v. NLRB, 863 F.2d 1292, 1299-1300 (6th Cir. 1988) (petition initiated by employee nevertheless tainted by employer's act of drafting and circulating it). *See also Placke Toyota*, 215 NLRB at 395 (employer's assistance unlawful even though it "did not initiate the decertification petition or 'urge' employees to sign it"). Accordingly, Narricot's claim (Br. 12) that the employees initiated the decertification effort is irrelevant where, as here, Potter "engineered, directed, and supported" that effort. (JA 402.)

Although Narricot and Intervenors argue (Br. 11-12, I. 12-13) that Potter simply provided factual information to the employees, an employer's furnishing information about decertification is only lawful where the employer "does not actively encourage, promote, or assist employees in repudiating their collective-bargaining representative." *Amer-Cal Indus.*, 274 NLRB 1046, 1051 (1985). Nor does Section 8(c) of the Act, 29 U.S.C. § 158(c), immunize an employer from unlawfully assisting in a decertification effort. Section 8(c) of the Act provides that "[t]he expressing of any views, argument or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Employer speech that would otherwise be protected under Section 8(c) may be unlawful under Section 8(a)(1) of the Act, where, as here, "'the employer's statements may reasonably be said to have tended to interfere with employees' exercise of their Section 7

rights.'" *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998) (quoting *Lee Lumber & Bldg. Material Corp.*, 306 NLRB 408, 409-10 (1992)). As the Supreme Court noted in *Chamber of Commerce v. Brown*, Section 8(c) "expressly precludes regulation of speech about unionization 'so long as the communications do not contain a threat of reprisal or force or promise of benefit.'" __ U.S. __, 128 S.Ct. 2408, 2413 (2008) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)).

Thus, an employer "must maintain complete neutrality of action" with regard to its employees' efforts to decertify their bargaining representative. *Texaco,* 722 F.2d at 1231. While an employer "may *voice* preference," it "may not act by way of preference." *Id.* And Potter went far beyond merely voicing his preference: he had HR create the decertification petition, told employees how many signatures were necessary to oust the Union, collected the signed petitions, and repeatedly encouraged Baumann to get additional signatures. An employer's request for employee assistance in gathering more signatures coerces and intimidates employees by "conveying the impression that [the employer] was monitoring the petition's course," and "put[s] the employees who were targets of his solicitations in the position of risking his displeasure if they did not follow through on his requests for more signatures." *Transp. Equip. Servs.*, 293 NLRB at 133-34. *Accord V&S ProGalv,* 168 F.3d at 276. Therefore, as the Board found

(JA 390-91), Potter "actively participated in the decertification effort," and thereby violated the Act.

2. Supervisor Hayes allowed an employee to put the petition in the supervisors' office, then solicited an employee to sign it and promised him a wage increase if the Union were ousted

Supervisor Hayes also provided unlawful assistance to the decertification effort by allowing an employee to put a copy of the petition on his desk in the office widely known as the "supervisors' office." (JA 397; JA 193-94, SA 8.) He allowed the petition to remain there for several days, and he knew employees were entering the office to sign it. (JA 397; 194.) By "permitting the use of Company supervisory offices for soliciting," an employer gives "every appearance that it approved of the petition and that it encouraged employees to sign." *Texaco*, 722 F.2d at 1233; *see also Placke Toyota*, 215 NLRB at 395 (employer acted unlawfully by allowing petition to remain for several days on supervisor's desk in view of employees). Therefore, the Board reasonably found that Hayes violated Section 8(a)(1) of the Act. *See id*. at 1233.

Furthermore, as employee Mitchell testified, Hayes told him "there's a petition going around" and that "if you want to sign it, it's in the office." (JA 397; 127.) Hayes then told Mitchell "if you . . . sign it and get rid of the Union, you ought to get more money." (JA 397; 127.) Soliciting an employee to sign a decertification petition and promising a raise to induce him to sign is clearly a

violation of the employer's required neutrality. *See NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 182 (4th Cir. 2003). It does not matter, contrary to Narricot's claim (Br. 31-32), whether other employees knew that Hayes solicited Mitchell; the solicitation itself in the aid of a decertification petition is a violation of Section 8(a)(1). *See NLRB v. Am. Linen Supply Co.*, 945 F.2d 1428, 1433 (8th Cir. 1991) (employer "actively supported" decertification effort by soliciting a single employee, and by providing work time, copying, use of offices, and a notary).

Narricot argues (Br. 27) that the administrative law judge should not have credited Mitchell's testimony that supervisor Hayes promised a wage increase if the Union were decertified. This Court, however, will not disturb the Board's credibility findings absent "extraordinary circumstances." *WXGI, Inc. v. NLRB*, 243 F.3d 833, 842 (4th Cir. 2001).

Narricot fails (Br. 27) to set out any "extraordinary circumstances," instead arguing that the Board incorrectly credited some, but not all, of Hayes's testimony, and arguing that Mitchell was not credible because he had received a verbal warning from Hayes. As Judge Learned Hand explained, "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *rev'd on other grounds*, 340 U.S. 474 (1951). Furthermore, the judge specifically found that even if Mitchell did harbor animus against Hayes,

Mitchell's testimony was "more credible" than Hayes's and that "Mitchell did not appear to embellish or exaggerate his description of the conversation." (JA 403 & n.10.) Hayes meanwhile gave a "blanket denial" that he ever told any employee about a pay raise. (JA 403.) As this Court has explained, the "balancing of the credibility of witnesses is at the heart of the fact-finding process," and this Court will not "second-guess a fact-finder's determinations about who was the more truthful witness." *Transpersonnel,* 349 F.3d at 184.

Hayes, by soliciting an employee to sign the decertification petition, promising a wage increase, and allowing a petition to remain in the supervisors' office, engaged in unlawful conduct "aimed specifically at causing employee disaffection with their union." *Hearst Corp*., 281 NLRB 764, 764-65 (1986), *aff'd mem*. 837 F.2d 1088 (5th Cir. 1988). As these facts demonstrate and as the Board reasonably found (JA 402), Hayes's conduct "conveyed to employees that the petition was supported and promoted by management." Therefore, in addition to violating Section 8(a)(1) of the Act, Narricot could not rely on the petition as objective evidence of an actual loss of majority support, and its subsequent withdrawal of recognition from the Union violated Section 8(a)(5) of the Act.

3. The contention of Narricot and Intervenors that the Board applied the wrong line of precedent is mistaken

Narricot and Intervenors (Br. 28-42, I. 26-31) misperceive the settled law applicable to this case, which, as shown above, holds that an employer may not

lawfully withdraw recognition where the employer directly participated in and unlawfully assisted the decertification effort. Specifically, Narricot (Br. 28), joined by Intervenors (I. 28), contends that "the Board has ignored and chosen not to apply its own causation requirement" and instead "attempts to promulgate" an "entirely new standard." This contention is simply wrong.

The Board's rule – that employers cannot lawfully provide more than "ministerial aid" to a decertification effort – is not new. Certainly, the Board did not "announc[e]" a new standard in this case. (Br. 29, I. 28.) Rather, the Board applied its decades-old, court-approved rule: where an employer provides more than ministerial aid to a decertification petition, the employer's conduct taints the petition, and the employer cannot rely on that petition to withdraw recognition from the union. *See, e.g., V&S ProGalv*, 168 F.3d at 276-77; *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 442 (7th Cir. 1993); *Am. Linen*, 945 F.2d at 1433; *Hancock Fabrics v. NLRB*, 902 F.2d 28 (4th Cir. 1990), *enforcing mem.*, 294 NLRB 189 (1989); *NLRB v. United Union of Roofers, Local 81,* 915 F.2d 508, 512 n.6 (9th Cir. 1990); *NLRB v. Manhattan Eye, Ear & Throat Hosp.*, 814 F.2d 653 (2d Cir. 1987), *enforcing mem.*, 280 NLRB 113 (1986); *Texaco*, 722 F.2d at 1233, 1235-36; *NLRB v. Allen's IGA Foodliner*, 651 F.2d 438, 440-41 (6th Cir. 1981); *Mickey's Linen & Towel Supply, Inc.*, 349 NLRB 790 (2007); *Eastern States*

Optical, 275 NLRB at 372; *Placke Toyota*, 215 NLRB at 395; *KONO-TV-Mission Telecasting Corp.*, 163 NLRB 1005, 1006 (1967).

Narricot, erroneously, relies on cases in which the employer did not participate in or encourage the decertification effort, but, instead, unlike here, committed unfair labor practices that may have coerced employees to disavow the union. The Board's four-factor test articulated in *Master Slack Corp.*, 271 NLRB 78 (1984),[26] addresses the very different question of whether an employer "committed unfair labor practices that have negatively impacted the union's efficacy," thereby tainting the petition. *See Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 520 (4th Cir. 1998). The Board and courts apply *Master Slack* to cases that do not primarily involve the employer's direct assistance or participation in the decertification effort. *See, e.g.*, *Transpersonnel*, 349 F.3d at 188 (employer did not circulate or even know about petition); *Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F.3d 867, 873 (4th Cir. 1999) (no allegation that employer unlawfully assisted petition); *Pirelli Cable*, 141 F.3d at 520 (same); *NLRB v. D&D Enters.*, 125 F.3d 200, 203-04 (4th Cir. 1997) (same). *Lexus of Concord, Inc.*, 343

[26] Those factors are: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency of the unfair labor practices to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and union membership. *See Master Slack*, 271 NLRB at 84. *Accord Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 520-21 (4th Cir. 1998).

NLRB 851 (2004), is not directly on point, as Narricot claims (Br. 42), because the Board in *Lexus* applied *Master Slack* to analyze an unfair labor practice unrelated to the employees' decertification effort. *See Lexus*, 343 NLRB at 851-52.

In contrast, here, the Board found that the petitions were *directly* tainted by Narricot's actual, simultaneous, *and* unlawful participation in the decertification effort that resulted in the petitions. Thus, no causal connection need be inferred between any prior, unremedied unfair labor practices and the decertification petition, as is typical in *Master Slack* cases (JA 390 n.5). *Compare Mickey's Linen*, 349 NLRB at 791 (Board did not undertake causation analysis in finding that employer tainted petition by providing more than ministerial aid) *and Hearst Corp.*, 281 NLRB at 765 (Board did not engage in causal analysis where employer engaged "in unlawful activity aimed specifically at causing employee disaffection with their union" prior to and simultaneously with circulation of petition) *with NLRB v. Williams Enters.*, 50 F.3d 1280, 1288 (4th Cir. 1995) (affirming Board's findings that there was causal relationship between employer's unremedied antecedent unfair labor practices "and the subsequent expression of employee disaffection with an incumbent union").

Accordingly, Narricot's suggestion (Br. 33) that the Board should have taken evidence about the decline in union membership or alleged vacancies in steward positions to inform its causation analysis is incorrect. As the Board

explained (JA 391), under *Levitz*, this type of evidence, "even if considered cumulatively, would [not] be sufficient as proof of a union's loss of majority support." *See Levitz Furniture Co.*, 333 NLRB 717, 725, 728 & n.60 (2001); *Henry Bierce Co.*, 328 NLRB 646, 650 (1999), *enforced in relevant part*, 234 F.3d 1268 (6th Cir. 2000). Furthermore, as the Board noted (JA 391), because Narricot did not rely on this evidence at the time it withdrew recognition, it could not later use that evidence to justify its withdrawal. *See Levitz*, 333 NLRB at 725 (employer must prove union had lost majority support "at the time the employer withdrew recognition").

Under *Levitz*, an employer must "show actual loss of majority support" through objective evidence such as "a petition signed by a majority of the employees in the bargaining unit." *Id.* As this Court has explained, objective evidence of loss of majority support "does not refer to the 'force' of the evidence, but rather its 'source.'" *NLRB v. Mullican Lumber & Mfg.*, 535 F.3d 271, 277 (4th Cir. 2008) (citing *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 367-68 n.2 (1998)). Narricot has the burden to show that its withdrawal was "supported by evidence *external to [Narricot's] own (subjective) impressions.*" *Id*. (quoting *Allentown Mack*, 522 U.S. at 368 n.2). An unsolicited decertification petition qualifies as objective evidence, but that is what Narricot lacks. By participating in

and encouraging the decertification effort, Narricot cannot now rely on the petition to justify its withdrawal of recognition.

4. Section 10(e) of the Act Precludes the Court from Considering Intervenors' Challenge to the Board's Ministerial Aid Rule

In their brief (I. 14, 25), Intervenors argue that the Board's ministerial aid rule "must be struck down." Because Intervenors never presented this argument to the Board, it is not properly before this Court.[27]

Section 10(e) of the Act, 29 U.S.C. § 160(e), states, in pertinent part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This statutory provision represents "a jurisdictional bar to judicial review of issues not raised before the Board." *NLRB v. HQM of Bayside, LLC,* 518 F.3d 256, 262 (4th Cir. 2008) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)).

Here, Intervenors did not participate as a party in the Board proceedings, and Narricot did not challenge the rule before the Board. Indeed, Narricot, instead of attacking the Board's ministerial aid rule, excepted to the judge's "failure to find

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[27] Intervenors' arguments (I. 10-13, 26-31) that Section 8(c) of the Act allows employers to provide information about decertification to employees and that the Board failed to apply the *Master Slack* causal analysis were preserved by Narricot and are properly before the Court.

and conclude that Narricot provided nothing more than lawful ministerial aid . . . ." (SA 1.) Because Intervenors failed to contest the propriety of the Board's ministerial aid rule in proceedings before the Board – and can point to no extraordinary circumstances that prevented them from doing so – they have waived any right to object to the rule before this Court.

The Board's discussion and application of the ministerial aid rule does not, alone, preserve the issue for appeal. Rather, as this Court has explained, whether "the Board has or has not discussed an issue raises no necessary inferences with respect to [S]ection 10(e)." *HQM*, 518 F.3d at 263 (quoting *Local 900, Int'l Union of Elec. Radio & Mach. Workers v. NLRB*, 727 F.2d 1184, 1193 (D.C. Cir. 1984)).

Absent a proper exception, the Board has no notice that its rule is under attack, and is therefore deprived of the opportunity to resolve all issues within its jurisdiction. *See HQM*, 518 F.3d at 262-63. In short, to allow Intervenors to pursue their argument "would be to set the Board up for one ambush after another." *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497 (D.C. Cir. 1996).

D. Narricot Unlawfully Solicited Employees To Resign from the Union

In addition to unlawfully assisting the decertification effort, Narricot supervisors unlawfully solicited employees to resign their union membership and

revoke their dues checkoff authorizations. (JA 390 n.4.) The evidence shows that:

- Without being asked to by employees, HR manager Potter directed his assistant to create the resignation letters (JA 398; 40);
- Supervisor Mallon delivered resignation letters to the Murphreesboro facility even though employees had not requested them (JA 398; 178-79, 184-85);
- Potter made resignation forms available in the HR office at Boykins so that if employees "were interested in stopping their Union dues, then they could come up to see Christine to sign" (JA 40);
- Potter personally solicited Worrell to sign a resignation letter (JA 398; 137-38); and
- Narricot gathered the resignation letters from employees and mailed the letters to the Union at its own expense (JA 398; JA 51, 112, 119, SA 2).

Under similar circumstances, where an employer has, during work hours and on company property, prepared resignation forms and assisted employees in executing them, the Board and courts have consistently found that the employer's conduct violates the Act. *See Am. Linen Supply*, 945 F.2d at 1433; *Manhattan Eye, Ear & Throat Hosp.*, 280 NLRB 113, 114-15 (1986), *enforced*, 814 F.2d 653 (2d Cir.); *Texaco*, 722 F.2d at 1231-34. Furthermore, contrary to the claims of Narricot and the Intervenors (Br. 10, 24-25, I. 12), this conduct goes far beyond simply providing requested information to employees. For example, although four Murphreesboro employees asked supervisor Beals how to resign their union

membership, Narricot created and delivered the resignation letters 2 months after Beals answered the employees' questions. (JA 398; 178-79, 183-85.) Thus, the Board reasonably found (JA 390 n.4) that Narricot violated Section 8(a)(1) of the Act by soliciting employees to resign their union membership and revoke dues authorizations.

Narricot further argues (Br. 48) that none of the employees was actually coerced to sign resignation letters. Whether Narricot's conduct was actually coercive is irrelevant. As this Court has explained, "the relevant inquiry is whether the conduct in question had a reasonable tendency in the totality of circumstances to intimidate." *Transpersonnel,* 349 F.3d at 184. Here, Narricot prepared resignation letters, which were completely filled out except for the name, date, and certified mail number. Supervisor Beals waited nearby while the employees signed. Under these circumstances, the Board reasonably found that the employees would have felt "compelled" to sign the letters that Narricot specifically prepared for them. (JA 400.)

E. The Board Did Not Abuse its Discretion in Ordering Narricot to Rescind its Unilateral Changes and Bargain with the Union as a Remedy for the Unlawful Withdrawal of Recognition

The authority of the Board to fashion affirmative remedial orders to alleviate the effects of unfair labor practices is "a broad discretionary one, subject to limited judicial review." *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)

(quotation omitted). Consequently, a Board remedial order must be enforced "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). *Accord Williams Enters.*, 50 F.3d at 1289. There are two parts to the Board's Order in this case: Narricot must rescind any or all of the unilateral changes upon request by the Union, and recognize and, on request, bargain in good faith with the Union. (JA 408.) They are discussed in turn.

An employer fails to meet its statutory bargaining obligation under Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), when, absent an impasse in negotiations, it unilaterally changes its employees' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Such unilateral action violates the Act even where, as here, it occurs after a collective-bargaining agreement has expired. *Louisiana Dock Co. v. NLRB*, 909 F.2d 281, 286 (7th Cir. 1990). Contrary to Narricot's claim (Br. 48), Narricot stipulated that, following its withdrawal of recognition from the Union, it unilaterally implemented five, not three, changes to employees' terms and conditions of employment: Narricot increased wages, eliminated double overtime premium pay, and changed the health and welfare benefit plan, the holiday schedule, and the 401(k) plan. (JA 407; 21-22.) Because, as shown above, Narricot's withdrawal of recognition was unlawful, those

unilateral changes also violated Section 8(a)(5) and (1) of the Act. *See Hancock Fabrics*, 294 NLRB 189, 192 (1989), *enforced mem.*, 902 F.2d 28 (4th Cir. 1990).

Narricot argues (Br. 48) that the Board's Order is overbroad because it requires the company to rescind "any or all unilateral changes." Narricot's claim is incorrect because "strictly remedial matters need not be specifically alleged in the unfair labor practice complaint." *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1323-24 (7th Cir. 1991) (quoting *North Carolina Coastal Motor Lines, Inc.*, 219 NLRB 1009, 1010 (1975), *enforced*, 542 F.2d 637 (4th Cir. 1976)).

As fully discussed above, Narricot unlawfully withdrew recognition from the Union and thereafter refused to bargain. The Board's Order is appropriately tailored to restore the status quo ante through reestablishment of the unlawfully interrupted bargaining relationship. The Supreme Court long ago approved the Board's conclusion that, as a general rule, "the only means by which a refusal to bargain can be remedied is an affirmative order requiring the employer to bargain with the [u]nion which represented a majority at the time the unfair labor practice was committed." *Franks Bros. v. NLRB*, 321 U.S. 702, 703-04 (1944) (quotation omitted). *Accord Williams Enters.*, 50 F.3d at 1289-90.

In short, the Board's affirmative bargaining order adequately safeguards employee rights, prevents employers from profiting from their wrongful refusal to bargain, and restores incumbent unions to their rightful position as the employees'

chosen representative. In view of the foregoing, the Board's authority to issue an affirmative bargaining order in cases like this one is "too plain for anything but statement." *Franks Bros.*, 321 U.S. at 705.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny Narricot's petition for review and enforce the Board's Order in full.

REQUEST FOR ORAL ARGUMENT

The Board believes that oral argument would be of assistance to the Court and that 15 minutes per side would be sufficient.

s/Meredith Jason
MEREDITH JASON
Supervisory Attorney

s/Kellie Isbell
KELLIE ISBELL
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2945
(202) 273-2482

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
June 2009

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Section 3.

(a) The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. . . . [29 U.S.C. § 153(a).]

(b) 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).]

Section 7.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . [29 U.S.C. § 157.]

Section 8.

(a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; [29 U.S.C. § 158(a)(1).]

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [Section 159(a) of this title]. [29 U.S.C. § 158(a)(5).]

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit. [29 U.S.C. § 158(c).]

Section 10.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . . [29 U.S.C. § 160(a).]

(e) The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . [29 U.S.C. § 160(e).]

Relevant provisions of 28 U.S.C. § 46 ("Assignment of judges; panels; hearings; quorum") are as follows:

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel. . . . [28 U.S.C. § 46(b).]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1164 **Caption:** Narricot Industries, Inc. v. National Labor Relations Board

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(s) Kellie Isbell

Attorney for National Labor Relations Board

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CERTIFICATE OF SERVICE

All Case Participants Are CM/ECF Participants

I hereby certify that on June 19, 2009 , I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

James M. Powell, Esq.
J. Mark Sampson, Esq.
WOMBLE CARLYLE
SANDRIDGE & RICE PLLC
300 North Greene Street
Suite 1900
Greensboro NC 27401

William Messenger
National Right to Work
Legal Defense Foundation
8001 Braddock Road
Suite 600
Springfield VA 22160

s/ Linda Dreeben