



US SUPREME COURT HOLDS THAT TWO-MEMBER NLRB LACKED AUTHORITY TO ACT, INVALIDATES OVER 600 DECISIONS

JUNE 2010

Earlier today a divided US Supreme Court held that the National Labor Relations Board (NLRB) lacked authority to act when three of its five seats were vacant, a decision with the potential to invalidate more than 600 decisions issued by the NLRB over the past 27 months. The 5-4 decision in *New Process Steel, LP v. NLRB* is expected to have far reaching implications for employers.

The Two-Member NLRB

The NLRB decides cases arising under the National Labor Relations Act, which governs relations between organized labor and private employers. Normally, the Board is comprised of five Members, but its authorizing statute, 29 USC §153(b), provides that the power to issue decisions may be delegated to a quorum of three Members. In late 2007, the Board was comprised of four Members - Wilma Liebman, Peter Schaumber, Peter Kirsanow and Dennis Walsh. Before Member Walsh's term expired near the end of 2007, the four Members delegated their powers to Members Liebman, Schaumber and Kirsanow as a three-Member quorum. On December 31, 2007 Member Kirsanow's term expired, which left only a two-

Member Board composed of Chairman Liebman and Member Schaumber.

The remaining two Members took the position that they still retained statutory authority to issue decisions because they represented a two-member quorum of the three-member group to which the Board's powers had been properly delegated. Further, the remaining two Members also contended that it was in the public's interest to avoid a shut-down of the Board by allowing the two-Member Board to continue to decide cases.

The Court's Decision

The Supreme Court disagreed with these arguments. Writing for the majority, Justice Stevens stated that Congress has the power to change the NLRB's statutory authority and authorize a two-member Board, 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".



CLIENT ALERT

Impact of the Court's Decision

According to a June 17, 2010 press release from the NLRB Office of Public Affairs, losing parties have sought Federal Court review of dozens of the two-Member Board's decisions. Other cases involving the same challenge to the Board's authority are still pending before the Federal Courts: five are before the Supreme Court, and 69 others are before the lower appellate courts. The Board expects that these will now be remanded to the current, four-member Board for reconsideration.

The Board has not stated, however, what action it will take regarding the decisions issued in cases that were not appealed to the Federal Courts on the grounds that the two-Member Board lacked authority to issue decisions. It remains to be seen

whether those decisions will also be subject to reconsideration by a proper quorum of at least three Board Members. Such a process would tie up the Board with old cases for years to come. Employers who may be inclined to celebrate that potential outcome today should temper that by remembering that the now four Member Board has two additional Unionfriendly Members appointed by President Obama, so the outcome of any such reconsideration could end with the same, or more onerous, results.

Bullard Law has briefed several appeals on this issue and will continue to monitor events at the NLRB. Please feel free to contact us with any questions or concerns about this or any other employment, labor relations, and employee benefits issues.