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[National Labor Relations Board Cannot Make Decisions With Only Two Board Members](#)

On June 17, 2010, the United States Supreme Court issued its opinion in the case of *New Process Steel v. National Labor Relations Board*. At the time the National Labor Relations Board ("NLRB") decided this case, the Board had only two members. The Board had historically been comprised of five members. However, near the end of 2007, there were four members, and they delegated their powers to three members. Then, on December 31, 2007, one of the Board member's term expired, obviously leaving only two members. Over the next 27 months, those two remaining Board members issued more than 500 decisions.

The facts of the *New Process Steel* case involved a claim filed by the Union against New Process Steel with the NLRB for unfair labor practices after New Process Steel allegedly failed to honor its Collective Bargaining Agreement to deal with the Union as the exclusive representative of employees of the plant. The NLRB agreed with the Union, and New Process Steel appealed on the ground that the NLRB's decision was invalid because the law provides that three members of the five member National Labor Relations Board shall "at all times" constitute a quorum.

The legal question for the Supreme Court to decide was whether the NLRB has the authority to decide cases with only two sitting members when the National Relations Labor Act provides specifically for three members. In a 5-4 decision, the Supreme Court held that the Act requires that the Board maintain a membership of three in order to exercise the delegated authority of the NLRB. Specifically, the Court explained that delegation to a group of no less than three or more members is the only way to "harmonize and give meaningful effect to all of [the Act's] provisions" and ensure that the delegation remains valid. In its own words, the Supreme Court stated that anything less "create[s] a tail that would not only wag the dog, but would continue to wag after the dog has died."

As a practical matter for employers, the Supreme Court's decision has the effect of reopening more than 500 decisions that were decided by an NLRB with only two members.