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No. 08-1457

In The
Supreme Court of the United States

NEW PROCESS STEEL, L.P.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER NEW PROCESS STEEL, L.P.

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I. SUMMARY OF ARGUMENT

The NLRB's justifications for an undersized two-member Board are at odds with every relevant principle of language, law, logic and policy.

The textual approach offered by the Board violates the critical rules of statutory construction. It makes the statutory mandate requiring a three-member quorum of the Board "at all times" inexplicable, if not superfluous, and accords no meaning to the obvious distinction in the statute between the "Board" and a "group." Standard rules of construction do not accommodate a functional two-member NLRB no matter how inconvenient it is for the Board.

The collateral sources of authority cited by the Board also provide no support. The Board notes that under the Wagner Act, for a short period, it operated with only two members. Wholly apart from whether this was deemed acceptable or desirable, it is irrelevant. The later Taft-Hartley amendments rejected this anomaly.

The Board's references to a general or common law of federal agency business, legislative history and deference are similarly unpersuasive. The legislative history cited is devoid of helpful information and mostly suggests that Congress would not have and did not approve a two-member Board. The notion that there is a federal common law of boards and agencies that supplants the common law of corporations and agency cited by New Process and the D.C. Circuit is unsupported by the authority noted. That authority

proves that Congress pays attention to the workings of boards and agencies and prescribes the rules that must apply in the text of enabling statutes. At bottom, the Board argues that this Court should apply the operating rules prescribed for different agencies if the NLRB's rules prove inadequate. There is no support anywhere for that argument.

The Board's newly hatched deference claim looks like a last resort. The Board did not request deference below and the request is not supported by any of the standard criteria for determining when deference is warranted.

Finally, the Board has no answer for the litigants whose decisions have been compromised by the lack of full and impartial consideration of their cases and who do not support the notion that an inadequately constituted Board is better as a matter of national labor policy than no Board at all. This is bad policy and a bad way of governing. The excuses offered to support the insufficient Board are not good enough to condone it.

The decision of the court of appeals should be reversed.

II. ARGUMENT IN REPLY

A. The Plain Statutory Language Is Not Compatible with a Two-Person Board

All of the parties and amici in this case claim that their interpretation is most obedient to the plain

language of section 3(b) of the NLRA, 29 U.S.C. § 153(b), and accords with the standard and accepted rules governing statutory construction. There is no disagreement over the rules of construction that apply, only on how they apply in this setting.

The NLRB contends that New Process overlooks the word "except" in its analysis and accordingly, petitioner's theory fails because the word "except" coming after the phrase, "three members of the Board shall, at all times, constitute a quorum of the Board," means that any three-member group constituted in accordance with the first sentence of section 3(b) really could be a two-member Board that does not require the third person otherwise mandated by the three-member Board clause. *See* NLRB Brief at 14-19.

This reading should not be preferred. First, it deletes the "at all times" phrase because that phrase is unnecessary to the meaning drawn by the Board. If the phrase is removed from the text, the interpretation suggested by the Board would be unchanged. The relevant passage would read:

> Three members of the Board shall constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

In the Board's formulation, the "at all times" clause is surplusage because it adds nothing to the predicate or antecedent words and has no apparent

influence on any word or phrase residing within the local commas or in the larger context. The Board offers no plausible explanation for the meaning or purpose of this clause. With or without it, three members of the Board will always constitute a quorum subject to the exception. With or without the clause, two members of the delegee group will always be sufficient for a quorum no matter how many people are on the Board. In the Board's analysis, the "at all times" clause neither adds nor subtracts meaning from any other word or phrase in the paragraph.

This manner of construction is not favored by this Court. *Penn. Public Welfare Dep't v. Davenport*, 495 U.S. 552, 562 (1990); *see also Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' "). *See also Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("The rule against superfluities complements the principle that courts are to interpret the words of a statute in context.").

Surplusage is entirely preventable here by acknowledging that with less than three members, there is no Board quorum and thus no power to act as

the NLRB. At the same time, only two members of the three-member group need to agree to transact business, but that allowance by no means eradicates the necessity of having a Board quorum in the first place "at all times."

Second, the petitioner's theory results in no loss of meaning with respect to the word "except." It does no damage to the meaning of any word or phrase in section 3(b) to construe the exception to refer only to the delegee group and to function so that a majority of two of the three-member group may carry out the adjudicative duties of the Board so long as there are at least three members to begin with who are participating in the process, thus giving a natural meaning to the "at all times" clause and recognizing the "exception" applicable to the group.

While the Board insists that petitioner's interpretation does violence to the word "except," it is not apparent how this happens or how the word becomes superfluous. Under New Process's interpretation, the "except" proviso performs the important function of introducing the proposition that a regular majority allows for decision-making by the three-member group if two of the three agree. In this analysis, no word is deprived of meaning and all of the words coexist harmoniously.

Third, the Board's theory fails to account for the separate meanings of "Board" and "group." The Board's theory glosses over the distinction between the two terms. If a "group" is just another word for

"Board," then much of section 3(b) is unnecessary. If Congress had intended Board and group to be synonymous, it would not have made sense to provide that "three members of the Board shall, at all times, constitute a quorum of the Board," while allowing for a two-member majority of a delegee group that can consist of only two members. Congress added the word "group" in Taft-Hartley and it must be presumed to have meaning.

It also makes nonsense of the vacancy clause. The vacancy clause does not by its words amend or alter the other specific requirements of section 3(b) and easily is read in harmony with them. There can be vacancies but not below the minimum requirements that are specified. Petitioner's linguistic analysis, but not the Board's, is reinforced by the vacancy clause which is applicable to the Board but not the group.[1] By implication, Congress's decision

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[1] The Board argues that since members of a group must also be members of the Board, the vacancy provision validates the theory that a two-member group is all that is needed. NLRB Brief at 22. This approach again asks the Court to conclude that different words have the same meaning. There is no known rule of construction to validate this proposition. The general rule is that different words are accorded their ordinary and natural meaning in the context in which they are used. *See Burlington N. & San Francisco Ry. Co. v. United States*, No. 07-1601, slip op. at 10 (May 4, 2009); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context.").

not to apply the vacancy clause to the three-member group suggests that a vacancy in the group is not permitted, and that Congress was not confused and did not intend to eliminate an obvious distinction between the terms "Board" and "group."

The Board's overall theory is selective in its analysis, giving great power to favored words at the expense of others. It suggests an improbable level of confusion on the part of the drafters that is not supported under any normal principles of statutory construction.

The Board's theory breaks too many rules to be compelling. More than anything, it suggests a belief that the circumstances justify a looser textual analysis than the rules of construction usually allow. The D.C. Circuit correctly rejected this conclusion. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009) (Pet. App. 97) ("[W]e may not convolute a statutory scheme to avoid an inconvenient result.").

B. The Common Law of Corporations and Agency Reinforces the Three-Member Quorum Requirement

The Board protests the suggestion that common law principles of corporate and agency law inform the analysis of the language of section 3(b). Citing *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967), the Board argues that the common law principles cited by New Process and the D.C. Circuit in *Laurel Baye*

do not establish the correct default rules for governmental entities where a statute is silent on the meaning of a commonly understood word or phrase.

Flotill Products embodies no such general rule. It stands principally for the unremarkable notion that Congress has treated various Boards and agencies differently in their organic statutes in establishing quorum rules for conducting agency business and, as is the case in *Flotill Products*, may have acquiesced in any agency's previous adoption of a long-standing quorum rule without reference to possible common law meanings.

The decision does not in any sense preclude application of ordinary common law principles for conducting business or preclude their use as a default position in the case of statutory silence or ambiguity. If, as the Board argues, *Flotill Products* announces a special quorum rule for agencies to be applied generally in the absence of congressional direction, that rule is apparent neither in the text of the decision nor in the Board's brief here. There is literally no support for it.

In the face of statutory silence, there is a strong presumption that Congress intends the application of established principles of general and common law. This Court has not stated an exception to this rule for the conduct of federal agency business. *Newport v. Fact Concepts, Inc.*, 453 U.S. 247, 258 (1981) (requiring express intent to the contrary to justify a departure). *See also Nationwide Mut. Ins. Co. v.*

Darden, 503 U.S. 318, 326 (1992) (rejecting the theory that Congress's decision to change a common law concept in one statute carries over by implication to another). The D.C. Circuit committed no error in relying on common law rules and those rules continue to point toward a proper resolution in this case.

C. Legislative History Does Not Support the Board's Theory

The Board seeks to supplement its statutory analysis by pointing to arguably supportive legislative history generated in the process of enactment of Taft-Hartley. In particular, the Board argues:

> The history of the 1947 changes . . . confirms what is plain in the text of Section 3(b). That history shows that Congress wanted the Board to operate more efficiently and to advance this objective, it authorized the Board to delegate any or all of its powers to a three-member group, which in turn could exercise their powers through a two-member quorum.

NLRB Brief at 26 (footnote omitted).

The argument is circular and mostly begs the question, proving nothing about Congress's consent to a two-member Board.[2]

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[2] The Board's reliance on advocacy in favor of a seven-member Board proposal that was not adopted adds nothing

(Continued on following page)

Conceding that greater efficiency was an objective of Congress in 1947, this generalized objective provides no insight that is relevant to this case. Whether or not Congress contemplated the prospect of three unfilled vacancies on the Board sixty years into the future, there is nothing obviously efficient about a two-member Board that cannot decide many of its cases because the two disagree, just as there is nothing inefficient in the expectation that appointments are made more expeditiously. Efficiency is a worthy objective, but even if a two-member Board could be considered an issue that is mainly about efficiency, "no law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v. Holder*, 588 U.S. ___, slip op. at 17, No. 08-911 (Jan. 20, 2010), quoting *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality opinion).

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substantive to the discussion and like most advocacy in favor of unenacted amendments, it has no apparent value as an indication of specific congressional intent, even if it were directly on point. It is not on point, however, and not meaningful here. For the same reasons, the critical comments of Senator O'Mahoney (Brief for the NLRB at 26 n.20) are not persuasive authority of Congress's intent. *See Bryan v. United States*, 524 U.S. 184, 196 (1998), quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation.").

The legislative history of the Taft-Hartley Act neither supports the NLRB's preference for a two-member Board nor does it enlighten this Court's consideration of the issue.

D. Deference Is Not Warranted

Although the Board claimed no special deference for its views in the proceedings below, it now embraces the concept. And while the rationale supportive of a functional two-member Board was the work of a Deputy Assistant Attorney General of the Office of Legal Counsel, Department of Justice,[3] the Board now claims it as its own. There was no public process by which the OLC opinion or Board adoption of it was open for notice and comment. The question is purely a question of statutory interpretation calling on no agency expertise that may arguably be claimed by the NLRB. None of the considerations that support special deference or special respect are present in this case. *See United States v. Mead Corp.,* 533 U.S. 218, 227-28 & nn.7-10 (2001) (collecting authorities).

The claim for deference in this case appears for the first time in the Board's Response Brief. No deference is warranted. *See Mead*, 533 U.S. at 228 (deference claim entitled to "near indifference" when first advanced in an agency's brief). Its claim of deference is based mostly on a flawed construction of

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[3] This position is not a Presidential appointment or subject to advice and consent confirmation by the Senate.

the statutory language, it relies on irrelevant legislative history and a circular rationale trying to make something out if it, and comes to rest at the end on the proposition that the Board had to do something "to stay 'open for business.'" Brief for the NLRB at 34, quoting *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 424 (2d Cir. 2009).

The NLRA contains no provision suggesting an intent to permit the NLRB to re-define quorum rules and overall, the Board's rationale for continuing to function as an undersized entity may be understandable but it has not earned deference or special respect from this Court.

E. No Collateral Makeweight Theory Relied on by the NLRB Justifies Decision-making By a Group of Fewer Than Three Members

The Board finally disputes that decision-making by a two-member group is bad policy. The Board argues that Congress has the ability to dictate the manner in which an agency functions. NLRB Brief at 27. No one disputes that Congress has that authority and has exercised it many times in directing the conduct of other agencies; however, the question raised in this case is whether Congress authorized a two-member Board to render decisions in the NLRA. The Board argues that the "participation and membership rules" established by Congress are controlling. No one disputes that either. The rest of the

Board's discussion either misses the point or is circular. The Board argues that Congress's "participation rules" authorize the NLRB to delegate the Board's powers to a group of three, and that a quorum of two may exercise those powers. NLRB Brief at 32. But the argument ignores that the "membership rule" requires that the Board have three members at all times and that a group have three members as well. Under the Board's current construction, a three-member group can contain a "phantom" member. That construction is inconsistent both with the language of the statute and common sense.

The Board's lengthy discourse into the soundness of decision-making by an even number of Board members similarly misses the point. Although the Board recognizes that membership rules protect "against totally unrepresentative action in the name of the body by an unduly small number of persons," the NLRB insists, with no support, that in the NLRA, Congress opted for decisions in the name of the Board to be made by an unduly small number of persons. NLRB Brief at 36, quoting *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980). According to the Board, Congress, as a matter of policy, preferred expedience over fullsome and healthy debate. If that is so, the source of the conclusion is not apparent. There is no support for this legislative choice in the words of the NLRA or the historical circumstances at the time of the enactment of the Taft-Hartley Act. The legislative history of the amendments to the Wagner Act suggest that

Congress's concern for expedience was manifest in expanding the size of the Board to permit the creation of multiple panels rather than to restrict the number of decision-makers. In all likelihood, Congress never contemplated the current partisan politics or congressional gridlock that has characterized the nomination process in recent years. It certainly was not the way it worked in 1947, when the Taft-Hartley Act was debated and passed.

The NLRB understandably defends the decisions made by two members of the Board in the last two years, analogizing the decision-making process of the two remaining Board members to decisions of this Court where a Justice issues an opinion concurring in the result but disagreeing with the controlling precedent. The analogy does not work. Decisions by the two remaining NLRB members have not been constrained by their belief that precedent controlled the outcome of the cases before them. Rather, their decisions reflect concurrence in an outcome solely in order to issue a decision whether or not they agree with it. They rely on "institutional reasons," not precedent, to justify the issuance of a decision in not just one or two isolated cases over a thirty-year period, but in multiple cases. This type of decision-making deprives the parties of the vigorous debate and full and fair consideration they deserve – and until January 2008, were provided.

The Board's reference to two-member decisions of the NLRB under the Wagner Act similarly is inapposite. As the Board acknowledges, those decisions

were consistent with the plain language of the statute at the time, which provided that the NLRB shall have three members, and "two members of the Board shall, at all times, constitute a quorum." 29 U.S.C. § 153 (Supp. I 1935). Taft-Hartley changed this provision.

In addition to expanding the size of the Board, increasing the quorum requirement from two to three, and permitting the Board to delegate its powers to a group of three or more, Congress stripped the Board of its prosecutorial powers and vested them in a newly created Office of the General Counsel. It makes no sense to argue, as the Board does, that Congress was content with the agency's decision-making practices under the Wagner Act in light of the fundamental changes Congress made in Taft-Hartley.

Finally, the Board suggests that New Process admitted that Congress could have enabled the Board to exercise its authority in the event of three vacancies on the Board. NLRB Brief at 40. That suggestion mischaracterizes New Process's argument. New Process raised the unremarkable observation, based on the various membership and participation rules enacted by Congress for other agencies, that Congress as well as the President have the authority and tools available to them to accommodate the loss of members of a Board or commission when its membership drops below the statutory authorized number. The leap the Board makes from Congress's inaction to its acceptance of a two-member Board is unsupported by any words in section 3(b) of the NLRA or any sound logic. There are many possible

explanations for the behavior of several Presidents and several Congresses in response to the NLRB's circumstances, but acquiescence in a two-member Board is not a likely explanation.

III. CONCLUSION

The judgment of the Court of Appeals should be reversed.

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