



Supreme Court Rules That Two-Member NLRB Did Not Have Authority To Act

Insights

6.17.10

On June 17, 2010 the U. S. Supreme Court ruled that the National Labor Relations Board (NLRB) was not authorized to act during the 27-month period after December 2007 when the Board had only two of its five members. The case required the Court to interpret the language of the National Labor Relations Act (NLRA), which provides for a five-member Board, but permits delegation to three-member panels, and also contains an exception for two-member quorums. *New Process Steel, L.P. v. National Labor Relations Board*.

The Supreme Court held, 5 to 4, that Section 3(b) of the NLRA requires that, when the Board delegates its authority to a three-member group, that delegee group must *maintain* a membership of three in order for the delegation to remain valid and allow the exercise of the delegated authority. Although the Board had delegated its authority to a three-member group before the membership fell to only two, the two remaining Board members did not have authority to act once the third delegate left the Board at the end of 2007. As the Court stated, "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."

The Supreme Court's decision creates an administrative dilemma for the Board and uncertainty for parties subject to decisions of the two-member Board. During the period of the two-member Board, it issued almost 600 decisions. Over 70 of those decisions were challenged in federal appellate courts on the basis that the Board did not have authority to act.

Background

The case arose from unfair labor practice (ULP) charges filed by a union against New Process Steel, following the negotiation of a collective bargaining agreement. Under NLRA procedures, ULP charges are filed with one of the several regional offices of the NLRB, which then determines whether a complaint should issue. If a complaint issues, the charges, absent settlement, are heard by an administrative law judge and are subject to review by the Board in Washington D.C. In New Process Steel's case, the judge ruled in favor of the union and, upon review, the Board, with two sitting members, adopted the decision. New Process Steel then petitioned to the U.S. Court of Appeals for the 7th Circuit, arguing the merit of the charges, but also arguing that the two-member Board lacked the authority to act under the NLRA.

The Board's Authority to Act A Question of Statutory Construction

In 1947, Congress amended the NLRA to, among other things, increase the Board from three to five members and increase the quorum from two to three. (A quorum is the number of members of a larger body that must participate for the valid transaction of business). By statute, the Board consists of five members who serve staggered terms and are appointed by the President with the advice and consent of the Senate. Under the NLRA, the Board is allowed to delegate the authority of the five-member body to smaller, three-member groups. The delegation process is set forth in Section 3(b) of the NLRA, which provides:

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).

On December 20, 2007, with one vacancy on the five-member Board, a four-member Board delegated all of its authority to a three-member group. When the recess appointments of two of the Board members expired at the end of 2007, the remaining two Board members (Democrat Wilma Liebman and Republican Peter Schaumber) proceeded as a quorum from January 2008 until March 2010, when President Obama made two recess appointments (Democrats Craig Becker and Mark G. Pearce) to the Board. During the intervening period, the two-member Board decided almost 600 cases, including the decision regarding the ULP charges brought against New Process Steel.

On May 1, 2009, the 7th Circuit found that the plain language of the statute supported the NLRB's delegation; two other circuits subsequently followed suit. However, the U.S. Court of Appeals for the District of Columbia held in an unrelated case that the Board did *not* have the power to act with two members because the Board's delegation could not survive the loss of a quorum on the Board itself since the NLRA requires that, "three members of the Board shall, at all times, constitute a quorum. The Supreme Court accepted New Process Steel's petition for certiorari to resolve this split in the Circuit Courts.

The Supreme Court's Ruling

The Supreme Court reversed the 7th Circuit and held that Section 3(b) of the NLRA requires that a delegatee group of the Board *maintain* a membership of three in order for the delegation to remain valid. The Supreme Court identified three main reasons in support of its reading of the statute. First, the Supreme Court found that requiring that the Board's delegated power be vested continuously in a group of three members is the only way to give meaningful effect to all of the provisions in Section 3(b) of the Act. The Court noted that a contrary reading would allow two members to act as the Board *ad infinitum*, which would allow the permanent circumvention of the Board quorum requirement. Second, the Court stated that, if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language.

Third, the Supreme Court reasoned that, although the Board has in the past allowed two members of a three-member group to issue decisions when one member was disqualified from a case, the Board has not (until recently) allowed two members to act as a quorum of a defunct three-member group. In rejecting the arguments of the government, the Supreme Court stated that Section 3(b) of the Act "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."

Uncertainty As To Two-Member Rulings, But Controversial Cases Remain To Be Decided

The Supreme Court's decision, while procedural in nature, has great implications for employers and unions who were subject to decisions of the two-member Board. It is not clear what will happen to the nearly 600 rulings issued by the two-member Board. Many of the parties have already complied with the decisions and there are about 70 pending challenges to the two-member decisions in the appellate courts. There will be uncertainty as to where these employers stand with the NLRB as the Board decides how to deal with the invalid two-member decisions and, there will most likely be further delay of matters currently pending with the Board.

It should be noted that, during the period of the two-member Board, a great number of cases were not decided because the two-member Board (Democrat Liebman and Republican Schaumber) were presented with cases involving questions about overturning precedent or novel issues. The two-member Board decided to set these cases aside. Employers can expect that President Obama's appointments to the Board will tilt the balance of the Board in favor of unions when vacated cases and cases previously set aside by the two-member Board come before the Board for review or decision.

For more information contact your regular Fisher Phillips attorney.

This Legal Alert is designed to give an overview of an important Supreme Court decision. It is not intended to be, nor should it be considered as, legal advice regarding any particular fact situation.