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# Supreme Court Holds That Rulings By Two-Member NLRB Are Invalid

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Earlier today, a divided Supreme Court ruled (5-4) that the National Labor Relations Board exceeded its statutory authority by deciding nearly 600 cases with only two sitting members. *New Process Steel, L.P.* v. *N.L.R.B.*, 560 U.S. __ (June 17, 2010). Analyzing Section 3(b) of the National Labor Relations Act, which provides that "three members of the Board shall, *at all times*, constitute a quorum of the Board," the Court held that the two-member Board had no power to issue the rulings, many of which will have to be reconsidered.

In a press release issued within hours of the Court's decision, the NLRB defended its actions as "legally correct" and in the "public interest," while expressing obvious disappointment at the outcome of the litigation. According to the release, the Agency expects that approximately 75 cases now pending in the Courts of Appeal and Supreme Court will be remanded, and that "the now-four member Board will decide the appropriate means for further considering and resolving them." However, it is unclear whether the Board's rulings in the nearly 500 additional cases -- where the issue of the two-member Board's authority was not raised -- will be subject to reconsideration if the aggrieved party makes such an application.

As discussed in the Court's opinion, in late December 2007, with the NLRB about to lose two members whose terms expired at year end, the four then-sitting members delegated all the Board's powers to Members Wilma Liebman, Peter Schaumber and Peter Kirsanow, knowing that effective January 1, 2008, only two members -- Liebman and Schaumber -- would remain on the Board. During the ensuing 27-month period, the two-member Board decided hundreds of cases for and against employers and unions, including an unfair labor practice case involving New Process Steel, in which they ruled that the company had refused to bargain in good faith with the union and ordered it to cease and desist. *New Process Steel, L.P.*, 353 NLRB Nos. 13 and 25 (2008).

New Process Steel sought review of the Board's order in the Court of Appeals for the Seventh Circuit and challenged the two-member Board's authority to order it to take any remedial action for the alleged violations. The court rejected the Company's argument and ruled for the NLRB, holding that Members Liebman and Schaumber constituted a valid quorum of a three member group to which the Board had delegated its powers. *New Process Steel, LP* v. *N.L.R.B.,* 564 F.3d 840 (7th Cir. 2009). On the same day, the Court of Appeals for the D.C. Circuit reached the opposite conclusion in *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *N.L.R.B.*, 564 F.3d 469 (D.C. Cir. 2009). The Supreme Court granted certiorari to resolve the conflict.

The majority, led by Justice Stevens, ruled that "[t]he Rube Goldberg-style delegation mechanism imposed by the Board in 2007 – delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group – is surely a bizarre way for the Board to achieve the authority to decide cases with only two members," adding that "[t]o conclude that Congress intended to authorize such a procedure to contravene the three-member Board quorum, we would need some evidence of that intent." In conclusion, Justice Stevens wrote:

> If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances. Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died.

The dissent, written by Justice Kennedy, acknowledged that "[it] is not optimal for a two-member quorum to exercise the full powers of the Board for an extended period of time," but criticized the majority for rewriting Section 3(b) of the NLRA and "leav[ing] the Board defunct for extended periods of time, a result that Congress surely did not intend."

It remains to be seen how the NLRB will "rectify the situation in accordance with the Supreme Court's decision." (NLRB Press Release at 2.) It is, and has been, our understanding that the abundance of cases decided by Members Liebman and Schaumber between January 2008 and March 2010 were non-controversial and involved no change in or extension of the law. Accordingly, upon reconsideration it seems likely that most of those decisions will be adopted by the current Board, on which Members Liebman and Schaumber now are joined by recess appointees Craig Becker and Mark Pearce.

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