U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

April 26, 2010

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

New Process Steel, L.P. v. National Labor Relations Board
S. Ct. No. 08-1457

Dear Mr. Suter:

This letter is in response to the Court's order of April 16, 2010, requesting letter briefs from the parties addressing "[w]hat should be the effect, if any * * * on the proper disposition of this case" of the President's March 27, 2010 appointments of Mr. Craig Becker and Mr. Mark Gaston Pearce to serve as members of the National Labor Relations Board. In brief, the appointments of Members Becker and Pearce should have no effect on the proper disposition of this case.

The terms of the December 20, 2007 delegation order at issue in this case provided that the delegation would automatically "be revoked when the Board returns to at least three [m]embers." Pet. Br. Add. 7a. With the recess appointments of Members Becker and Pearce, the Board has four members and the delegation is no longer in effect.

This factual development does not render *New Process Steel, L.P.* moot. The Question Presented is whether Section 3(b) of the National Labor Relations Act (NLRA), 29 U.S.C. 153(b), authorized Members Wilma B. Liebman and Peter C. Schaumber to act as a two-member quorum of the delegee group in deciding *New Process Steel, L.P.* The appointments of Members Becker and Pearce do not alter the Board's decision challenged in this case, which was decided in September 2008 by Members Liebman and Schaumber when they were acting as a quorum of a three-member group to which the Board had delegated all of its powers.

Moreover, the March 27, 2010 appointments do not affect the nearly 600 other cases decided by the Board between January 1, 2008 and March 26, 2010. See NLRB Cert. Br. 15-17. Indeed, there are four other cases currently pending in this Court (*Narricot Indus., L.P.* v. *NLRB*, No. 09-1248, petition for cert. pending (filed Apr. 15, 2010); *NLRB* v. *Laurel Baye Healthcare of Lake Lanier, Inc.*, No. 09-377, petition for cert. pending (filed Sept. 29, 2009); *Snell Island SNF, LLC* v. *NLRB*, No. 09-328, petition for cert. pending (filed Sept. 11, 2009);

Northeastern Land Servs., Ltd. v. *NLRB*, No. 09-213, petition for cert. pending (filed Aug. 18, 2009))—and 76 additional cases currently pending in or decided within the last 90 days by the courts of appeals—in which litigants have challenged (or a court has sua sponte raised) the validity of the Board's decision because it was entered by the same two-member quorum of the delegee group.[1] All of these cases present live controversies because it remains the Board's position that the orders at issue are entitled to enforcement and that parties are obliged to comply with the judgments of the courts that have enforced such orders. Moreover, the Board no longer has jurisdiction over *New Process Steel, L.P.* or the other cases where jurisdiction was transferred to the relevant court of appeals or to this Court. See 29 U.S.C. 160(e) and (f) (providing that court of appeals obtains jurisdiction after party files a petition for review or enforcement and the record is filed in the court of appeals). The Board therefore lacks the ability to take any action—such as considering the cases anew by at least three members—that might render this case (or other cases pending in this Court and the courts of appeals) moot.

There are approximately 500 orders issued by Members Liebman and Schaumber in which no party has sought further review at the present time. But many of those Board decisions are in potential jeopardy as a result of the uncertainty regarding the meaning of Section 3(b)'s quorum and delegation provisions. An unusual feature of the NLRA is that no statutory provision or implementing regulation imposes a time limit for an aggrieved party to file a petition for review. See 29 U.S.C. 160(f). Moreover, because the Board's decisions are not self-enforcing, the Board must file a petition for enforcement with a court of appeals if a party to a case does not comply with a Board order. If an aggrieved party now petitions for review of a Board order or the Board seeks enforcement, the validity of the underlying order issued by the two-member Board is subject to challenge. Thus, an unknown but potentially large portion of those 500 orders could require reconsideration if this Court does not resolve the validity of the two-member decisions.

Absent further direction from this Court, it is unclear whether the Board has the authority to "ratify" the two-member decisions *en masse* without reconsidering each case individually. In any event, prudential considerations in these circumstances would weigh against the Board's exercising such authority in view of the high risk of potential challenges to a blanket ratification order. And individual reconsideration would impose a significant burden on the Board, whether acting through all four sitting members or through newly constituted groups of three members. Approximately 261 cases are currently pending before the Board, including 73 cases in which Members Liebman and Schaumber could not agree and 50 cases involving significant or novel issues that the two members chose to defer for decision. In addition, the Board decides between 300 and 400 cases annually in the normal

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[1] In addition, there are 22 cases pending in or recently decided by a court of appeals in which the two-member quorum issued the decision, but the litigants have not challenged the validity of the action on this basis.

course of business. Reconsidering a large number of additional cases would severely tax a still-short-handed Board.

Furthermore, such reconsideration could inject additional ambiguities (such as, for example, whether a particular Board order was effective on the date of the two-member decision or on the date of reconsideration) that parties might use to invite further litigation. The resulting uncertainty would impose a significant burden on employees, employers, and unions whose rights have been adjudicated by the Board or who have otherwise relied on the validity of a certification or order issued by the two-member quorum. For these reasons, a decision of this Court declining to decide whether the two-member decisions are valid would significantly burden the rights protected by the NLRA.

In addition to the retrospective harms engendered by continuing uncertainty over Section 3(b), the need for prospective guidance remains important. Although the recent period—which lasted nearly 27 months—is the longest the Board has ever been with only two sitting members since the Board was expanded to include five members in 1947, the Board has also had only two members on prior occasions. And given the complexities and potential length of the Senate confirmation process, multiple vacancies could arise again in the future. Although a President may fill such vacancies through the use of his recess appointment power, as the President did on March 27 of this year, the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period. For example, the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007. See Jim Rutenberg, *Bush, On His Way Out, Leads Others In*, New York Times, Dec. 7, 2008, at A39; Henry B. Hogue & Maureen Bearden, Congressional Research Service Report for Congress RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008*, at 6-7 (updated Nov. 3, 2008). Presidents have not in recent decades made recess appointments during intrasession recesses lasting fewer than three days. See Congressional Research Service, *Intrasession Recess Appointments* (Apr. 23, 2004).[2] The Board therefore may face the prospect of being

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[2] A 1905 report of the Senate Judiciary Committee discussing the Recess Appointments Clause emphasized that the term is "used in the constitutional provision in its common and popular sense" rather than a "technical" sense. S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905) (reprinted in 39 Cong. Rec. 3823 (1905)). The Committee concluded that "recess" refers to "the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions*." *Id.* at 2. The Senate continues to view that report as authoritative. See *Riddick's Senate Procedure* 947 & n.46 (1992), http://www.gpoaccess.gov/riddick/index.html. To this day, official congressional documents define a "recess" as "any period of three or more complete days—excluding Sundays—when either the House of Representatives or the Senate is not in session." *2003-2004 Congressional Directory* 526 n.2 (Joint Comm. on Printing, 108th Cong., comp. 2003).

reduced to two members in the future, in which case it may again seek to do what Section 3(b)'s terms permit—delegate all of its powers to a group of three members, two of whom may thereafter act as a quorum.

Thus, the March 27 recess appointments of Members Becker and Pearce should have no effect on the proper disposition of this case.

Sincerely,

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cc: See Attached Service List

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