



Press Release

National Labor Relations Board

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Supreme Court rules two-member NLRB lacked authority to issue decisions

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 5-4 decision authored by Justice Stevens concluded, “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 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 be swept aside in the face of admittedly difficult circumstances.”

In writing the dissent, however, Justice Kennedy said, “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.”

The Board operated with two members from January 2008 to late March 2010, when President Obama recess-appointed two additional members. In continuing to issue decisions during that period, the two remaining members—current Chairman Wilma B. Liebman, a Democrat, and Member Peter C. Schaumber, a Republican—relied on Section 3(b) of the National Labor Relations Act as well as 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.” The Board made such a delegation in December 2007 to a group of three members, which included Liebman and Schaumber, who, acting under that delegation, issued about 600 decisions.

Losing parties sought review of dozens of Board decisions in the federal courts of appeals, arguing that the two-member Board lacked authority to issue those decisions. The Supreme Court agreed to take up the question after the Courts of Appeals split on the issue, with five circuits ruling in the Board's favor and the D.C. Circuit ruling against it.

The same question has been raised in five more cases pending before the Supreme Court, and 69 that are pending before the Courts of Appeals. It is expected that those cases will be remanded to the Board, and the now-four member Board will decide the appropriate means for further considering and resolving them..

The case in question, *New Process Steel, LP v. NLRB*, involved a steel processing plant in Butler, Indiana that unilaterally withdrew recognition from the International Association of Machinists. The two-member Board had ordered the employer to recognize the union, honor a contract negotiated in the fall of 2007 and make employees whole for any income lost while the employer failed to honor the contract.

“When the Board went to two members in January 2008, Member Schaumber and I made a difficult decision in difficult circumstances,” said Chairman Liebman. “In proceeding to issue decisions in nearly 600 cases where we were able to reach agreement, we brought finality to labor disputes and remedies to individuals whose rights under our statute may have been violated. We believed that our position was legally correct and that it served the public interest in preventing a Board shut-down. We are of course disappointed with the outcome, but we will now do our best to rectify the situation in accordance with the Supreme Court’s decision.”

Member Schaumber’s term will expire at the end of August. Three nominations for Board seats are currently pending before the Senate, including those of Members Craig Becker and Mark Pearce, who were recess-appointed in late March.

The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees’ rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.

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