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Circuit Court Rulings Bring Uncertainty To NLRB Decisions

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In a decision with potentially far far-reaching consequences for management and labor, the United States Court of Appeals for the District of Columbia Circuit has cast into doubt hundreds of cases decided by the National Labor Relation Board ("NLRB" or "Board") since January 1, 2008, as well as all other actions taken by the Board since that date. The court held that the Board's members lacked the authority, under the National Labor Relations Act (the "Act"), to delegate the authority to act on the Board's behalf to a panel consisting of only two Board members when the Board's other three seats are vacant. *Laurel Baye Healthcare of Lake Lanier v. NLRB*, No. 08-1162 (D.C. Cir. May 1, 2009).

Indeed, the D.C. Circuit's decision in *Laurel Baye* casts into doubt the validity of every NLRB decision and order issued since January 1, 2008, the date when the NLRB began functioning with only two members. This uncertainty includes not only the hundreds of Board decisions and orders in unfair labor practice ("ULP") cases decided since that date but also all other actions taken by or in the name of the Board, where the Board's authority to act arises under the provisions of the Act or the Board's Rules and Regulations. These include:

- Countless actions the Board has authorized in representation proceedings, including the certification of election results in representation and decertification proceedings; all rulings on requests for review concerning determinations of supervisory status; issues concerning appropriate bargaining units; and with respect to issuance of *Gissel* bargaining orders as a remedy for "hallmark violations" during the course of organizing drives;

- Cases in which the Board has ordered routine remedies of reinstatement of employees with back pay and other affirmative remedial actions to resolve ULPs and cases in which it has ordered "extraordinary remedies" for violations of the Act that the Board has held require such extreme relief;

- Cases in which the Board has authorized Regional Directors to pursue Section 10(j) injunctive relief in aid of pending ULP cases, including cases where the Board has sought interim orders requiring employers to bargain with unions;

- Cases in which the Board has moved in district court to pursue injunctive relief under Section 10(l) of the Act, where labor unions have been alleged to have engaged in activity in violation of Sections 8(b)(4) or 8(b)(7) of the Act;

- Cases in which the Board has acted under Section 10(k) of the Act to resolve jurisdictional disputes, where employers have been faced with competing claims by multiple unions as to the right to perform disputed work; and

- All other proceedings that require Board action, approval or authorization.

Laurel Baye will have a far-reaching impact, not only on employers and unions but on individual employees whom the Board may have ordered reinstated with back pay, in cases that will now need to be reconsidered by a properly constituted Board. Employers and other parties that have had unfavorable rulings before the Board or that have been subject to adverse rulings by the two-member Board should consider petitioning for review before the D.C. Circuit, rather than elsewhere, given that this court has now found that orders issued by two-member Board panels are invalid, and it appears almost certain that the court would find that any other decision or action of a two-member Board panel was equally flawed.

The Board must decide how to address the issues relating to all of its orders of the past 16 months, given *Laurel Baye's* impact. In light of the split in the circuits discussed below, and the fact that the First and Seventh Circuits do not agree with the D.C. Circuit and have concluded that orders issued by two-member panels are valid, one option for the Board may be to seek United States Supreme Court review. Even if such review is sought, the passage of time will take its toll as uncertainty mounts.

Employers, unions and individual litigants that have participated in proceedings before the Board since January 1, 2008, are likely to be reviewing *Laurel Baye*'s holding to determine how it may affect their rights and whether action is needed either to preserve favorable results already achieved or to gain strategic and/or tactical advantages through revisiting past results.

Overview of the Board

The Board is a five-member, quasi-judicial body that is a part of the Executive Branch. It is charged, *inter alia*, with deciding cases adjudicated under the Act, the federal statute governing private-sector labor-management relations. Board members are appointed by the president to staggered five-year terms.

The Board has distinct responsibilities with respect to the Act's provisions concerning representation proceedings through which employees exercise their rights to decide whether or not they wish to be represented for collective bargaining purposes and with respect to the adjudication of ULP proceedings, which are for the purpose of enforcing the Act's prohibitions against conduct defined by Congress as constituting unfair labor practices. Rather than engaging in extensive rulemaking, the NLRB decides most questions concerning the interpretation and application of the Act's prohibitions through the adjudication of ULP complaints before the agency's administrative law judges, whose decisions and proposed orders are subject to appellate review by the Board.

The Board's orders in ULP cases are not self-enforcing, but rather may be enforced in the various United States Circuit Courts of Appeal. Similarly, litigants before the Board that seek review of the NLRB's decisions and orders in ULP cases may also petition for review in the various courts of appeal. Review and enforcement may be sought in the United States Court of Appeals for the circuit where the alleged ULP occurred, where the party resides or transacts business, or in the United States Court of Appeals for the District of Columbia.

Laurel Baye

The *Laurel Baye* case arose out of unfair labor practice charges filed in 2005. The case was prosecuted by the agency's General Counsel before an administrative law judge ("ALJ"), who in July of 2006 issued a decision finding against the employer. Laurel Baye appealed the decision by filing exceptions to the ALJ's decision with the Board in Washington, D.C. Before the Board had an opportunity to review the case, then-Board Chairman Battista's term expired, leaving the Board with four members. On December 28, 2007, the Board's four members voted unanimously to delegate all of the Board's authority to panels consisting of three Board members. Later, after its membership dropped to three, the Board members took the position that they had authority to delegate the Board's powers to a two-member Board, in that a two-member panel would constitute a quorum with respect to a three-member Board. In this regard, they relied upon Section 3(b) of the Act, which provides, in relevant part, that:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise….A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence.

On December 31, 2007, one of the member's term expired, leaving the Board with two members. On February 29, 2008, the two remaining Board members, Wilma B. Liebman (D), who has since been named as Chairman by President Obama, and Peter C. Schaumber (R), issued a decision affirming the ALJ's decision in *Laurel Baye*. The employer petitioned the D.C. Circuit for review, arguing that the Board

lacked authority to decide the case, in that decisions by two members were not authorized by the statute.

The D. C. Circuit held that the Board's interpretation of Section 3(b) of the Act was erroneous because Congress had expressly provided that the Board requires not fewer than three of its five members to constitute a quorum "at all times" and that although a three-member quorum acted to delegate the Board's power to "quorums" consisting of two members, such order of the Board ceased to have any authority once the Board's membership dropped below the statutorily mandated three-member level. The court held, therefore, that the two-member panel that had issued the Order that was before the court in *Laurel Baye* lacked the authority to issue any orders and thus the Order was "invalid." For that reason, the court vacated the Board's decision and remanded the case to the Board for further proceedings before the Board "at such time as it may once again consist of sufficient members to constitute a quorum."

The court recognized that its decision was likely to create a great deal of uncertainty concerning all of the Board's orders issued since January 1, 2008. While the court did not offer definitive guidance, it did suggest, as dicta, that "[p]erhaps a properly constituted Board, or the Congress itself, may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating the rump panel's previous decisions, including the case before us."

Chairman Liebman, on behalf of the Board, issued a statement shortly after the Court's decision on Friday, May 1. While that statement expressed disappointment and indicated that the Board would "carefully consider the legal options open to the current Board, both with respect to the court's decision and the cases now pending before us," the Board has not yet indicated whether it will seek an order staying the effect of the *Laurel Baye* ruling, seek en banc review of the ruling or take other action.

Two Other Circuit Courts Uphold Two-Member Quorums

On the same day the D.C. Circuit issued its decision in *Laurel Baye*, the Seventh Circuit in Chicago reached a contrary conclusion, finding the Board's delegation of its power to a two-member quorum to be within its authority under the Act. *New Process Steel, L.P. v. NLRB*, 08-3517 (7th Cir. May 1, 2009). In reaching that conclusion, the Seventh Circuit held that the plain language of Section 3(b) of the Act grants the Board the power to delegate its authority to a group of three members and it allows the Board to continue with three members but expressly provides that two members of the Board can constitute a quorum where the Board has delegated its power to a group of three. The Seventh Circuit's reasoning is consistent with that of the First Circuit in *Northeastern Land Services v. NLRB*, 08-1878 (1st Cir. March 13, 2009), which also upheld the authority of a two-member Board.

Significance for Employers

The D. C. Circuit's decision and the contrasting decisions in other circuits introduce a

great deal of uncertainty and arguably leave all decisions of the NLRB in a wide range of proceedings over the past 16 months subject to challenge as to their validity. While the conflicting circuit court decisions place a cloud of legal uncertainty over the two-member Board, the D.C. Circuit's decision is particularly influential, not only because it is a well-respected court but also because any party may petition that court for a review of a final Board order, regardless of where the ULP or Board proceeding occurred. Even if the NLRB were ultimately to decide to seek Supreme Court review, and the court were to grant *certiorari*, that process would leave employers and other parties in legal limbo until the Supreme Court rendered its final decision.

The D.C. Circuit's decision also creates a sense of urgency for President Obama and the Senate to fill the vacant seats on the Board. President Obama recently announced his intention to nominate Craig Becker, the Associate General Counsel of the Service Employees International Union, and Marc G. Pearce, a New York lawyer whose practice consists of representing unions, for two of the three vacancies on the Board. Both are Democrats. All such nominations are subject to Senate confirmation and, given the degree of interest generated by the Employee Free Choice Act, which would substantially amend the Act, the Senate can be expected to carefully consider the President's nominees for these NLRB vacancies.

Once the Board reaches a quorum, while it may seek to heed the court's suggestion to review and "ratify" the decisions and actions of the two-member Board, it may find that questions of due process as well as an unwillingness of its new members to rubber-stamp the policies and decisions of the compromises that emerged from the two-member Board of 2008 and early 2009 may make this a less realistic proposition than the court's *dictum* suggests. In the meantime, it appears that the Board will be hard-pressed to issue any decisions with a two-member Board, given the legal cloud created by the *Laurel Baye* decision. Employers that have been subjected to Board decisions that were issued over the past 16 months, or impacted by any other action taken or authorized by the Board since January 1, 2008, would be well-advised to carefully examine all aspects of the Board proceedings that they have been party to with their labor counsel, to see what opportunities the *Laurel Baye* decision may offer.

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