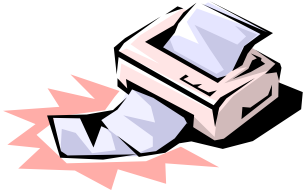


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**National Labor Relations Board Was Without Power to Issue  
Over 500 Decisions Over the Past 3 Years**

*By Attorneys Alec J. Beck & Corie J. Tarara*




In a soon-to-be famous quote, Justice Stevens concluded the National Labor Relations Act “as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died.” The National Labor Relations Board has been functioning with only two members since January 1, 2008, and during that time has issued many decisions, including several that were favorable to employers. The validity of those decisions has now been called into question, and it may be that the current (and much more pro-labor) NLRB will be reviewing (and perhaps reversing) some of those decisions.

In late 2007, the Labor Board was scheduled to go from three to two members, as one member’s appointment was due to expire. At the time, Congress had been refusing to approve any of President Bush’s nominees to the Board, and also refusing to go into recess, so that the President could make “recess appointments.” The Board therefore voted 3-0 to delegate its power to a two-member quorum. Almost immediately thereafter, the third member’s term expired, and the two remaining members (one Republican and one Democrat) remained. Using this administrative sleight of hand, the two-member Board issued more than 500 decisions in the next 26 months. Several employers who lost these decisions appealed, arguing that a two-person NLRB was illegal and without power to issue decisions.

On June 17, 2010, the U.S. Supreme Court held in *New Process Steel v. NLRB* that the NLRA required the Board to have at least three members, and that the decision (in which *New Process Steel* had been found to have violated the law) was invalid, and had to be sent back to the NLRB for further consideration. Although the Court did not (as usual) expand its ruling beyond the case in front of it, this case calls into question *all* of the decisions which have been issued since January of 2008. Any cases which are sent back will go to the current NLRB, which (following President Obama’s recess appointments) consists of three Democrats and one Republican. The current Board is widely considered to be much more antagonistic to employers, and thus cases which employers won under the two-person Board could be overturned. More ominously, labor law doctrine that was announced by the two-person Board could be discarded, if the current Board finds that it is not sufficiently pro-labor.

Seaton, Beck & Peters (and its Worklaw network) is continuing to monitor the situation, and will provide updates as they become available. In the meantime, employers can get details on the situation at the NLRB by contacting either Alec Beck or Corie Tarara at 952-896-1700.



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