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Supreme Court: National Labor Relations Board Lacked Authority to Issue Decisions With Only Two Members

Introduction

The Supreme Court has just issued a decision in the closely-watched case *New Process Steel, L.P. v. NLRB*, No. 08-1457, resolving whether decisions of the National Labor Relations Board that were decided by only two Board Members are valid. By a vote of 5-4, the Court held that the Board cannot issue decisions with only two Members. The decision potentially invalidates approximately 600 NLRB decisions issued over a two-year period.

Supreme Court: The Tail Can't Wag the Dog

The Board's authority to issue decisions with only two Members was challenged in the courts of appeals in approximately 75 cases. Richie and Gueringer, along with Greenberg Traurig, were asked by New Process Steel to handle the Supreme Court litigation.

New Process Steel asked the Supreme Court to resolve this important question of federal labor law and on November 2, 2009, the Supreme Court granted certiorari. By the time the case was argued in the Supreme Court in March 2010, six courts of appeals had issued rulings on this issue, with the First, Second, Fourth, Seventh, and Tenth Circuit upholding the Board's two-Member decisions and the D.C. Circuit striking them down.

On June 17, 2010, the Supreme Court, in a landmark ruling, held that the Board did not have authority to issue decisions with only two Members. The Court held that the plain language of the statute, as well as the Board's history of not acting when it lost a quorum, supported New Process's interpretation of the statute. The vote was 5-4, with Justice Stevens writing the majority opinion, which concluded that:

If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, 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, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances. 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 Road Ahead

As a result of the Supreme Court's ruling, all of the cases currently pending in the courts of appeals challenging a two-Member decision will be remanded to the Board for consideration by a properly constituted panel of three or more Board Members.

It remains to be seen how the courts of appeals and the NLRB will handle cases that were issued by the two-Member Board but where the composition of the Board was

not challenged in the courts of appeals. Issues of waiver, the precedential or persuasive value (if any) of two-Member decisions, and countless other issues will surely be litigated in the coming months. Employers who received an adverse decision from the two-Member Board may wish to evaluate their options carefully in the context of their overall labor relations strategy. With the NLRB now at five Members, the situation presented previously does not continue, but the impact of *New Process Steel* likely will be felt for many months to come.

Employers should take note that the composition of the Board changed again on June 22, 2010 when the United States Senate confirmed Republican Brian Hayes and Democrat Mark Pearce as Board Members. These confirmations restore the Board to its full five-Member complement for the first time since late 2007.

The current Board Members and their respective terms are:

- Member Schaumber (August 2010)
- Chairman Liebman (August 2011)
- Member Hayes (December 2012)
- Member Pearce (August 2013)
- Member Becker (serving a recess appointment expiring at the end of 2011)

We will monitor the impact of *New Process Steel* in the courts and at the Board and report on new developments as they arise.

For more insight into *New Process Steel, L.P. v. NLRB* and other labor and employment issues, please visit GT's LE Blog at <http://www.gtleblog.com/>.

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