

No. 09-60156

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

COASTAL CARGO COMPANY, INC.

Respondent

**ON APPLICATION FOR ENFORCEMENT
OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument would be of assistance to the Court.

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board” or “the NLRB”) to enforce its Decision and Order issued against Coastal Cargo Company, Inc. (“the Company”) on January 30, 2009, and reported at 353 NLRB No. 86. (D&O1-7.)¹ In its Decision, the Board

¹ Record references are to the Board’s Decision and Order (D&O), the transcript (“Tr.”) from the underlying unfair-labor-practice hearing, and the General

found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act” or “the NLRA”), by unilaterally increasing the wage rates of bargaining unit employees without first giving their representative, the International Brotherhood of Teamsters, Local Union 270 (“the Union”), notice and an opportunity to bargain over the change. (D&O1 n.1, 5.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Board submits that this Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practice occurred in New Orleans, Louisiana, and the Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). (*See* D&O1 n.2.)

The Board filed its application for enforcement on March 9, 2009. This filing was timely, as the Act places no time limit on the institution of proceedings to enforce Board orders.

Counsel’s Exhibits (“GCX”) admitted at the hearing. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

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 within the full powers of the Board in issuing the Board's Order in this case.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally increasing employees' wage rates without first giving the Union notice and an opportunity to bargain over the change.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act by increasing the wages of unit employees on October 2, 2006, without affording the Union adequate notice and an opportunity to bargain about this change. (GCX1(a), 1(d), 1(g), 1(j), 1(m) at 4.) Following a hearing, an administrative law judge issued a decision and recommended order finding that the Company had violated the Act as alleged. (D&O1-7.) After considering the Company's exceptions, the Board issued its Decision affirming the judge's finding. (D&O1.)

Summarized below are the Board's findings, conclusions and Order in the instant case, as well as its related findings in an earlier case, *Coastal Cargo Co.*, 348 NLRB 664 (2006) ("*Coastal I*").

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; in *Coastal I*, the Board Finds that the Company Violates the Act by Unilaterally Implementing Its Final Contract Offer

The Company provides services ancillary to the commercial shipping industry, specifically, loading and unloading cargo from ships at the Port of New Orleans. (D&O2; Tr.12.) The Union is the longtime collective-bargaining representative of the Company's "checkers, lift drivers, loaders, flagmen, etc." employed at its New Orleans facility. (D&O2 n.2; GCX2 at 1.) Since around 1985, the Company and the Union have negotiated successive collective-bargaining agreements covering the bargaining-unit employees, the most recent of which was effective by its terms through September 30, 2005. (D&O2; Tr.10-11, GCX2.)

In mid-August 2005, about a month before the agreement was due to expire, the Company and the Union began bargaining for a successor contract. (GCX13 at 5.) The parties met on August 16 and August 22, but had to cancel a third session that was set for August 29 due to Hurricane Katrina. (GCX13 at 5-6.)

When the parties met again on September 22, the Company precipitously announced that it was presenting a “last, best, and final offer.” (GCX13 at 6.) The Company made this announcement despite the dislocations caused by the hurricane and the hiatus since the parties’ prior meetings. (*Id.*) The Company implemented its offer without the Union’s consent on October 17, 2005. (D&O2; GCX13 at 7.) As the Board found in *Coastal I*, the Company’s unilateral action violated its duty to bargain under the Act and was plainly opportunistic:

what [the Company] did is when the storm had passed and the parties decided to try to get back into negotiations, it elected to take advantage of this situation, the dispersal of the bargaining unit, the difficulties that the [U]nion was having in . . . functioning in its office, to implement significant changes in employees’ terms and conditions of employment, before the parties had really even had an opportunity to discuss them seriously or at any length.

(GCX13 at 11.)

B. As the Litigation in *Coastal I* Proceeds, the Company Indicates that It Might Increase Wages, and Later Says that It Must Do So, but Fails To Give the Union Notice of Any Specific Proposals; the Union Responds, Warning that It Will File Charges Over Any Further Unilateral Changes; the Company Nevertheless Increases Wages Unilaterally

On October 18, 2005, one day after the Company took the unlawful unilateral actions that became the subject of *Coastal I*, Company Vice President and Chief Operating Officer David Mannella sent Union Business Manager David Negrotto the following letter:

As we discussed during the time we were trying to restore operations after Hurricane Katrina and in negotiations, it may be necessary to pay in excess of the wage rate. As you were advised, if that unusual condition arises, the roster employees will receive equal to or excess of any rate paid to casual employees.

(D&O2; GCX3.)² The parties, however, had never discussed changing wage rates as a result of the hurricane. In addition, Mannella did not identify any particular proposal to change wages by specific amounts, nor did he specify a timeframe. Accordingly, Negrotto did not respond to the letter. (D&O2; Tr.16.) Negrotto heard nothing more from the Company on this issue for almost a year. (D&O2; Tr.23, 27, 41-42, GCX4.)

In the meantime, the Union filed unfair-labor-practice charges with the Board in *Coastal I*, alleging that the Company had violated its duty to bargain by unilaterally implementing its contract offer in October 2005. (GCX13 at 1-2.) The General Counsel issued a complaint in March 2006, and the parties were thereafter involved in litigating those issues. (D&O2 n.4; GCX13 at 2.) During this period, they did not meet for bargaining. (D&O2. n.4; Tr.62.)

On September 26, 2006, while the parties were awaiting a decision in *Coastal I*, Mannella sent Negrotto a letter stating:

² The parties refer to unit employees who receive benefits as “roster employees,” and to other employees who perform the same work as “casual employees.” The distinction is largely irrelevant here.

In accordance with our letter to you of October 18, 2005, the current labor market requires Coastal to offer increased wages to attract qualified lift operators. As stated previously, roster employees will receive no less than any casual employee.

(D&O2; GCX4.) Mannella, however, provided no specific proposal or information regarding the amount of any wage increase or a timeframe for implementation.

(D&O2-3; Tr.23, 59, 104, GCX4.)

Negrotto responded on September 29, advising Mannella that the Union “d[id] not recognize [the Company’s] letter of October 18, 2005,” given the ongoing litigation in *Coastal I*. (D&O8; GCX5.) Negrotto also warned Mannella that any further changes to the terms established by the parties’ expired collective-bargaining agreement would precipitate the filing of new unfair-labor-practice charges. (*Id.*)

On the same day that Negrotto responded to Mannella’s letter, the Board issued its decision in *Coastal I*. (D&O3; GCX13.) As noted above p. 5, the Board found that the Company’s October 17, 2005 unilateral implementation of its “final offer” violated Section 8(a)(5) and (1) of the Act. (D&O2-3; GCX13.) The Board ordered the Company to remedy this unfair labor practice by refraining from “any changes to employees’ wages, hours, and other terms and conditions of employment in the absence of agreement with the Union or a good-faith impasse in negotiations.” (GCX13 at 2.)

Notwithstanding Negrotto's September 29 letter and the Board's Order issued on the same date, the Company unilaterally increased employee wages on October 2, 2006. (D&O3; Tr.104.) The Company raised the wage rate by \$1.25 per hour for roster employees, and by \$1.00 to \$1.75 per hour for casual employees. (D&O3; Tr.105, GCX2 at 31.) The Company did not tell the Union about or bargain over these changes before implementing them. (D&O3; Tr.104-05.)

C. Without Mentioning that It Had Already Unilaterally Changed Wage Rates, the Company Tells the Union that It Cannot Operate Without Higher Wages; the Union Reminds the Company that *Coastal I* Prohibits Unilateral Changes and Offers To Negotiate; the Company Still Does Not Tell the Union About the Wage Increases

On October 3, the day after the Company unilaterally changed employees' wage rates, Mannella wrote to Negrotto, stating that he "d[id] not understand" Negrotto's September 29 letter opposing a wage increase. (D&O3; GCX6.) Mannella added that the Company would have difficulty continuing in business without "the higher wage." (*Id.*) He did not say what this higher wage was, nor did he mention that the Company had implemented wage increases the day before.

As Negrotto did not immediately respond, Mannella sent him another letter on October 5, entreating the Union to "give consideration" to a still-unspecified wage increase. (D&O3; GCX7.) In making this plea, Mannella again neglected to mention that the Company had already implemented wage increases on October 2.

On October 5, Negrotto wrote to Mannella to advise him of the Board's September 29 Decision and Order in *Coastal I*. (D&O3; GCX8.) Negrotto enclosed a copy for Mannella's reference, and called Mannella's attention to the portion of the Order directing the Company to refrain from unilateral changes. Negrotto added: "it is imperative that both parties adhere to the original contract." (*Id.*) He also repeated the warning in his September 29 letter, that any change in the terms set forth in the parties' agreement "will result in a charge with the . . . Board." (*Id.*) Negrotto stated in conclusion that the Union stood ready to negotiate. (*Id.*)

On October 19, the parties met for their first bargaining session since the Company's unilateral implementation of its contract offer one year earlier. (D&O3; Tr.21.) At that meeting, the Company submitted a written statement assuring the Union that it had "rescinded any changes made to employees' wages, hours, and other terms and conditions of employment . . . that were implemented on or after October 17, 2005." (D&O3; Tr.22, GCX11.) The parties then discussed issues relating to the "status quo" for about an hour. (D&O3; Tr.22.) Although Mannella participated in this discussion, neither he nor the other company representative said anything about the wage increases that the Company had unilaterally implemented on October 2. (D&O3; Tr.23.) Negrotto ultimately

learned the details of the wage increases long after the fact, on June 23, 2008.

(D&O3; Tr.24.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally increasing the wage rates of unit employees. (D&O1, 5.) The Board's Order requires the Company 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 their statutory rights. (D&O6.) Affirmatively, the Board's Order requires the Company to: rescind the wage increases, upon request from the Union, until such time as the parties have bargained in good faith to an agreement or have reached an impasse; bargain with the Union, upon request, as the exclusive representative of the bargaining-unit employees; and post a remedial notice. (D&O6.)

SUMMARY OF ARGUMENT

The Company's contention that the Board's Order was not issued by a quorum of the Board must be rejected. Chairman Liebman and Member Schaumber, sitting as a two-member quorum of a properly-established, three-member group within the meaning of Section 3(b) of the Act, acted with the full powers of the Board in issuing the Board's Order. Their authority to issue Board

decisions and orders under such circumstances is provided for in the express terms of Section 3(b), and is supported by Section 3(b)'s legislative history, cases involving comparable situations under other federal administrative agency statutes, and administrative-law and common-law principles. In contrast, the Company's argument is based on an incorrect reading of Section 3(b) and a misunderstanding of the nature and extent of the authority delegated to the three-member group and exercised by the two-member quorum.

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by altering employees' wage rates on October 2, 2006, without ever giving the Union a proposal, much less an opportunity to bargain over it. The Company admits that it made the changes on that date—just three days after the Board issued its decision in *Coastal I* condemning the Company's 2005 unilateral changes—but argues that it was nonetheless privileged to act unilaterally because the Union allegedly waived bargaining on the subject. As the Board reasonably found, however, the Company never presented a specific proposal or timeframe for implementation. The Union can hardly be faulted for failing to request bargaining over a proposal it never received. In any event, although the Company continued to keep the Union in the dark after implementing the changes, the Union, referring to the Board's findings in *Coastal I*, notified the Company that it stood ready to negotiate, and warned that it would file more unfair

labor practice charges if the Company made further unilateral changes. On this record, the Board reasonably rejected the Company's claim that the Union waived its bargaining rights.

The Board also reasonably rejected the Company's assertion that "exigent circumstances" privileged the unilateral action. For the type of exigency claimed here, the Company still had to give its employees' collective-bargaining representative adequate notice and an opportunity to bargain, which it failed to do. In any event, the Company did not meet its heavy burden of showing an exigency that required it to act on October 2, 2006, without allowing any time for negotiations. Indeed, the testimony of company officials undermined its claim.

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 Liebman³ 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*, 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-

³ On January 20, 2009, President Obama designated Wilma B. Liebman as Chairman of the Board. See BNA, *Daily Labor Report*, No. 13, at p. A-8 (Jan. 23, 2009).

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*, 568 F.3d 410 (2d Cir. 2009) (“*Snell Island*”).⁴ *But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) (“*Laurel Baye*”), *reh’g denied* (July 1, 2009) (discussed below). As we now show, their authority to issue Board decisions and orders is provided for in the express terms of Section 3(b) and confirmed by Section 3(b)’s legislative history, as well as supported by cases involving comparable circumstances under other federal statutes, and general principles of administrative and common law. The Company’s 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.

⁴ The issue was argued before the Eighth Circuit in *NLRB v. Whitesell Corp.*, No. 08-3291, on June 9, 2009. This issue has also been fully briefed in this Circuit in *Bentonite Performance Mineral LLC v. NLRB*, No. 09-60034; in the Third Circuit in *J.S. Carambola, LLP v. NLRB*, Nos. 08-4729 and 09-1035, and *NLRB v. St. George Warehouse, Inc.*, Nos. 08-4875, 09-1269; in the Fourth Circuit in *Narricot Industries, L.P. v. NLRB*, Nos. 09-1164 and 09-1280, and *McElroy Coal Company v. NLRB*, Nos. 09-1332, 09-1427; in the Eighth Circuit in *NLRB v. American Directional Boring, Inc.*, No. 09-1194; in the Ninth Circuit in *NLRB v. United Food and Commercial Workers, Local 4*, No. 09-70922; and in the Tenth Circuit in *Teamsters, Local 523 v. NLRB*, Nos. 08-9568 and 08-9577.

A. Background

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

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

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, 3 days later, Member Kirsanow's recess appointment expired⁵ 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

⁵ Member Walsh's recess appointment also expired on December 31, 2007.

members shall constitute a quorum” of any group of three members to which the Board had delegated its powers. Since January 1, 2008, this two-member quorum has issued over 300 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders.⁶

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 Congress expressed a clear intent to allow the Board to operate as a two-member quorum of a properly delegated three-member group, the court is required to apply “traditional principles of statutory construction,” and this process begins with looking to the plain meaning of the statutory terms. *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1195 (5th Cir. 1997) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). The meaning of a term, however, “cannot be determined in isolation, but must be drawn from the context in which it is used.” *Id.* at 1195-96 (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)). And of course, “a statute must, if possible, be construed in such a fashion that every word has some operative

⁶ On May 4, 2009, it was reported that the two-member Board quorum had issued approximately 400 decisions, published and unpublished. See BNA, *Daily Labor Report*, No. 83, at p. AA-1 (May 4, 2009). The published decisions include all decisions in Volume 352 NLRB (146 decisions), Volume 353 NLRB (132 decisions), and Volume 354 NLRB (48 decisions as of July 21, 2009).

effect.” *Id.* at 1196 (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)).

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;⁷ 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 both the Seventh Circuit and the First Circuit have 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

⁷ The Company mistakenly argues (Br. 16) that the vacancy clause in Section 3(b) only allows for a single “vacancy,” not multiple “vacancies.” That argument overlooks that, in the construction of federal statutes, “unless context indicates otherwise--words importing the singular include and apply to several persons, parties, or things.” 1 U.S.C. § 1. Moreover, Section 3(b)’s vacancy clause is identical to, and was modeled on, the ICC’s vacancy clause which has been interpreted to cover multiple vacancies. *See, e.g., Assure Competitive Transp., Inc.*, 629 F.2d at 473. If Section 3(b) were construed as the Company contends, the Board would be disabled whenever it had only three sitting members, a result wholly at odds with that section’s quorum provisions.

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 those decisions recognize, the three provisions of Section 3(b), 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 authority 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.⁸

⁸ In our view, as set forth above, Congress’ intention is clear, and “that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S at 842-843. In *Snell Island*, 568 F.3d at 424, however, the Second Circuit found that Section 3(b) does not have a plain meaning, but that the Board’s reasonable interpretation of its authority under Section 3(b) is entitled to deference. If this Court, like the Second Circuit, should find that Section 3(b) is susceptible to different reasonable interpretations, then the Court should also find, in agreement with the Second Circuit, that the Board is entitled to deference. *See Barnhart v. Walton*, 535 U.S.

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, as "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

212, 214-15 (2002) (if statute is ambiguous, agency's interpretation must be sustained unless it "exceeds the bounds of the permissible," citing *Chevron*, 467 U.S. at 843, and *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

The Board delegation decision at issue here, at a minimum, reflects a reasonable construction of Section 3(b). As explained further below, that construction is consistent with the Act's legislative history and with the common law principles governing public agencies, and it furthers the overall purpose of the Act to avoid "industrial strife," 29 U.S.C. § 151. The fundamental deference point is that courts should prefer a permissible construction that permits an agency to continue to carry out its public function. *See Snell*, 568 F.3d at 424 (commending the Board for its "conscientious efforts to stay 'open for business'"). *Accord Falcon Trading Group, Ltd v. SEC*, 102 F.3d 579, 582 n.3 (D.C. Cir. 1996); *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1335, 1340 n.26 (D.C. Cir. 1983). Thus, under any standard of deference, the Board's reasonable understanding of its statutory authority should be respected by this Court.

the Board possesses 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 (Mar. 4, 2003).

The Company relies (Br. 15-18) in large part on the reasoning of the D.C. Circuit in its *Laurel Baye* decision. The D.C. Circuit's contrary conclusion, however, 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 “group” is not in fact an exception to the three-member quorum requirement for the “Board.” *See id.* at 473. The court stated that Congress' use of those two different object nouns indicates that each quorum provision is independent, 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*, 129 S.Ct. 1886, 1890-91 (2009) (applying “ordinary English” to determine the meaning of a statute). The ordinary meaning of the word “except” is “with the exclusion or exception of.” *Webster’s New World College Dictionary* (4th ed. 2008). Thus, in ordinary English usage, the statement in Section 3(b)—that “three members of the Board shall, at all times, constitute a quorum of the Board, *except* that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof” (emphasis added)—denotes that the two-member quorum rule that applies when the Board has delegated its powers to a three-member group is an *exception* to the requirement of a three-member quorum “at all times.”

Laurel Baye’s refusal to give full effect to this express exception is based on an assumption that it would be anomalous for Congress to have used the statutory rubric “at all times . . . except” if Congress intended that there be some times when the general requirement of a three-member quorum would not apply. That assumption is erroneous. *Laurel Baye* ignores that, in other statutes, as in Section 3(b), Congress has used that same statutory rubric to state a true exception to a

general rule. *See, e.g.*, 20 U.S.C. § 1099c-1(b)(8) (Secretary of Education shall “maintain and preserve *at all times* the confidentiality of any program review report . . . *except* that the Secretary shall promptly disclose any and all program review reports to the institution of higher education under review”) (emphasis added).

Laurel Baye also fails to give the word “quorum” its ordinary meaning. “Quorum” means “the minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted.” *Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (“*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.⁹ 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. *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)).

⁹ *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.”).

The Company, citing the provision in Section 3(a) of the Act that “the Board shall consist of five instead of three members,” erroneously contends (Br. 11-12) that the Board must have five members to delegate its authority to a three-member group. Section 3(b) expressly states that a quorum of the Board shall consist of three members (“except” that a quorum of a three-member group is two members), which is therefore the minimum number of members that must be present to transact Board business. *Yardmasters*, 721 F.2d at 1341 (citing Robert's Rules of Order 16 (rev. ed. 1981)). Accordingly, as long as there are at least three members, the Board has the authority to exercise any of the powers granted in the Act, including the power to delegate its authority to groups of three or more. There is nothing in either Section 3(a) or (b) which limits the powers that a three-member quorum can exercise. Contrary to the Company’s argument, nowhere in the statute does it state that there must be five members present to delegate the Board’s powers to a three-member group.¹⁰

¹⁰ Denying a four-member Board the authority to delegate its powers to a three-member group would be inconsistent with the purpose of Section 3(b)’s delegation authority, which was to increase the Board’s casehandling efficiency. *See Snell Island*, 568 F.3d at 421.

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

As shown, the meaning of statutory language cannot be determined by isolating particular terms, but 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); *United States v. Mikell*, 33 F.3d 11, 12 (5th Cir. 1994). Thus, ascertaining that meaning often requires resort to historical materials, including legislative history. *Gustafson*, 513 U.S. at 578; *Mikell*, at 13-14.

A brief history of the Board's operations and of the legislation that ultimately became Section 3(b) of the Act confirms that Section 3(b) authorizes the Board 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."¹¹ Pursuant to that two-member quorum provision, the original Board, during its 12 years of administering federal labor policy, issued 464

¹¹ *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).

published decisions with only two of its three seats filled.¹² *See, e.g., NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50 (1943), *enforcing* 35 NLRB 621 (Sept. 23, 1941).

The Wagner Act of 1935 was controversial and subsequently generated extensive legislative scrutiny and numerous proposed amendments.¹³ 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.¹⁴

The Senate bill, while proposing to enlarge the Board and amend the quorum requirement, was careful to do so in a manner that explicitly preserved the Board's

¹² 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.

¹³ *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).

¹⁴ *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.

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.¹⁵ The Senate bill’s preservation of the two-member quorum option demonstrates that the proposed enlargement was not to ensure a greater diversity of viewpoint in deciding cases, contrary to the suggestion of one Senator.¹⁶ 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.”¹⁷ Senator Taft similarly stated that the Senate bill was designed to “increase[] the number of the members of the Board from 3 to 7, in order that they may sit in two panels, with 3 members on each panel, and accordingly may accomplish twice as much.”¹⁸ *See Snell Island*, 568 F.3d at 421 (Congress added

¹⁵ S. 1126, 80th Cong. § 3 (1947), *1 Leg. Hist. 1947*, at 106-07.

¹⁶ Remarks of Sen. Ball, 93 Cong. Rec. 4433 (May 2, 1947).

¹⁷ S. Rep. No. 80-105, at 8, *1 Leg. Hist. 1947*, at 414.

¹⁸ 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 (“ICC”) and the Federal Communications

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.¹⁹

Despite having only two additional members, rather than four as proposed by the Senate, the new five-member Board was able to leverage its two additional members by using them in three-member groups to issue decisions in a manner similar to the original three-member Board. As the Joint Committee created by Title IV of the Taft-Hartley Act to study labor relations issues²⁰ 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

Commission (“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).

¹⁹ 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.

²⁰ See 61 Stat. at 160, *1 Leg. Hist. 1947*, at 27-28.

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).²¹ 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.²²

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

²¹ 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”).

²² 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).

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 847.²³

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

²³ The Company argues (Br. 18 n.1) that the legislative history does not support this interpretation of Section 3(b). Unlike the references cited above, however, the legislative history references cited by the Company do not specifically relate to Section 3(b). For example, contrary to the Company's contention, there is no indication in the legislative history of Section 3(b) that Congress wanted the Board to act more like a court with regard to case assignment. Rather, as noted at pp. 26-27 n.18, the delegation provisions and case processing practices of the ICC and the FCC appear to be the model that Congress had in mind in crafting Section 3(b). Congress' concern that the Board act more like a court was expressed in different provisions, such as Section 4 of the NLRA (29 U.S.C. § 154), which abolished the centralized "Review Section" that reviewed transcripts and prepared drafts, and required individual Board members instead to use legal assistants employed on their staffs to perform those functions. *See* S. Rep. No. 80-105, at 8-10, *1 Leg. Hist. 1947*, at 414-16.

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 allows the Board to continue functioning under the present circumstances gives effect both to the plain language of the Act and its purpose.

The Company attacks (Br. 13) the Board's delegation of authority as "an attempt to circumvent the authority prescribed under the statute" on the grounds that the Board was aware that Member Kirsanow's departure was imminent and that the delegation would soon result in the Board's powers being exercised by a two-member quorum consisting of Members Liebman and Schaumber. Rejecting that argument, the Second Circuit recognized that the anticipated departure of one member of the group "has no bearing on the fact that the panel was lawfully constituted in the first instance." *Snell Island*, 568 F.3d at 419.

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.

The Company, in agreement with the D.C. Circuit in its *Laurel Baye* decision, contends (Br. 15) that *Yardmasters* is 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 Company and 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 powers of the Board that were properly delegated to that three-member group is consistent with established principles of both 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).²⁴

At common law, the power held by a public board was held “not individually but collectively” (*Commonwealth ex rel. Hall v. Canal Comm’rs*, 9 Watts 466, 471, 1840 WL 3788, at *5 (Pa. 1840)), and “considered joint and several” among its members. *Wheeling Gas Co. v. City of Wheeling*, 8 W.Va. 320,

²⁴ 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.

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).²⁵ By providing for an express two-member quorum exception to Section 3(b)'s three-member quorum requirement where the Board has appropriately delegated its powers to a three-member group, Congress enabled the Board to continue to exercise its powers through a quorum number identical to that called for under the common-law rule that a majority of the remaining members constitutes a quorum.

²⁵ 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).

Giving effect to Section 3(b)'s plain language produces a result that is consistent with what Congress has authorized in similar statutes, enacted like the NLRA against the backdrop of common-law quorum rules applicable to public agencies. In *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (1996), the D.C. Circuit, recognizing the relevance of these common-law quorum principles, held that, in the absence of any countermanding provision in its authorizing statute, the SEC lawfully promulgated a two-member quorum rule that enabled the commission to issue decisions and orders when only two of its five authorized seats were filled. *Id.* at 582 and n.2.

The common-law principles applied in *Falcon Trading* apply as well in interpreting the quorum provisions Congress enacted in the NLRA, even though, unlike the NLRA, the SEC's authorizing statute contained no quorum provision. The only real difference is that the SEC had to hand-tailor its solution to the imminent problem of being reduced to two members by amending its own quorum rules at a time when three members remained as a quorum prescribed by its rules. 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).

That common-law rule is reflected in the authorizing statutes of other administrative agencies, as well. *See Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 472-73 (7th Cir. 1980) (when only 6 of the 11 seats on the ICC were filled, 4 commissioners, a majority of those in office, constituted a quorum and could issue decisions); *Michigan Dep't of Transp. v. ICC*, 698 F.2d 277, 279 (6th Cir. 1983) (when 7 of the 11 seats on the ICC were vacant, a decision issued by the remaining 4 commissioners was valid); cf. *Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983) (based on provision permitting 11-member agency to "carry out its duties in [d]ivisions consisting of three [c]ommissioners," a "majority" of whom "is a quorum for the transaction of business," ICC decision participated in and issued by only two of the three division members was valid).

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 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.²⁶

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

²⁶ *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. The Two-Member Quorum Has Authority To Decide All Cases Before The Board

Nor is the two-member quorum provision of Section 3(b) limited to situations where a case was originally assigned to a group of three members. 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 (see 29 U.S.C. § 154), and the power, in accordance with the Administrative Procedure Act, to promulgate the rules and regulations necessary to carry out the provisions of the NLRA (see 29 U.S.C. § 156). Thus, 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, and the two-member quorum retains the authority to consider and decide those cases, including the authority to issue the decision in this case.

Section 3(b)’s broad authority permitting the Board to delegate all of its powers to a group contrasts with statutes governing appellate judicial panels, which require the assignment of at least three judges in every case. 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)).

The Supreme Court’s decision in *Nguyen v. United States*, 539 U.S. 69 (2003), 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 that case, 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 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. *See Snell Island*, 568 F.3d at 419 (three-member panel that

took effect on December 28, 2007, was properly constituted). 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 83.²⁷

KFC National Management Corp. v. NLRB, 497 F.2d 298 (2d Cir. 1974), involves a very different kind of delegation. In *KFC*, the Second Circuit held that the Board members responsible for deciding whether a representation election had been conducted fairly were required to make that decision themselves and could not, under the NLRA, delegate that responsibility to Board staff. As the court stated: “In view of the rather clear congressional distrust of staff assistants—who are, of course, neither appointed by the President nor approved by the Senate, as are Board members, 29 U.S.C. § 153(a)—we cannot say that Congress intended, or would have approved, the general proxies issued [to Board staff] here.” 497 F.2d at 303. Thus, *KFC* involved an improper delegation of authority to NLRB staff employees who did not have adjudicatory authority under the Act. In contrast, here, Section 3(b) expressly authorizes the Board to delegate its powers to a group of three Board members, all of whom are authorized by the Act to adjudicate cases.

²⁷ See also *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137, 138, 144 (1947) (Urgent Deficiencies Act “require[d] strict adherence to the [statutory] command” that a case brought to enjoin an ICC order “shall be heard and determined by three judges,” where there was “no provision for a quorum of less than three judges.”).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY INCREASING EMPLOYEES’ WAGE RATES WITHOUT FIRST GIVING THE UNION NOTICE AND AN OPPORTUNITY TO BARGAIN OVER THE CHANGE

A. Applicable Principles and Standard of Review

1. An employer violates Section 8(a)(5) of the Act by unilaterally changing employee wages

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees” Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining, in relevant part, as “the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment”

Under Section 8(d), wages are a mandatory subject of bargaining. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); accord *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 852 n.1 (5th Cir. 1986).

Consequently, an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing employee wages, for such unilateral action “is a circumvention of the duty to negotiate which frustrates the objectives of Section

8(a)(5) much as does a flat refusal” to negotiate on the subject of wages.²⁸ *NLRB v. Katz*, 369 U.S. 736, 742 n.9, 743 (1962). Unilateral action is unlawful because it “minimizes the influence of organized bargaining” and “interferes with the right of self organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.” *May Department Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). For this reason, even unilateral improvements in wages are unlawful. *See Katz*, 369 U.S. at 744-46 (finding unilateral wage increases unlawful).

The rule against unilateral changes obligates employers to “preserve the status quo” with respect to wages and other mandatory subjects of bargaining. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 551 (1988); *accord Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198. This obligation emphatically applies “where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed.” *Litton*, 501 U.S. at 198. *Accord Gulf States Mfg. Co., Inc. v. NLRB*, 704 F.2d 1390, 1395-99 (5th Cir. 1983); *NLRB v. Imperial House Condominium, Inc.*, 831 F.2d 999, 1007 (11th Cir. 1987) (employer’s obligation to refrain from unilateral action is

²⁸ An employer’s violation of Section 8(a)(5) of the Act derivatively violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” of the Act (29 U.S.C. § 157), including the right to bargain collectively. *See, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Tri-State Health Serv., Inc. v. NLRB*, 374 F.3d 347, 350 n.1 (5th Cir. 2004).

“unaltered by the fact that the collective bargaining agreement . . . ha[s] expired”).

As the Supreme Court has explained, “[f]reezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.”

Laborers Health & Welfare, 484 U.S. at 545 n.6 (internal quotation marks and citation omitted). The terms of an expired collective-bargaining agreement accordingly retain legal significance during the pendency of negotiations, as they “define the status quo for purposes of the prohibition on unilateral changes.”

Litton, 501 U.S. at 206.

An employer that wishes to alter status-quo wages established by an expired collective-bargaining agreement must “at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments and proposals.” *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964); accord *NLRB v. Walker Constr. Co.*, 928 F.2d 695, 696-97 (5th Cir. 1991). This means, in particular, that the employer must give “express” and “detailed notice of proposed changes” to the union. *Stone Boat Yard v. NLRB*, 715 F.2d 441, 444-45 (9th Cir. 1983); accord *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402-03 (5th Cir. 1981) (unilateral implementation of piece rates and production quotas unlawful where employer had failed to “give notice of changes in particular rates” to union); *Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343,

1350 (5th Cir. 1978) (unilateral implementation of wage increase unlawful where employer had failed to give union notice as to particular amount of wage increase). Moreover, the requisite “notice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining.” *Crystal Springs Shirt Corp.*, 637 F.2d at 402 (citing *International Ladies’ Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972)); accord *Walker Constr. Co.*, 928 F.2d at 696 (employer is “required to notify the union itself . . . not just the bargaining unit employees,” sufficiently in advance of actual implementation).

2. The Board’s finding of unlawful unilateral action is entitled to deference where, as here, it is supported by substantial evidence

The rule against unilateral changes represents “the Board’s interpretation of the NLRA requirement that parties bargain in good faith.” *Litton*, 501 U.S. at 200. As such, the rule is “entitled to deference from the courts” if it is “rational and consistent with the Act.” *Id.* (citations omitted). This Court additionally defers to the Board’s application of the rule, and related findings of fact, where, as here, they are “reasonable and supported by substantial evidence considered on the record as a whole.” *Strand Theatre of Shreveport v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007).

“Substantial evidence,” for purposes of this Court’s review of factual findings, consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); accord *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446 (5th Cir. 2003). The Court, however, may not displace the Board’s choice between two fairly conflicting views of the evidence. *Universal Camera Corp.*, 340 U.S. at 488. Indeed, “[r]ecognizing the Board’s expertise in labor law,” this Court has stated that it “will defer to plausible inferences [the Board] draws from the evidence, even if we might reach a contrary result were we deciding the case *de novo*.” *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001) (internal quotation marks and citation omitted).

B. Substantial Evidence Supports the Board’s Finding that the Company Unilaterally Increased Employee Wages

It is undisputed that the Company unilaterally increased the wages of its roster and casual employees on October 2, 2006. Further, as Company Vice President and Chief Operating Officer Mannella admitted, the Company never gave the Union advance notice of these wage increases—or any specific wage-increase proposals, for that matter. (D&O3; Tr.104.) Nor did the Company give the Union advance notice as to “which employees would be receiving [an increase], and when it would go into effect.” (D&O3; Tr.56, 59, 104.)

The Company's failure to give the Union advance notice of a specific proposal, with time to allow for bargaining, is completely unexplained in the record, and is all the more incomprehensible given the many months during which the Company apparently was considering wage increases before it unilaterally implemented them on October 2, 2006. Although Mannella told Union Business Manager Negrotto on October 18, 2005 that a wage increase "may be necessary," aside from this vague suggestion, Mannella never saw fit to present the Union with an actual proposal for a wage increase, contrary to the Company's obligation under the Act. Rather, Mannella kept from the Union the most basic elements of a bargaining proposal — he never bothered to tell the Union about the specific wage increases that the Company was seeking, or to indicate when the Company wanted them to take effect. And when Mannella wrote to Negrotto again, on September 26, 2006, it was only to relay the Company's assessment that a wage increase was "require[d]" given "the current labor market." (D&O2; GCX4.) Even then, Mannella did not bother to present the Union with a specific bargaining proposal or timeframe. Instead, the Company proceeded to implement the wage increases unilaterally less than a week later.

In these circumstances, the Board properly found that the Company had failed in its duty to bargain with the Union. As the Board observed, the Company "never once . . . approach[ed] the Union with a specific proposal to increase

wages.” (D&O5.) The Company thus unlawfully deprived the Union of any opportunity to engage in meaningful negotiations over a proposed wage increase.

Indeed, the Company continued to deprive the Union of any opportunity for discussion even after it unilaterally implemented the wage increase on October 2. Thus, in an October 5 letter to Negrotto, Mannella misleadingly persisted in urging Negrotto to “give consideration” to unspecified wage increases, even though Mannella knew full well, at that point, that the Company had already implemented the increases. (GCX7.) Similarly, on October 19, when the parties met for their first bargaining session after the Board issued its decision in *Coastal I*, Mannella engaged in an hour-long discussion of the “status quo,” but said nothing of the wage increase that the Company had unilaterally implemented just weeks earlier. At the same meeting, the Company also submitted a written statement falsely assuring the Union that the Company had “rescinded any changes made to employees’ wages, hours, and other terms and conditions of employment . . . that were implemented on or after October 17, 2005.” (Tr.22, GCX11.) Mannella never amended this statement to clarify that, in fact, one change—the October 2 unilateral wage increases—had not been rescinded.

C. The Company Was Not Privileged To Act Unilaterally

Notwithstanding the evidence discussed above, which establishes that the Company shirked its obligation to bargain with the Union over the wage increases,

the Company maintains that its conduct was lawful. Specifically, the Company argues (Br. 18-24) that it was privileged to act unilaterally because the Union assertedly waived bargaining, and because “exigent circumstances” necessitated unilateral action. As shown below, the Board reasonably rejected both of these defenses.

1. The Union did not waive its right to bargain over the wage increase

In arguing that the Union waived its bargaining rights, the Company (Br. 18) proceeds on the erroneous view that it gave the Union “proper notice” of the wage increase, sufficient to trigger the Union’s obligation to request bargaining. As shown above, however, for notice to be considered proper or adequate, it must contain sufficient information to “permit[] [the] union to meaningfully negotiate” over a proposed change. *NLRB v. Roll & Hold Warehouse & Distrib. Corp.*, 162 F.3d 513 (7th Cir. 1998). “[T]he determination of the adequacy of notice is essentially one of fact.” *Id.* As shown below, substantial evidence supports the Board’s finding (D&O1 n.1, 5) that the Company’s asserted “notices”—its October 18, 2005 and September 26, 2006 letters to the Union—fell woefully short of this standard.

The Company’s letters failed to convey, in even the most basic terms, what the Company’s plans were with regard to the wage increase. Indeed, as the Board found (D&O3), the Company’s October 18, 2005 letter “made no specific proposal

regarding any change,” but simply stated that a wage increase “may be necessary.” Similarly, the Company’s September 26, 2006 letter set forth no specific proposal. Given the Company’s complete failure to communicate anything approaching a specific proposal, the Union cannot be faulted for failing to request bargaining.

There is, moreover, nothing in the Union’s other conduct to support the Company’s assertion that the Union waived its right to bargain. On the contrary, the totality of the Union’s conduct here forecloses a finding of waiver. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (waiver of statutory rights must be “clear and unmistakable”); *accord Axelson, Inc. v. NLRB*, 599 F.2d 91, 96 (5th Cir. 1979). Soon after receiving the Company’s September 26, 2006 letter, in which it asserted for the first time that the market “require[d]” unspecified wage increases, the Union objected. Thus, on September 29—the very day that the Board issued *Coastal I*—the Union wrote the Company to remind it about that litigation, and to warn that unfair-labor-practice charges “will be filed” if the Company made further unilateral changes. (D&O3; GCX5.) The Company responded in an October 3 letter that failed to inform the Union about the changes it had unilaterally implemented the day before. Even so, the Union wrote the Company again, referring to the recently-issued *Coastal I*, and telling the Company, in no uncertain terms, that the Union stood “ready to negotiate,” but that any unilateral changes “will result in a charge” (D&O3; GCX8.) By warning

the Company that it would file charges, and offering to negotiate even though the Company had neglected to tell it about the unilaterally-implemented changes, the Union effectively preserved its bargaining rights. *NLRB v. Williams Enters., Inc.*, 50 F.3d 1280, 1287 (4th Cir. 1995); *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993).

Implicitly recognizing this, the Company argues (Br. 19-20) that “an employer may make a unilateral change absent an absolute waiver by the Union.” To support its claim, however, the Company mistakenly relies on a distinguishable case, *NLRB v. Pinkston-Hollar Construction Services, Inc.*, 954 F.2d 306 (5th Cir. 1992). Although the Court in *Pinkston-Hollar* permitted unilateral implementation on evidence short of waiver, it did so in very different circumstances—namely, “where, upon expiration of a collective bargaining agreement, the union has avoided or delayed bargaining, and the employer has given notice to the union *of the specific proposals the employer intends to implement.*” *Pinkston-Hollar*, 954 F.2d at 311 (emphasis added). Thus, the employer in *Pinkston-Hollar*, unlike the Company here, gave the union specific advance notice of its proposal: it “informed the union that it intended to cease participation in the union [pension] plan and to substitute its own plan some 40 days hence.” *See NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 738 (11th Cir. 1998) (distinguishing *Pinkston-Hollar* on this basis). Further, the events in *Pinkston-Hollar* took place in a very

different context: there, the parties were in the midst of ongoing contract negotiations when the union stalled on the disputed issue.²⁹ *Id.*

This case involves a vastly different factual setting. Unlike the employer in *Pinkston-Hollar*, 954 F.2d at 308, 310, the Company here never presented the Union with a specific proposal over which the parties could meaningfully bargain, nor did the Company provide the Union with a timeframe for implementation. Moreover, unlike *Pinkston-Hollar*, the instant case is set against the backdrop of the unfair labor practices found by the Board in *Coastal I*—namely, the Company’s unlawful declaration of impasse and implementation of its contract offer. In these circumstances, unlike *Pinkston-Hollar*, the Board reasonably found that the Union did not avoid or delay bargaining.

In sum, the record establishes that the Company never gave the Union the sort of advance notice of a specific proposal that would trigger a party’s duty to demand bargaining. Indeed, even after the Company unilaterally implemented the wage increase, it still did not tell the Union about its action. It was not until 2008 that the Union learned the details of the Company’s unilateral action. This belated

²⁹ The Company erroneously suggests (Br. 20) that, in *Pinkston-Hollar*, the Court “rejected” the requirement that “proper notice” must include “a specific proposal.” The Court had no occasion to address that issue, as it was “undisputed . . . that the [employer] notified the [u]nion of its proposed changes several weeks in advance of its desired implementation date.” *Pinkston-Hollar*, 954 F.2d at 310, 311 n.4. In the circumstances, the Court declined to address arguments raised for the first time on appeal, that the employer’s proposals were insufficiently specific. *Id.* at n.4.

revelation did not provide the Union with the sort of notice upon which a claim of waiver could be predicated. *See Gulf States Mfg., Inc. v. NLRB*, 704 F.2d at 1397 (“Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.”).

2. There were no “exigent circumstances” necessitating unilateral implementation of the wage increases

The Company mistakenly claims (Br. 21-24) that “exigent circumstances” justified its unilateral conduct. The Board does recognize that “matters may arise where the exigencies of a situation require prompt action” outside the normal course of bargaining. *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *accord Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). However, where, as here, the claimed exigency is admittedly (Br. 22) susceptible to bargaining, the employer must fulfill certain obligations *before* it may take “prompt action” in response to the exigency. *RBE*, 320 NLRB at 82.³⁰ Specifically, as the Company acknowledges (Br. 22), the employer must “satisfy its statutory obligations by providing adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to impasse over the

³⁰ In *RBE*, 320 NLRB at 81-82, the Board recognized two categories of exigencies: (1) those exigencies that require “immediate action” and therefore “excuse bargaining altogether;” and (2) lesser exigencies that “require prompt action for which bargaining is appropriate.” The Company claims (Br. 22) an exigency of the second, lesser type, for which some bargaining was concededly appropriate.

particular matter.” *Id.* Because the Company failed to fulfill these obligations, it cannot invoke its claimed exigency to justify its unilateral action.

As the Board properly found (D&O5), and as shown above pp. 46-47, the Company never made any specific proposal regarding the wage increase for which it now claims an exigency. Nor did the Company otherwise “seek to bargain over the wage-rate increase as a separate emergency matter,” as required under *RBE. Pleasantview Nursing Home*, 335 NLRB 961, 963 (2001), *enforced in relevant part*, 351 F.3d 747, 755-57 (6th Cir. 2003). On the contrary, without bargaining at all, the Company “went ahead and implemented the increase on October 2 in the face of the Union’s objection and demand for bargaining.” (D&O5.) On this evidence, the Board reasonably found (D&O5) that the Company did not take the antecedent steps necessary to claim that exigent circumstances justified its unilateral action. *See RBE*, 320 NLRB at 82.

In any event, as the Board further found (D&O4-5), the Company utterly failed to establish any exigency “compelling” unilateral action on October 2, 2006. *Id.* at 82. Under *RBE*, an employer asserting such a defense must establish that it faced an exigency caused by external events beyond its control that was not “reasonably foreseeable,” and that “time [was] of the essence.” *Id.* The Company failed to meet that “heavy burden.” *Our Lady of Lourdes Health Ctr.*, 306 NLRB 337, 340 n.6 (1992). Here, contrary to the Company’s contention (Br. 21-22), the

Board fully recognized (D&O4-5) the nature of the claimed exigency—specifically, “the labor shortage in New Orleans following Katrina.” The Board properly found (D&O5), however, that this labor shortage simply was not an “extraordinary unforeseen event” in October 2006, when the Company implemented the wage increases, or that they were “require[d]” immediately.

As the Company’s own witnesses admitted (D&O4-5; Tr.88, 134-35), the labor shortage had been an ongoing problem in the New Orleans area for over a year, since late August 2005. During that period, however, the Company showed no particular urgency about increasing wages in response to the shortage. The Company thus took an entire year to deliberate and monitor labor market conditions before precipitously implementing the wage increases on October 2, 2006, without even bothering to present a proposal to the Union beforehand.

Moreover, the Company failed to show that an immediate wage increase was needed at that particular time—that “time was of the essence.” *See RBE*, 320 NLRB at 82. Thus, as the Board noted, Company Vice President and Chief Operating Officer Mannella could not identify any incident or event that particularly necessitated action on October 2. (D&O5; Tr.88.) Similarly, Company General Manager Don Zemo candidly admitted that there was no “magic date” for the wage increases; he acknowledged that it would have made no difference if the Company had granted them a month later (which would have

provided time for discussions with the Union). (D&O5; Tr.134-35.) All of this evidence, supplied by the Company's own witnesses, belies the Company's claim here that it faced a particular exigency necessitating wage increases on October 2, 2006.

Notwithstanding the lack of evidence to prove any real exigency, the Company maintains (Br. 23) that it had to increase wages on October 2 in order to prevent an "exodus of its roster and casual employees." The Company, however, points to no evidence supporting its assertion that an exodus was about to take place on October 2. As the Board found (D&O4-5), the Company's own witnesses were unable to identify any employees who had left the Company for higher pay during the relevant time period. Indeed, the Company's witnesses could not even identify whether any employees had threatened to leave. (D&O5.) In these circumstances, the Board properly found (D&O5) that the Company failed to meet its heavy burden of showing that it faced an exigency on October 2, 2006, requiring unilateral action on that date.

Given all of the above considerations, the Board reasonably rejected the Company's claims that the Union waived its right to bargain over the wage increases, and that exigent circumstances necessitated prompt action. The Board therefore properly found that the Company violated the Act by making the changes unilaterally.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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July 2009

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

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Petitioner	:
	:
	: No. 09-60156
v.	:
	:
COASTAL CARGO COMPANY, INC.	: Board Case No.
	: 15-CA-18215
Respondent	:
	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,924 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 29th day of July, 2009

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	:	

CERTIFICATE OF SERVICE

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

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this 29th day of July 2009