



# Inside The Beltway

## Keeping You Informed

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## Critical developments in labor and employment law

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### Judicial Branch/U.S. Supreme Court

A divided U.S. Supreme Court on June 17, 2010, held (5–4) in *New Process Steel, LP v. NLRB*—<http://www.supremecourt.gov/opinions/09pdf/08-1457.pdf>—that the National Labor Relations Board (NLRB) was without authority to issue decisions for the 27 months it was reduced to two members, Peter Schaumber (R) and Wilma Liebman (D). According to the NLRB's press release issued within hours of the Supreme Court's decision, 75 cases challenging two-member decision-making will now be remanded to the NLRB for further consideration and resolution. During the same period, the two member board decided an additional 500 or so cases. Although these were not appealed, the parties may now seek reconsideration. Also at issue are all NLRB authorizations for statutory injunctions during the same January 1, 2008–March 27, 2010, period.

The 1947 Taft-Hartley amendments to the 1935 National Labor Relations Act (Act) expanded the NLRB from three to five members. Section 3(b) of the Act authorizes the NLRB to delegate to any group of three or more members any or all of its powers, and any vacancy on the NLRB does not impair the right of the remaining members to exercise the board's authority. The issue before the Court concerned whether two members could act for the NLRB as a quorum of a delegated group of three. In December 2007, the then four-member NLRB delegated its powers to a three-member group in anticipation of the expiration of terms for two members effective December 31 on the theory that the remaining two members would then constitute a quorum of the three-member group. The Court's majority noted that the NLRB had never before allowed two members to act as a quorum of a defunct three-member quorum.

The Court majority's esoteric analysis of the statutory language is best summarized by their following comment: "The Rube Goldberg-style delegation mechanism employed by the Board in 2007—delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group—is surely a bizarre way for the Board to achieve the authority to decide cases with only two members." The majority concluded finding that "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 dissenters reasoned that although the statutory language requires a three-member quorum at all times in order to operate as the full NLRB, this does not mean it must maintain three members for

delegee groups to act. While acknowledging that Congress would not have intended to allow two members to exercise the powers of the NLRB for protracted periods of time, nevertheless, “unintended consequences are typically the result of unforeseen circumstances.”

### Commentary

The majority’s footnote 2 is particularly revealing: “When one member of a group is disqualified [absence due to illness, recusal, or vacancy], only two members actually participate in the decision. That circumstance thus also presents the problem of the possible inferiority of two-member decisionmaking.”

On August 27, 2010, Member Schaumber’s term ends. Without additional appointments, the NLRB then will have three members, all of whom are Democrats, raising a different issue of “possible inferiority,” namely, ensuring balanced consideration of parties’ issues on review from administrative law judge and Regional Director decisions and General Counsel requests for injunctive relief.

Although President Obama nominated Craig Becker (D), Mark Pearce (D), and Brian Hayes (R) on July 9, 2009, Senate Republicans prevented voting for confirmation. Consequently, the President recess appointed Becker and Pearce with terms ending upon the adjournment of Congress in 2011 rather than as nominated for terms ending December 16, 2014, and August 27, 2013, respectively. The President chose not to recess appoint Hayes, presumably in reaction to the opposition of Republican senators to Becker’s nomination. Article II, Section 2, clause 3A of the Constitution grants the sitting President the power to fill vacancies during a Senate recess.

This crisis of NLRB legitimacy began in 2007, the last year of the former Bush Administration. The NLRB had only four members with Members Kirsanow and Walsh each serving recess appointments expiring December 31, 2007. Senate Majority Leader Harry Reid (D-NV) prevented President Bush from making recess appointments by refusing to recess the Senate for any scheduled holiday or other break.

Of interest now will be how the NLRB proceeds to re-review the remanded cases and all grants for injunctive relief during the 27-month two-member period and whether the NLRB will entertain requests for review of previously decided cases that went unchallenged. Critical to the process will be whether re-review will be robust or perfunctory. And, of greatest interest will be whether the now one-party NLRB will proceed with their much-anticipated agenda to reverse Bush NLRB case precedent, make new law, and engage in substantive rule-making. The questions of whether President Obama will nominate a replacement for departing Member Schaumber whose term ends August 27, 2010, whether the Senate will vote to confirm Becker, Pearce, Hayes, and a Schaumber replacement or whether the President will recess appoint Hayes and an additional Republican nominee remain open and are complicated by the June 20, 2010 departure of the NLRB General Counsel.

### Executive Branch/Administration

#### National Labor Relations Board

Effective today, President Obama appointed Lafe Solomon, Director of the NLRB's Office of Representation Appeals and former staff counsel to former NLRB members including Nixon Peabody counsel John N. Raudabaugh, to serve as Acting General Counsel. The NLRB General Counsel serves as an independent prosecutor of unfair labor practices and provides general supervision of the NLRB's 32 Regional, 3 Sub-Regional, and 15 Resident offices throughout the United States.

Nixon Peabody's Labor and Employment Law practice will monitor NLRB developments and report significant NLRB rulings and pronouncements.

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