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## Metro Mayaguez, Inc., d/b/a Hospital Pavia Perea and Unidad Laboral De Enfermeras (OS) Y Empleados De La Salud. Case 24–CA–10505

September 30, 2010

## DECISION AND ORDER

## BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

On April 30, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 352 NLRB 418.<sup>1</sup> Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the First Circuit. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3 (b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals issued an order denying enforcement.<sup>2</sup>

Although the Board sought clarification of the court's order, the court denied that motion without explanation. Accordingly, we are required to construe the court's decision and mandate in light of the principle that a "mandate is 'to be interpreted reasonably and not in a manner to do injustice." Bailey v. Henslee, 309 F.2d 840, 844 (8th Cir. 1962) (quoting Wilkinson v. Massachusetts Bonding & Ins. Co., 16 F.2d 66, 67 (5th Cir. 1926)). Accord: NLRB v. Donnelly Garment Co., 330 U.S. 219, 225-228 (1947). Because the First Circuit predicated its denial of enforcement solely on New Process Steel's determination that the two members lacked authority to issue an order, we have concluded that the court's decision and mandate are not a final resolution of the pending unfair labor practice issues litigated before the administrative law judge and are not reasonably interpreted as terminating further proceedings before the Board. Further, we do not find the First Circuit's denial of the Board's motion for remand or clarification to be a significant factor in construing the court's decision and mandate. As courts have explained, no inferential weight should be ascribed to The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>3</sup>

The Board has considered the judge's decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at 352 NLRB 418 (2008), which is incorporated herein by reference.

Dated, Washington, D.C. September 30, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

summary denials of postjudgment motions for rehearing or clarification, given the myriad reasons that the denials could represent. See, e.g., *Exxon Chemical Patents v. Lubrizol Corp.*, 137 F.3d 1475, 1479–1480 (Fed. Cir. 1998) (motion for clarification); *U.S. v. Cote*, 51F.3d 178, 181 (9th Cir. 1995) (petition for rehearing or modification); *Luckey v. Miller*, 929 F.2d 618, 621–622 (11th Cir. 1991) (petition for rehearing en banc).

Finally, the court's jurisdiction under Sec. 10(e) and (f) of the Act extends to review only of a "final order" of the Board. See Augusta Bakery Corp. v. NLRB, 846 F.2d 445 (7th Cir. 1988) (dismissing petition for review for want of jurisdiction where Board had not issued a "final" order). Absent such an order, there is nothing for a court to enforce or set aside. See In re Labor Board, 304 U.S. 486, 494 (1938) (in finding that the Third Circuit exceeded its jurisdiction in attempting to halt further proceedings before the Board, the Supreme Court held that a court without statutory power to decide the controversy in the particular circumstances, "lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith"). The court here made no finding that the order issued by two Board Members who lacked authority to issue that order constituted a "final order" under the Act and, in light of New Process, there is a serious question whether the court had jurisdiction either to decide any dispute on the merits or to terminate further proceedings before the Board in this case.

<sup>3</sup> Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the remaining member who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board Members not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.

<sup>&</sup>lt;sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

<sup>&</sup>lt;sup>2</sup> The sole basis of the court's decision denying enforcement was that in *New Process Steel, L.P. v. NLRB,* 130 S.Ct. 2635, the Supreme Court had determined that "following a delegation of the NLRB's powers to a three-member group, two members cannot continue to exercise that delegated authority once the group's (and the NLRB's) membership falls to two." *NLRB v. Hospital Pavia Perea, No.* 90–1344 (1st Cir. July 30, 2010) at \*1 (quoting *New Process Steel, L.P. v. NLRB,* 130 S.Ct. at 2644). The court neither discussed nor decided the merits of the two Board Members' unfair labor practice findings.