On June 17, the U.S. Supreme Court released its much-anticipated decision on whether the National Labor Relations Board (NLRB) has the authority to decide cases with a complement of only two Board members. In a 5-4 decision, the Court held in New Process Steel, L.P. v. NLRB, 560 U.S. ___ (2010), that the National Labor Relations Act (NLRA) does not grant a two-member Board authority to act. To read the full opinion, go to http://www.supremecourt.gov/opinions/09pdf/08-1457.pdf.

The Board began functioning with two members – current Chair Wilma Liebman and Member Peter Schuumber – in January 2008, following the retirement of former Chair Robert Batista and the expiration of the recess appointments of Members Dennis Walsh and Peter Kirsanow. In late December 2007, days before the expiration of those appointments, the Board delegated its authority to a three-member panel including then-Chair Schuumber and Members Liebman and Kirsanow, with the expectation that the two remaining members would continue to exercise the Board's authority after Member Kirsanow's appointment expired. The Board functioned with only two members until April 2010, when President Obama made recess appointments of Members Craig Becker and Mark Pearce.

The high Court agreed to decide New Process Steel to resolve a split among the courts of appeals. When the case was before the U.S. Court of Appeals for the Seventh Circuit, that court held that language in Section 3(b) of the NLRA permitting the Board to delegate its powers to a three-member group, and providing that any two members constitute a quorum of such a group, expressly permits a two-member Board to decide cases.

In a decision issued the very same day, the D.C. Circuit reached exactly the opposite conclusion in Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009). In Laurel Baye, the D.C. Circuit held that the language of Section 3(b) of the NLRA means that “the Board’s ability to legally transact business exists only when three or more members are on the Board.”

Thus, the Supreme Court’s decision hinged on its interpretation of Section 3(b). The government argued that Liebman and Schuumber were acting as a quorum of the three-member group to which the Board had properly delegated its authority in December 2007. Therefore, the government reasoned, the two-member complement had the authority to decide cases under Section 3(b). The Court rejected this argument, concluding that the properly delegated three-member group ceased to exist when Member Kirsanow’s appointment expired. Thus, the Court reasoned, “[a]lthough the group quorum provision clearly authorizes two members to act as a quorum of ... a group of at least three members[,] it does not, by its plain terms, authorize two members to constitute a valid delegatee group.” Therefore, under the unique circumstances created in January 2008, the two-member Board was without authority to act.

The majority concluded the opinion by inviting Congress to allow the Board to decide cases with only two members if Congress so desires. In the meantime, “Section 3(b), 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 two-member Board issued decisions in almost 600 cases between January 2008 and April 2010. What will become of those decisions in light of New Process Steel remains unclear. At a minimum, the approximately 75 cases currently pending before the courts of appeals are likely to be remanded to the Board for reconsideration, thus adding to the Board’s existing backlog of cases and possibly hampering the new Obama Board’s ability to revisit some of the more controversial decisions made by the Bush-era Board, at least in the short term. Although the two-member Board decisions by necessity involved issues on which Ms. Liebman and Mr. Schuumber agreed, there is some possibility that the changed composition of the Board might lead to a different outcome with the input of Members Becker and Pearce.