No. 08-1457

In The Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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

BRIEF FOR PETITIONER NEW PROCESS STEEL, L.P.

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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 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. None of these entities is publicly traded. The National Labor Relations Board is a federal agency established by the National Labor Relations Act, 29 U.S.C. § 153.

New Process Steel, L.P. ("New Process") was the respondent before the National Labor Relations Board ("NLRB" or "Board") and the petitioner/cross-respondent in the court of appeals. New Process is the petitioner in this Court. The NLRB was the cross-respondent/petitioner in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 564 F.3d 840. Appendix to Petition for Writ of Certiorari ("Pet. App.") 1-25. The decisions and orders of the National Labor Relations Board are reported at 353 NLRB Nos. 13 and 25. Pet. App. 26-81.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 2009. The petition for writ of certiorari was filed on May 22, 2009. The petition was granted by this Court on November 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 3(a) and (b) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 153, is set forth below. The provision, in its entirety is set forth in the addendum to this brief.

§ 153. National Labor Relations Board

(a) **Creation, composition, appointment, and tenure; Chairman; removal of members**

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations

Act, 1947 [29 U.S.C. § 141 *et seq*.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) **Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal**

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. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a

request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. 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 shall have an official seal which shall be judicially noticed.

STATEMENT OF THE CASE

A. Background

This case asks the Court to determine whether in 29 U.S.C. § 153(a), (b), Congress permitted a two-member NLRB to decide unfair labor practice and representation cases.

The National Labor Relations Act ("NLRA" or "Act") promotes labor peace by ensuring certain rights or remedies for employees, employers and labor organizations. The NLRB was established to adjudicate and enforce these rights and remedies.

Congress created the Board in 1935, in the Wagner Act, which provided for a three-member Board, and stated that "a vacancy in the Board shall

not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." Act of July 5, 1935, ch. 372 § 3(b), 49 Stat. 449, 451. In 1947, Congress enacted the Taft Hartley Act, which, among other changes, expanded the Board from three to five members, and permitted the Board to delegate any or all of its powers to "any group of three or more members." The Taft-Hartley Act also revised Section 3(b) of the Wagner Act by stating 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." Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 3(b), 80 Pub.L. 101, 61 Stat. 136, 139 (1947) (codified at 29 U.S.C. § 153(b)). The Board was expanded to make it more efficient and to better manage significant delays that plagued the Board in those days. *See* S. Rep. No. 105, 80th Cong. 1st Sess. 8 *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 407, 414 (1947) ("LEG. HIST. 1947"). *See also Hall-Brooke Hosp. v. NLRB*, 645 F.2d 158, 162 n.6 (2d Cir. 1981) (Congress added the delegation provision "to enable the Board to handle an increasing caseload more efficiently.").

In the year following enactment of the Taft-Hartley Act, the Board began delegating decision-making authority in individual unfair labor practice and representation cases to panels of three members. NLRB Thirteenth Annual Report at 8-9 (1949). Even though delays and backlogs persisted in the years since 1947, due, in part, to the frequency of vacancies on the Board, the Board did not issue a reported decision by a panel of less than three members.[1] Moreover, Board members have publicly stated that the Board cannot issue decisions when it has fewer than three members on the panel or group. *See* John C. Truesdale,[2] *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response,* 16 LAB. LAW. 1, 6, 13 & n.37 (2000) (noting that pursuant to the Board's procedure, "no case will issue unless it reflects the majority opinion of the full Board" and adding: "The continuing problem of Board member

[1] The Board has issued decisions of three-member panels in which a member was recused or did not otherwise participate in the decision on the merits. In *Photo-Sonics, Inc. v. NLRB,* 678 F.2d 121 (9th Cir. 1982), the Ninth Circuit considered whether a Board decision, issued by a three-member panel on the day that one panel member resigned, was valid. The resigning member had participated in the decision. In dicta, the Ninth Circuit stated that even if the resigning member "did not participate in the Board's decision, the decision would be valid because a 'quorum' of two panel members supported the decision." 678 F.2d at 123.

[2] Mr. Truesdale is a former Chairman (1999-2003) and Executive Secretary of the NLRB.

turnover and vacancies . . . was at its worst in the first year of the Clinton presidency when the Board actually fell to two members, less than the necessary quorum."); John E. Higgins, Jr.,[3] *Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U. L. REV. 941, 954 & n.43 (1998) (commenting: "For a short period in 1993, the Board actually fell to two members, one short of its statutory quorum" and noting: "During this period, the Board could not act on contested cases. Anticipating the loss of a quorum, the Board delegated the section 10(j) authority to the General Counsel.").[4]

In 2003, in response to a May 16, 2002 request from the NLRB for an opinion whether the Board could issue decisions in the event three of the five seats on the Board were vacant, the Office of Legal Counsel, U.S. Department of Justice ("OLC"), concluded, although not free from doubt, that the Board

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[3] Mr. Higgins, a career NLRB attorney, has served in various capacities since 1964, including Board Member, Board Solicitor and Deputy General Counsel. 47 CATH. U. L. REV. 941 at n.*.

[4] The Board's "10(j)" authority is the authority to seek injunctive relief in certain unfair labor practice cases. At the same time that the Board delegated its authority to three members in 2007, anticipating that this "group" would fall to two members in a matter of days, the Board also delegated its authority to initiate and prosecute injunction proceedings under Section 10(j), and to seek enforcement of Board orders in the courts of appeals under Section 10(e) and 10(f) of the NLRA to the General Counsel. Minute of Board Action (Dec. 20, 2007). Addendum at 4a.

could delegate its powers to a group of three members in contemplation of the departure of one of those members, and that the later departure of one of those members would not impair the remaining members' power to issue decisions. The OLC characterized this delegation as an "arrangement." 2003 WL 24166831 (OLC March 4, 2003).

At the end of 2007, the Board was faced with the prospect of three vacancies. Effective midnight on December 28, 2007, the then-sitting four members of the Board delegated to three of them – members Liebman, Schaumber and Kirsanow – as a "three-member group, all of the Board's powers. . . ." Minute of Board Action, December 20, 2007. *See* Addendum at 5a. On December 31, 2007, the recess appointments of two of the four members, including member Kirsanow, expired. For almost two years, since January 1, 2008, the remaining two Board members have issued decisions in unfair labor practice and representation cases. Congress has yet to confirm any additional Board members.

B. The Proceedings Below

New Process purchases large rolled coils of steel, slits them, and sells them to end-users. New Process engaged in collective bargaining with a newly-certified union for approximately one year, and reached agreement on an initial contract, subject to ratification by the union. The union initially notified New Process that the contract had been ratified, but

when employees reported irregularities in the ratification process – namely that the employees voted *against* ratification – the union insisted it was nonetheless effective. New Process advised the union that the contract had not been ratified and the parties should return to the bargaining table. New Process subsequently withdrew recognition from the union based on a petition from a majority of employees in the bargaining unit asking the company to do so. The union initially filed an unfair labor practice charge alleging that New Process unlawfully repudiated the collective bargaining agreement. It later filed a second charge alleging that New Process unlawfully withdrew recognition from the union.

An administrative law judge for the NLRB ruled against New Process on the first unfair labor practice charge on May 1, 2008. New Process filed exceptions with the NLRB.[5] On September 25, 2008, NLRB Members Schaumber and Liebman issued a "Decision and Order" affirming the recommended Order of the administrative law judge. The same two Board members issued a decision on September 30, 2008, on cross-motions for summary judgment arising out of the union's second unfair labor charge, finding that New Process unlawfully withdrew recognition from

[5] Filing exceptions with the Board is the method for seeking appellate review by the NLRB of a decision of an administrative law judge in unfair labor practice cases. Exceptions must be filed within twenty-eight days of an ALJ's decision. *See* 29 C.F.R. § 102.46(a).

the union, and issued a remedial order against New Process.

New Process appealed from both decisions to the Seventh Circuit, which consolidated the cases. The Seventh Circuit first considered whether the Board could lawfully issue a decision when it consisted of only two members, and then considered whether New Process violated the Act. The Seventh Circuit ruled in favor of the NLRB on both issues. In addressing the delegation and quorum provisions of Section 3(b), it held:

> 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.

Pet. App. 10-11.

In addition to its plain meaning evaluation, the court of appeals justified its conclusion by relying on the OLC's opinion letter, the decision of the First Circuit in *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *pet. for cert. pending* (No. 08-1878) and dictum from *Photo-Sonics, Inc. v. NLRB*, 678 F.2d at 123 (where the Ninth Circuit observed the

two remaining members of a three-member panel that heard and decided the case but lost a member on the day the decision was released could do so as a quorum of two under Section 3(b) of the Act). Pet. App. 11-12.

The court below dismissed New Process's textual and public policy arguments as unpersuasive. The court of appeals observed that over 300 opinions had been decided by a "two-member quorum." Pet. App. 9.

On the same day that the Seventh Circuit rendered its decision, the D.C. Circuit decided that the requirement that the Board have at least three members "at all times" meant that when the Board consisted of only two members, it lost the power to act because any powers that had been delegated to the three-member group automatically ceased. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *pet. for cert. pending* (No. 09-377). Pet. App. 82-98.

The D.C. Circuit's textual analysis differs markedly from the Seventh Circuit's, focusing on its observance of rules of construction requiring the court to construe a statute "so that no provision is rendered inoperative or superfluous, void or insignificant" [citations omitted]. Pet. App. 88-89. On this foundation, the D.C. Circuit held:

> Specifically, the Board's position ignores the requirement that the Board quorum requirement must be satisfied "*at all times*." 29 U.S.C. § 153(b) (emphasis added). 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. *Id*. 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. *See id*. The Board quorum requirement therefore must still be satisfied, regardless of whether the Board's authority is delegated to a group of its members. 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.
>
> Indeed, if Congress intended a two-member Board to be able to act as if it had a quorum, the existing statutory language would be an unlikely way to express that intention. The quorum provision clearly requires that a quorum of the Board is, "at all times," three members. 29 U.S.C. § 153(b).

Pet. App. 89.

The D.C. Circuit relied also on the law of agency and corporations mandating the termination of a delegation when the delegating authority ceased to exist. The court was not persuaded by the force of decisions in cases involving other governmental entities that were authorized to act notwithstanding defects in their composition, finding these cases and their statutory settings to be distinguishable.

The Second Circuit was the next to weigh in. *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 415 (2d Cir. 2009). There, the court of appeals concluded that neither canons of construction nor any other interpretational methodology was enlightening enough to resolve the linguistic puzzle, so the court deferred to the agency and affirmed the authority of a two-member board to conduct its adjudications.[6]

Finally, the Fourth Circuit had its turn. In *Narricot Indus. L.P. v. NLRB*, Nos. 09-1164, 09-1280, 2009 WL 4016113 (4th Cir., Nov. 20, 2009), the court embarked upon yet another linguistic adventure. It reasoned that the D.C. Circuit's analysis would read

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[6] The Tenth Circuit recently joined the Second in deferring to the NLRB. *Teamsters Local Union No. 523 v. NLRB*, Nos. 08-9568 and 08-9577 (10th Cir., Dec. 22, 2009). The courts deferred to the NLRB, but it was the OLC that authorized the two-person board. The NLRB was following the OLC opinion, not its own specific ruling. Assuming that deference might be a proper inquiry in a matter of statutory interpretation like this one, OLC is not entitled to deference. It is not the agency that administers the NLRA. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997).

the two-member quorum clause and the vacancy clause out of the statute. The court believed that based on the plain language of the statute, and giving effect to all of its terms, a two-member quorum was permitted to act for the Board even if they were the only two members of a three-member group.

This Court now has agreed to review the decision of the Seventh Circuit.

SUMMARY OF ARGUMENT

This case invokes three cardinal principles of statutory construction: Words and clauses in a statute cannot be ignored; each of them should be accorded its ordinary and natural meaning. Conflicts that arise between words and clauses must be resolved in a way that harmonizes them without diminishing the force or meaning of any of them. And, each word and clause must be considered in its context so that no meaning is lost by unnaturally narrow focus.

Application of these principles to Section 3(b) of the NLRA, as amended by the Taft-Hartley Act, leads to the conclusion that the NLRB is authorized to decide cases so long as at least three members are present in a "group" that has been delegated any or all the powers of the Board by the whole Board. A vacancy on the Board only, as distinct from a delegee group, will not deprive the Board of its authority to decide cases unless the vacancy or vacancies deprive

the Board of a quorum of at least three members, because three members must be present "at all times." In contrast, a delegee group that is duly authorized by the Board may act if two members, *i.e.*, a majority or a two-member quorum, agree. When there are only two members on the Board itself, however, there is no Board, no operative authorized delegee group, and no authority to issue decisions. By this formula, all of the words count and none tyrannizes another. Giving meaning to each of the words and phrases in this setting eliminates any ambiguity and leads to a rational operating construct for the NLRB.

The D.C. Circuit in *Laurel Baye Healthcare* was right in following this simple prescription. The other courts, including the Seventh Circuit below, violated or ignored the rules of interpretation set down by this Court. All of them ignored the "at all times" clause, treating it as having been repealed by the "exception" for the two-member quorum of a fully empowered three-member group. And, none of them accorded significance to the differences suggested by the terms "Board" or "group," rendering this linguistic distinction irrelevant. The "at all times" clause for the Board, however, is not limited or overridden by the majority rule exception for a quorum of a three-member group. The Fourth Circuit accorded the "vacancy" clause more force than it can bear and the Second Circuit's default to deference is inappropriate. The requirements for deference are not present here and the NLRB has not asked for it.

Available collateral aids for determining statutory meaning reinforce the conclusions mandated by the plain language. The D.C. Circuit correctly analogized the general and common law of agency and corporations to support the premise that when the delegating and delegee entities were no longer properly constituted, they lost the authority to decide cases. These common law principles are presumed to be embedded in federal statutes in the absence of an express intent to the contrary. The requirement of a three-person group also makes good sense. Decision-making by odd-numbered bodies is commonplace; even-numbered or even two-member adjudicatory bodies are not. The vigor of dissent cannot inform decisions of a two-member Board.

Moreover, since the enactment of Taft-Hartley, the NLRB has abided by the minimum three-member requirement for action by the delegee group. Board members and executives have articulated the point over many years. Unrelated federal boards and commissions similarly have refrained from acting when their membership fell below their statutorily authorized numbers. By contrast, no agency has embraced the view offered by the OLC and Board in this case because the Board and the OLC's theory defies common sense, as well as the plain language of the Act.

There are many valid ways Congress and the President can solve the problems posed by an undersized NLRB, but the one preferred by the court below is not one of them.

Restoring what the NLRA requires will not significantly disrupt national labor policy as much as it has already been distorted by decisions by the current two-member Board. The current Board members have admitted to compromising their views of the proper interpretation of the NLRA in order to promote institutional continuity.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE NLRA DOES NOT AUTHORIZE A TWO-PERSON BOARD

Despite the divergent approaches of the courts of appeals, a straightforward plain language analysis yields a simple answer that comports with common sense and harmonizes all of the statutory provisions. Such a review of all of the words of Section 3(a) and (b) of the Act leads naturally to the conclusion that a Board that consists of only two members shorn from a previously authorized group of three does not have legal authority to decide NLRB cases. Ambiguities arise in this statute only by leaving out certain words in the statute, or overemphasizing the significance of some words by according them enhanced meaning to the detriment of other words in the statute.

In deciding the question presented here, the NLRB, the Department of Justice, and the various circuit courts (other than the D.C. Circuit) all fail to provide a plausible statutory justification for a

two-member Board. Instead, they argue that if these two members cannot act, an important law is inoperative and unable to fulfill Congress's expectations in enacting it. A natural judicial impulse in this setting is to give the most force to words that produce the least undesirable outcome. *See Laurel Baye Healthcare*, Pet. App. 97 (acknowledging that "[b]oth [the Board and OLC's actions] were undoubtedly born of a desire to avoid the inconvenient result of having the Board's adjudicatory wheels grind to a halt. Nevertheless, we may not convolute a statutory scheme to avoid an inconvenient result.").

The principal rules of statutory construction applied by this Court lead to the conclusion reached by the D.C. Circuit. If each word and phrase is given equal force with its neighbors and the words and phrases are harmonized in a way that no one word or phrase deprives another of meaning, there is no ambiguity in this law. Congress did not intend to authorize two members to act in the absence of at least one more.

A. Well-Established Principles of Statutory Construction Require that All Words and Phrases Be Given Effect

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2350 (2009), *quoting*

Engine Mfr. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004).

In this interpretative exercise, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) *quoting* 2A N. Singer, STATUTES AND STATUTORY CONSTRUCTION § 46.06 at 181-86 (6th ed. 2000). Context is important as well and it provides insight into the meaning and interplay of the words and phrases of the statute as a whole. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). These guideposts lead to a full understanding of Congress's intent in this case.

Section 3(a), as amended by the Taft-Hartley Act, provides that the NLRB is "continued" (after enactment of Taft-Hartley) with "five instead of three members." 29 U.S.C. § 153(a). Congress enlarged the size of the Board to streamline procedures, reduce delay and eliminate backlogs. *See* S. Rep. No. 105 *reprinted in* 1 LEG. HIST. 1947 at 417. The language of this provision is neutral for determining the validity of a two-member Board. The intent to increase efficiency points in no particular direction. It may be inefficient to have a 60% vacancy problem but this clause does not inform the issues by its terms or in any apparent way other than to define the NLRB as a five-member entity.

The next relevant phrase appearing in Section 3(b) of the Act, as amended, is: "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." 29 U.S.C. § 153(b). This provision expresses an intent to allow the Board as a whole to delegate its powers to a "group" of three or more Board members. The intent, again, is to improve the efficiency of the Board by dividing up the work. No other provision authorizes the delegation of the Board's powers to an entity that is smaller or different than a full strength, five-member Board.

The next sentence is an amalgam of both Wagner Act segments and Taft-Hartley segments and is the minefield that has caused the confusion here. The first clause, a Wagner Act holdover, provides: "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." The second clause, added by Taft-Hartley, states "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).

The vacancy clause can mean only that a vacancy that does not reduce the Board below a minimum number of members required for action will not affect the Board's ability to act. Otherwise, the vacancy clause would override the quorum clauses. By its plain terms, however, the vacancy clause refers only to the "Board" itself and not to "any group of three or more members." Had Congress meant to apply the provision to the Board as well as any group of three

or more members of the Board, it would have said so. The courts of appeals which have endorsed decisions by a two-member Board rely on the vacancy clause but ignore the company the words keep. *See, e.g., Narricot*, *supra*, slip op. at 10. The quorum clauses and vacancy clause easily live in harmony when the vacancy clause is applied, as it is written, only to the Board. The vacancy clause does not bear the power to authorize a two-member Board.

The two quorum provisions, in their context, also make sense.[7] The Board quorum of three members in the middle phrase of the sentence lays down a clear rule requiring that "at all times" there must be three members present for the Board to issue decisions.

The natural meaning of the clause is two-fold. First, the fully constituted five-member Board may decide a case if three members agree. But, second, "at all times," the Board needs no less than three deciders to decide cases.

The two-member quorum applicable to any three-member "group" delegated in accordance with the first sentence of Section 3(b) does not in any obvious

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[7] A "quorum" is defined typically as "the number of members of a group or organization required to be present to transact business legally, usually a majority." *The Random House Dictionary of The English Language*, at 1182 (Unabridged ed. 1971). This was the definition in effect at the time Congress enacted the Wagner Act and the Taft-Hartley Act. *See Black's Law Dictionary* 1489 (3d ed. 1933) (defining quorum as "a majority of the entire body").

way amend or modify the Board quorum requirement of three which must be present at all times. As the D.C. Circuit held in *Laurel Baye Healthcare*, "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." Pet. App. 89.[8]

Giving meaning to all the words without diminishing the force of any of them, the relevant phrases say that three members have the authority to reach decisions whether the Board consists of three or four or five members, but that at a minimum, three members must always be present for the Board to issue decisions. At the same time, when there is a delegation to a group pursuant to the first sentence of Section 153(b), the three members of the group can reach decisions by a majority of two. A vacancy in a

[8] Even so, when Congress provided that "two members shall constitute a quorum of any group designated pursuant to the first sentence hereof," it contemplated that the three or more member group would remain in existence. Until January 1, 2008, the Board's practice in issuing decisions was consistent with this view. The members of the panel who have decided the case (or, in the case of a decision by the full Board, the members of the Board) are identified in every reported decision. Since January 1, 2008, however, despite the fact that the NLRB designated members Schaumber, Liebman and Kirsanow to exercise the Board's powers, the decisions identify only Schaumber and Liebman as the panel. The Board did not designate only those two members to exercise its powers. And Kirsanow, as a private citizen, cannot be a member of any properly designated group of the Board.

three-member group precludes any action by that group unless the missing member is replaced.[9]

By this analysis, any conflict is resolved and all the words matter. The Board and the Department of Justice, together with the court below, needed to ignore the "at all times" requirement. They either failed to mention it or failed to give it any significance. They also accorded no relevance to Congress's undeniable distinction between "Board" and "group." According to the interpretation and theory advocated by the NLRB and accepted by the Seventh Circuit, these words mean nothing.

According to the NLRA, only the Board is authorized to act, the Board cannot issue decisions if its membership falls below three, and a quorum of a delegee group that is not fully constituted does not substitute for the Board.

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[9] By contrast, a recusal or a failure to participate in a decision for any reason does not preclude two members of a three-member group from issuing a decision, since there are three actual members of the group. The NLRB has issued such decisions on rare occasions. *See, e.g.*, *Wisconsin Bell*, 346 NLRB 62 (2005). In those cases, the decision is still issued by all three members of the panel. *Id.* at n.2 (stating: Decision and Order issued "BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER" but noting that "Member Liebman did not participate in the decision on the merits.") Here, the Board claims that Members Liebman and Schaumber are a quorum of a three-member group, but this three-member group does not exist and the decisions were issued by only Chairman Schaumber and Member Liebman. Pet. App. 28; 72.

1. Common Sense and Common Law Principles Support the D.C. Circuit's Plain Language Construction

The analogy to the law of agency and corporations used by the D.C. Circuit may be presumed to have influenced a Congress sitting in 1947, and it is a persuasive analogy as well. The D.C. Circuit relying on the RESTATEMENT (THIRD) OF AGENCY § 3.07(4) (2006), and William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, explained that the Board's adjudicatory powers were suspended when its membership fell below the quorum specified in the statute. *Laurel Baye Healthcare*, Pet. App. 91, citing 2 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 421 ("If there are fewer than the minimum number of directors required by statute, [the remaining directors] cannot act as a board."). Here, the Board's authority to issue decisions lapsed when it lost a quorum, so the group's authority to issue decisions also expired. Pet. App. at 91.[10]

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[10] It also follows that a group acting with "all of the powers" of the Board loses its ability to decide cases when its membership falls below three. The NLRB has argued that the delegee group stands in the shoes of the Board. *See* NLRB, Petition for Rehearing and Suggestion for Rehearing En Banc at 14, *Laurel Baye Healthcare*, 564 F.3d 469 ("[T]he Board members in the group have been jointly delegated all of the Board's institutional powers, and thus are fully empowered to exercise them, not as Board agents, *but as the Board itself*.") (Emphasis added). If, as the NLRB argues, a delegee group imbued with "all of the powers" of the Board may take advantage of the vacancy provision, it follows that such a group is also bound by

(Continued on following page)

When Congress legislates, there is a strong presumption that well-established principles of common law and general law are intended to be applied in the ordinary way. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles. . . . Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." (citations omitted)); *see Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981) (recognizing that Congress is familiar with common law principles and that these principles are embedded in federal statutes absent express intent to the contrary; statutes "cannot be understood in a historical vacuum."); *see also United States v. Texas*, 507 U.S. 529, 534 (1993).

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the Board's quorum provision. It cannot be both ways. Either the vacancy provision does not apply to a group in accordance with the express terms of the statute, or a group delegated with all of the powers of the Board is bound by both the Board's vacancy provision and the Board's quorum provision. Either way, the result is the same: a delegee group cannot issue decisions with only two members. Also, the delegee group cannot issue decisions with only two members because the group, as the entity that received the delegation, was no longer fully constituted and therefore no longer a proper delegee. This does not diminish the authority delegated to the Regional Directors or General Counsel because they are still properly constituted entities.

The principles of corporate and agency law identified by the D.C. Circuit and applied in informing the court's understanding of the language at issue here validate the proposition that Congress was not guilty of inattentive drafting when Section 3(a) and (b) were amended in 1947. It makes good sense that Congress would employ these principles in addressing the concerns raised by vacancies and the Board's authority to act.

In this case, common sense and considerations of effective legislating also enlighten the plain language analysis and are relevant considerations. Congress would not in the first instance have created a board or commission with adjudicatory powers affecting private adverse parties, consisting of an even number of members. Entities with an even number of members which must achieve supermajority rule are rare and reflect special considerations not present here.[11]

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[11] For example, the Federal Election Commission consists of six members, but its enabling statute specifically states that "the affirmative vote of 4 members of the Commission" is required in order for the Commission to initiate, defend or appeal any civil enforcement action, render advisory opinions, develop forms or make, amend, or repeal rules, conduct investigations and hearings and report violations. 2 U.S.C. §§ 437c(c), 437d(a)(6)-(9). Supermajority rule here ensures that action cannot be taken on a purely partisan basis. The International Trade Commission similarly has six members, but its enabling statute spells out specifically the effect of divided votes in certain determinations and specifies that the President may decide which result should be considered the determination of the Commission. *See* 19 U.S.C. § 1330(a), (d).

The NLRB is not one of them even though in the Wagner Act, some decisions were issued by two members. Congress changed this in the Taft-Hartley Act. While the loss of a member from time to time on an adjudicatory board or commission is to be expected, Congress knows how to avoid the consequences of a loss of majority rule decisionmaking in organic legislation.[12]

Majority rule, which contemplates an odd number of deciders, is important. It improves the quality of decisionmaking and sharpens both the debate and opinions. It sharpens the law as well. Common sense suggests that Congress intended to promote and preserve this beneficial environment for decisionmaking by facilitating the expression of minority views. *See The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights: Hearing Before the S. Subcomm. on Employment and Workforce Safety and H. Comm. on Health, Employment, Labor, and Pensions*, 110th Cong., 1st Sess. (2007) (statement of Robert J. Battista, Chairman, NLRB) ("[D]issent is healthy for many reasons, including the assurance dissent provides that the members in the majority have considered carefully opposing views and arguments."). In the legislative process, these important considerations are not ignored.

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[12] *See infra* pp. 36-39.

Here, the common sense outcome is fully consistent with the plain language theory of statutory construction. *See United States v. Turkette*, 452 U.S. 576, 588 n.10 (1981). It makes no sense to assume that Congress in enacting Taft-Hartley would prefer a deeply compromised two-member board to a properly comprised board of at least three members. It is hard to envision anything beneficial about a two-person board except that it would avoid a shutdown. There are other much better ways to accomplish this end.

2. The Theories Adopted by the Other Circuits Cannot Be Reconciled with Each Other or the Words of the Statute

The Seventh Circuit and the other courts that agree with it add little clarity to the discussion. The First and Fourth Circuits accord no significance to Congress's distinction between "Board" and "group," and to the statutory admonition that the "Board" must be comprised of three members "at all times." *See Northeastern Land Servs.*, 560 F.3d at 41; *Narricot Indus.*, *supra*, slip op. at 8-9. The Fourth Circuit justifies its conclusion on the belief that the vacancy clause "necessarily" applies to a group as if they were interchangeable. *Id.*, slip op. at 10. These words may have seemed inconsequential to the courts but they are present and they should be given the obvious meaning that Congress intended.

The Second Circuit's default to deference is neither satisfactory nor appropriate. *See Snell Island SNF LLC*, 568 F.2d at 423. On a careful reading, there is no obvious ambiguity in the statute and this forecloses a deference inquiry. But of greater importance, there is no proper foundation for deference in a case like this one which presents a question of pure statutory interpretation which is best suited to judicial resolution. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 (1987). The Second Circuit does not explain which special insight the Board (or a two-member group)[13] or the OLC brings to the table in a matter like this. The deletion of statutory terms is not a proper use of deference jurisprudence in any event. Deference principles are not helpful in this case.

B. Other Agencies Have Abided By Their Quorum Constraints

The inability of a federal government agency or commission to act because of the absence or lack of a quorum is not unprecedented. When that has occurred, other agencies, unlike the NLRB, have refrained from acting. For example, in early 2008, the Federal Election Commission ("FEC") lacked four of the six members authorized by Congress to comprise

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[13] Even if deference were appropriate, it is undermined by the Board's failure to conduct rulemaking or engage in any public deliberative process. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

the Commission. *See* 2 U.S.C. § 437c(a)(1).[14] As a bipartisan commission, the FEC requires a super-majority (67%) to act. Its enabling statute requires "the affirmative vote of 4 members of the Commission" for the FEC to conduct its core business. *See* 2 U.S.C. §§ 437c(c), 437d(a)(6)-(9). When it lacked a quorum, the FEC did not continue to act. As it reported to Congress:

> Fiscal year 2009 presented the FEC with a unique challenge in conducting its day-to-day operations. Specifically, for the first six months of the calendar year the Commission only had two Commissioners and therefore lacked a quorum and was unable to take action on many core business matters.

Federal Election Comm'n, FISCAL YEAR 2010 CONGRESSIONAL JUSTIFICATION & PERFORMANCE BUDGET (May 7, 2009) at 4 (available at www.fec.gov/pages/budget/fy2010/FY_2010_CJ_Bud_05_07final.pdf (last viewed Dec. 11, 2009)). *See also id.* at 6 n.2, 14, 16 (reporting that due to a lack of quorum, the FEC was unable to achieve several of its performance targets, could not open or close cases under its administrative fine program, approve or conduct audit reports or

[14] This occurred even though Congress provided that "[a] member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission." 2 U.S.C. § 437c(a)(2)(B).

meet a statutory deadline for implementing certain rules).

Similarly, in 2006, when the chairman of the Consumer Product Safety Commission ("CPSC") stepped down, the agency was left with only two commissioners.[15] Without a three-member quorum, the agency was unable to sue manufacturers or demand recalls. *See* Consumer Product Safety Comm'n, 2009 PERFORMANCE BUDGET REQUEST (Feb. 2008) at 8 (available at www.cpsc.gov/cpscpub/pubs/reports/2009plan.pdf (last viewed Dec. 11, 2009)). In 2004, the absence of a quorum on the Federal Mine Safety and Health Review Commission prevented the Commission from issuing decisions within the time-frame set out in the agency's performance goals. *See* Federal Mine Safety and Health Review Comm'n, JUSTIFICATION OF APPROPRIATION ESTIMATES FOR COMMITTEE ON APPROPRIATIONS FY 2006 at 2, 15, 18 (noting that "[b]y law, a quorum of three Commissioners is required to consider and decide cases appealed from the Commission's ALJs" but the Commission could not issue opinions in a timely manner "due to a lack of a quorum of Commissioners for most of fiscal

[15] At that time, the Consumer Product Safety Act provided that in the case of a vacancy, two members could constitute a quorum for six months. *See* 15 U.S.C. § 2053(d). When a third member was not appointed within six months, Congress passed legislation that extended the two-member quorum provision for another six months. *See* Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016, 3039-40 § 202(a).

year 2003.") (available at www.fmshrc.gov/plans/fy06budget.pdf (last viewed Dec. 11, 2009). *Cf. Secretary of Labor, Mine Safety and Health Admin. v. Cannelton Indus.*, 26 FMSHRC 146, 2004 WL 787220 (F.M.S.H.R.C. March 12, 2004) (where four Commissioners of the FMSHRC denied a motion to dismiss a petition for discretionary review granted by the FMSHRC at a time when it consisted of only two commissioners, because, among other things, the Commission believed that the Mine Act's provision for discretionary review by two Commissioners "allows the business of the Commission to continue so that meritorious cases may proceed to briefing during the infrequent instances where there are only two sitting Commissioners" and distinguished the FMSHRC from the NLRB "which must act with three members." *Id.* at 3-4 (citing 30 U.S.C. § 823(d)(2)(A)(iii)) (permitting review by the Commission "only by affirmative vote of two of the Commissioners present and voting"). And for more than ten months, the Occupational Safety and Health Review Commission (OSHRC) "lacked a quorum to take official action." *McLaughlin v. Union Oil Co. of California*, 869 F.2d 1039, 1041 (7th Cir. 1989) (where OSHRC consisted of a single commissioner, and the commissioner declined OSHRC review of an administrative law judge's decision because without a quorum, any review would have been a futile gesture).

The NLRB stands alone among the various administrative agencies in failing to adhere to the quorum provisions Congress mandated.[16]

C. The Actions of the NLRB Since 1947 Reinforce the Plain Meaning of the Statute

Since passage of the Taft-Hartley Act in 1947, the Board has routinely delegated unfair labor practice and representation cases to groups of three members, known as panels. The panel system is flexible and fluid, permitting members to join panels at their discretion and allowing members to insist that cases of first impression or that raise important policy matters be decided by the full Board. *See* Higgins, 47 CATH. U. L. REV. at 953. Although the Board had numerous vacancies and concomitant case backlogs in the decades since 1947, with one reported exception where three members participated in the decision, but one member resigned on the day the decision was released, the Board did not issue decisions by less than a three-member panel.[17] If the intent of the Taft-Hartley Act

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[16] Two prominent former members of the Board, however, have publicly stated that the Board cannot issue decisions without a quorum of three members. *See supra* at pp. 5-6.

[17] Under the Wagner Act, the Board, at times, issued decisions with two members where the third Board seat was vacant. Those decisions were valid under the quorum and vacancy provisions of the Wagner Act. They have no bearing on decisions of the Board following its expansion to five members

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was solely to promote efficiency, one would have expected the Board to issue numerous two-member panel decisions where a third panel member's term had expired. That has not been the case. Instead, the Board reconstituted its panels – often repeatedly – to fill vacancies created by departed members, often resulting in long delays but decisions by at least three members. *See* U.S. Government Accounting Office, REPORT ON THE NLRB: ACTION NEEDED TO IMPROVE CASE-PROCESSING TIME AT HEADQUARTERS 45-62 (1991).

The NLRB's historical practice and composition reinforce the proposition that a minimum of three members is required for Board adjudications. As originally established, the NLRB was to be "strictly nonpartisan" and composed of "three impartial government members." *See* SEN. COMM. PRINT, COMPARISON OF S. 2926 (73d Cong.) and S. 1958 (74th Cong.) § 3 (1935), *reprinted in* 1 LEG. HIST. 1947 at 1319, 1320. When Congress enlarged the Board to five members in the Taft-Hartley Act, it considered, but did not alter, the nonpartisan composition of the Board.[18] *See* H.R. Rep. 80-510 at 36-37 (1947),

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and the revision of the quorum requirement under the Taft-Hartley Act.

[18] *Compare* H.R. 320, 80th Cong. (1947), § 3(a) *reprinted in* 1 LEG. HIST. 1947 at 44, 171 (limiting the number of members who could belong to one political party) *with* S. 1126, 80th Cong. (1947), § 3(a), *reprinted in* 1 LEG. HIST. 1947 at 106, 233-34 (containing no such provision).

reprinted in 1 LEG. HIST. 1947 at 540-41. *See also* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 244 & n.110 (2005) (summarizing the floor debate on the Labor Management Relations Act). Over time, however, as a matter of custom, not law, the Board consisted of three members of the President's political party and two members of the opposition. *See* Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 714 & n.42 (2006). *See also* Ronald Turner, *On the Authority of the Two-Member NLRB: Statutory Interpretation Approaches and Judicial Choices*, U. HOUSTON PUB. L. & LEGAL THEORY SERIES 2009-A-33 at 17 n.89 (2009).

That practice makes the presence of at least three Board members critical for an agency like the NLRB that makes policy through adjudication, not rulemaking. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (commenting: "The National Labor Relations Board, uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking."). A two-member body does not maximize the potential for meaningful debate or consideration of differing viewpoints. It is simply too small to be representative or even to permit a decision by a majority vote. *See* ROBERT'S RULES OF ORDER, § 3 (10th ed. 2001) ("The requirement of a quorum is a protection against totally unrepresentative action in the name of the

body by an unduly small number of persons."), *quoted in Assure Competitive Transp. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980), *cert. denied*, 429 U.S. 1124 (1981) (holding that the quorum rules permitted the Interstate Commerce Commission to act with fewer than the full complement of the six remaining board members, so long as a quorum of the current board was present). *See also Ballew v. Georgia*, 435 U.S. 223, 232-239 (1978) (summarizing research on the size of decisionmaking groups and concluding that "progressively smaller juries are less likely to foster effective group deliberation. . . . Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.").

Board member (now Chairman) Liebman and member Schaumber have repeatedly acknowledged that the decisionmaking process they engage in skews the historical process of full deliberation. In numerous cases, they have abandoned their view of the NLRA for "institutional reasons," *i.e.*, to produce an ostensibly lawful decision by the agency. *See, e.g., Brighton Retail, Inc.*, 354 NLRB No. 62, n.4 (2009) ("In the absence of a majority to reverse the judge's recommended finding of an interrogation violation, Member Schaumber, for institutional reasons, joins his colleague in adopting that violation."); *Hamilton Sundstrand,* 352 NLRB 482, 483 n.3 (2008) ("Member Liebman dissented in *Disneyland Park*, and she applies it here for institutional reasons only."); *see*

also Essex Valley Visiting Nurses Ass'n, 352 NLRB 427 (2008); *The Lorge School,* 352 NLRB 119 (2008).

D. The Authority to Ensure the Board's Ability to Function Notwithstanding Vacancies Rests with the President or Congress, Not with the NLRB or the Courts

The ability to overcome the potential for paralysis caused by the departure of members of an administrative agency lies with the President or with Congress. Four options are available. First, under the Vacancy Clause, "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST., art. II, § 2.

Second, under the Vacancies Act, 5 U.S.C. §§ 3345-3349d, the President has the ability to direct an officer or employee of an agency to perform the functions and duties of an office that becomes vacant on a temporary or acting basis. *See* 5 U.S.C. § 3345(a)(3).

Third, Congress has the authority to alter the vacancy or quorum provisions for an agency. Even a limited survey of some of the various accommodations Congress has made in other instances demonstrates that Congress has a full range of options available to it to accommodate the loss of members of a commission. For example, in 2008, when the composition of

the CPSC dipped below its statutorily mandated quorum, Congress enacted a temporary provision to allow the Commission to continue to operate. *See* 15 U.S.C. § 2053(d) (stating: "No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission, but three members of the Commission shall constitute a quorum for the transaction of business, except that if there are only three members serving on the Commission because of vacancies in the Commission, two members of the Commission shall constitute a quorum for the transaction of business, and if there are only two members serving on the Commission because of vacancies in the Commission, two members shall constitute a quorum for the six month period beginning on the date of the vacancy which caused the number of Commission members to decline to two.").

Alternatively, Congress has authorized members to continue to serve on a commission until a replacement is nominated and confirmed. *See, e.g.,* 42 U.S.C. § 2000e-4(a) (Equal Employment Opportunity Commission) ("all members of the Commission shall continue to serve until their successors are appointed and qualified . . . "); 7 U.S.C. § 2(a)(2)(A)(ii) (Commodity Futures Trading Commission) ("Each Commissioner shall hold office for a term of five years and until his successor is appointed and has qualified . . . "); 15 U.S.C. § 41 (Federal Trade Commission) ("That upon the expiration of his term of office a Commissioner shall continue to serve until his successor

shall have been appointed and shall have qualified."). Or, Congress has permitted agencies to temporarily fill vacancies with administrative law judges. *See, e.g.,* 33 U.S.C. § 921(b)(5) (permitting the Chairman of the Benefits Review Board, U.S. Department of Labor, to designate up to four Department of Labor administrative law judges to serve on the Board, "temporarily, for not more than one year.").[19]

Finally, Congress has permitted agencies to promulgate regulations establishing their own quorum provisions. *See, e.g.*, 15 U.S.C. §§ 78d-1, 78w(a)(1) (permitting the Securities and Exchange Commission to promulgate rules of practice, including rules or orders delegating certain specified functions vested in them by Congress) and 17 C.F.R. § 200.41 (SEC regulation stating: "A quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office; and provided further that on any matter of business as to which the number of members in office, minus the number of members who either have disqualified themselves from consideration of such matter pursuant to 200.60 or are otherwise disqualified from such consideration, is

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[19] In 1959, Congress used this route to allow the President to appoint an Acting General Counsel in the event that there is a vacancy in the NLRB's Office of General Counsel. *See* The Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, codified at 29 U.S.C. § 151 *et seq*.

two, two members shall constitute a quorum for purposes of such matter."); 16 C.F.R. § 4.14(b) (regulation of the Federal Trade Commission stating: "A majority of the members of the Commission in office and not recused from participating in a matter . . . constitutes a quorum for the transaction of business in that matter.").[20]

Here, the President and Congress each chose the fourth option – inaction.

II. REQUIRING THREE MEMBERS AT ALL TIMES FOR THE NLRB TO ACT DOES NOT IMPOSE AN ADMINISTRATIVE BURDEN OR UNDERMINE NATIONAL LABOR POLICY

A decision by this Court invalidating two-member Board decisions would not disrupt national labor policy. According to the Board, there are seventy-seven challenges to the authority of the Board to issue decisions with two members pending in the various courts of appeal. *See* NLRB's Response to FOIA Request ID/LR-2009-0432 (May 29, 2009). In most cases, the Board's orders already have been

[20] This Court upheld the FTC's authority to promulgate a quorum provision by regulation in the absence of a specific quorum provision specified by Congress in 15 U.S.C. § 41. *FTC v. Flotill Prods., Inc.*, 389 U.S. 179 (1967). The D.C. Circuit upheld the SEC's regulation as within its general rulemaking authority. *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996).

complied with and thus the issues have been resolved. Any objection to a decision by the two-member Board in those finally decided cases is waived. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-38 (1952) (holding that the failure to object to the authority of a hearing officer to decide a case waives that objection). *See also Pittston Coal Group v. Sebben*, 488 U.S. 105, 122-23 (1988) (finding no duty to reopen finally decided claims, even if decided under erroneous standards). Moreover, the decisions of the two-member Board themselves have disrupted national labor policy, because they reflect no dissent, and the two members who have issued those decisions have repeatedly acknowledged that they have sacrificed their own view of national labor policy in favor of the "institutional" need to issue decisions. It can hardly be said that preservation of this less-than-ideal environment promotes labor peace or advances the beneficial purposes of the NLRA.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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ADDENDUM

§ 153. National Labor Relations Board

(a) **Creation, composition, appointment, and tenure; Chairman; removal of members**

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 *et seq*.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) **Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal**

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. The Board is also authorized to

delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. 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 shall have an official seal which shall be judicially noticed.

(c) **Annual reports to Congress and the President**

The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) **General Counsel; appointment and tenure; powers and duties; vacancy**

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act

(1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or

(2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

MINUTE OF BOARD ACTION

DECEMBER 20, 2007

The Board anticipates that in the near future it may for a temporary period have fewer than three Members of its statutorily-prescribed full complement of five Members.[1] The Board also recognizes that it has a continuing responsibility to fulfill its statutory obligations in the most effective and efficient manner possible. To assure that the Agency will be able to meet its obligations to the public, the four current Members of the Board (Members Liebman, Schaumber, Kirsanow and Walsh) unanimously decided to temporarily delegate to the General Counsel full authority on all court litigation matters that would otherwise require Board authorization. This delegation is made under the authority granted to the Board under Sections 3, 4, 6, and 10 of the National Labor Relations Act.

Accordingly, the Board delegates to the General Counsel full and final authority and responsibility on behalf of the Board to initiate and prosecute injunction proceedings under Section 10(j) or Section 10(e) and (f) of the Act, contempt proceedings pertaining to the enforcement of or compliance with any order of

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[1] The five-Member Board presently has four Members, Chairman Battista's term having expired on December 16, 2007. Two of the remaining Members, Member Kirsanow and Member Walsh, are in recess appointments which will expire at the sine die adjournment of the current session of Congress.

the Board, and any other court litigation that would otherwise require Board authorization; and to institute and conduct appeals to the Supreme Court by writ of error or on petition for certiorari.

The four current Members of the Board also unanimously decided to delegate to Members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board's powers, in anticipation of the adjournment of the 1st Session of the 110th Congress. The Board is of the view that this action will permit the remaining two Members to issue decisions and orders in unfair labor practice and representation cases after departure of Members Kirsanow and Walsh, because the remaining Members will constitute a quorum of the three-member group.

The Board acted pursuant to Section 3(b) of the Act, which provides that

> 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.

In addition to the statutory language, the Board relied on the legal analysis and U.S. Circuit Court precedent set forth in the March 4, 2003 opinion

issued by the Office of Legal Counsel of the U.S. Department of Justice (OLC) in response to the Board's May 16, 2002 request for OLC's opinion whether the Board may issue decisions during periods when three or more of the five seats on the Board are vacant. OLC's opinion concluded that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." The Board noted that this is essentially the same theory that the Board has historically used in situations where one member of a three-Member Board is disqualified or recused from participating on the merits of a case. The Board also noted that OLC's opinion does not distinguish between cases that were pending at the time of the delegation of authority by the three-member Board and cases that are submitted to the Board after the delegation and the departure of the third member.

The Board acknowledged that it is bound by OLC's opinion, but that the opinion does not require the Board to take the action taken today. Instead, OLC's opinion stands for the proposition that the Board has the authority to issue two-member decisions and orders, but that it is within the Board's discretion whether or not to exercise that authority. In the current circumstances, the Board has decided to exercise its discretion to continue to function with its full powers as a two-member quorum of a three-member group designated by the Board.

These delegations will be effective as of midnight December 28, 2007, and shall be revoked when the Board returns to at least three Members following the adjournment of the 1st Session of the 110th Congress. All existing delegations of authority to the General Counsel and to staff in effect prior to the date of this order remain in full force and effect.

WILMA B. LIEBMAN, MEMBER

PETER C. SCHAUMBER, MEMBER

PETER N. KIRSANOW, MEMBER

DENNIS P. WALSH, MEMBER