



New Process Steel: Much Ado About Nothing?

by James B. Yates and Nicole A. Flynn

For the first time since 2007, the National Labor Relations Board is now at full strength. The Board historically has been comprised of five members. However, at the close of 2007, the Board found itself with four members and one vacancy. Anticipating two more vacancies at the end of the year – too few to meet the Board’s three member quorum requirements – the Board delegated its authority to a three member group, believing that after the expiration of one of those members’ terms, the remaining two members would constitute a two-member quorum of the three member group. At the end of December 2007, a third member’s term expired, leaving a two member board.

For over two years, the two member NLRB decided nearly 600 cases. On June 17, 2010, the United States Supreme Court invalidated each of those decisions. In *New Process Steel, L.P. v. National Labor Relations Board*, the Supreme Court held that the NLRB lacked authority to delegate its powers to a two member group. Accordingly, all of the decisions issued by the two member Board were deemed invalid.

About the photo: Attorneys in the Labor and Employment Practice Group.

Offices

Toledo Office:
One Seagate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: 419-241-6000
Fax: 419-247-1777

Columbus Office:
100 E. Broad Street, Suite 600
Columbus, Ohio 43215
Telephone: 614-564-1445
Fax: 614-280-1777

Findlay Office:
510 S. Main Street
Findlay, Ohio 45840
Telephone: 419-424-5847
Fax: 419-424-9860

Novi Office:
28175 Haggerty Road
Novi, Michigan 48377
Telephone: 248-994-7757
Fax: 248-994-7758

www.eastmansmith.com

At the time of the June 17th decision, 96 of the two member decisions were pending on appeal before the federal courts – six at the Supreme Court and 90 in the courts of appeals. On June 23, 2010, in what appeared to be one of the first applications of *New Process Steel* in the courts of appeals, the Second Circuit denied the NLRB’s petition for enforcement of an order issued by the two member board, even though the employer did not contest the Board’s authority to issue a two member decision. Significantly, the court denied enforcement of the Board’s petition without remanding the case back to the Board, foreclosing the Board’s ability to reconsider the case. The First Circuit followed suit in *National Labor Relations Board v. Metro Mayaguez, Inc.* and, concluding that the Board lacked authority to issue an order declaring that the employer had committed unfair labor practices, denied enforcement of the NLRB’s petition for enforcement.

The Sixth Circuit, which covers Ohio and Michigan, took a different approach. Without being requested to do so, it sent at least one case back to the NLRB, while the Supreme Court disposed of its remaining cases by sending them back to the circuit courts from whence they came. The Board subsequently announced its intention to petition each of the courts of appeal to remand the cases before them for further consideration, stating that each of the remanded cases would be considered by a three member panel. As of yet, there is little indication whether the courts of appeal will comply with the Board’s request to remand the pending cases.

With respect to the remaining cases decided by the two member panel but not appealed into the courts, the Board has begun to address them on an individual basis. On August 5, 2010, the NLRB issued a series of decisions adopting and affirming the decisions issued by the two member panel. It also announced that it ratified litigation actions taken by the agency’s general counsel during the 27 month period.

So far, it appears that only the 96 cases in the courts of appeals will be affected by the Supreme Court’s June 17th decision. If you are one of the lucky (or unlucky) employers who find yourself in federal court, the labor attorneys at Eastman & Smith Ltd. are available to assist you in investigating your options. If you are one of the remaining several hundred employers who fell victim to an unfavorable Board decision, it appears that President Obama’s labor board will not examine your case with fresh eyes, but instead, will simply rubber stamp the earlier decision.



Mr. Yates and Ms. Flynn are members of the Firm’s Labor and Employment Section. Mr. Yates represents public and private sector employers in all facts of labor and employment law matters, including workers’ compensation matters. He is a certified Senior Professionals in Human Resources. Ms. Flynn’s practice consists primarily of representing employers in labor disputes, collective bargaining and all facets of employment matters, including human resources management, immigration and employment litigation. They can be reached at our Toledo office (419- 241-6000).



Disclaimer

The articles in this newsletter have been prepared by Eastman & Smith Ltd. for informational purposes only and should not be considered legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney/client relationship.