

U.S. Supreme Court Rules 5-4: Two-Member National Labor Relations Board Lacked Authority to Act

June 18, 2010

In *New Process Steel, L.P. v. Nat'l Labor Relations Bd.*, No. 08-1457, decided June 17, 2010, the U.S. Supreme Court held that Section 3(b) of the Taft-Hartley Act requires that the National Labor Relations Board (the Board) maintain a membership of three in order to exercise its authority. This decision places into question the fate of more than 500 cases decided by the two-member Board over a 27-month period, including five other cases pending before the Supreme Court and approximately 70 cases pending before various federal courts of appeals challenging the validity of the two-member rulings.

Background

At the end of 2007, the Board—which normally comprises five members appointed by the President—had four members with one vacancy. Two more vacancies were anticipated by the end of 2007, when the recess appointments of Members Kirsanow and Walsh were to expire. Those departures would leave the Board with only two members. With no pending appointments on the horizon, the four-member Board made a delegation of its authority on December 20, 2007, relying upon the text of Section 3(b) of the Taft-Hartley Act,¹ as well as an opinion issued by the Office of Legal Counsel (OLC) in 2003, which stated that “if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.”²

The Board delegated “to Members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board’s powers, in anticipation of the adjournment of the 1st Session of the 110th Congress.”³ In doing so, the Board opined that its action would permit the remaining two members to exercise the powers of the Board “after [the] departure of Members Kirsanow and Walsh, because the remaining Members will constitute a quorum of the three-member group.”⁴

¹ Section 3(b) states, in relevant part: “The Board is authorized to delegate to any group of three or more members any and 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).

² See Dept. of Justice, OLC, Quorum Requirements (2003).

³ See Minutes of Board Action (Dec. 20, 2007).

⁴ *Id.*

On December 28, 2007, the Board’s delegation to the three-member group of Members Liebman, Schaumber, and Kirsanow became effective. On December 31, 2007, Member Kirsanow’s recess appointment expired. The two-member Board was active—deciding more than 500 cases—until March 27, 2010, when President Obama made two recess appointments to the Board, returning its membership to at least three members.

The Supreme Court Decision

Writing for the five-justice majority, Justice Stevens, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, held that the delegation clause of Section 3(b) “requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board[,]” thereby invalidating the two-member Board’s authority to act over the period January 1, 2008 through March 27, 2010.

Importantly, the majority noted that “[t]he delegation clause still operates to allow the Board to act in panels of three, and the group quorum provision still operates to allow any panel to issue a decision by only two members if one member is disqualified.” Likewise, the Court did not question the validity of the Board’s delegation “to its regional directors its powers under section 159 . . . to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof[,]” thereby seemingly limiting its decision to invalidating the powers of the Board itself where it lacks at least three members.

Nevertheless, the holding throws more than two years’ worth of Board law into doubt and calls into question the outcome of more 500 individual cases involving

a wide variety of disputes over union representation and allegations of unfair labor practices, including cases involving employers’ discharges of employees for exercising their statutory rights; disputes over secret ballot elections in which employees voted to select a union representative; protests over employers’ withdrawal of recognition from union representatives designated by employees; refusals by employers or unions to honor their obligations to bargain in good faith; and challenges to the requirement that employees pay union dues as a condition of employment.⁵

The Court made no determination regarding the fate of any of these cases. Instead, the matter was remanded to the Court of Appeals for the Seventh Circuit “for further proceedings consistent with this opinion.”

What This Means for Employers

The Court’s opinion raises many questions as to the resolution of the affected cases and will create issues for employers, some immediate. As an initial matter, it is expected that the remaining five cases pending before the Supreme Court and the 69 cases pending before the Courts of Appeals, each

⁵ See Opinion in Dissent, at 9 (quoting Respondent’s Brief, at 6–7).

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