

## Supreme Court: NLRB case creates quandary for lawyers

*Ruling that Board lacked authority affects hundreds of decisions*

By Kimberly Atkins  
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Labor and employment lawyers' jobs got a little trickier last week, after the U.S. Supreme Court ruled that nearly 600 rulings from the National Labor Relations Board were handed down while the Board lacked the authority to act.

"It kind of makes my head spin," said William E. Hannum, managing partner at the Andover, Mass. labor and employment law firm Schwartz Hannum. "It seems to me like a technically correct decision, but a very impractical one."

During a 27-month period from 2008 to 2010, the normally five-member NLRB handed down nearly 600 decisions resolving labor disputes - all with a skeleton crew of only two members.

The National Labor Relations Act requires the Board to operate "at all times" with a quorum of at least three mem-

bers. But it also allows the Board - while operating with at least three members - to designate a quorum of two members to act.

In 2007 several of the Board's members' terms were about to expire. At the time, President George W. Bush's NLRB nomination picks were stalled in the Senate.

The Board, in an effort to continue to operate during the Senate stalemate, designated a two-member quorum after seeking the advice of its general counsel, which advised that such a move was legal. In fact the Board had done the same thing several times before - in 1993, 2001 and 2005.

But last week, the Supreme Court held in *New Process Steel v. NLRB* that two is not enough. Rather, the Board needed at least three members at all times to have authority under the National Labor Relations Act to operate, the Court said.



William E. Hannum III

In a divided ruling - with Justice John Paul Stevens writing for a 5-4 majority which included the Court's more conservative members Chief Justice John G. Roberts, Jr. and Justices Antonin Scalia, Clarence Thomas and Samuel Alito - the Court held that the Board erred when it determined that it could delegate authority to a group smaller than three.

"Congress' decision to

require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances," Stevens wrote. "[The 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."

Justice Anthony Kennedy, in a dissent joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor, disagreed, writing that the "statute's plain terms permit a two-member quorum of a properly designated three-member group to issue orders."

After the ruling, Board Chairman Wilma B. Liebman said that the members were only doing what they thought they had to do - and they believed the law was on their side.

“We believed that our position was legally correct and that it served the public interest in preventing a Board shut-down,” Liebman said in a statement. “We are of course disappointed with the outcome, but we will now do our best to rectify the situation in accordance with the Supreme Court’s decision.”

### Surprise and blame

Many attorneys were surprised at the ruling, particularly since the circuit split on the issue was so heavily tilted in the other direction.

Four circuits had ruled that the Board had authority to act with its two-member delegation, while only one - the D.C. Circuit - ruled that the Board had operated without authority.

“Given the nature of the circuit split, I’m a little surprised that the Court came down on the side of the one circuit,” Hannum said.

As soon as the Court handed down its ruling, attorneys, labor unions and business groups were preparing for the legal fall-

out - and assigning blame.

Jerry M. Hunter, who served as General Counsel of the NLRB from 1989 through 1993 and is now a partner in the Labor and Employment Group in the St. Louis office of Bryan Cave, said that lawmakers who blocked President Bush’s NLRB nominees are at fault.

“All of the parties who will be affected by the Court’s ruling should not forget that this present predicament is a direct result of the efforts of organized labor and the majority in the U.S. Senate to prevent President Bush from appointing any member to the Board, whether a permanent or recess appointment, for the last two years of his term,” said Hunter, who added that he thought the Court’s ruling was correct.

But Kimberly Freeman Brown, executive director of the labor union advocacy organization American Rights at Work, said that the Court got it wrong.

The ruling “adds insult to injury for thousands of workers across America,” Freeman Brown said. “Now hundreds of decisions in

cases already decided by the NLRB will have to be reopened, needlessly delaying finality for workers who were led to believe they already had it.”

### Lawyers must proceed with care

Several dozen of the cases the Board ruled on are still active, so while the ruling may throw a curve ball to those litigants, they can still go back to the Board - which now has four members - for a binding ruling.

But for the parties in the hundreds of other decisions the two-member Board handed down, as well as for the lawyers who relied on those rulings as precedent in their own cases, the legal landscape is a mess.

Will cases be allowed to be re-litigated? May parties who chose not to appeal the Board’s ruling have a chance to do so now? Will third parties who relied on the rulings be able to change their strategies retroactively?

“There was a sense of finality, and now arguably this completely undoes that,” Hannum said. “If I

were the losing party in one of those cases, I think I would be well within my rights to say that the two-member decision is not valid - it’s void. I’m going to challenge it. The fact that I may have needed to file an appeal is moot, because there’s now nothing to appeal from.”

Although the Board steered clear of more controversial issues while it was short-staffed, labor lawyers still relied on those rulings to advise their own clients.

At best, attorneys can now look at those rulings as advisory in nature - keeping in mind that since they were handed down, President Barack Obama has appointed two more members to the Board, which now consists of three Democrats and one Republican.

“I would read [the two-member decisions] as tea leaves,” Hannum said. “Take it for what it’s worth. [But] for the most part, we are back on shaky ground.”

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Questions or comments  
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