



Does the NLRB Still Have Jurisdiction to Adjudicate Labor Disputes?

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The United States Supreme Court will soon decide whether the National Labor Relations Board has jurisdiction to resolve labor disputes. For the past two years the Board has operated with only two members. Under the National Labor Relations Act, the Board, which ordinarily consists of five members, needs at least three members for a quorum. But an obscure sentence in the Board's enabling legislation lead to the Board concluding that under certain circumstances, two members constitute a quorum, allowing the Board to continue its normal operations. So far, the Appellate Courts are divided over whether a two member panel of the Board has authority to hear cases, and the Supreme Court has been asked to resolve the dispute.

The problem first arose almost two years ago. In December 2007, the five member board faced the imminent loss of three of its members within the span of a single month. Board Chairman Robert J. Battista's term expired on December 16, 2007, leaving the Board with only four members. Two more terms -- those of members Kirsanow and Walsh -- were set to expire on December 31, 2007. The four remaining members, anticipating that replacements were not forthcoming and that the Board would soon lose its three member quorum, voted to delegate the Board's powers to a three member panel consisting of members Liebman, Schaumber, and Kirsanow.

Only a few days later, the terms of members Kirsanow and Walsh expired. And as the Board expected, the members -- who are appointed by the President with the advice and consent of the Senate -- were neither reappointed nor replaced, leaving the Board with only two remaining members. Since then, these two members have continued to hear cases, issue decisions, and otherwise operate as though they are empowered to exercise the full-authority of the Board.

The obvious question is whether the Board can legally operate with 60 percent of its seats vacant. That is, whether Congress intended for the five member Board to adjudicate labor disputes with only two members. The Board is under the impression that it indeed has such authority. This view is based upon the Board interpreting the confusing language in its enabling legislation. Specifically, Section 3(b) of the National Labor Relations Act provides that:

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.

As an administrative agency, the Board is a creature of the statute. Unlike a federal court, the Board does not have a wide range of constitutional authority; instead the Board's authority is limited to the powers expressly given to it by Congress. In Section 3(b), Congress clearly states that the Board must have three members to constitute a quorum, and that the Board may delegate its full authority to any three member panel. In fact, the Board normally hears and decides cases in three member panels.

But the enabling legislation also states that whenever the Board delegates its authority to a three member panel, that panel may operate with a two member quorum. The issue thus becomes whether Congress' baffling statement that "two members shall constitute a quorum of any [three member panel]" somehow overrides the requirement that that "three members of the Board, *at all times*, constitute a quorum."

Since January 2009, four circuit courts have addressed this very question. Three of those courts -- the First, Second, and Seventh Circuits -- have found that members Schaumber and Liebman constitute a two member quorum of the three member panel, and are authorized to exercise the powers of the full Board. The courts' rationales, however, differed. The First Circuit simply relied upon the plain language of Section 3(b), while the Seventh Circuit found support for its position in the legislative history of the National Labor Relations Act. The Second Circuit was not persuaded by either the statutory language or the legislative history. Instead, the Second Circuit relied upon the principle of *Chevron* deference, under which an administrative agency is allowed to interpret an ambiguous statute as long as the interpretation is not unreasonable, and found that the Board's interpretation of Section 3(b) -- which allowed it to operate with only two members -- was not unreasonable.

But the D.C. Circuit took a different view. According to the D.C. Circuit, the plain language of Section 3(b) contains four separate provisions, which are:

1. the delegation provision;
2. the vacancy provision;
3. the quorum provision; and
4. the delegee group quorum provision.

The Court found that when these provisions are read together, the only logical conclusion is that the Board can delegate its authority to any three member panel, which in turn may operate with only two members, but the general requirement that the Board maintain at least a three member quorum "at all times," is not eliminated.

The Court then reasoned that the Board and its three (now two) member panel was akin to a principal and its agent. Under well established principles of agency law, an agent's authority ends once the entity that delegated the authority (the principal) loses its own authority, or ceases to exist. Thus, once the Board lost its three member quorum, it necessarily followed that the three member panel (which again now consisted of only two members) also lost its power. As concisely stated by the court: "Congress has spelled out precise quorum provisions of the Board. Congress provided that quorum of the Board is three members. The Board does not have three members. It cannot act."

Although the D.C. Circuit currently represents the minority view, its decision may nonetheless control the outcome of more cases than the decisions of the First, Second, and Seventh Circuits combined. Under the National Labor Relations Act, any party aggrieved by a decision of the Board may appeal the decision to either the court of appeals for the circuit in which the actions took place, or in the D.C. Circuit. Obviously, any aggrieved (ie., losing party) will be inclined to file an appeal in the D.C. Circuit, in which case, the Board's order will likely be vacated.

As the Second Circuit noted, "the question regarding the jurisdiction of the [Board's] two-member panel is one ultimately to be resolved by the Supreme Court." On November 2, 2009 the Supreme Court agreed to resolve the issue. The Supreme Court will ultimately determine whether the Board's actions over the past two years have been lawful, or whether to vacate every order the Board has issued since December 31, 2007.