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SUPREME COURT AGREES TO DECIDE SPLIT ON NLRB'S AUTHORITY TO ACT WITH TWO MEMBERS

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On November 2, the Supreme Court agreed to decide whether the National Labor Relations Board can decide cases with its current complement of only two Board members. The Board has been functioning with two members – current Chair Wilma Liebman and Member Peter Schaumber – since 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 Schaumber 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 Supreme Court's decision to grant the petition for certiorari filed by New Process Steel, L.P. will provide the Court the opportunity to decide once and for all the proper interpretation of section 3(b) of the National Labor Relations Act, which provides that "three members of the Board shall, at all times, constitute a quorum of the Board," but also permits the Board to delegate its authority to any group of three or more members and provides that two members shall constitute a quorum of any such group. The Courts of Appeals have reached diametrically opposed conclusions about whether this language permits the Board to function as it is currently constituted. In *New Process Steel, L.P. v. NLRB,* 564 F.3d 840 (7th Cir. 2009), the Seventh Circuit held that the 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 the current 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." Having reached that conclusion, the Court in Laurel Baye remanded "for further proceedings before the Board at such time as it may again consist of sufficient members to constitute a quorum."

Since the *Laurel Baye* decision, the two-member Board has continued to issue decisions while awaiting confirmation of the three new Board members nominated by President Obama. Altogether, the Board has issued decisions in approximately 500 cases since January 2008. The validity of those decisions will now be determined by the Supreme Court. Meanwhile, the number of decisions affected by this issue seems likely to continue to grow for some time. The slate of three nominees to bring the Board up to its full complement of five members was approved by the Senate Health, Education, Labor and Pensions Committee on October 21. However, Senator John McCain reportedly has placed a "hold" on one of the nominees – SEIU Associate General Counsel Craig Becker – which will likely prevent the full Senate from voting on any of the nominations. And so the uncertainty about the Board's authority continues for employers, employees and unions alike.