

Supreme Court Rules Two-Member NLRB Lacked Authority to Decide Cases

In a 5-4 decision, the Supreme Court ruled yesterday that the National Labor Relations Board (NLRB) does not have authority to issue decisions while it has only two members. The decision, *New Process Steel, L.P. v. National Labor Relations Board*, No. 08-1457 (June 17, 2010), seemingly invalidates decisions in the nearly 600 cases the NLRB decided over a 27-month period while it operated with three vacancies.

The Taft-Hartley Act increased the size of the NLRB from three to five members, and authorized the Board to delegate its authority to a quorum of at least three members. In December 2007, a four-member Board delegated its powers to a group of three members, and on Dec. 31, 2007, the term of one of those three members expired. The remaining two members continued to issue decisions for more than two years.

In considering the validity of these two-member cases, the Court examined §3(b) of the National Labor Relations Act, which provides that “[t]he 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.” The majority opinion, authored by Justice Stevens and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, reasoned that this provision should be read to require that the group to which authority was delegated must maintain a membership of three in order to issue valid decisions. In considering the statute in full, the majority found that while an interpretation allowing two-member panels “is textually permissible in a narrow sense, it is structurally implausible, as it would render two of §3(b)’s provisions functionally void.”

The dissent, authored by Justice Kennedy and joined by Justices Ginsburg, Breyer, and Sotomayor, argued that “the statute’s plain terms permit a two-member quorum of a properly designated three-member group to issue orders,” and that the majority’s holding was inconsistent with congressional intent.

The Board has had four members since March 2010, when President Obama filled two empty seats through recess appointments of Democrats Craig Becker and Mark Pearce. In a June 17 press release, the NLRB stated that “[i]t is expected that [two-member cases currently being challenged on appeal] will be remanded to the Board, and the now-four member Board will decide the appropriate means for further considering and resolving them.”

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