

NLRB AUTHORITY IN QUESTION AS BOARD REDUCED TO TWO MEMBERS

Two federal appeals courts issue diametrically opposed decisions on whether the National Labor Relations Board (NLRB), which has been operating with just two members since the start of 2008, has the authority to issue decisions and orders.

In its ruling rejecting the legality of two-member rulings, the District of Columbia Circuit Court of Appeals emphasizes that Section 3(b) of the National Labor Relations Act (NLRA) states that three members shall “at all times” constitute a quorum. Although the board “may delegate its powers to a three-member group, and this delegee group may act with two members,” the requirement of a least three members on the overall board must always be met, Judge David B. Sentelle writes for the D.C. Circuit.

However, Sentelle acknowledges that it is “a close question” and that the board’s interpretation, backed up by a 2003 memorandum opinion by the Justice Department’s Office of Legal Counsel, is not “entirely indefensible.” He suggests that the board, once it regains three members, or Congress could “minimize the dislocations engendered by our decision by ratifying or otherwise reinstating the rump panel’s previous decisions, including the case before us.”

In contrast, the Seventh Circuit, agreeing with a March decision by the First Circuit, holds that the plain meaning of Section 3(b) is that it gives the board “the power to delegate its authority to a group of three members” and that it allows the board “to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board had delegated its authority to a group of three members.” Judge Joel M. Flaum writes the opinion.

The two rulings follow a March decision by the First Circuit in support of the validity of two-member rulings (*Northeastern Land Services Ltd. d/b/a NLS Group v. NLRB*, 560 F.3d 36, (1st Cir. 2009), that the board’s “delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text” of Section 3(b).

The board has issued approximately 400 published and unpublished decisions during the 16-month period in which it has been down to two members. In addition to the three circuits that have decided the issue so far, similar cases challenging the board’s two-member decisions currently are pending in seven other circuits.

NLRB Chair Wilma B. Liebman says that the D.C. Circuit ruling is “a disappointment, especially in light of favorable decisions of two other courts of appeals.” She asserts that the board’s delegation decision, made shortly before the board dropped down to two members, was based “on a reasonable interpretation of the law and on a desire to keep the Board’s important work from coming to a complete halt for an indefinite period.” Liebman says she and Member Peter D. Schaumber during the past 16 months have dedicated themselves “to resolving cases and to avoiding a decisional backlog.”

In making the delegation, the board relied on its own interpretation of Section 3(b) as well as the Justice Department memorandum, which found that “if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained.

The D.C. Circuit opinion is available at <http://op.bna.com/dlrcases.nsf/r?Open=smgk-7rmqvk>, and the Seventh Circuit decision is available at <http://op.bna.com/dlrcases.nsf/r?Open=smgk-7rmqwj>.

(Source: *Laurel Baye Healthcare of Lake Lanier Inc. v. NLRB*, D.C. Cir., No. 08-1214, May 1, 2009; *New Process Steel LP v. NLRB*, 7th Cir., No. 08-3517, May 1, 2009, as reported in BNA, *Daily Labor Report*, No. 83, May 4, 2009, pp. AA1-AA3, E1- E10.)