

# PUTTING THE GENIE BACK IN THE BOTTLE

## WHAT HAPPENS IN THE WAKE OF THE DECISION IN *NEW PROCESS STEEL V. NLRB*?

by M. Trevor Lyons

On June 17, 2010, a deeply divided United States Supreme Court held in *New Process Steel LP v. NLRB*<sup>1</sup> that the National Labor Relations Board (NLRB) lost its statutory authority to issue rulings when its membership, which is normally five members, fell to two members for a period of approximately 27 months between January 2008 and April 2010. This decision potentially calls into question the validity of the nearly 600 decisions rendered by the board during this period.

While it remains to be seen exactly how the NLRB will address these cases, on July 1, 2010, the NLRB issued a press release mapping out a plan for reconsidering and reissuing approximately 96 of the NLRB cases that were then pending appeal in the federal courts. Each of these remanded cases will be reviewed by a three-member panel that will include the original two board members who rendered the original decision. It remains unclear, however, how many of the remaining decisions, those that were not appealed, can or will be contested.

### **The Supreme Court Invalidates the Rulings of the Two-Member Board**

In 2007, the NLRB had four members, two who had undergone the standard confirmation process and two others who were recess appointees with terms set to expire on Dec. 31, 2007. As that date approached, it appeared likely that no new members would be appointed by Congress. In a plan designed to maintain its legitimacy, the NLRB delegated all its powers to a three-person group consisting of the two regularly appointed members and one recess appointee. Beginning Jan. 1, 2008, when the recess appointee no longer served, the board operated indefinitely with its remaining two members, one Democrat (Wilma B. Liberman) and one Republican (Peter C. Schaumber), based on the theory that, provided these two remaining members agreed on a decision, they constituted a quorum of the three-member group to

whom the NLRB originally delegated authority.

In continuing to issue decisions during that period, the two remaining members relied on Section 3(b) of the National Labor Relations Act (NLRA) and an opinion issued by the U.S. Department of Justice's Office of Legal Counsel, which concluded that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained."<sup>3</sup>

Subsequently, several employers appealed determinations issued by the two-member board, arguing that it had no authority to act with less than three members. In *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*,<sup>4</sup> the D.C. Circuit Court of Appeals agreed with this position and held that the two-member board had no authority to act. In *New Process Steel v. NLRB*, however, the Seventh Circuit held that the two-member board was a valid quorum and could issue rulings.<sup>5</sup> Several circuit courts took positions similar to the Seventh Circuit's decision, and the Supreme Court took the *New Process Steel* case to resolve the split of authority.

The circuit split arose out of the fact that the Taft-Hartley Act, enacted in 1947, expanded the board from three to five members, but also permitted the board to delegate any or all of its powers to "any group of three or more members."<sup>6</sup> It also provided that 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."<sup>7</sup> The question before the Supreme Court was whether this section of the Taft-Hartley Act, Section 3(b) of the NLRA, statutorily permitted a two-member board to issue decisions.

On June 17, 2010, a 5-4 majority of the Supreme Court reversed the Seventh Circuit decision in *New Process Steel*, and held that the NLRB lacked the statutory authority to issue decisions when its membership dwindled to two members. Aware of the practical ramifications of its decision, the majority opinion explained:

We are not insensitive to the Board's understandable desire to keep its doors open despite vacancies. Nor are we unaware of the costs that delay imposes on the litigants. If Congress wishes to allow the Board to decide cases with only two mem-

bers, 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 be swept aside in the face of admittedly difficult circumstances.<sup>8</sup>

The majority opinion, authored by Justice John Stevens, and joined by the chief justice and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, recognized that competing interpretations of Section 3(b)'s statutory grant of the board's authority to a "group of three or more members" were possible. According to the majority, the clause could mean a delegee group need only contain three members at the precise moment of the delegation, and that two members alone may exercise the full powers of the board as long as they were part of a group that initially included three members. The majority explained that the statutory clause could also be read to mean that, for the delegation to remain valid, a delegee group *must maintain* three members.

The majority opinion determined that the latter interpretation, requiring the board to maintain three members, was the correct reading of the statutory language, and gave the following reasons for its decision. First, the majority reasoned that requiring the delegee group to have at least three members was the only way to harmonize and give meaningful effect to all of the provisions in Section 3(b). By contrast, reading the statute to allow two members to act as the board would allow the permanent circumvention of the quorum requirement and would give no meaningful effect to the statutory command that the board's full power be vested in no fewer than three members.<sup>9</sup>

Second, the majority considered congressional intent and emphasized that if Congress had intended to authorize just two members to act for the board on an ongoing basis, it could have said so in plain and straightforward language. Instead, Congress required the board to delegate authority to no fewer than three members, and to have three participating members to constitute a quorum. Additionally, the majority opinion further explained "...had Congress wanted to

provide for two members alone to act as the Board, it could have maintained the NLRA's original two-member Board quorum provision..."<sup>10</sup>

Third, the majority opinion recognized that a three-member requirement interpretation of statute was consistent with the board's longstanding practice of reconstituting a delegee group when one member's term expired. In other words, the board has only tolerated a two-person quorum when one member of a three-member delegee group was disqualified from a particular case. When a member leaves the three-person group because the member's term has expired, however, the board had consistently reconstituted the group with three members.<sup>11</sup>

Justice Anthony Kennedy filed a dissenting opinion, in which he was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor. In Justice Kennedy's view, the board's interpretation of the statute permitting two-member decisions was supported by the plain text: "Because the [three-member] group was properly designated...and a two-member quorum of the group was authorized to act under the statute's plain terms, its actions were lawful."<sup>12</sup>

Regarding the practical implication of the majority's decision Justice Kennedy further commented that:

....the objectives of the statute, which must be to ensure orderly operations when the Board is not at full strength as well as efficient operations when it is, are better respected by a statutory interpretation that dictates a result opposite to the one reached by the Court.<sup>13</sup>

### **The Practical Ramifications and Implication of *New Process Steel***

By invalidating the statutory authority of the two-member board to issue decisions, the Supreme Court's *New Process Steel* decision calls into question a little less than 600 cases. In a series of press releases, the board first outlined its plans for handling returned cases that were then pending on appeal. Specifically, in a July 1, 2010, press release, the board stated:

At the time of the June 17 Supreme Court decision, 96 of the

two-member decisions were pending on appeal before the federal courts—six at the Supreme Court and 90 in various Courts of Appeals. The Board is seeking to have each of these cases remanded to the Board for further consideration. Each of the remanded cases will be considered by a three-member panel of the Board which will include Chairman Liebman and Board Member Schaumber. Consistent with Board practice, the two other Board members not on the panel will have the opportunity to participate in the case if they so desire.<sup>14</sup>

The more difficult question is what happens to those cases that were not appealed and would have otherwise been deemed final judgments, or are in other stages of agency litigation. Regarding the status of such cases, the board has provided no clarity to date, explaining in an Aug. 5, 2010, press release that:

Meanwhile, hundreds of the other two-member cases were closed through compliance with the original Board decision, settlement, withdrawal or other means. Still more are in some stage of litigation or compliance stemming from the original decision. It is unclear how many of those rulings can or will be contested.<sup>15</sup>

The fundamental question remains what is the legal status of decisions rendered by an administrative body that lacked the statutory authority to make rulings? Ordinarily, *res judicata* principles would preclude reopening such judgments, but a decision rendered by an authority lacking the statutory power to act cannot legitimately be deemed "a matter adjudged."<sup>16</sup> One would anticipate, however, that the first wave of cases seeking reconsideration of the board's two-member decisions will force the board to tackle or take a position on this difficult issue shortly. Hopefully, the board will also address and clarify what precedential force, if any, the two-member board decisions will have at that time.

As a practical matter, however, it may not be worth the time and expense for the vast majority of employers to challenge the two-member board deci-

sions. The two-member board did not generally issue decisions in controversial cases, and none of its decisions were much of a departure from existing board precedent. Given that two of the three recent appointments to the board are pro-union, it is likely that as the board reconsiders two-member decisions, the new decisions will not be any more favorable to employers. ■

#### Endnotes

1. 130 S. Ct. 2635 (2010).
2. 29 U.S.C. §153(b).
3. *Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., March 4, 2003).
4. 564 F.3d 469 (D.C. Cir 2009).
5. 564 F. 3d 840 (7th Cir. 2009).
6. 29 U.S.C.A. 153(a).
7. 29 U.S.C.A. 153(b).
8. 130 S. Ct. at 2644-45.
9. *Id.* at 2640.
10. *Id.* at 2641, *citing*, 29 U.S.C. §153(b) (1946 ed.).
11. *Id.*
12. *Id.* at 2646.
13. *Id.* at 2645.
14. Press Release R-2762, National Labor Relations Board, "NLRB outlines plans for considering 2-member cases in wake of Supreme Court ruling," July 1, 2010.
15. Press Release R-2772, National Labor Relations Board, "NLRB issues first decisions in returned two-member cases," Aug. 5, 2010. The NLRB's Aug. 5, 2010, press release also noted that the board had issued its first three decisions in cases that were returned to it by the federal courts of appeals following the *New Process Steel* decision, and that the agency had made public a database of all contested cases that were decided by the two-member board. That database has 554 entries.
16. *See Black's Law Dictionary* 1336 (8th Ed. 2007).

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