

ALERT

LABOR & EMPLOYMENT LAW

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Supreme Court Invalidates Years' Worth of NLRB Decisions

In a split decision, the United States Supreme Court has ruled that nearly 600 National Labor Relations Board decisions decided by a shorthanded board since January of 2008 must be reconsidered because the NLRB did not have the authority to render those decisions.

The NLRB is comprised of five members who are nominated by the president and approved by Congress for five-year terms. Due to political wrangling, as terms expired during the past two and a half years, the members were not replaced. Knowing that two seats would become vacant in December 2007, the five-member Board delegated all of its powers to the three remaining board members. The term for one of those three members expired on Jan. 1, 2008, leaving only two members on the Board. The remaining two members rendered decisions in about 600 cases in which they agreed, operating under the belief that those two members made up a quorum of the three-member Board. The two-member Board did not rule on cases when they disagreed on the outcome.

Yesterday, the Supreme Court ruled that the National Labor Relations Act requires that when the NLRB delegates its authority to a three-member group, the group must maintain a membership of at least three in order to continue exercising the delegated authority. Justice John Paul Stevens authored the majority opinion. Chief Justice John G. Roberts, Justice Scalia, Justice Thomas, and Justice Alito joined in the decision.

Some of the decisions rendered by the two-member Board were appealed to various federal courts of appeals on the theory that it did not have authority to render those decisions under the federal law that created the Board. Those appellate courts issued conflicting decisions on whether the two-member Board had such authority. The Supreme Court took the case, *New Process Steel LP v. National Labor Relations Board*, No. 08-1457, to resolve the disagreement and, as noted, determined the two-member Board did not have the authority to render decisions.

In March, President Obama appointed two members to the board via recess appointments, which last only until the end of the following congressional session (*i.e.*, the end of the 2011 congressional session). The Board now has four members: three Democrats and one Republican. The current four-member Board must now review the hundreds of invalid decisions, rule on the

pending cases on which the two-member board could not reach agreement, and keep up with its normal daily case load.

The timing of reviewing the nearly 600 now-invalid decisions may be critical. The lone Republican's term expires in August. Assuming he is not replaced because of continued political wrangling, the Board will continue to have a quorum and the authority to render decisions, albeit from the remaining three Democrat members. One of those members' term expires in August 2011, and the recess appointments of members Pearce and Becker will expire in December 2011. It is possible that at the end of next year, the Board will not have *any* members, though President Obama will likely continue to make recess appointments for Democrat members so the Board maintains its three-member quorum.

The Supreme Court's decision left many questions unanswered, though. For example:

- Which cases will have different results after they are re-decided?
- Will any of the decisions of the two-member Board be treated as binding or even useful precedent, either while waiting for a new decision or after a new decision is issued?
- If the invalid decision did not require the employer to pay back wages, but a new decision requires such payment, does the calculation of back wages continue until the valid decision is rendered or does it stop when the first, invalid decision was rendered?
- Will parties be able to appeal newly decided decisions, even though the time to appeal the invalid decision had already expired?

More questions will arise as the current four-member board reviews the cases, and we will keep you informed of developments as they occur during this unprecedented phase in board history.

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