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U.S. Supreme Court Rules 3/5 is a Must for NLRB

A seemingly innocuous U.S. Supreme Court ruling has invalidated approximately 600 decisions made by the National Labor Relations Board ("NLRB").

On June 17, 2010, the Court issued its decision in *New Process Steel, L.P. v. National Labor Relations Board*. The Court held that the NLRB must have at least three members seated in order to issue decisions. The affected decisions were made by the two-member board from January 2008 to March 2010.

Background

The Taft-Hartley Act expanded the NLRB from a three-member to a five-member board. Currently the statute states 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." 29 U. S. C. §153(b) (hereinafter "§ 153(B)").

At the end of 2007, four members of the Board delegated all of the Board authority to a three-member group. Shortly thereafter, an appointment of one of the three members expired, leaving the remaining two members as the only members of the Board. For more than two years, those two members acted as a quorum, deciding hundreds of cases. One of the cases decided involved petitioner New Process Steel. In September 2008, the two-member Board issued decisions sustaining two unfair labor practice complaints against New Process Steel, and the company later challenged these rulings arguing that the two-person board lacked the authority to issue such decisions. The Court agreed.

Ruling Implications

The Court held that the five-member NLRB must have at least three members seated in order to issue decisions, effectively challenging hundreds of previous decisions. The Court reasoned that requiring the delegatee group to have at least three members was the logical reading of § 153 (b) because allowing two members to act as the Board would circumvent the quorum requirement.

This decision may lead to procedural delays if less than three members are seated (because of delay in executive appointment or congressional approval). Ultimately, the NLRB will be precluded from issuing decisions.

Potential Impact on Companies

As to those cases where the parties complied with the Board's ruling, the Court's decision may be moot. There are many pending challenges to the two-member decisions in the appellate courts. More than likely, the challenges will be upheld. However, the Board could decide each case must be re-evaluated on its merits or permit parties to present arguments as to why their respective case should or should not be re-evaluated.

For any questions regarding an NLRB complaint against your company, please contact [Rebecca Aragon](#), a Labor & Employment Partner, or [Noah Steinsapir](#), a Labor & Employment Associate, both in Venable's Los Angeles office.

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