A Timely Analysis of Legal Developments

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The U.S. Supreme Court decides in *New Process Steel* that a two-member panel of the NLRB lacked authority to render decisions, a holding that calls into question the legal force and effect of approximately 600 cases.

U.S. Supreme Court Potentially Invalidates Hundreds of NLRB Decisions

By Adam Wit

On June 17, 2010, a divided U.S. Supreme Court held that the National Labor Relations Board did not have the authority to render approximately 600 decisions during the period between January 1, 2008 and March 27, 2010, when three of the five seats on the Board were vacant. In a 5 to 4 decision authored by Justice Stevens, the Court, in *New Process Steel, L.P. v. National Labor Relations Board*, held that Section 3(b) of the National Labor Relations Act (the "Act") requires that when the Board delegates its authority to a three-member group, the group must maintain a membership of three in order to exercise the delegated authority of the Board. When the membership of the group falls below three, the Court held, two members do not constitute a proper quorum and may not continue to exercise the delegated authority of the Board.

The above is precisely what happened during the 27-month period between January 1, 2008 and March 27, 2010. During that time, three Board vacancies existed. While Members Wilma Liebman and Peter Schaumber were the only members of the Board, they exercised the Board's full authority in deciding "almost 600 cases." At the very least, the Court's decision in *New Process Steel* leaves the legal force and effect of these decisions in question.

The Court's Decision in *New Process Steel*

Section 3(b) of the Act provides the full five-member Board with the authority to delegate its powers to groups of three or more members. In fact, most decisions by the Board are rendered by three-member panels. The section further provides that two members shall constitute a quorum of any three-member group to which the authority of the Board is delegated.

At the end of 2007, the terms of two Board members (Peter Kirsanow and Dennis Walsh) were set to expire, leaving only two members (Liebman and Schaumber) beginning in 2008. To address this issue, and in order to keep its doors open for business, the four members of the Board delegated its authority to a three-member

group consisting of Kirsanow, Liebman, and Schaumber. The Board also expressed its opinion (based upon an independent legal analysis) that, when Kirsanow and Walsh were gone as of January 1, 2008, Members Liebman and Schaumber could continue to exercise the powers of the Board "because the remaining Members will constitute a quorum of the three-member group." Members Liebman and Schaumber rendered decisions on behalf of the Board under this arrangement from January 1, 2008 until March 27, 2010, when President Obama made two recess appointments to the Board (Members Craig Becker and Mark Pearce), returning the membership level to four.

In the course of that time, several Courts of Appeals were called upon to address the issue facing the Court in *New Process Steel* – whether the two-member quorum had the power to exercise the authority of the Board. The First, Second, Fourth, Seventh (from which the *New Process Steel* case originates) and Tenth Circuits held that the two-member quorum had the authority to exercise the powers of the Board. The D.C. Circuit held that it did not. Siding with the D.C. Circuit, albeit on somewhat different grounds, the U.S. Supreme Court cited three primary reasons why Section 3(b) did not allow for a two-member quorum of the Board under the circumstances.

First, the Court found that the "only way" to harmonize all of the provisions in Section 3(b) was to require that "the Board's delegated power be vested continuously in a group of three members." Under the contrary approach, the Court reasoned, Section 3(b) would be satisfied if the Board included a third member in the group "for only one minute before her term expires." Such a result, the Court reasoned, "gives no meaningful effect to the command implicit in both the delegation clause and the Board quorum requirement that the Board's full power be vested in no fewer than three members." Thus, for power to be vested in a two-member quorum, there must be a minimum of three members actually serving on the Board.

Second, the Court found that, had Congress intended to authorize two members to exercise the authority of the Board on an ongoing basis, it could have said so specifically. Instead, the Court reasoned, Congress "imposed the requirement that the Board delegate authority to no fewer than three members, and that it have three participating members to constitute a quorum." The Court described the Board's actions in delegating its powers to two members as a "Rube Goldberg-style delegation mechanism" and "surely a bizarre way for the Board to achieve the authority to decide cases with only two members."

Third, the Court reasoned that its decision was consistent with the Board's "longstanding practice." In this regard, the Court noted that the Board historically had not allowed two members to act as a quorum for a defunct three-member group. Rather, its typical practice had been to reconstitute a three-member group when the term of a group member expired. The two-member Board at issue in *New Process Steel*, the Court noted, "is unprecedented in the history of the post-Taft-Hartley Board."

What *New Process Steel* Does Not Do

Before addressing the potential impact of *New Process Steel*, it is important to note what this decision will *not* affect. First, the Court was careful to note that its decision "does not cast doubt" on "prior delegations of authority to nongroup members, such as the regional directors or the general counsel." Thus, decisions rendered at the regional level – such as those related to the investigation of unfair labor practice charges and the administration of election proceedings – are not directly affected by *New Process Steel*. Regional Directors still have the authority to act in such matters, regardless of the number of Board members. Similarly, the general counsel still has the authority, for example, to prosecute an unfair labor practice complaint or provide an advisory opinion to a region on Board law with respect to a particular issue.

Second, a three-member group may still render decisions on behalf of the Board, and a two-member quorum may still exercise the authority of the Board in certain circumstances. In this regard, the Court stated: "The 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."

In other words, the Court left intact the procedure by which one member of a three-member panel can recuse or disqualify himself

or herself, leaving the case to be decided by the remaining two members. In that instance, the Court reasoned, there are still *three* members of the group. One is simply unable to participate in the decision.

Potential Implications of *New Process Steel*

The above aside, the implications of *New Process Steel* are hardly insignificant. Between January 2008 and March 2010, two members of the Board exercised the authority of the Board on an "ongoing" basis. All decisions rendered during this time period are now in doubt. Certainly, if a matter decided by the two-member quorum is currently on appeal, and the issue of Board authority has been raised, the outcome is clear: The case will be remanded to the Board for, at the very least, reconsideration.

However, as of April 2010, there were 22 cases on appeal from the Board (or recently decided on appeal) where this issue had not been raised. Further, there are hundreds of cases decided by the two-member quorum that were not appealed at all. What happens to these cases now? Certainly, the majority's opinion does not distinguish between such cases and those in which the issue was raised. Rather, the Court offers a sweeping indictment of *any* decision rendered by the Board without maintaining a membership of three, stating that the Board simply had no authority to exercise its power in these instances.

Justice Kennedy expressed the opinion of the dissent concerning the legal force behind the latter group of decisions: "Under the Court's holding, the Board was unauthorized to resolve the more than 500 cases it addressed during those 26 months in the course of carrying out its responsibility to remove obstructions to the free flow of commerce through the promotion of industrial peace." Similarly, in responding to the Court's decision in *New Process Steel*, the Board itself stated: "The U.S. Supreme Court today ruled that the National Labor Relations Board was not authorized to issue decisions during a 27-month period when three of its five seats were vacant."

The question therefore becomes, if the Board had no authority to render these decisions, must they *all* now be reopened in some form, whether or not the issue was preserved on appeal? The Court's opinion offers no guidance on this point. However, prior Supreme Court precedent suggests that the answer to this question may be "yes." In *Nguyen v. U.S.*, 539 U.S. 69 (2003), for example, the petitioner challenged a decision by a three judge panel of the U.S. Court of Appeals for the Ninth Circuit in relation to a criminal conviction, on the grounds that one of the judges on the panel was not an Article III judge, and, therefore, the panel was improperly constituted. Although the petitioner had not raised this issue before the Ninth Circuit, the Supreme Court nonetheless took it up and voided the panel's decision. In so doing, the Court stated:

> It is true, as the Government observes, that a failure to object to trial error ordinarily limits an appellate court to review for plain error. But to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld. Even if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel.

Similar reasoning appears to apply to the present context. In other words, a party's failure to challenge the authority of the two-member quorum may not vest the quorum with the authority of the Board if that is not what Congress intended through Section 3(b).

The legal and practical implications of *New Process Steel* are therefore significant to employers. There are, of course, a range of potential outcomes if it is determined that all of these decisions must be revisited. It could simply be that the newly constituted Board will reopen these decisions only for the purpose of affirming them as written. The Board could choose to do this *en masse*. However, that would appear to be inadvisable, given the potential for challenging such decisions in their own right. The Board is more likely to establish a "fast track"-type system to vest these decisions with proper Board authority or at least give them some review.

Alternatively, each decision could be given full reconsideration, but that probably is the least likely option. After all, with almost 600 cases at issue, and, of course, new cases pending, this would undoubtedly result in a serious backlog. Indeed, according to the U.S. Department of Justice, as of April 26, 2010, there were 261 cases pending before the Board (73 of which were cases in which Members Liebman and Schaumber could not agree on a decision as a two-member quorum, and 50 of which presented novel legal issues and were deferred by the two-member quorum).

Nonetheless, the Board could determine that each of these cases should be reevaluated and a decision rendered anew. Or, alternatively, the Board could allow each party to argue to the Board why they believe their case should, or should not, be fully reconsidered. That is a far more disconcerting scenario for employers. From a practical standpoint, the costs and business disruptions associated with having to revisit a case that has already been decided by the Board could be significant. This is especially true if, as is likely, the parties already have complied with the Board's prior order. As the dissent in *New Process Steel* notes, these orders resolved "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 obligation to bargain in good faith; and challenges to the requirement that employees pay union dues as a condition of employment."

Perhaps more significantly, with the recess appointments of Members Becker and Pearce, any decision reopened by virtue of the Court's decision in *New Process Steel* will face a decidedly pro-union Board. This has the potential to impact employers negatively regardless of the outcome of the decision before the two-member Board. In cases where the two-member Board decided in favor of the employer, the current Board could, at the very least, reverse the decision. In cases decided in favor of the union, however, the danger is not limited to a reaffirmation of the two member decision. It is certainly possible that the newly constituted Board could take the opportunity presented by the facts of the case to reach farther in promoting pro-union policies.

Although it is little comfort to employers, there is an irony in the Court's decision, in terms of the composition of the majority and the dissent. The majority includes Justices Scalia, Thomas, Alito, and Chief Justice Roberts, all of whom generally would be associated with more conservative and employer-friendly labor policy. By potentially invalidating the two-member quorum decisions and putting them back before a pro-union Board, the majority very well may have opened the door to a wider range of pro-union decisions. On the other hand, the dissent includes Justices Ginsburg, Breyer, and Sotomayor, who typically would be associated with more liberal, pro-union labor policy. Yet, had their argument carried the day (*i.e.*, that the two-member quorum had the authority to exercise the Board's power), potentially none of these prior decisions would be subject to further question.

In the end, Congress may have the final say here. The Court certainly invited that outcome. Specifically, the Court indicated that it was "not insensitive to the Board's understandable desire to keep its doors open despite vacancies," and that "[i]f Congress wishes to allow the Board to decide cases with only two members, it can easily do so." Given the make-up of the dissent and the current political breakdown in Congress, one might expect that Congress would take up that opportunity. However, reversing the Court's decision through legislation also would eliminate the potential that these decisions would be subject to reconsideration by the current, pro-union Board. Again, given the current composition of Congress, there may be no incentive for the majority to pursue this route, especially with midterm elections on the horizon and more high profile and priority matters presently facing this Congress.

Either way, the authority of a two-member quorum is an issue that employers will likely have to face again. The Board has not been fully constituted with five confirmed members since August 2003. The confirmation process is highly politicized, and this is not likely to change in the near future. Thus, we are likely to see two- or three-member Board compositions again soon, perhaps sooner than later, given that Members Becker and Pearce are serving via recess appointments.

What Should Employers Involved in the Affected Cases Do?

Employers involved in affected cases should discuss their options with experienced labor counsel. The best option will be to wait until the Board decides how it will treat the cases that were decided by the two-member Board. We expect the Board to offer its analysis fairly quickly as to the next step on the affected cases.

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