



NLRB Asks Supreme Court to Uphold Two-Member Decisions

Insights

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On September 29, 2009, the National Labor Relations Board (NLRB) asked the Supreme Court to resolve a split in the United States Circuit Courts of Appeals as to whether a panel of only two members of the NLRB has the authority to issue final orders under the National Labor Relations Act (NLRA). As of today, three Circuit Courts - the 1st, 2nd, and 7th Circuits - have ruled that a two-member panel of the NLRB may issue decisions, while the District of Columbia Circuit has held that two-member decisions are illegitimate.

In simultaneous filings, the Solicitor General, on behalf of the NLRB, responded to a petition for writ of certiorari filed in the case of *New Process Steel v. NLRB* (from the 7th Circuit), agreeing that the Supreme Court should hear the issue, and filed a separate petition for writ of certiorari in *NLRB v. Laurel Baye Healthcare of Lake Lanier* (from the D.C. Circuit), arguing that the Supreme Court must resolve the inconsistencies between the circuits. Two other certiorari petitions are pending in the cases originating in the 1st and 2nd Circuits, and we expect that the NLRB's responses to those petitions will also ask the Supreme Court to decide the issue.

The NLRA provides for panel of five NLRB members, appointed by the President and subject to Senate confirmation. Under the NLRA, a three-member panel has the authority to issue final decisions and orders with the same force as the full five-member Board. Since December 31, 2007, the NLRB has been operating with only two members, following the expiration of the other members' terms. Before those terms expired, four members of the NLRB delegated their authority to the remaining two members, Wilma Liebman and Peter Schaumber. On July 9, 2009, President Obama sent three names to the Senate for confirmation as new members of the NLRB, but the Senate has not acted on those nominations.

Member (now Chairman) Liebman and Member Schaumber have issued nearly 500 decisions since 2008, and continue to do so, under the theory that the NLRA sanctions the delegation of authority to a two-member panel. Employers and unions across the country that disagree with the two-member panel's rulings in their cases have appealed to the Circuit Courts, and the legal effect of the two-member decisions remains up in the air. While the NLRB and the employers seeking Supreme Court review are in agreement, there is no guarantee that the Supreme Court will hear the issue. Until the Supreme Court weighs in - taking the cases or not - the viability of the two-member panel, and the enforceability of its awards, is uncertain.

Stay tuned for additional news on whether the Supreme Court takes the case, and how the issue is finally resolved.