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Effects of *New Process Steel*

By Jennifer A. Dunn

The U.S. Supreme Court recently issued its highly anticipated decision in *New Process Steel, L.P. v. NLRB*, No. 08-1457 (June 17, 2010), ruling that the National Labor Relations Board lacked the authority to issue nearly 600 decisions with only two sitting board members.

This case stemmed from the board's attempt in late 2007 to preserve its authority to act and maintain operations as the recess appointments of members Dennis P. Walsh and Peter N. Kirsanow were set to expire. At that time, the board delegated all of its powers to a three-member group, under the belief that following the departure of its recess appointees, the remaining two board members would constitute a valid quorum of that three-member group.

In January 2008, Walsh's and Kirsanow's recess appointments expired, leaving only Wilma B. Liebman and Peter Carey Schaumber on the board. Liebman and Schaumber proceeded to issue decisions as a two-member quorum of the board for the next two years. They decided close to 600 decisions involving labor-management issues arising under the National Labor Relations Act.

Of those 600 cases, 69 were appealed to various federal circuit courts of appeals, where the parties challenged the board's authority to act with only two sitting members. The appeals courts remained divided on the issue, with five circuits — including the 7th Circuit — finding in the board's favor, and one circuit against. In *New Process Steel*, the court granted certiorari to resolve the conflict among the courts.

In a 5-4 decision authored by Justice John Paul Stevens, the court concluded that the board lacked the authority to act with just two members. Interpreting Section 3(b) of the National Labor Relations Act, the court found that Congress required the board to delegate its powers to no fewer than three members, and that the board must have three participating members at any given time to constitute a quorum.

The contrived delegation mechanism used by the board in late 2007 — “delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group” — was not permissible, given the plain language of the National Labor Relations Act and the board's own past practice of not allowing two members to act as a quorum (until the circumstances giving rise to this case).

Jennifer A. Dunn is an associate at Franczek Radelet P.C., a Chicago labor and employment and education law firm. She can be reached at jad@franczek.com or (312) 986-0300.

In the court's view, any contrary interpretation would allow the board to act indefinitely as a two-member group, which would diminish the significance of statutory language mandating that three members of the board shall “at all times” constitute a quorum.

Stevens was joined in the majority by some unusual allies — Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito. In dissent, Justice Anthony Kennedy, joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor, disagreed with the majority's interpretation.

The court's *New Process Steel* decision has significant procedural and policy implications for the labor-management community.

As a matter of board procedure, all of the cases on appeal are expected to be remanded to the board. The court's decision appears to invalidate all of the decisions issued by the two-member board during that period. To date, the board has not indicated whether it will reconsider those decisions as well, and, if so, how that reconsideration would be accomplished.

Yet, as a practical matter, all of this may prove largely inconsequential. Members Liebman's and Schaumber's labor and management viewpoints are fundamentally at odds, and they reached agreement in cases that were largely non-controversial and that did not set any new precedent. Moreover, the board's

composition makes any reconsideration of these cases potentially uneventful, as the current Democratic majority on the board is unlikely to reach a different result in those non-game-changing decisions.

As a matter of policy, however, the court's decision speaks volumes about the board's ability to function amidst constant board member turnover and recurring vacancies. As the court itself noted, these events have been identified as a “significant impediment” to board operations, and the court sympathized with the board's “understandable desire to keep its doors open despite vacancies.”

In recent years, the board member confirmation process has become mired in partisan politics, resulting in tremendous delays in appointments. The court's *New Process Steel* decision serves as a signal to the Senate to forgo the political grandstanding when considering appointees, and may even encourage the nomination of more reasonable and moderate appointees by presidential administrations.

This signal apparently was received; five days after the court's decision, the Senate unanimously confirmed President Obama's nomination of Mark Gaston Pearce, a union attorney, and Brian Hayes, a Republican labor policy director, to the board, bringing the board to its full five-member strength for the first time since 2007.

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