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Three recent federal appellate court decisions have created a circuit split of authority on whether the two current members of the National Labor Relations Board (NLRB) have the statutory authority to decide cases and issue final orders, with the U.S. Court of Appeals for the District of Columbia Circuit finding that the NLRB does not have such authority and the U.S. Courts of Appeals for the First and Seventh Circuits finding that the NLRB does have such authority. Despite the circuit split, the NLRB will most likely accept the D.C. Circuit's decision and reissue or adopt the decisions issued by the two-Member NLRB when a quorum is reestablished.

Federal Appellate Court Holdings Strike Down (and Uphold) Decisions by the Two-Member NLRB

By Jay Sumner and C. Scott Williams

Since January 2008, the National Labor Relations Board (the "Board") has had only two (out of five) active members. Despite this apparent lack of a quorum, the Board has issued final decisions in approximately 400 cases. The authority of the two-member Board to issue decisions was challenged in many cases and has recently been addressed in three federal appellate court decisions: *Laurel Baye Healthcare v. NLRB*, No. 08-1162 (D.C. Cir. May 1, 2009), *New Process Steel v. NLRB*, No. 08-3517 (7th Cir. May 1, 2009), and *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009). These opinions, however, do not resolve the issue of the two-member Board's authority to rule on pending cases because the D. C. Circuit struck down the Board's authority to do so and the Seventh Circuit and First Circuit upheld it. Moreover, the same issue has been raised in two cases still pending before the Second and Eighth Circuits.

Board Seeks Opinion on Authority of Two-Member Board

In May 2002, with the prospect that the Board composition would drop below a quorum, the Board sought and obtained an opinion from the Department of Justice Office of Legal Counsel regarding the Board's ability to issue cases with only two members. In March 2003, the Office of Legal Counsel concluded that a two-member Board could issue final decisions and orders. The statutory basis for the Office of Legal Counsel's conclusion was that:

The statute permits the Board to "delegate to any group of three . . . members any or all of the powers which it may itself exercise." 29 U.S.C. § 153(b). In the proposed arrangement, the three remaining members of the Board would constitute themselves a "group" of the Board and would delegate to that group "all of the [Board's] powers." The statute further declares that, where the Board has delegated power to a group of three or more members, a quorum of the group shall be two members. *Id.* The provision for a two-member quorum of such a group is an express exception to the requirement that a quorum of the Board shall be three members: "[T]hree 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” by the Board. *Id.* Moreover, 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.” *Id.* (emphasis added). We therefore conclude that the plain terms of section 153(b) provide that the Board could form a “group” that could exercise all of the Board’s powers as long as it had a quorum of two members.

The Board’s Delegation of Authority to Only Two Members

In August 2005, then-Chairman Robert J. Battista, then-Member Wilma B. Liebman, and Member Peter Schaumber delegated to themselves, as a three-member group, all of the five-member Board’s powers, in anticipation of the expiration of Member Schaumber’s term on August 27, 2005. The two-member Board, however, only acted on four cases before President George W. Bush named Member Schaumber to a recess appointment to the Board.

The possibility of the Board’s falling below three members materialized again in late 2007 when Members Peter Kirsanow and Dennis Walsh’s terms were about to expire. Faced with the likelihood that Members Kirsanow and Walsh’s recess appointments would expire at the end of the first session of the 110th Congress, the then-four member Board of Liebman, Schaumber, Kirsanow, and Walsh “temporarily” delegated all the authority of the full five-member Board to the three-member group of Members Liebman, Schaumber, and Kirsanow. The temporary delegations, issued on December 20, 2007, were to be revoked when the Board returned to at least three members.

The Board’s cited authority for the delegation was section 3(b) of the Act,¹ which provides:

[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 Board also cited the legal opinion issued by the Office of Legal Counsel in March 2003. What was initially intended, however, to be a temporary delegation of authority has unexpectedly turned into a lengthy period during which the two-member Board consisting of Members Liebman and Schaumber has issued over 400 published decisions.

Although the two-member Board decided cases for over 16 months beginning in January 2008, the first cases to challenge the Board’s authority to do so are just now being decided by the federal appellate courts.

First Circuit’s Decision Upholding the Two-Member Board’s Authority

In *Northeastern Land Services v. NLRB*, the First Circuit concluded that the two-member Board had the full authority to decide cases and issue decisions. The court reasoned that the Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b). First, section 3(b) allowed the Board to delegate all of its powers to a three-member group. Second, 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.” The vacancy, which left the two-member quorum remaining, may not, under the terms of section 3(b), impair the right of the two-member quorum to exercise all powers of the Board.

The First Circuit’s rationale is fully consistent with the conclusion of the Office of Legal Counsel. The First Circuit, however, went further than the Office of Legal Counsel opinion and held that any other general rule would impose an undue burden on the Board’s administrative process.

Seventh Circuit's Decision Upholding the Two-Member Board's Authority

In *New Process Steel, LP v. NLRB*, the Seventh Circuit held that the two-member Board's authority to issue final decisions and orders was valid, stating (among other things) that the Board's reading of section 3(b):

Indeed is the plain meaning of the text. As we read it, § 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the NLRB's delegation procedure.

Although the Seventh Circuit's analysis is more thorough than the First Circuit's decision, the result is the same – the National Labor Relations Act grants a two-member Board the authority to decide cases and issue final orders.

D.C. Circuit's Decision Striking Down the Two-Member Board's Authority

In contrast to the decisions of the First and Seventh Circuits, the District of Columbia Circuit held, in *Laurel Baye Healthcare v. NLRB*, that the two-member Board did not have statutory authority to issue final decisions and orders. According to the court, the Board incorrectly interpreted section 3(b) of the National Labor Relations Act as permitting two-member decisions:

[T]he Board's position ignores the requirement that the Board quorum requirement must be satisfied "at all times." Moreover, it ignores the fact that the Board and delegee group quorum requirements are not mutually exclusive. The delegee group quorum provision's language does not eliminate the requirement that a quorum of the Board is three members. Rather, it states only that the quorum of any three-member delegee group shall be two. The use of the word "except" is therefore present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value. The Board quorum requirement therefore must still be satisfied, regardless of whether the Board's authority is delegated to a group of its members.

Thus, a three-member, four-member, or five-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board's overall quorum requirement of three members is, "at all times," satisfied. As the court held quite simply, "Congress provided that a quorum of the Board is three members. The Board does not have three members. It cannot act."

While recognizing the quandary the Board was in and acknowledging the Board's desire to continue operations when it only had two members, the court stated, "Nevertheless, we may not convolute a statutory scheme to avoid an inconvenient result . . . Perhaps a properly constituted Board, or the Congress itself, may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating the rump panel's previous decisions, including the case before us."

Thus, the court suggested that once the Board regains a three-member quorum, it could lawfully adopt and re-issue all of the approximately 400 decisions issued by the two-member Board and each of those decisions would have the imprimatur of the full Board's authority.

Further Litigation on the Two-Member Board's Authority

Because the issue of the two-member Board's authority is also currently pending in the Second and Eighth Circuits, it is likely the existing circuit split will deepen when those courts issue their opinions on this subject. See *Snell Island SNF v. NLRB*, Nos. 08-3822, 08-4336 (2nd Cir.) and *NLRB v. Whitesell Corp.*, No. 08-3291 (8th Cir.).

Even if no other circuit court rejects the Board's authority to issue two member decisions, the D.C. Circuit's rejection of that authority poses a significant problem for the Board, as every decision issued by the two-member Board could potentially be reviewed by the D.C. Circuit. Although the Board could petition the D.C. Circuit for rehearing *en banc* in light of the other federal court decisions on this issue or petition the U.S. Supreme Court for a writ of certiorari to resolve the split of circuit court authority, the most likely outcome is that the Board will merely adopt and re-issue the nearly 400 cases issued by the two-member Board once a third member of the Board is confirmed (or is recess appointed) and a quorum is re-established.

As the D.C. Circuit's opinion suggests, the recurring problem of a two-member Board is one that could best be addressed by nomination by President Obama of appointees for the three vacant Board positions followed by prompt action in the Senate. Given the President's recent nomination of Craig Becker and Mark Pearce to the Board, the D.C. Circuit's opinion could prompt the Senate to move quickly to confirm the two nominees and restore the Board's authority to issue final decisions and orders. However, unless the President nominates the final position, it is entirely possible that the Senate might not take action on any of the President's Board nominees until a full slate has been nominated. In that event, the D.C. Circuit decision could cause significant issues for the Board's ability to function effectively.

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¹ 29 U.S.C. § 153(b).