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SUPREME COURT HOLDS THAT TWO-MEMBER NATIONAL LABOR RELATIONS BOARD LACKED POWER TO ISSUE DECISIONS

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Last Thursday, the United States Supreme Court held in *New Process Steel v. National Labor Relations Board* that the National Labor Relations Board was not authorized to act when it had only two sitting members. The holding calls into question the almost 600 decisions issued by the two-member Board from January 2008 through March 2010.

Under the National Labor Relations Act, the Board normally consists of five members. A vacancy generally does not impair the Board's power to act, since a quorum consists of three members. The Board is authorized to delegate its power to a three-member panel, and the statute provides that, in that instance, a quorum consists of two members.

At the end of 2007, the appointments of three members of the Board were set to expire. Because of a political deadlock between the Democrats and the Republicans, no new appointments were anticipated. Thus, the Board delegated its powers to a three-member panel, believing that the remaining two members would constitute a quorum. From January 2008 until March 2010, the two-member Board issued nearly 600 decisions. The Courts of Appeals were split as to whether these decisions were valid or not.

A majority of the Supreme Court held that the two-member Board lacked the power to act. The Court explained that it was not enough for the Board to have three members at the time it delegated its power. Instead, the Board had to maintain a membership of at least three "at all times" for the delegation to remain valid. The Court rejected the Board's argument that the quorum language allowed it to operate with only two members.

The current Board likely will have to reconsider many of the decisions invalidated by the Court's holding in *New Process Steel*. This may delay the Board's resolution of other pending cases and impair the ability of the current Democratic majority to advance its labor agenda.