

Can A Federal Agency Lose The Power To Act? – Courts split on whether the NLRB can issue binding decisions with only two of five members

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The National Labor Relations Board (“NLRB” or “Board”), the ultimate arbiter of disputes between unions and employers, has been functioning with only two members - less than half of the five members its enabling statute calls for - since January 1, 2008. President Obama has nominated three replacements for the open seats, but they have not yet been confirmed. Insisting that the Board's work must continue in the meantime, its remaining members - Chairman Wilma Liebman and Member Peter Schaumber – have continued to hear and decide unfair labor practice and representation cases at a steady pace. In May 2009, though, the United States Court of Appeals for the D.C. Circuit (“D.C. Circuit”) declared that the Board had no authority to issue any decision with only two members. In *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), the D.C. Circuit held that two members did not constitute a quorum for purposes of the National Labor Relations Act (“NLRA” or “Act”), and therefore lacked the authority to decide cases or issue opinions. In addition to setting aside the Board's ruling in the case at hand, *Laurel Baye* called into question the validity of all of the decisions issued by Members Liebman and Schaumber - that is, essentially the entire output of the Board - during the preceding 15 months.

Lawyers who practice traditional labor law are used to uncertainty; because the Board members are political appointees, three of whom traditionally are from the President's party, the law in this area tends to shift with the political tides. But the D.C. Circuit's decision raises an entirely new breed of uncertainty, calling into question whether hundreds of decisions can be relied upon as even temporarily authoritative statements of law.

In the time leading up to the *Laurel Baye* decision, the Board had undergone drastic changes in its membership. On December 16, 2007, former Chairman Robert J. Battista's term had expired, and he was not replaced. Shortly thereafter, the remaining four members of the Board unanimously voted to delegate all of the NLRB's powers to a three-member group consisting of members Liebman, Schaumber, and Peter N. Kirsanow, effective December 28, 2007. The purpose of this delegation, as described in the Board's minutes, was to prepare for the anticipated expiration of the terms of Members Kirsanow and Dennis P. Walsh on December 31, 2007, which the members understood would leave the Board with only two remaining members for an unknown period of time. Thus, the Board declared, “[p]ursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b)

of the Act." *Northeastern Land Servs. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009) (quoting *Northeastern Land Servs.*, 352 N.L.R.B. No. 89 at 1 n.2).

D.C. Circuit: The NLRB Has No Power To Act

In *Laurel Baye*, the D.C. Circuit was confronted with a petition for review of a Board order. The employer did not allege any error in the Board's findings, conclusions, or remedies, but instead based its attack solely on the argument that the Board lacked the authority to enter the order at issue, in light of its current two-member configuration. The court began by analyzing the portion of the NLRA's governing statute that sets forth the structure and operation of the Board. Since 1947, the NLRA has provided that the Board should be made up of five members. 29 U.S.C. § 153(a) ("[T]he Board shall consist of five instead of three members[.]").

Section 3(b) of the Act further provides 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).

It is the interpretation of Section 3(b), and its provisions for delegation of the Board's powers to a three-member panel, and further to a two-member quorum thereof, that forms the basis of the present debate. According to the D.C. Circuit, because the Act expressly provides that the Board's three-member quorum requirement must be met "at all times," the later reference to a two-member quorum in certain circumstances does nothing to preserve the authority of a Board to operate with only two members. As the court put it: "Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegatee group may act with two members so long as the Board quorum requirement is, 'at all times,' satisfied." *Laurel Baye*, 564 F.3d at 472–473. However, "the only authority by which the [three-member] committee can act is that of the Board. If the Board has no authority, it follows that the committee has none. The delegatee's authority to act on behalf of the Board therefore ceased the moment the Board's membership dropped below its quorum requirement of three members." *Id.* at 473. The *Laurel Baye* court therefore vacated the Board's challenged order and remanded the case for further proceedings "at such time as [the Board] may once again consist of sufficient members to constitute a quorum." *Id.* at 476.

Not The Last Word: Other Circuits Disagree And Affirm The Board's Power To Act

In the same several-month period during which the D.C. Circuit issued its *Laurel Baye* decision, three other circuit courts took up the same issue. All three came to the conclusion, contrary to the D.C. Circuit, that the two remaining members of the Board do constitute a quorum under the Act, and therefore have the continuing authority to render decisions on behalf of the Board. See *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009).¹ While the decisions of the First, Second, and Seventh Circuits varied somewhat in their analyses of the underlying facts (and the degree of their reliance on legislative history), the rationale and holdings of all three decisions were ultimately quite similar. Each of the circuits began with an analysis of the enabling statute, Section 153(b) (excerpted above), and determined: (1) that the Board was empowered to delegate all of its powers to a three-member panel; (2) that a two-member group of such a properly-delegated three-member panel constituted at quorum of the Board; and (3) that a subsequent vacancy on the Board, reducing its membership to the two-member quorum, did not impair the right of that two-member quorum to exercise the full powers of the Board. The decisions also acknowledged that the Board had acted in reliance on an opinion solicited and received from the Office of Legal Counsel of the U.S. Department of Justice ("OLC Memo"), which concluded: "In our view, if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." Quorum Requirements, Memorandum from M. Edward Whelan III, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, (Mar. 4, 2003), available at http://www.usdoj.gov/olc/2003/nlrq_quorum_03042003.pdf (last visited Aug. 25, 2009).

In the meantime, until the issue of the Board's authority to act is resolved definitively (whether by the U.S. Supreme Court or otherwise), Members Liebman and Schaumber have made it clear that they intend to keep operating as they have been:

After very careful consideration, we have determined that, as a quorum of the National Labor Relations Board, we will continue to issue decisions and orders in unfair labor practice and representation cases. ...We believe that the Board has an important public duty to keep functioning, and to avoid an indefinite shutdown in its decision-making, where (as here) there is a reasonable legal basis for concluding that the Board can act.

NLRB Press Release, May 18, 2009, available at: http://www.nlr.gov/shared_files/Press%20Releases/2009/R-2693.pdf.

Thus, the authority of the Board's two current members to decide unfair labor practice and representation cases, and to issue binding opinions and orders on behalf of the Board, has become the subject of a stark split in circuit court authority. While

the majority of decisions to date have come down in favor of the Board's continuing authority to operate, the D.C. Circuit's *Laurel Baye* decision nonetheless looms large, especially in light of that circuit's unique status as the venue to which more NLRB appeals and enforcement petitions are brought than any other. The D.C. Circuit has jurisdiction over all NLRB decisions, although such decisions may also be challenged through the courts of the circuit in which they arise. Given this state of uncertainty in such an important area of law, the involvement of the U.S. Supreme Court seems almost inevitable. See *Snell Island SNF LLC v. NLRB*, 568 F.3d at 419 (noting that “[t]he question regarding the jurisdiction of the NLRB's two-member panel is one ultimately to be resolved by the Supreme Court”). Indeed, both *New Process Steel (New Process Steel, L.P. v. National Labor Relations Board*, No. 08-1457 (U.S. filed May 27, 2009)) and *Northeastern Land Services (Northeastern Land Services, Ltd. v. National Labor Relations Board*, No. 09-213 (U.S. filed Aug. 20, 2009)) have filed petitions for a writ of certiorari. Other possibilities include a legislative solution - as suggested by the D.C. Circuit - or the quick confirmation of President Obama's new appointees for vacant slots on the Board.² Until the Board has at least three confirmed members in place, or the split is otherwise definitively resolved, however, we can expect a period of pronounced instability as all of the Board's decisions continue to be called into question.

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¹ The same question is also now pending before several other appellate courts.

² On April 24, 2009, President Obama nominated two individuals for the vacant Democratic Board seats: (1) Craig Becker, a longtime union lawyer and author of numerous scholarly articles espousing the causes of organized labor who currently serves as Associate General Counsel to the Service Employees International Union; and (2) Mark Gaston Pearce, also a career union-side labor lawyer, who currently serves on the New York State Industrial Board of Appeals and practices law at the Buffalo, New York, law firm of Creighton, Pearce, Johnsen & Giroux. Most recently, on July 10, 2009, Mr. Obama nominated Brian Hayes for the vacant Republican seat on the Board. Hayes currently serves as the Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP), and previously practiced management-side labor law for over 25 years.