

No. 081457 MAY 22 2009

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In The
Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the National Labor Relations Board have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that “three members of the Board shall, at all times, constitute a quorum of the Board”?

**LIST OF PARTIES AND
RULE 29.6 STATEMENT**

Pursuant to Rule 14.1(b), the caption contains the list of all parties appearing here and before the United States Court of Appeals for the Seventh Circuit. Pursuant to Rule 29.6, petitioner states that New Process Steel, L.P. is a Delaware limited partnership. The partners are New Process Steel GP LLC, an Illinois limited liability company, and Richard Fant, an individual. New Process Steel Holding Co., Inc., a Texas corporation, is a member of New Process Steel GP LLC.

No publicly traded company owns 10% or more of the stock of New Process Steel, L.P.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner New Process Steel, L.P. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *New Process Steel, L.P. v. NLRB*, Nos. 08-3517, 08-3518, 08-3709, 08-3859.¹

**OPINION BELOW**

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1) is published at 2009 WL 1162556 (7th Cir. 2009). As of the date of this petition, the opinion has not been published in the federal reporter.

**JURISDICTION**

The Court of Appeals filed its opinion on May 1, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).



¹ Case Nos. 08-3517 and 08-3518 are petitioner's petitions for review of two NLRB decisions (App. 26; 72) which arose from the same facts. Case Nos. 08-3709 and 08-3859 are the NLRB's petitions for enforcement of its orders in the same underlying Board decisions.

STATUTE INVOLVED

This case involves provisions of the National Labor Relations Act (the “NLRA”), 29 U.S.C. §§ 151 *et seq.* The pertinent provisions are reproduced below:

The 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. 29 U.S.C. § 153(b).



STATEMENT OF THE CASE

The National Labor Relations Board is the appellate body charged with enforcing the National Labor Relations Act. It creates and enforces U.S. labor policy. Its decisions maintain industrial peace, shape the future of labor law, and carry out an important congressional mandate. And, absent guidance from this court, no one can be sure whether or not it has existed for the past 16 months.

On May 1, 2009, the validity of hundreds of decisions of the National Labor Relations Board (the “Board” or the “NLRB”) was cast into doubt by diametrically opposed holdings from two courts of

appeals. As of the date of this petition, the authority of the NLRB from December 31, 2007 through the present is unclear. According to the D.C. Circuit's decision in *Laurel Baye Healthcare of Lake Lanier v. NLRB*, No. 08-1162 (D.C. Cir. May 1, 2009) (App. 82), the Board has been without power to act since December 31, 2007; according to the Seventh Circuit's decision in this case (App. 1), and the First Circuit's decision in *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. March 13, 2009) *reh'g denied*² the Board acted lawfully when it rendered decisions with only two members.

The United States Court of Appeals for the Seventh Circuit had jurisdiction over the underlying decisions of the National Labor Relations Board pursuant to Sections 10(e) and (f) of the National Labor Relations Act. 29 U.S.C. § 160(e) and (f). This matter arises from the near-simultaneous issuance of contrary holdings from the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the District of Columbia on May 1, 2009. The question before each court of appeals was the same as the question presented by this petition – does the National Labor Relations Board have authority to act and issue decisions with only two sitting members, where the NLRA provides that “The Board is authorized to delegate to any group of three

² On May 20, 2009 the First Circuit denied *Northeastern Land Services'* petition for rehearing *en banc*.

or more any or all of the powers which it may itself exercise . . . ” and “three or more” members constitute a quorum of the Board “at all times.” 29 U.S.C. § 153(b).

◆

ARGUMENT

The Courts of Appeals – particularly the First, Seventh and District of Columbia Circuits – are divided over the NLRB’s authority to act with only two sitting members. The District of Columbia Circuit interprets the NLRA to require “three or more” sitting Board members “at all times” in order for the agency to act. App. 88-90. By contrast, the First and Seventh Circuits interpret the NLRA to allow the Board to act with only two members, so long as the Board delegated its authority to a group of “three or more” at some point in the past, even where the Board acknowledged that one of the three member’s term would expire in mere days. Essentially, the First and Seventh Circuits endorse the NLRB’s attempt to end-run the NLRA’s quorum provision.

Absent resolution from this Court, employees, employers and unions throughout the country will face continued uncertainty.³ *New Process Steel, L.P.*

³ Petitioner has not sought *en banc* review of the decision below. Petitioner believes the question presented by this petition is of significant import to labor relations, is capable of repetition yet evading review and should be resolved directly once and for all by this Court. Indeed, in 2005, the NLRB issued a decision with only two members, but the Board’s authority to do so was

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(“New Process”) asks this Court to grant its petition and provide much-needed resolution of the current circuit split, which threatens to stymie labor relations throughout the United States. This petition is especially timely, given that the role of labor organizations in the American economy regularly dominates the front pages. While economists, union officials, scholars, employees and employers debate the role organized labor will play in the new economy, a cloud looms over the very agency charged with administering the NLRA and ensuring industrial peace. As of the date of this petition, there is no clear answer to a question of critical importance to labor law – does the NLRB exist?

As a result of the circuit split, the validity of hundreds of decisions of the NLRB has been cast into doubt. Absent resolution by this Court, the legal effect of virtually every NLRB decision issued from December 31, 2007 to the present and into the future, unless and until a third member is nominated by the President and confirmed by the Senate, is uncertain. This Court should resolve this disagreement now. The

never decided as that particular case was not challenged by the employer in the courts of appeals. *See Bon Harbor Nursing & Rehabilitation Center*, 345 NLRB 905 (2005) (published order granting motion to strike by Chairman Battista and Member Liebman). The need for final resolution by this Court was recently made abundantly clear by the NLRB when it issued a statement declaring that it would “continue to issue decisions and orders in unfair labor practice and representation cases” with only two sitting members. *See Statement of Chairman Wilma B. Liebman and Member Peter C. Schaumber Concerning the District of Columbia Circuit’s Laurel Baye Healthcare Decision, dated May 18, 2009.*

issue is of national import because the appellate body of the NLRB has effectively ceased to exist in the D.C. Circuit, while the First and Seventh Circuits have endorsed the two-member Board's actions. Because the D.C. Circuit has jurisdiction over every NLRB decision, the circuit split is even more problematic. Today, the validity of a Board decision against an employer within the First or Seventh Circuit turns on who wins the race to the courthouse. If the employer exercises its right to seek review from the D.C. Circuit, *Laurel Baye* controls and the Board's decision will be vacated. If, however, the Board petitions the First or Seventh Circuit for enforcement of its order, *Northeastern Land Services* and *New Process Steel* control and enforcement will likely be granted, assuming that the Board prevails on the merits.

This case directly raises the issue of the viability of a two-member Board. The Seventh Circuit's holding is incorrect; as the D.C. Circuit rightly held, the plain language of the NLRA *requires* "three or more" sitting Board members "at all times" in order for the agency to function.

I. The Circuits Are Divided Over the Question Presented

A. Background

The NLRA, passed in 1935 and amended in 1947, created the NLRB, a federal agency that administers the NLRA and functions as the appellate body in labor disputes regarding union representation issues

and unfair labor practices. Representation cases are decided by the NLRB's 34 regional offices located throughout the United States, while unfair labor practice cases are tried before NLRB administrative law judges. Both representation and unfair labor practice decisions can be appealed to the five-member Board in Washington, D.C. The Board is comprised of a chairman and four members. Traditionally, the chairman is a member of the president's political party and the remaining members consist of two Democrats and two Republicans.

On December 28, 2007, the Board had only four members, and the terms of Members Dennis Walsh and Peter Kirsanow were set to expire on December 31, 2007, leaving the Board with only two members – Democrat Wilma Liebman and Republican Peter Schaumber. Under Section 3(b) of the NLRA, the Board would have lacked a quorum and been unable to function. In an attempt to continue deciding cases while lacking the required three-member quorum, the four members delegated the Board's authority to Members Kirsanow, Liebman and Schaumber and declared that Members Liebman and Schaumber would thereafter constitute a quorum of the newly-created three-member body.

The Board relied on three provisions of Section 3(b) in support of its actions: the *delegation* provision, the *quorum* provision and the *vacancy* provision. The delegation provision states that the Board can delegate its authority to a group of three or more members; the vacancy provision states that a vacancy on the Board

will not impair the remaining members' ability to exercise the Board's powers; and the quorum provision states that three members of the Board constitute a quorum of the Board, except that two members will constitute a quorum in the event the Board properly delegates its authority to a group of three or more members under the delegation provision. Thus, according to the Board, its delegation of authority at a time when there were "three or more" sitting Board members would allow the Board to function with two members in perpetuity even though the Board knew at the time of the delegation that two members' terms would expire in days.

In every decision issued since the attempted delegation, including the decisions that are the subject of the Seventh Circuit's holding below, the Board has included the following footnote by way of explanation:

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. *See* Sec. 3(b) of the Act.

B. The Conflict

The Seventh Circuit's decision in this case has created a conflict over whether the NLRB, contrary to the plain and unambiguous language of the statute, can function with only two sitting members.

In *Laurel Baye Healthcare of Lake Lanier v. NLRB*, No. 08-1162 (D.C. Cir. May 1, 2009), the Court of Appeals for the D.C. Circuit vacated a decision of the two-member Board and remanded it "for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum." App. 98. The court ruled that the NLRA's quorum provision, which states that "three members of the Board shall, at all times, constitute a quorum of the Board," requires a minimum of three sitting Board members for the agency to function. App. 88-90. The court held that any such delegation "cannot survive the loss of a quorum on the Board itself." App. 88. Because it was not properly constituted at the time the court rendered its decision in *Laurel Baye*, the Board "did not have the authority to issue the order" before the court. App. 98. In reaching its conclusion, the court looked to the plain language of the Act and found that "Congress provided unequivocally that a quorum of the Board is three members, and that this requirement must be met *at all times*." (Emphasis added). App. 90.

In the case below, issued the same day as *Laurel Baye*, the court's holding is squarely at odds with the D.C. Circuit's decision in *Laurel Baye*. In *New Process*

Steel, the court looked to the language of the Act and inexplicably concluded that the vacancy provision authorized the Board to continue to function with only two members. This interpretation of the NLRA effectively deletes the first sentence of Section 3(b) from the statute. According to the court, the NLRA “expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members.” App. 10. The Seventh Circuit’s decision relied on an earlier case, *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), in which the First Circuit upheld a decision of the two-member Board under the same rationale.

In a decision issued at almost the exact hour as *Laurel Baye*, the Seventh Circuit rejected the argument that the NLRA “restricts the Board from acting when its membership falls below three.” App. 10. In other words, the Seventh Circuit rejected the very rationale on which the D.C. Circuit relied in *Laurel Baye* in invalidating the two-member decisions.

The direct conflict between the Seventh Circuit in this case and the D.C. Circuit in *Laurel Baye* creates an untenable situation: decisions of the NLRB are void if challenged by employers in the D.C. Circuit, but binding in the First and Seventh Circuits if the NLRB seeks enforcement of an order. The practical effect of the circuit split is that the legal effect of virtually every NLRB decision issued since December 31, 2007 will now be decided by who wins the race to the courthouse. It is in the interest of all

employers, employees, labor organizations, and the Board itself that this Court promptly resolve the split over the question presented. Unless and until this Court does so, enforcement of the NLRA will remain at a standstill.

II. The Decision Below Misconstrues Section 3(b) of the NLRA

The decision below endorsed the Board's contorted reading of the delegation, vacancy, and quorum provisions to allow the Board to act with only two members. This holding is premised on the Board's eleventh-hour "delegation" of its authority to a group of three members, one of whose terms was set to expire almost immediately thereafter. According to the decision below, the Board, having once delegated its authority at a time where it had three or more members, could continue to function *in perpetuity* with only two members. This holding is an error because it fails to give effect to the plain meaning of the statute and effectively deletes the first sentence of Section 3(b) from the NLRA.

The D.C. Circuit rightly held to the contrary. Giving meaning and effect to all of the words in the statute, the court explained:

Reading the two quorum provisions harmoniously, the result is clear: a three-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 quorum requirement is, "at all times," satisfied.

Id. But the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied. (Emphasis added). App. 89.

When construing a statute, a court's task is to give effect to the will of Congress. If the will of Congress has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). The decision below fails to give the words in the statute their plain meaning. The language of Section 3(b) is not ambiguous or difficult. The words are clear and simple. As the D.C. Circuit correctly held in *Laurel Baye*, the NLRA explicitly requires the Board to have three members "at all times" in order to function. The decision below wrongly endorsed the Board's linguistic gymnastics and acquiesced to a re-writing of the NLRA. New Process Steel asks this Court to bring clarity and uniformity to federal labor law by granting its petition and vacating the decision below.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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