



Legal Alert: Supreme Court Holds that Two-Member NLRB Lacked Authority to Issue Rulings

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In a 5-4 decision, the U.S. Supreme Court has held that the National Labor Relations Board (NLRB) improperly delegated its authority to a two-member group after the expiration of two Board members' appointments in December 2007. See *New Process Steel v. National Labor Relations Board* (June 17, 2010). Accordingly, the two-member Board did not have authority to issue decisions on unfair labor practice and representation cases.

The National Labor Relations Act (NLRA) 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.

29 U.S.C. § 153(b). In December 2007, the NLRB was comprised of four members: Liebman, Schaumber, Kirsanow and Walsh. The terms of Members Kirsanow and Walsh were to expire on December 31, 2007. In anticipation of this, the four members delegated all of the Board's authority to Members Liebman, Schaumber, and Kirsanow pursuant to the first sentence of § 153(b). After the terms of Members Kirsanow and Walsh expired, the Board was left with only two members, Liebman and Schaumber, both of whom were part of the three-member group to which the Board delegated its authority.

Thus, effective January 1, 2008, the Board consisted of only two members – Liebman and Schaumber – and issued decisions until March 27, 2010, when President Obama made two recess appointments to the Board. During this time, the Board decided almost 600 cases. One of these decisions involved *New Process Steel*, in which the Board upheld determinations that the employer committed two unfair labor practices. The employer sought review of this decision with the federal appeals court and challenged the authority of the Board to act with only two members. The Court agreed to hear the case to resolve a split of authority among the federal appeals courts over the two-member Board's authority.

The Supreme Court held that there is no question that the first sentence of § 153(b) (quoted above) authorized the Board to delegate its authority to a three-member group effective December 28, 2007 "and the last sentence

authorized two members of that group to act as a quorum of the group during the next three days if, for example, the third member had to recuse himself from a particular matter." The question the Court faced was whether the two-member group could continue to act for the Board as a quorum of the delegee group when the Board's membership fell to two and the designated three-member group ceased to exist due to the expiration of Member Kirsanow's term. The Court held that it could not.

The Court interpreted the first sentence of § 153(b) (which it called the "delegation clause") to require the delegee group to maintain a membership of three in order for the delegation to remain valid. The Court reached this decision for three reasons. First, reading the delegation clause to require that the Board's delegated powers be vested continuously in a group of three members is the only way to harmonize and give meaningful effect to all of the provisions of § 153(b). The Court held that reading the delegation provision to permit a two-member group to act as the Board *ad infinitum* would dramatically undercut the significance of the Board quorum requirement by allowing its permanent circumvention. Further, the Court held that permitting a two-member group to act as the Board for an extended period of time gives no meaningful effect to the command implicit in the delegation clause and the Board quorum requirement that the Board's full powers be vested in no fewer than three members.

Second, the Court held that if Congress had intended to authorize two members to act alone for the Board on an ongoing basis, it could have said so in straightforward language. "The Rube Goldberg-style delegation mechanism employed 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." The Court found no evidence that Congress intended to authorize such a procedure to contravene the three-member Board quorum.

Third, the Court held that its determination is in keeping with the long-standing practice of the Board, which had not, until recently, permitted a two-member group to act as a quorum for a defunct three-member group. In reaching its decision, the Court stated that although it is not "insensitive to the Board's understandable desire to keep its doors open despite vacancies," the Court must give practical effect to 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. "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."

Employers' Bottom Line:

In a press release issued after the Court's decision, NLRB Chairman Liebman stated "We are of course disappointed with the outcome, but we will now do our best to rectify the situation in accordance with the Supreme Court's decision." It is not clear how this decision will impact the nearly 600 decisions issued by the two-member Board. We will keep you updated as more information becomes available on this issue.

If you have any questions regarding this decision or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.