

No. 09-1194

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

**LOCAL 2, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS**

Intervenor

v.

**AMERICAN DIRECTIONAL BORING, INC.
d/b/a ADB UTILITY CONTRACTORS, INC.**

Respondent

**SURREPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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INTRODUCTION

On June 12, 2009, this Court granted the Board's motion to file a surreply brief. The Board's surreply brief will address only the new arguments that American Directional Boring, Inc. d/b/a ADB Utility Contractors, Inc. ("ADB")

made in its reply brief concerning the authority of the Board's two-member quorum to issue the Order in this case.¹

After the Board filed its brief and before ADB filed its reply brief, the Seventh Circuit and the D.C. Circuit issued decisions addressing the authority of the Board's two sitting members to issue Board decisions, as a two-member quorum of a properly established, three-member group within the meaning of Section 3(b) of the National Labor Relations Act (29 U.S.C. §§ 151, 153(b)) ("the Act" or "the NLRA").² The Seventh Circuit, in agreement with the First Circuit, held that the plain meaning of Section 3(b)'s delegation, vacancy, and quorum provisions authorizes the two-member quorum to issue such orders. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845 (7th Cir. 2009), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 22, 2009) ("As the NLRB delegated its full powers to a

¹ On June 9, 2009, the same issue was argued before this Court in *NLRB v. Whitesell Corp.*, No. 08-3291. The issue has been fully briefed in the Third Circuit in *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729 and 09-1035 and *St. George Warehouse, Inc. v. NLRB*, Nos. 08-4875 and 09-1269; the Fourth Circuit in *Narricot Industries, L.P. v. NLRB*, Nos. 09-1164 and 09-1280; 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 and 08-9577.

² Section 3(b) of the Act provides in pertinent part as follows:

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

group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text.”); *Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *reh’g denied*, No. 08-1878 (May 20, 2009) (discussed in Board’s brief pp. 16, 19-20). Since ADB filed its reply brief, the Second Circuit also has upheld the authority of the 2-member quorum to issue decisions. *Snell Island SNF LLC v. NLRB*, ___ F.3d ___, 2009 WL 1676116 (2d Cir. June 17, 2009).

Contrary to those courts, the D.C. Circuit held that unless the Board has three sitting members, it cannot issue decisions, despite having delegated all its powers to a three-member Board group. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 546 F.3d 469, 472-76 (D.C. Cir. 2009), *petition for reh’g filed*, (May 27, 2009), *and response filed* (June 16, 2009), Nos. 08-1162, 08-1214. In its reply brief, ADB relies (Reply Br. 1-11) almost exclusively on the D.C. Circuit’s decision. As shown below, that decision is flawed.

ARGUMENT

A. 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 authority to a three-member group. The D.C. Circuit's interpretation, which ADB recites nearly verbatim, without citation (R. Br. 4-6), fails to give the critical terms in Section 3(b) their ordinary and usual meaning. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("courts must presume a legislature says in a statute what it means and means in a statute what it says there"); *Flores-Figueroa v. United States*, 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 have used 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 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) (quoting H. Robert, *Robert's Rules of Order* 16 (rev. ed. 1981)). Under *Laurel Baye*, however, the actual presence of a two-member quorum of the Board, possessed of all the Board’s powers by a valid delegation, is *never* a sufficient number to transact business unless there is also a third sitting Board member.

While correctly stating that Congress intended each quorum provision to be “independent” from the other (564 F.3d at 473), the D.C. Circuit flouted that intent by denying Section 3(b)’s two-member quorum provision *any* truly independent role. Rather, under the D.C. Circuit’s construction, whether a two-member Board quorum is ever a legally sufficient number to decide is made wholly *dependent* on the availability of a three-member quorum. As the Seventh Circuit explained, that

proposition “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.” *New Process*, 564 F.3d at 846 n.2. The D.C. Circuit’s holding therefore ignored 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 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)).

B. The D.C. Circuit's decision in *Laurel Baye*, which ADB echoes (R.Br. 6-10), mistakenly departed from established principles of the common law of public entities. As the Board's responsive brief stated (Br. 34), the D.C. Circuit recognized the relevance of common-law quorum principles in *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), in holding that the Securities and Exchange Commission ("SEC") lawfully promulgated a two-member quorum rule allowing the commission to issue decisions with only two of its five seats filled.

In *Laurel Baye*, the D.C. Circuit deemed *Falcon Trading* inapplicable to the present issue on the ground that, unlike the NLRA, the SEC's authorizing statute had no quorum provision, and therefore the SEC could exercise its statutory authority to create its own quorum rule. 564 F.3d at 474-75. The D.C. Circuit, however, overlooked that the same common-law principles that supported its upholding of the SEC's two-member quorum rule in *Falcon Trading* also inform the proper construction of the two-member quorum provision in Section 3(b) of the NLRA. The statutory mechanism Congress provided for the NLRB differs from the mechanism afforded the SEC, but the result—that two members of a properly-delegated three-member group constitute a quorum that can issue agency decisions—is equally valid.³

³ See *New Process*, 564 F.3d at 847 (*Falcon Trading* supports the Board's authority to issue decisions pursuant to Section 3(b)'s two-member quorum provision despite three vacancies on the Board).

ADB also asks this Court (R. Br. 6) to follow the lead of the D.C. Circuit by giving controlling weight to “basic tenets of agency and corporation law.” *Laurel Baye*, 564 F.3d at 473. In so doing, the D.C. Circuit failed to heed the warning of the very treatises it cited—namely, that governmental bodies are often subject to special rules not applicable to private bodies.⁴

Specifically, the D.C. Circuit 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 Laurel Baye*, 564 F.3d at 473 (citing RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006) for the proposition that “an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended”). “Agency” is defined as “the fiduciary relationship that arises when one person (“the principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests consent or otherwise consents so to act.” *Id.*, § 1.01. The delegation of institutional powers to the three-member group authorized by Section 3(b) does not create any kind of “fiduciary” relationship and

⁴ *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.”

does not involve the three-member group acting on “behalf” of the Board or under its “control.” Instead, the Board members in the group have been jointly delegated all of the Board’s institutional powers, and thus are fully empowered to exercise them, not as Board agents, but as the Board itself.

The D.C. Circuit’s misapprehension concerning the governing common-law principles also led it unwarrantedly to disregard the teaching of *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983). In *Yardmasters*, the D.C. Circuit properly rejected reliance on the principles of agency and private corporation law that it erroneously invoked in *Laurel Baye*. Rather, the *Yardmasters* court 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. *Id.* at 1343 n.30. Similarly, in this case, the plain meaning of Section 3(b)’s delegation, vacancy, and quorum provisions manifests Congress’ intent that three or more members of the Board should have the option to delegate the Board’s powers to a three-member group, knowing that an imminent vacancy “shall not impair the right of the remaining members to exercise all the powers of the Board” and that “two members shall constitute a quorum of any group” so designated.

CONCLUSION

For the reasons stated above, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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June 2009

UNITED STATES COURT OF APPEALS
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v.	*	
	*	
AMERICAN DIRECTIONAL BORING, INC. D/B/A ADB UTILITY CONTRACTORS, INC.	*	
	*	
	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its surreply brief contains 2,212 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the respondent and intervenor.

Board counsel further certifies that the CD-ROM has been scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (06/18/2009 rev.4). According to that program, the CD-ROM is free of viruses.

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Dated at Washington, DC
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	*
Respondent	*

CERTIFICATE OF SERVICE

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

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