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April 26, 2010

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, DC 20543-0001

RE: No. 08-1457
NEW PROCESS STEEL L.P. v. NLRB

Dear Mr. Suter:

This letter responds on behalf of Petitioner New Process Steel L.P. ("New Process") to the Court's Order of April 16, 2010 directing the parties in this case to address what effect, if any, the recess appointments of March 27, 2010 of two new members to the National Labor Relations Board ("NLRB") should have "on the proper disposition of this case."

New Process respectfully suggests that this development should have no effect on the posture of this case in this Court or on this Court's ultimate disposition of the case. We reach this conclusion for the following reasons.

1. This Court granted certiorari to resolve whether the National Labor Relations Act ("NLRA"), 29 U.S.C. § 153(b), authorizes the NLRB to decide cases when it has only two of its five members. That question remains in dispute among the circuits whether the Board has two members or four members.

2. The Solicitor General's notice to the Court of the recess appointments makes no argument that it has an effect on the case. It may be that the Solicitor General notified this Court of the recess appointments in keeping with her duty to inform the Court of important developments that are relevant to pending cases. Presumably, had the Government thought that this particular development mattered, she would have said so. The Solicitor, however, has not suggested either that this case is moot or that there is some other more arcane effect as a result of the recess appointments.

3. This case is not moot by any measure. A mootness inquiry presents questions of constitutional and prudential dimension. Article III, § 2 of the Constitution precludes the exercise of judicial power in the absence of a live case or controversy. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974). A sufficient case or controversy may not exist if the Court is faced with the prospect of deciding questions "that cannot affect the rights of litigants in the case before [it]." Id. (citation omitted).

There is no constitutional defect presented here by the recent appointments because these appointments do not matter to the status or posture of this case or the controversy it presents.

New Process was found to have violated the NLRA by an undersized NLRB. New Process argues that the improperly constituted NLRB had no authority to

adjudicate New Process's rights in this regard, and has sought this Court's review of that question. This Court has held that affected parties have rights to redress when their cases are decided by improperly constituted adjudicators. Nguyen v. United States, 539 U.S. 69, 83 (2003). While the statutory setting is different here, the same kind of dispute persists in this case and the rights alleged cannot be finally determined except by this Court. By the same token, a case is not likely to be moot where the parties continue to seek different relief. Pacific Bell Tel. Co. v. LinkLine Commc'ns, Inc., 129 S. Ct. 1109, 1117 (2009). That surely is true here. There is no valid argument that a decision on the merits presented "cannot affect the rights of litigants" in this case. See DeFunis, 416 U.S at 316.

4. Other circumstances identified by this Court may influence a determination of mootness, but none of them supports the theory that this case is moot.

The burden of establishing mootness lies with the party asserting mootness and it is a "heavy burden." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

The cases suggest that a party seeking to prove mootness must demonstrate that the dispute presented is over, that it is not capable of repetition, and that any action taken voluntarily by a party to terminate the case or controversy truly ends

it. See Alvarez v. Smith, 130 S. Ct. 576, 581 (2009); Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 221-22 (2000).

All of these factors weigh against a finding that this case is moot. The addition of the new Board members is for all practical purposes irrelevant to the dispute between New Process and the NLRB. The Board has no authority to claw back the case from this Court and the NLRA prohibits it from doing so. Section 10(e) of the Act provides, "Upon the filing of the record with [the court of appeals] the jurisdiction of the court shall be exclusive. . . ." 29 U.S.C. § 160(e); Scepter, Inc. v. NLRB, 448 F.3d 388, 390-91 (D.C. Cir. 2006). The same effect occurs when this Court assumes jurisdiction. "Absent a remand, the Board may neither reopen nor make additional rulings once exclusive jurisdiction vests in the reviewing court." George Banta Co., Inc., Banta Div. v. NLRB, 686 F.2d 10, 16 (D.C. Cir. 1982). There is no contrary authority.

Of greater importance is the question whether the authority of a Board with an insufficient number of members to conduct its business is a matter of continuing concern especially in light of the option given to employers to seek review of NLRB decisions either in the D.C. Circuit or in another appropriate circuit. It is hard to say that the concern has abated. The recurrence of the problem is not only possible but likely, and the issue may recur in this case even though the Board now has four members.

The two new members, Mr. Pearce and Mr. Becker, have recess appointments, although both also are nominated for full-term appointments as is a third nominee who has not been given a recess appointment. The recess appointments will run out at the end of the Senate's next session in late 2011. Member Schaumber's appointment terminates in August 2010. The Board could, therefore, find itself with as few as one member at the end of next year with no relief in sight until the next recess. Any one of the now-pending cases decided by a two-member Board, including this case and the others pending on petitions for certiorari and the cases pending in the courts of appeals decided by two members, would need to be re-decided by a validly composed Board. It would not be unusual for a case to remain pending before the Board for a year or more and, indeed, the first two-member Board case now pending on a petition for certiorari in this Court was before the Board for almost six years before being decided. Northeastern Land Servs. v, NLRB, 560 F.3d 36 (1st Cir. 2009) (pet. for cert. pending, No. 09-213) (filed Aug. 18, 2009).

The Government's "voluntary cessation of challenged conduct moots a case . . . only if it is '***absolutely***' clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Adarand Constructors, 528 U.S. at 725 (citations omitted) (emphasis in original).

That assurance cannot be made in the setting presented here. The NLRB has fallen below three members on several occasions in the past. It is likely that the NLRB may again fall to two members in the future and then as now, the decisions reached by this shorthanded Board will be undermined by uncertainty. The better public policy calls for a resolution of this case on its merits at this time.

The recess appointments do not, however, change anything or in any way diminish the robust dispute that has been fully presented to this Court. This case should proceed to decision in the normal course.

Respectfully submitted,

/s/ Sheldon E. Richie

Sheldon E. Richie, Counsel of Record for New Process Steel, L.P.

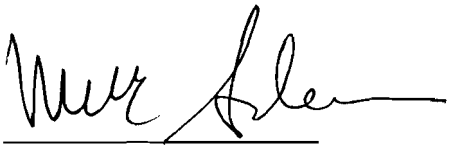
CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, New Process Steel, L.P. states that the corporate disclosure statement contained in its petition remains accurate.

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2010, a copy of the foregoing was served upon the following by first–class mail, postage prepaid:

Neal Katyal
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001



Mark E. Solomons