

Nos. 09-1332, 09-1427

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

MCELROY COAL COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JULIE B. BROIDO
Supervisory Attorney

AMY H. GINN
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-2942

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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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
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**BRIEF FOR
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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of McElroy Coal Company (“McElroy”) to review and the cross-application of the National Labor Relations Board (“the Board”) to enforce a Decision and Order of the Board that issued on

March 9, 2009, and is reported at 353 NLRB No. 108. (JA 202-12.)¹ McElroy filed its petition on March 25, 2009, and the Board filed its cross-application on April 14, 2009. Both filings were timely; the Act imposes no time limit on such filings.

The Board had jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § § 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in Glen Easton, West Virginia.

STATEMENT OF THE ISSUES PRESENTED

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

2. Whether substantial evidence supports the Board’s finding that McElroy violated Section 8(a)(1) of the Act by restricting employees when it threatened employee White with having his vehicle towed from McElroy’s parking lot because he engaged in the protected activity of displaying signs stating “We Don’t Want Scabs” to protest McElroy’s use of nonunion subcontractors.

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

STATEMENT OF THE CASE

Acting on a charge filed by the United Mine Workers of America Local Union 1638, AFL-CIO, CLC (“the Union”), the Board’s General Counsel issued a complaint alleging that McElroy violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening its employees with having their vehicles towed from the parking lot if they displayed signs in support of the Union’s position on subcontracting. (JA 203; 129.) Following a hearing, the administrative law judge issued a decision and recommended order, finding that McElroy had violated the Act as alleged. (JA 211.) McElroy filed exceptions. (JA 166-78.) The Board affirmed the judge’s rulings, findings and conclusions, and adopted his recommended remedial order with one modification. (JA 202.)

I. THE BOARD’S FINDINGS OF FACT

A. The Parties’ Collective-Bargaining Agreement and Its Subcontracting Clause; the Parties’ Disputes Over McElroy’s Use of Subcontractors

McElroy operates a coal mine in Glen Easton, West Virginia, where the Union represents over 700 production and maintenance employees, who work in three shifts around the clock. (JA 203-04, 210; 10, 19.) McElroy and the Union are parties to a collective-bargaining agreement that includes a grievance and arbitration provision and a clause governing subcontracting. (JA 203; 11-12, 152-62.) The meaning of this clause has caused longstanding disputes between the parties, which intensified in 2007 when McElroy began to increase its use of subcontractors. (JA 203, 210; 11-12.)

Employees had previously seen contractors working at the mine surface, but not underground. (JA 203; 11.) In June or July, there started to be an influx of subcontractors underground. (JA 203; 11-12, 44.) Subcontractors were working on all shifts at the mine. (JA 204; 46.)

B. The Union Files Numerous Grievances Over Subcontracting; Most of the Grievances Settle; McElroy Prevails in Several Arbitration Proceedings; New Grievances Are Filed

By the end of September, the Union had filed over 100 grievances in 2007 over McElroy's subcontracting practices in that year. (JA 210; 13, 88.) For the Union, grievances are filed and handled by the "mine committee," which acts as a grievance committee. (JA 203; 10.) Clifford White, a belt man in the mine, acted as a mine committeeman beginning in June 2007 and wrote multiple grievances over subcontracting in his area of the mine. (JA 203-04; 38.)

Most of the grievances filed by White and other committeemen were settled, in many instances with McElroy paying back wages to unit members. (JA 203-04, 210; 30, 54-55.) Of the seven grievances that went to arbitration in 2007, the Union won two cases, although one of them was later reversed in a judicial proceeding. McElroy prevailed in the remaining cases. (JA 210; 31, 88, 100.) New grievances continued to be filed after the arbitration rulings issued. (JA 203; 33.)

C. At a Union Meeting, Union President Sparks suggests Putting Signs on Employees' Vehicles To Send a Message to Management About Subcontracting; Suggestions Include Messages Saying "We Don't Want Scabs"

On September 16, the Union held its regular monthly membership meeting, which was attended by 35 to 40 employees, including Union President Roger Sparks, and mine committeemen White and Terry Lewis. (JA 204; 13-14.) Sparks and the union members discussed how to send a message to management that they did not want subcontractors in the mine doing unit work. (JA 204; 13.) Sparks suggested that employees could put signs on their personal vehicles when they parked in McElroy's lot to protest the subcontractors' presence at the mine. (JA 204; 13, 60.)

Messages suggested by members included "We don't want scabs; leave scabs; UMWA only." (JA 204; 14.) Employees discussed the meaning of the word "scab," and shared different definitions, among them that the subcontractors' employees were nonunion workers performing bargaining unit work. (JA 204; 35-36, 40.) White's definition was "it's a union coal mine; it should be union work." (JA 204; 56.)

D. Sparks Sends Subcontracting Complaints to Supervisor Adkins; White Has Signs Made for His Truck and Informs Sparks

Less than 2 weeks later, on September 27, Sparks sent two signed complaints over subcontracting, and an information request relating to subcontracting, to Human Resources Supervisor Jason Adkins. (JA 210; 147-49.) Adkins later responded by

letter acknowledging that he received the complaints on September 28. (JA 210; 145-46.)

In the meantime, White had two signs made to span the length of the bed of his full-size pickup truck. (JA 210; 16, 39, 164.) The plywood signs were two feet by eight feet, painted white with blue lettering, and each read, “WE DON’T WANT SCABS.” (JA 204; 39, 164.) White called Sparks to let him know that the signs were made. (JA 204; 48.)

E. White Parks His Truck with the Signs in the Parking Lot and Adkins Sees the Signs; White Parks His Truck with the Signs in the Lot Twice More

On September 27, White drove his truck with the signs to work for his regular afternoon shift and parked in McElroy’s lot, about 50 feet from the main entrance. (JA 204; 49.) Employees asked White about the signs that day, and White saw Adkins walk by, stop, and put his hands on his hips while looking at the truck. (JA 204; 49.)

On September 28, White again worked the afternoon shift and parked his truck with the signs in the lot, this time about 200 feet from the entrance. (JA 204; 50.) On his next work day, October 1, White parked near the main entrance to the parking lot where the miners drive by. (JA 204; 50.) The mine parking lot is not visible from the road leading to the mine. (JA 205; 52.)

F. Adkins Tells White To Remove His Truck Because of the Signs; Adkins Says the Truck Will Be Towed If It Returns With the Signs

On the third day, White got word from coworkers that Adkins wanted to see him. (JA 210; 39.) At the end of his shift, White, accompanied by Committeeman Lewis, went to Adkins' office, where Adkins told White to remove his truck from the parking lot because of the signs. (JA 210-11; 19-20, 50, 76.) White responded, "It's a freedom of speech, ain't it?" (JA 211; 20, 50.) Adkins repeated that the truck had to be removed. When White asked whether he could bring it back the next day, Adkins replied that he could do so as long as the signs were not on it. (JA 211; 20, 51.)

The only reason Adkins gave for demanding the signs' removal was that they were on private property. (JA 211; 20, 25.) Adkins further stated that he would have the truck towed at White's expense if White brought it back to the parking lot with the signs on it. (JA 211; 20, 51, 76.)

G. White Removes the Signs and Tells Coworkers About the Incident; the Union Continues To Grieve McElroy's Use of Subcontractors

White removed the signs and did not return to McElroy's parking lot with them on his truck. (JA 205; 51.) White and Lewis told fellow employees that Adkins had ordered White to remove the signs, and that if he did not, the truck would be towed at White's expense. (JA 205; 21, 51-52, 66.) No other employees put signs on their vehicles. (JA 205; 48, 51, 61, 66.) The Union continued to file grievances over McElroy's subcontracting practices. (JA 203; 33.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Schaumber) found, in agreement with the administrative law judge, that McElroy violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by restricting employees by threatening White with having his vehicle towed from its parking lot because White engaged in the protected activity of displaying signs stating “We Don’t Want Scabs” in support of the Union’s position on subcontracting. (JA 202.)

The Board’s Order requires McElroy to cease and desist from the unfair labor practice found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires McElroy to post copies of a remedial notice at its Glen Easton facility. (JA 202, 212.)

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, McElroy's challenge is based on an incorrect reading of Section 3(b).

Supreme Court and Board precedent has long recognized that use of the term "scab" to refer to nonunion workers is protected speech under the Act. Consistent with this precedent, the Board reasonably found that White engaged in protected union activity when he posted signs on his personal truck saying "We Don't Want Scabs" to protest McElroy's ongoing use of nonunion subcontractors. The record shows that amidst a flurry of grievances, settlements, arbitrations, and more grievances, union members discussed putting signs on employee vehicles opposing McElroy's actions. In a concerted act, White parked his truck with the anti-subcontractor signs in the company lot during his shifts over the course of 3 days before McElroy threatened him for engaging in this protected activity. As the Board found, McElroy's threats were unlawful because they tended to interfere with employees' Section 7 right to protest an employment practice that adversely affected their wages, hours and working conditions.

The Board properly rejected McElroy's attempts to justify its unlawful threat. As the Board reasonably found, McElroy failed to meet its burden of showing any special circumstances to justify its abridgement of employees' Section 7 rights. McElroy could only muster subjective speculation by two

company officials, whom the judge largely discredited, that they were concerned about potential hostilities or work stoppages as a result of the signs, despite the fact that no disruptions or complaints of any kind arose in the 3 days before White removed the signs under threat. Finally, McElroy's attempt to rewrite the judge's credibility determinations in favor of its own witnesses are unacceptable, given that McElroy cannot show any exceptional circumstances warranting reversal of the judge's rational and well-articulated findings.

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 Liebman² 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*

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).

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 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. McElroy’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,

³ The issue has been briefed in the Fourth Circuit in *Narricot Indus. v. NLRB*, Nos. 09-1164, 09-1280; in the Third Circuit in *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729, 09-1035 and *NLRB v. St. George Warehouse, Inc.*, Nos. 08-4875, 09-1269; 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. The issue was argued before the Eighth Circuit on June 9, 2009, in *NLRB v. Whitesell Corp.*, No. 08-3291.

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

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

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. 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*

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).

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 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)).

McElroy asserts (Br. 19) that, when Member Kirsanow’s appointment expired, a “three-person quorum” no longer existed and thus the two remaining

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.”)

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 McElroy suggests, Member Kirsanow's departure disempowered the remaining two-member quorum.⁷ In contrast, the Board's reading of Section 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.

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).

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 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).

⁸ *See* Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 449, reprinted in 2 *NLRB, Legislative History of the National Labor Relations Act, 1935* (hereinafter "*Leg. Hist. 1935*"), at 3272 (1935).

⁹ The Board had only two members during three separate periods between 1935 and 1947: from 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.

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 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

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.

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

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 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

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).

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.

similar to the original three-member Board. As the Joint Committee created by Title IV of the Taft-Hartley Act to study labor relations issues¹⁶ 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 was able to implement Congress' intent that the Board exercise its delegation authority for the purpose of increasing its casehandling efficiency.¹⁸

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 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).

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 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
Furtheres 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.

McElroy (Br. 18) correctly describes the Board's delegation of authority as "simple and transparent" 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. As such, 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

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

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.

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*, 102 F.3d 579 (1996), when it observed that the common-law rule likely permits “a quorum made up of a majority of those members of a body *in office* at the time.” *Id.* at 582 n.2 (emphasis in original).

With that common-law principle as a backdrop, the court held that, in the absence

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).

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 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

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."

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

Section 3(b) of the NLRA 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.

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 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).²²

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

²² 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.

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.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT McELROY VIOLATED SECTION 8(a)(1) OF THE ACT BY RESTRICTING EMPLOYEES WHEN IT THREATENED WHITE WITH HAVING HIS VEHICLE TOWED FROM McELROY'S PARKING LOT BECAUSE HE ENGAGED IN THE PROTECTED ACTIVITY OF DISPLAYING SIGNS SAYING "WE DON'T WANT SCABS" TO PROTEST McELROY'S USE OF NONUNION SUBCONTRACTORS

One of the basic rights that employees enjoy under the Act is the right to discuss issues related to collective bargaining with their coworkers. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-99, 803-04 & n.10 (1945). The Supreme Court's decision in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) ("*Austin*"), makes clear that, in exercising their *Republic Aviation* rights, employees commonly use confrontational language, which does not remove them from the Act's protection. Indeed, in *Austin* itself, the Court recognized that use of the term "scab" to describe nonunion workers is "protected under federal law." *Id.* at 282. Therefore, to justify a restriction on such protected speech, an employer must show "special circumstances which make the rule necessary to maintain production or discipline." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492-93 (1978).

Here, McElroy admits (Br 14) that it threatened White with having his truck towed if he did not remove signs saying "We Don't Want Scabs." Before the

Board, McElroy's witnesses conceded that if the signs had used the term "subcontractors" instead of "scabs," McElroy would not have placed the restriction on White. (JA 207-08; 98.) Thus, McElroy's argument turns on White's choice of the term "scab"—a choice that he was protected in making under well-settled precedent. As we show below at pp. 49-57, the Board reasonably found that McElroy failed to establish any "special circumstances" warranting its restriction on White's use of the word "scab."

A. The Act Prohibits an Employer from Restricting Employees in the Exercise of Their Section 7 Rights Absent Special Circumstances Not Present Here

Section 7 of the Act (29 U.S.C. § 157) protects employees' 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." Those rights are protected even when employees "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 7 rights are enforced through Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of those rights.

Furthermore, well-settled law “gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point.” *Austin*, 418 U.S. at 283. In particular, use of the term “scab” has been found by the Supreme Court to be “common parlance in labor disputes and has specifically been held to be entitled to the protection of § 7 of the NLRA.” *Id.* (citing *Linn v. United Plant Guard Workers*, 383 U.S. 53, 60-61 (1966)). The Court has also recognized that “naming” nonunion workers as scabs is “literally and factually true” because “[o]ne of the generally accepted definitions of ‘scab’ is ‘one who refuses to join a union.’” *Austin*, 418 U.S. at 283 (citing Webster’s Third New International Dictionary (unabridged ed. 1961)).

When an employee exercises his Section 7 rights while legally on an employer’s property pursuant to his employment, the balance to be struck is “only *vis-a-vis* the employer’s managerial rights . . . [which] prevail only where [an employer] can show that the restriction is necessary to maintain production or discipline or otherwise prevent the disruption of [the employer’s] operations.” *Firestone Tire & Rubber Co.*, 238 NLRB 1323, 1323 (1978) (citing *Eastex*, 437 U.S. at 570-71), *enforced mem.*, 651 F.2d 1172 (6th Cir. 1980); *Hudgens v. NLRB*, 424 U.S. 507, 521, n.10 (1976); *NLRB v. The Babcock & Wilcox Company*, 351 U.S. 105, 113 (1965)); *see also Republic Aviation*, 324 U.S. at 803. “Managerial

rights decisions make clear that any restriction of employees’ on-premises communication in nonworking areas during nonworking hours ‘must be presumed to be an unreasonable impediment to self-organization—in the absence of evidence that special circumstances make the rule necessary.’” *District Lodge 91, Int’l Ass’n of Machinists v. NLRB*, 814 F.2d 876, 880 (2d Cir. 1987) (“*United Technologies*”) (quoting *Republic Aviation*, 324 U.S. at 803-04 & n.10). *See also Beth Israel Hosp.*, 437 U.S. at 492-93.

The Board’s factual findings are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). *See also NLRB v. Air Contact Trans., Inc.*, 403 F.3d 206, 210 (4th Cir. 2005). A reviewing court may not displace the Board’s choice between conflicting views, “even if the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Air Contact*, 403 F.3d at 210. Thus, the Board’s findings will not be overturned if “it would have been possible for a reasonable jury to reach the [same] conclusion.” *WXGI, Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001) (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998)).

Further, a reviewing court owes “due deference” to the Board’s inferences drawn from the facts. *Grinnell Fire Protection Sys. Co. v. NLRB*, 236 F.3d 187, 195 (4th Cir. 2000). Indeed, “[i]t is well settled that absent exceptional

circumstances, the [administrative law judge's] credibility findings, when adopted by the Board are to be accepted by the reviewing court." *NLRB v. Air Prod. & Chem., Inc.*, 717 F.2d 141, 145 (4th Cir. 1983) (citation omitted).

This Court will "give deference to the Board's interpretation of the Act 'if it is reasonably defensible.'" *WXGI*, 243 F.3d at 840 (internal quotation omitted). In a case involving a violation of Section 8(a)(1), the "question of [w]hether particular conduct is coercive is a question essentially for the specialized experience of the NLRB," and this Court "grant[s] considerable deference to [the Board's] determinations." *Medeco Sec. Locks v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1998) (internal quotation omitted).

B. McElroy Unlawfully Threatened White for Displaying Signs in Support of the Union's Position on Subcontracting

The Board reasonably found that McElroy violated Section 8(a)(1) of the Act when it threatened White with having his vehicle towed for engaging in the protected activity of displaying signs on his truck that used the term "scab." The Board relied on several undisputed factors in reaching its conclusion. It is undisputed that McElroy, through its agent and supervisor Adkins, threatened White with having his personal vehicle towed at White's expense, even though he was entitled to park in the lot, which was not visible from the main road, during his shifts. (JA 205-06, 211; 73, 76.) It is undisputed that McElroy and the Union had been engaged in an ongoing dispute about subcontracting resulting in over 100 grievances in the 9-month period

preceding White's display of the signs, and that White's actions were concerted in nature. (JA 210; 68, 88.) Based on these undisputed factors, the Board reasonably found that White engaged in protected union activity when he parked his truck in the mine lot for 3 days, and that Adkins' threat restricted employees' exercise of their Section 7 rights.

McElroy also does not dispute that its parking lot, as a natural congregating area for off-duty employees, is a key protected forum for employee expression. *See, e.g., Lafayette Park Hotel*, 326 NLRB 824, 828-29 (1998) (prohibiting employer from maintaining a rule denying employees access to parking lots after their shift), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999); *Beverly Farm Foundation, Inc.*, 323 NLRB 787, 795-96 (1997) (concluding that employer acted unlawfully by preventing employees from distributing literature in employee parking lots), *enforced*, 144 F.3d 877 (7th Cir. 1998); *Olathe Healthcare Ctr., Inc.*, 314 NLRB 54, 54-55 (1994) (finding unlawful employer's discipline of prounion employee for distributing literature near parking lot entrances).

This protection applies equally to employees who place prounion (or antiunion) signs in or on their vehicles. *See United Technologies*, 814 F.2d at 879 (approving Board's conclusion that employee engaged in protected activity when he displayed prounion sign on his van); *Int'l Bus. Mach. Corp.*, 333 NLRB 215, 219-21 (employer violated Section 8(a)(1) by informing employees that they could

not display large prounion signs on their vans in employee lot), *enforced*, 31 Fed. Appx. 744 (2d Cir. 2002); *Firestone Tire*, 238 NLRB at 1323 (employer could not lawfully discipline employee for parking in employee lot with several prominent signs saying “Support [the Union]” and “Don’t Buy Firestone Products” affixed to his car).

Based on undisputed facts and the precedent discussed above, the Board reasonably found that McElroy’s threats to tow White’s truck for engaging in protected speech plainly tended to coerce, not only White, but also his coworkers, who learned about the threat and decided against displaying signs for fear of having their vehicles towed. *See Consolidated Diesel Co. v. NLRB*, 263 F.3d 346, 352 (4th Cir. 2001); *Medeco Sec. Locks*, 142 F.3d at 747. Moreover, as we now show, the Board properly rejected McElroy’s claims that White’s choice of words somehow deprived him of the Act’s protections, or that special circumstances justified its threat. Accordingly, by threatening White, McElroy violated Section 8(a)(1) of the Act.

C. The Board Reasonably Rejected the Company’s Claims that White Lost the Protection of the Act

McElroy variously asserts (Br 21, 29) that White’s statement on the signs was not protected because he used the term “scab,” and that special circumstances justified its restriction on employees’ Section 7 rights. As we now show, the Board reasonably rejected those assertions. As we further show, McElroy’s attack on the judge’s

credibility determinations must fail, as it points to no exceptional circumstances to warrant overturning his well-reasoned determinations.

i. White did not lose the protection of the Act by using the term “scab”

The Board rejected (JA 211) McElroy’s claim that White lost the protection of the Act by using the term “scab” instead of “subcontractors” on the signs. As discussed above, use of this term in a labor dispute is “protected under federal law.” *Austin*, 418 U.S. at 282. Further, as this Court has emphasized, speech will remain protected unless it is “unlawful, violent, in breach of contract, or indefensible,” *NLRB v. Waco Insulation, Inc.*, 567 F.2d 569, 599 (4th Cir. 1977) (citing *NLRB v. Washington Aluminum*, 370 U.S. 9, 17 (1962)), or so “egregious . . . or of such character as to render the employee unfit for further service.” *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 280 (4th Cir. 2003) (quoting *Consumers Power Co.*, 282 NLRB 130, 132 (1986)). *See also NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984). As the Board reasonably found (JA 211), White’s use of the term “scab” does not fit under this exception; on the contrary, it falls within the range of speech protected by Board and court precedent.

In seeking to foster industrial peace, Congress intended the Act to encourage “free debate on issues dividing labor and management.” *Austin*, 418 U.S. at 272. The Supreme Court has “stress[ed] that ‘freewheeling use of the written and

spoken word . . . has been expressly fostered by Congress and approved by the NLRB.” *Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 2408, 2413-14 (2008) (quoting *Austin*, 418 U.S. at 272-73). Indeed, as this Court has similarly recognized: “[P]ermitting the fullest freedom of expression by each party’ nurtures a healthy and stable bargaining process.” *Americare Pine Lodge Nursing & Rehabilitation Ctr. v. NLRB*, 164 F.3d 867, 875 (4th Cir. 1999) (internal quotation omitted).

Because labor disputes “are ordinarily heated affairs . . . frequently characterized by bitter and extreme charges, countercharges, vituperations, personal accusations, misrepresentations and distortions,” the Act recognizes that affording the competing parties “wide latitude” in the language they use to communicate their positions is essential for resolving labor disputes in the workplace. *Linn*, 383 U.S. at 58, 60. The protections due labor speech are so broad that otherwise defamatory or profane speech may enjoy immunity from sanction. *Id.* at 58; *Austin*, 418 U.S. at 272. Consequently, the Board has repeatedly “concluded that epithets such as ‘scab,’ . . . are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7.” *Linn*, 383 U.S. at 60-61.²³ As the Supreme Court stated, although “the word

²³ To the extent that McElroy relies (Br 31) on *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (7th Cir. 1956), and its apparent per se rule that the term “scab” is inherently disruptive of the workplace, the Supreme Court’s subsequent decisions

[‘scab’] is most often used as an insult or epithet . . . federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point.” *Austin*, 418 U.S. at 283.

Consistent with the foregoing principles, the Board reasonably found that White was engaged in protected activity when he used the word “scab” on the sign, and that his use of that term, standing alone, did not remove him from the Act’s protection. (JA 211.) Thus, as the Board noted here (JA 210), it has long recognized that “the term ‘scab’ is not so opprobrious as to justify barring its use in the workplace.” *Coors Container Co.*, 238 NLRB 1312, 1319, *enforced*, 628 F.2d 1283 (10th Cir. 1983) (employees who displayed sign saying “Boycott Coors-Scab Beer” were unlawfully barred from employer’s property; employer was not justified in restricting employees’ right to engage in activities to improve their working conditions). *Accord Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000) (use of word “scab” does not remove employee from Act’s protection unless accompanied by threats or physical gestures); *Mead Corp.*, 314 NLRB 732, 733 (1994) (employees were protected when they wore “no scab” buttons in part to

in *Linn* and *Austin* make clear that use of the term is not without the protection of the Act absent additional factors showing special circumstances that require a ban to maintain discipline. *See, e.g., NLRB v. Mead Corp.*, 73 F.3d 74, 79-80 (6th Cir. 1996) (rejecting an employer’s post-*Linn* reliance on *Caterpillar Tractor* as stating a per se rule).

protest collectively-bargained “flex” program), *enforced*, 73 F.3d 74 (6th Cir. 1996). McElroy cannot cite even a single post-*Linn* case in which an employee’s use of the term “scab,” standing alone, caused him to lose the Act’s protection.

ii. McElroy’s reliance on *Atlantic Steel* is not properly before this Court, and is inapposite in any event

McElroy’s assertion (Br 22-28)—that under the multi-factor test set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), White’s communication was so “indefensible” as to forfeit the protection of the Act—is not properly before this Court, as McElroy made no such argument to the Board. Pursuant to Section 10(e) of the Act, “[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.” 29 U.S.C. § 160(e). *Accord NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 262 (4th Cir. 2008). The statutory prohibition creates a jurisdictional bar against judicial review of issues not raised before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

In the exceptions that McElroy filed with the Board, it did not assert that White’s conduct was “indefensible,” nor did it invoke the *Atlantic Steel* factors in form or substance. (JA 172-73.) This Court recognizes that “generalized exceptions . . . do not satisfy § 10(e), for they fail[] to provide the Board ‘adequate

notice of the argument [a party] seeks to advance on review.’”²⁴ *HQM of Bayside*, 518 F.3d at 262 (citation omitted). Accordingly, Section 10(e) of the Act bars judicial review of McElroy’s claim.

In any event, McElroy fails in its belated attempt to show that White’s message was indefensible under the *Atlantic Steel* test. The parking lot is undisputedly private and is not visible from the road. Thus, White’s communication was not made in public. As to the subject matter and nature of the sign, as shown above at pp. 42-44, the Board reasonably found, based on long-standing precedent, that White, after concertedly discussing the matter with coworkers, displayed the signs to protest McElroy’s subcontracting practices, and therefore that his use of the term “scab” did not fall outside the Act’s protection.

iii. McElroy did not meet its burden of showing special circumstances to justify its threat

McElroy seeks to restrict employees’ rights to engage in protected speech in its parking lot—a nonwork area. White was exercising his Section 7 rights while legally parked in McElroy’s lot while on the job. Thus, as shown above at pp. 40-41, McElroy could not lawfully order White to remove his signs without demonstrating special circumstances necessitating the restriction. *See Beth Israel*, 437 U.S. at 483. McElroy did not meet this burden.

²⁴ Likewise, McElroy’s reliance (Br 28 n.9) on the standard for comments directed to third parties was not raised to the Board and is not properly before this Court, nor is that standard applicable to White’s sign in any event.

McElroy's proffered (Br 33-35) "special circumstance" is that White used the term "scab" in a non-customary manner and in bad faith. McElroy claims (Br 31) that, because the term "scab" is commonly used to refer to a worker who crosses a picket line and there was no strike or picket line at the mine, the context in which White used the term was enough to incite employees to engage in violence or other improper actions. In making this argument, however, McElroy ignores other common, protected usages of the term "scab" that apply here. Indeed, as noted above at p. 40, the Supreme Court has recognized that a generally accepted definition of "scab" includes a nonunion worker. *See Austin*, 418 U.S. at 283. Thus, in *Austin* itself, employees used the word "scab" in a newsletter to refer to coworkers who did not join the union; there was no strike or picket line. *Id.* at 267-68. Similarly, in *Mead Corp.*, cited by the Board here (JA 211), employees were protected when they wore "no scab" buttons in part to discourage coworkers from participating in a training program. 314 NLRB at 733. Thus, the Board appropriately rejected (JA 211) McElroy's claim that White's use of the term "scab" to refer to a subcontractor's nonunion employees establishes "special circumstances."

As the Board further found, White used the term in good faith to register a legitimate complaint against McElroy's continued practice of giving unit work to nonunion subcontractors. White credibly testified that he used the word "scab" to

“represent nonunion workers taking the work of union members.” (JA 211; 56.)

Given the undisputed evidence that employees discussed McElroy’s subcontracting practices at a union meeting and suggested White’s “scab” sign, his compatriots plainly understood that he used the term to refer to the subcontractors’ employees. Accordingly, McElroy cannot plausibly contend (Br 32) that White’s sign would incite an illegal work stoppage. (JA 204; 35-36, 40.) In short, the Board, considering the circumstances surrounding White’s decision to display the signs—“including numerous grievances that were not resolving an ongoing dispute concerning the alleged loss of bargaining unit work”—, reasonably concluded that White did not use the term “scab” either recklessly or in bad faith. (JA 211.)

McElroy’s other assertions (Br 30-32) that White’s signs could have led to violence are likewise based on unwarranted speculation. Thus, in claiming that White was attempting to foment an illegal strike, rather than protest subcontracting, McElroy suggests (Br 8) that White could not have been referring to subcontractors because all subcontracting grievances assertedly were withdrawn prior to September 2007. McElroy, however, inaccurately characterizes the record, which shows that the Union actually continued to file new grievances over subcontracting. (JA 203; 33.) Indeed, one of those grievances was settled just a week before the October 2008 hearing in this case. (JA 203; 33.)

McElroy also does not help its argument by relying (Br 8) on the testimony

of labor consultant Gregory Dixon about the timing of the grievances. Dixon equivocated, conceding that he did not “remember for sure if they got withdrawn pre-September of 2007 or after September,” and he acknowledged that “[e]ven thereafter, there have been some subcontracting grievances.” (JA 90.) Moreover, McElroy forgets that even if the grievances had all been resolved, which they were not, employees would still have been engaged in protected union activity by continuing to protest McElroy’s subcontracting practices. *See Eastex*, 437 U.S. at 565.

McElroy also does not gain traction by professing (Br 26, 32) that its officials were unclear whether the signs referred to the subcontracting dispute, and thus feared they would lead to violence or illegal work stoppages. (JA 209.) Even Adkins conceded that he “assumed” White’s signs referred to subcontractors, not some other dispute. (JA 206, 211; 74.) Moreover, given Adkins’ admitted receipt of the union president’s letters of protest about subcontracting the day after White first brought his signs to the lot, the judge properly found that Adkins was aware of the signs’ meaning. (JA 209; 145-46.) Dixon’s testimony also does not support McElroy’s claim that it did not realize White’s signs referred to the parties’ subcontracting dispute. As the judge noted, Dixon “equivocated as to whether he was aware of the subject of White’s protest, but incredibly claimed he could not recall seeking clarification from Adkins.” (JA 208; 94.) The judge reasonably

disregarded Dixon's "ambiguous" testimony as little more than "an effort to support [McElroy's] legal argument." (JA 209.)

In sum, Adkins' and Dixon's testimony amounts to no more than sparse, completely subjective speculation that the Board reasonably rejected as insufficient to justify the threatened restriction on Section 7 rights. Contrary to McElroy's assertion (Br 30), the Board was not required to accept their conjecture at face value simply because it was "unrebutted." *See Vance v. NLRB*, 71 F.3d 486, 493 (4th Cir. 1995) (upholding Board's rejection of "uncontradicted testimony"). Furthermore, the judge considered (JA 208) Adkins' and Dixon's demeanor in making his credibility determinations, and found it wanting. *Id.* at 491 ("the Board . . . attaches great weight to a [judge's] credibility findings insofar as they are based on demeanor"). The judge, concluding (JA 208) that Adkins' testimony was not "particularly convincing" and that Dixon's recall was "poor," thus reasonably found (JA 209) that McElroy knew that White's protest concerned subcontracting.

Importantly, McElroy introduced no objective evidence to demonstrate the alleged harm White's sign would cause. McElroy offered no evidence that the signs provoked any hostile behavior or otherwise disrupted work in the 3 days that they were displayed. McElroy failed to show even a threat of disruption. Adkins conceded that he received no complaints from subcontractors about the signs. (JA

211; 85.) McElroy's claim that White's signs could cause an illegal work stoppage was therefore "more fanciful than real," *Armstrong Cork Co. v. NLRB*, 211 F.2d 843, 848 (5th Cir. 1954), and ignores the reality of employee relations at the mine.

Contrary to McElroy's assertions (Br 37), the Board never required McElroy to wait until actual violence or hostilities occurred to justify its restrictions on employee speech. Rather, the Board only demanded that McElroy witnesses do more than merely speculate that the signs might cause workplace disruptions. As the Board and Courts have consistently held, "[t]he mere assertion by an employer that special circumstances exist is, of course, insufficient to justify curtailment of the employee's guaranteed rights." *Coors Container Co.*, 628 F.2d at 1286. Consequently, an employer must proffer more than just its opinion that a restriction on Section 7 rights is necessary to prevent the degradation of an important managerial interest, even though it has no obligation to wait for actual harm to befall its enterprise. *See United Technologies*, 814 F.2d at 882 (warning that an employer must put forth "substantial evidence that some restriction of employee speech was necessary"). In sum, the Board reasonably found that McElroy failed to show any special circumstances justifying its restriction on its employees' exercise of their Section 7 rights.

McElroy fails to cite even a single case where use of the term "scab" alone established special circumstances. To the contrary, in *Mead Corporation*, the

Board rejected an employer's defense of special circumstances where the employer failed to link vandalism at its facility, including the word "scab" spray-painted on a supervisor's locker, with the "no scab" messages on employee buttons. 314 NLRB at 734. Similarly, in *Coors Container Co.*, the employer failed to show special circumstances where a boycott sign with the term "scab" was displayed inside a truck and there were no incidents among the employees arising out of the strike. 238 NLRB at 1319. Likewise, McElroy can point to "no reaction to the sign or any disruption of work." (JA 211.) As discussed, McElroy only mustered unsupported conjecture in its attempt to show special circumstances. In short, McElroy "failed to demonstrate that 'special circumstances,' such as violence, interference with training or production, or threats thereof, caused the [Company's] interests in plant discipline to outweigh the employees' rights." *Mead Corp.*, 314 NLRB at 734.

The cases cited by McElroy (Br 30-31) illustrate the established rule relied on by the Board, requiring the employer to meet its burden of showing "special circumstances" to justify a restriction of protected activity, and necessitate no different result here. For instance, in *Fabri-Tek, Inc. v. NLRB*, the employer banned employees from wearing large, eye-catching buttons in the workplace, asserting that the display of the particular insignia distracted employees and led to an increase in poorly produced products. *See* 352 F.2d 577, 583 (8th Cir. 1965).

The employer prevailed because it offered evidence showing that its production process required extreme concentration and that, after the button's initial dissemination, at least six employees had left the production floor during their shifts to examine them, potentially undermining plant production. *Id.* at 583-84.

Similarly, in both *Virginia Power and Electric Company v. NLRB*, 703 F.2d 79, 82-83 (4th Cir. 1983), and *Davison-Paxon Company v. NLRB*, 462 F.2d 364, 369 (5th Cir. 1972), the employers prevailed in court because they, like the employer in *Fabri-Tek*, were able to provide specific examples of employee conflicts justifying the prohibition on provocative buttons worn by a receptionist and a department-store sales clerk. Both companies asserted as a justification for prohibiting the buttons a fear that prounion and antiunion employees would engage in public combat, thereby endangering the employers' public image.²⁵ In all of these cases, the employer was not required to show an actual injury to reputation,

²⁵ To the extent that visitors might see union signs on employee vehicles, the contact is only incidental while they travel into the mine. Although McElroy states (Br 32) that the signs "erroneously conveyed to third parties that [McElroy] was involved in a work stoppage," the case law demonstrates that outsiders almost always see employee signs when protected activity occurs in employer parking lots, and that this is not sufficient to justify a restriction on employees' protected activity. *See, e.g., Colonial Stores*, 248 NLRB 1187, 1188-89 (1980) (finding no "special circumstances" where an employee parked in the first space outside a retail store and affixed a sign complaining that the store "has no regard for its employees' rights"); *Firestone Tire*, 238 NLRB at 1323 (noting that "the record indicates that other persons parked [in the employee parking lot] as well, as shown in part by the existence of three spaces designated as visitor spaces").

image, discipline, or sales. Rather, the employer was obligated, as was McElroy here, to produce concrete evidence demonstrating that it was reasonably foreseeable that the protected speech would create a problem (e.g., distracted employees on a sensitive production line) impacting a legitimate managerial interest (e.g., diminished productivity). The Board reasonably found that McElroy failed to make such a showing.

iv. No exceptional circumstances warrant overturning the Board's credibility determinations

The Board found that, despite Adkins' professed concern about violence or illegal work stoppages, he waited 3 days before telling White to remove the signs or his truck would be towed. (JA 208.) In making this finding, the judge reasonably credited White's testimony that Adkins saw the truck on the lot 3 days before their meeting and reasonably discredited Adkins' claim that he acted immediately. (JA 208.) The judge further discredited Adkins' claim that he discussed work conduct rules with White at the meeting. (JA 208; 78-79.) Before this Court, McElroy challenges (Br 39-44) these credibility rulings, hoping that Adkins' discredited version of events would somehow assist it in proving "special circumstances" to justify its threat. As we now show, McElroy fails to establish any basis for disturbing the judge's reasonable determinations to discredit Adkins' testimony, which, in any event, does not establish special circumstances.

“It is well settled that absent exceptional circumstances, the [judge’s] credibility findings, ‘when adopted by the Board are to be accepted by the [reviewing] court.’” *Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 331 (4th Cir. 2008) (quoting *NLRB v. Air Prods. & Chem., Inc.*, 717 F.2d 141, 145 (4th Cir. 1983)). As this Court has stated, “balancing of witnesses’ testimony is at the heart of the factfinding process” and, thus, “it is normally not the role of the reviewing court to second-guess a fact-finder’s determinations about who appeared more ‘truthful’ or ‘credible.’” *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 71 (4th Cir. 1996). Quite simply, the judge was in the best position to assess the credibility of the witnesses who appeared before him. To overturn a credibility determination, the Court must find that the determination “is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all.” *Sam’s Club v. NLRB*, 173 F.3d 233, 240 (4th Cir. 1999) (citation omitted). Here, the judge’s credibility determinations contradict no other findings of fact, and are based on well-articulated reasons.

The judge reasonably credited White because he testified with “specificity, good recall, and in a credible fashion” about when and where he parked his vehicle with the signs. (JA 208.) As the judge also noted, White’s testimony that he first brought the signs to the lot on September 27 is corroborated by evidence that Union President Sparks sent Adkins his written complaints on the same day—

indicating a “coordinated effort” by the Union to combat McElroy’s subcontracting practices. (JA 208.)

In contrast, the judge reasonably discredited Adkins’ proffered timeline because McElroy presented no corroborating evidence to support Adkins’ assertion that he immediately acted to have the signs removed from the lot. (JA 208.) For instance, although Adkins asserted that he immediately took a photograph of the truck and emailed it to Dixon, the photograph is undated and no such email was introduced into evidence, nor did Dixon recall when he received the photograph. (JA 208; 72, 164.) Additionally, McElroy is simply wrong (Br 13) in claiming “no testimony” established Adkins’ failure to meet with White the first time he saw the signs. As shown above, White credibly testified that Adkins saw the signs on September 27 but did not meet with him and Lewis until October 1. (JA 208; 49-50.) Given all of these factors, the judge reasonably discredited Adkins’ testimony as to when he first saw the truck and met with White.

McElroy’s reliance (Br 39-40) on Dixon’s testimony is equally unavailing because the judge reasonably discredited his uncertain account as to when Adkins confronted White about the signs. (JA 208.) As the judge found, Dixon’s “testimony about the timing and content of his conversation with Adkins was hazy at best . . . [his] recall as to the event was poor.” (JA 208.) Indeed, Dixon could

not even remember if Adkins contacted him before or after threatening to have White's truck towed. (JA 208; 79, 92-93.)

McElroy gets no further in attacking (Br 42) the judge's findings by relying on Adkins' statement that he cited to a work rule in his meeting with White. The judge discredited Adkins' testimony, which came in response to a leading question, in the face of Lewis' credible testimony that Adkins "did not" cite to a work rule and White's corroborating testimony that Adkins gave no reason for demanding the signs' removal other than that they were on private property. (JA 208; 50-52, 78, 105.) The judge credited White and Lewis' "consistent" accounts of their October 1 meeting with Adkins based on the "demeanor of the witnesses, and the evidence of the record as a whole." (JA 208.) McElroy errs (Br 43) in relying on Lewis' preliminary response ("not that I recall") when he was questioned about whether Adkins ever mentioned work rules in their meeting. (JA 105.) When the judge asked Lewis to clarify his testimony, he unequivocally responded, "No, [Adkins] did not" cite a work rule. (JA 105.)

McElroy next argues (Br 44) that, even if Adkins did not cite a company work rule in the meeting, the rule nevertheless justified Adkins' threat to have White's truck towed. McElroy, however, failed to raise this meritless contention before the Board. Thus, McElroy is precluded from raising its claim for the first time on review, and it is not properly before this Court. *See* 29 U.S.C. § 160(e),

and cases cited above at p. 48. In any event, the existence of a posted work rule at the mine would not have established McElroy's "special circumstances" defense. As discussed previously, White was not urging an illegal work stoppage or any other inappropriate, hostile behavior. Besides, interpreting a work rule as barring White's use of the term "scab" would be unlawful in itself because, as the Board found, his use of the term was protected under the Act. *See* pp. 42-44 above and *Guardsmark LLC v. NLRB*, 475 F.3d 369, 372 (D.C. Cir. 2007) (where employer promulgates work rules "likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice").

In sum, McElroy has not established any "exceptional circumstances," *Evergreen Am. Corp.*, 531 F.3d at 331, to justify overturning the judge's well-reasoned credibility determinations. In any event, the discredited testimony on which McElroy relies would not have shown, as it asserts (Br 42), that White's signs would have led to "violence, unrest, or an improper work stoppage." The Board reasonably found that McElroy failed to meet its burden of establishing special circumstances sufficient to justify threatening White for engaging in protected activity.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court enter a judgment denying McElroy's petition for review and enforcing 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/ Julie B. Broido

JULIE B. BROIDO

Supervisory Attorney

/s/ Amy H. Ginn

AMY H. GINN

Attorney

National Labor Relations Board

1099 14th Street NW

Washington DC 20570

(202) 273-2996

(202) 273-2942

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).]

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. _____ **Caption:** _____

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