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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**

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT NATIONAL LABOR RELATIONS BOARD

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

OF COUNSEL:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

JAMES D. FAGAN, JR.
1401 Peachtree Street, NE
Atlanta, GA 30309

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of 11.5 million working men and women.[1] The instant case presents an important question concerning the ability of the National Labor Relations Board to delegate its powers to a group of three or more members and the authority of such a designated group to exercise the del-

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

egated powers once the Board has been reduced to two sitting members. For over two years, the NLRB has had only two sitting members, and during that period those two members, acting as a quorum of a three-member group, have exercised delegated Board powers by issuing hundreds of decisions. The AFL-CIO and its affiliated unions have a vital interest in the validity of these NLRB decisions enforcing the National Labor Relations Act.

SUMMARY OF ARGUMENT

Section 3(b) of the National Labor Relations Act provides that the National Labor Relations Board "is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise" and that "two members shall constitute a quorum of any [such] group." 29 U.S.C. § 153(b). That provision further provides that "[a] vacancy on the Board shall not impair the right of the remaining members to exercise all powers of the Board." *Ibid.* Thus, the plain meaning of Section 3(b)'s terms is, as the NLRB has concluded, that two members of a group to which Board powers have been delegated may exercise those powers without regard to the number of vacancies on the full Board. The legislative history indicates that reading of Section 3(b) according to the plain meaning of its terms effectuates Congress's intent in drafting that provision.

The D.C. Circuit and the Petitioner New Process Steel have each offered different readings of Section 3(b) to counter the NLRB's reading of that provision. Neither the D.C. Circuit's nor the Petitioner's reading squares with the statutory text.

ARGUMENT

The National Labor Relations Board has read Section 3(b) of the National Labor Relations Act, 29 U.S.C. §

153(b), to mean that once the full Board, which has a statutory complement of five members, acts with the participation of at least three of its members to "delegate to any group of three . . . members any or all of the powers which it may itself exercise," then "two members . . . of any group [so] designated" may lawfully exercise those delegated powers during an ensuing period when three of the Board's five membership positions are vacant. *See* Pet. App. 27 n. 2; Pet. Br. 5a-6a.

The court below concluded that "the plain meaning of the statute supports [the] NLRB's reading of the statute." Pet. App. 17. In what follows, we show: first, that the conclusion reached by the court below regarding the plain meaning of the statute is correct; second, that the legislative history of Section 3(b) reinforces that plain-meaning construction of the statutory language; and finally, that neither of the contrary readings of Section 3(b) offered by the D.C. Circuit or Petitioner New Process Steel's brief can be squared with the provision's text.

1. Section 3(b)'s text leads step-by-step to the NLRB's reading of that statutory provision.

The first sentence of Section 3(b) states the full Board's authority to delegate its powers to groups of its members:

> "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."

By specifying that the Board may delegate "any or *all* of the powers which it may itself exercise," the delegation provision makes particularly clear that the full Board may delegate its full authority to a group of three or more Board members.

The third sentence of Section 3(b) states the effect that Board vacancies have on the rights and powers of the

remaining members and conjoins that statement regarding vacancies with definitions of what will constitute a quorum for the full Board and what will constitute a quorum for a group of Board members to which Board powers have been delegated:

> "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 hereof."

The first clause of this sentence ensures that a vacancy on the Board will not impair the right of the remaining members to exercise all of the Board's powers, including the right to exercise those powers that have been delegated to a group of Board members.

The quorum provisions that follow are joined to the vacancy provision by the conjunction "and" to make clear that no matter how many of the Board's five membership positions are vacant, three members will constitute a quorum of the full Board and two members will constitute a quorum of a designated group of members to which Board powers have been delegated. Thus, the quorum provisions state two quorum definitions – three members for the full Board and two members for a designated group of Board members. The structure of the sentence makes it clear that each definition is completely independent of the other by using the phrase "except that" to separate the definition of a designated group quorum from the definition of a full Board quorum.

The sum of the foregoing is this: The full Board may delegate "any or all of the powers which it may itself exercise" to "any group of three or more members." Any such delegation is subject to the general rule that "[a] vacancy in the

Board shall not impair the right of the remaining members to exercise all of the powers of the Board," including the right of the remaining members to exercise all of the powers delegated to those members as part of a designated group of members. And, notwithstanding that three members constitute a quorum of the full Board, two members constitute a quorum of any designated group of members to which the Board has delegated its powers. Thus, the text of Section 3(b) expressly provides that, when the Board has delegated all of its powers to a designated three-member group and later vacancies reduce the Board's complement to two of the three members of that designated group, those remaining members constitute a quorum of the group with the right unimpeded by the vacancies to exercise all of the delegated Board power.

2. The legislative history confirms that Section 3(b)'s plain meaning reflects Congress's intent in drafting that provision.

The National Labor Relations Act of 1935 provided for a three-member NLRB. Section 3(b) of the 1935 NLRA provided:

> "A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." 49 Stat. 449, 451 (1935).

Pursuant to this provision, the original NLRB issued hundreds of decisions during periods when a vacancy reduced the Board to two members. *See* NLRB Br. 3 n. 1.

In 1947, Congress both increased the size of the Board to five members and amended Section 3(b). The impetus for these changes came from the Senate Labor Committee, which favorably reported a bill that would have increased the size of the Board to seven members. S. 1126, as Reported, 80th Cong., 1st Sess. 6 (1947), reprinted in 1

NLRB, *Legislative History of the Labor Management Relations Act, 1947* 106 (1948) ("Leg. Hist."). Along with increasing the size of the NLRB to seven members, the Senate Labor Committee bill would have amended Section 3(b) to read as follows:

> "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 four 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 hereof." S. 1126, as Reported, 6, 1 Leg. Hist. at 107.

The Senate Labor Committee explained the purpose of these proposed changes as follows:

> "The expansion of the Board from three to seven members, which this bill proposes, would permit it to operate in panels of three, thereby increasing by 100 percent its ability to dispose of cases expeditiously in the final stage, and to leave the remaining member, not presently assigned to either panel, to deal with problems of administration, personnel, expenditures, and the preparation of the budget." S.Rep. No. 105, 80th Cong., 1st Sess. 8 (1947), 1 Leg. Hist. at 414.

In other words, the Senate Labor Committee proposals were intended to allow the Board to increase its productivity by creating multiple three-member groups that would decide cases in the same manner as the original three-member Board.

The bill that passed the House would neither have changed the size of the Board nor amended Section 3(b). H.R. 3020, as Passed by the House, 80th Cong., 1st Sess. 14-15 (1947), 1 Leg. Hist. at 171-72. But the bill that passed the

Senate included the increase in Board membership and amendments to Section 3(b) recommended by the Senate Labor Committee. H.R. 3020, as Passed by the Senate, 80th Cong., 1st Sess. 75-76, 1 Leg. Hist. at 233-34. In conference, the House and Senate agreed to increase the size of the Board to five members, rather than to seven members as the Senate had proposed, and to adopt the Senate amendments to Section 3(b) with the size of the full Board quorum reduced from four to three members to reflect the smaller increase in the size of the Board. H.Conf. Rep. No. 510, 80th Cong., 1st Sess. 4-5 (1947), 1 Leg. Hist. at 508-509.

The legislative history thus indicates that the purpose of Section 3(b)'s delegation, vacancy, and quorum provisions was to empower the expanded NLRB to create three-member groups that would decide cases in the same fashion as the original three-member NLRB. By specifying that "two members shall constitute a quorum of any group designated" by the full Board, the text of Section 3(b) expressly provides that two members of such a three-member group may lawfully continue to exercise the group's delegated powers in the face of a group vacancy just as two members of the original three-member Board continued to exercise the Board's powers in the face of a Board vacancy.

3. Against that statutory background, it is hardly surprising that, along with the court below, every circuit – but one – to have considered the question has sustained the NLRB's reading of Section 3(b). *See Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654, 659-660 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 423-24 (2d. Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009); *Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36, 41 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009).

The lone exception is the D.C. Circuit's decision in

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. pending No. 09-377 (filed Sept. 29, 2009). But the D.C. Circuit's alternative reading of Section 3(b) cannot be squared with the statutory language.

The D.C. Circuit's contrary construction rests on reading the phrase "three members shall, at all times, constitute a quorum of the Board" in the third sentence of Section 3(b) as mandating "that the Board quorum requirement must be satisfied '*at all times*.'" 564 F.3d at 472 (emphasis in original). Thus, while the D.C. Circuit began by correctly recognizing that "a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members," the Court of Appeals severely limited the effect of that recognition by adding that the delegee group may exercise its powers only "so long as the Board quorum requirement is, 'at all times,' satisfied" and specifying that to satisfy that requirement the Board must have at least three sitting members at all times. *Id.* at 472-73.

The D.C. Circuit's reading improperly transforms Section 3(b)'s definition of what constitutes a Board quorum into a minimum membership requirement that must be satisfied at all times for any powers of the Board – including those powers that the Board has delegated to a designated group of members – to be exercised. That is a wholly improper interpretation of the term "quorum."

A quorum is "the minimum number of members (usu[ally] a majority of all members) who must be present for a deliberative assembly to legally transact business." *Black's Law Dictionary* 1370 (9th ed. 2009). *See Robert's Rules of Order; Newly Revised* §39 (9th ed. 1990) ("Quorum"). "The purpose of a quorum requirement is to insure that a certain number of persons shall convene and transact the business at hand." *Gardner v. Applied*

Geographics, *Inc.*, 18 Mass. L. Rep. 33, 35 (Mass. Super. Ct. 2004). *See Mason's Manual of Legislative Procedure* § 49 (2000) ("Right to Act for a Body – Quorum"). Giving the term "quorum" its normal meaning, the sole point of Section 3(b)'s full Board quorum definition is to establish the minimum number of members who must participate for the full Board to act.

There is nothing in the statutory language or legislative history to suggest that Section 3(b) establishes a minimum Board membership requirement that must be satisfied at all times in order for any Board powers – including those that have been delegated – to be exercised. Had Congress meant to establish such a minimum membership requirement, it would have drafted the statute in terms providing "that at all times the Board must be comprised of three members." Chamber of Commerce Br. 3 (capitalized as heading in original). But, contrary to the Chamber of Commerce, that is *not* what "the NLRA . . . states." *Ibid.*

Given the meaning of the term "quorum," the D.C. Circuit could not have been more wrong in its assertion that "the Board and delegee group quorum requirements are not mutually exclusive." 564 F.3d at 472. The question of whether the full Board has a quorum only arises when the full Board undertakes to transact business. But with respect to the exercise of powers that have been delegated to a group of Board members, it is the designated group and not the full Board that is transacting business. Thus, with respect to any particular piece of business, there will never be an occasion for both the full Board and the group quorum definitions to apply, because it will either be the full Board or the designated group – but not both – that is transacting the business in question. This common sense point is reflected in the fact that the full Board quorum definition and the group quorum definition are separated by the phrase "except that," which clearly indicates that the

group quorum definition is an exception to the Board quorum definition.

The D.C. Circuit's reliance on the phrase "at all times" in Section 3 (b) as a means for transforming the definition of a full Board quorum into a minimum membership requirement takes that phrase entirely out of its statutory context. The relevant statutory context is provided by the full sentence in which that phrase appears:

> "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 [of Section 3(b)]."

The principal meaning of the word "constitute" is "to make up." *Webster's II New College Dictionary* 241 (1999). That is obviously the sense in which that word is used in the third sentence of Section 3(b). The quorum clause is joined to the vacancy clause by the conjunction "and" in order to establish that no matter how many Board vacancies there may be, three members "shall, at all times, constitute a quorum." Without this specification, the normal understanding would be that a simple majority of the sitting Board members constitutes a quorum of the full Board. *See* 564 F.3d at 473 ("Quorums . . . are usually majorities."). Thus, the point of the specification that "three members of the Board shall, at all times, constitute a quorum" is that, regardless of how many Board seats are filled, it takes three Board members to make up a quorum of the full Board.

The statutory language most certainly does *not*, as the D.C. Circuit would have it, "impose[] a requirement for a three-member quorum 'at all times'" in the sense that the Board must be populated by three sitting members "at all

times" in order for a designated group of Board members to exercise delegated Board powers. To the contrary, the statutory language expressly provides that the two-member quorum requirement governing the exercise of delegated powers by a designated group is "except[ed]" from the three-member quorum requirement applicable to the full Board.

Contrary to the D.C. Circuit, treating the two quorum requirements as independent does *not* allow the Board to "circumvent the statutory Board quorum requirement." 564 F.3d at 473. The three-member Board quorum requirement applies to any action of the full Board, including any delegation of Board powers to a group of three members, an action that can only be taken by the full Board. Thus, if the Board has only two members there is no longer a quorum of the full Board that could act to delegate its powers to a three-member group.[2]

4. The Petitioner argues that "[a] vacancy in a three-member group precludes any action by that group unless the missing member is replaced." Pet. Br. 21-22. The Petitioner's theory is that "the delegee group cannot issue decisions with only two members because the group, as the entity that received the delegation, [i]s no longer fully constituted and therefore no longer a proper delegee." Pet. Br. 24 n. 10.

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[2] The D.C. Circuit sought to buttress its reading of Section 3(b) by drawing on "basic tenets of agency and corporation law" to the effect that "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended." 564 F.3d at 473. However, as the D.C. Circuit itself recognized in construing a similarly worded provision in the Railway Labor Act, "the applicable rule in the present case is provided not by the common law of corporations but by the vacancies provision of the statute itself, which clearly and expressly provides that vacancies in the Board shall not impair the powers of the Board." *Railroad Yardmasters v. Harris*, 721 F.2d 1332, 1343 n. 30 (D.C. Cir. 1983).

The Petitioner's interpretation of Section 3(b) has been rejected by every circuit that has considered the question, including the D.C. Circuit. *See Laurel Baye*, 564 F.3d at 472-73. *See also Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121, 123 (9th Cir. 1982). Indeed, as we have noted, the D.C. Circuit expressly recognized that the statute provides that "a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members." *Laurel Baye*, 564 F.3d at 472.

Section 3(b) does not place any limit on the authority of two members of a designated group to exercise the group's delegated powers. And, the text of that provision rules out the theory that a vacant seat might constitute an exception to the group quorum definition by providing that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board."

The Petitioner and its *amici* also argue that, as a matter of policy, two-member decisionmaking under the NLRA is a bad idea. Pet. Br. 34-35; Ch. Comm. Br. 15-20; Carpenters Br. 8-20. But the 1947 Congress that put Section 3(b) in its present form obviously disagreed. Against the background of the original three-member NLRB issuing hundreds of decisions with only two sitting members, the 1947 Congress expressly authorized the expanded five member Board to delegate its decision making powers to three-member groups and expressly authorized those groups to exercise the delegated powers with the participation of only two members.

The long and the short of the matter is that Congress has provided that once the full Board has delegated Board decisionmaking powers to a designated group of three or more members, two members of that group may exercise the delegated powers regardless of what has made the other designated group members unavailable to participate.

CONCLUSION

The decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

JAMES D. FAGAN, JR.
1401 Peachtree Street, NE
Atlanta, GA 30309