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NEW PROCESS STEEL: STEVENS' LAST STAND AGAINST CHEVRON AND LABOR

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Through its 2010 *New Process Steel* decision, the Supreme Court effectively threw out nearly 600 decisions and orders made by the National Labor Relations Board ("NRLB" or "the Board") over a twenty-seven month period.[1] The majority opinion was authored by Justice Stevens, whose fifty year tenure on the Court has been mostly characterized by the liberal nature of his decisions.[2] While this championship of liberal ideals surprised those conservatives who first supported his confirmation to the Court,[3] Justice Steven's opinion in *New Process Steel* is evidence that he maintains some of the conservative values evidenced at the time of his confirmation.

On its face, Stevens' *New Process Steel* opinion reflects a sound and rational legal analysis of legislative history and intent.[4] However, a more in depth

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1. *See* New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2645 (2010)

2. *See generally,* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 56-57, 66-68, 167 (Doubleday 2007) (characterizing Justice Stevens as liberal); *see also* Charles F. Jacobs & Christopher E. Smith, *The Influence of John Paul Stevens: Opinion Assignments By The Senior Associate Justice*, 51 SANTA CLARA L. REV. 743, 748 (2011) (noting that, over time, Stevens more frequently sided with the liberal members of the Supreme Court).

3. *See id.* at 747 ("Justice Stevens proved to be a more liberal decision maker than many of his Republican political supporters had expected."); *see also* Richard G. Wilkins, *Supreme Court Voting Behavior: 1996 Term*, 25 HASTINGS CONST. L.Q. 35, 100 (1997) (offering statistical data on Supreme Court Justice voting patterns over several years beginning in 1988, which shows a "clear and growing domination of the [Court's] liberal frontier by Justice Stevens").

4. 130 S. Ct. at 2641 ("To conclude that Congress intended to authorize such a procedure to contravene the three-member Board question, we would need some evidence of that intent").

analysis of the opinion produces questions as to whether this decision was motivated by a desire to adhere to the legislative intent of the law or whether the reasoning of the opinion was crafted to fit within the majority's desired result.[5] Claiming the latter was the Court's true intent, I will present evidence that the Court's interpretation of the law flies in the face of its own jurisprudence and that the Court used only those parts of the law that it believed would reach its desired outcome—ignoring other relevant facts or law.[6] This article will analyze the reasoning of the *New Process Steel* decision and its impact on American society,[7] specifically the American labor movement,[8] in order to determine if this was a proper exercise of judicial authority or whether this was the tail wagging the dog.

Part I of this Article introduces the relevant issues and law that led to the *New Process Steel* decision, including a discussion of the crisis at the Board when it's membership fell below the statutorily required quorum.[9] Part II examines Justice Stevens' analysis of the legislative history of the Taft-Hartley Act[10] and presents an alternative to this analysis.[11] Part III presents determinations of the legitimacy of two-member, NLRB decisions based on statutory construction prior to the Taft-Hartley Act.[12] Part IV discusses the effects of *New Process Steel* through a detailed, statistical analysis of the cases affected by the Supreme Court's decision.[13] Through careful analysis of the *New Process Steel*, Part V suggests possible causes of the Court's decision, specifically focusing on the absence of any discussion or application of *Chevron* deference and the majority's approach to statutory interpretation.[14]

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5. *See infra* part V.

6. *See* Connor N. Raso & William N. Eskridge, *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1727 (Nov. 2010) (analyzing statistical data on Justice voting patterns to argue that Justices are guided more by policy considerations than by past levels of deference to agencies).

7. *See, e.g.,* Julia Di Vito, Comment, *The New Meaning of New Process v. Steel, L.P. v, NLRB*, 46 WAKE FOREST L. REV. 307, 327-29 (2011) (finding that the decision in *New Process Steel* "does solidify a trend" of "formalistic statutory interpretation"); Daniel J. Moore & James A. Burns, Jr., *U.S. Supreme Court Voids Almost 600 Decisions Issued By Two-Member NLRB,* EMPLOYMENT LAW WATCH (Jun. 29, 2010), *available at* http://www.employmentlawwatch.com/tags/national-labor-relations-board/ ("It is not clear . . . how [the Court] will treat a losing party in such a case that now seeks 'another bite at the apple' in the hopes of reversing an unfavorable outcome") (alteration in original).

8. *See Supreme Court Sides with Employers in NLRB Case*, AFL-CIO NOW BLOG (2010), http://blog292.aflcio.org/2010/06/17/supreme-court-sides-with-employers-in-nlrb-case/ (expressing that the General Counsel for the AFL-CIO was disappointed that the Court rewarded employer stall tactics and effectively penalized workers whose cases had been resolved.); *see also* Moore & Burns, *supra* note 7 (finding that it is possible that the majority could use this as an opportunity to issue new opinions in some of those cases that favor labor over management).

9. *See infra* Part I.

10. 29 U.S.C. § 153 (1975).

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part V.

INTRODUCTION

In 2010, the Supreme Court decided *New Process Steel*, determining that the NLRB lacked authority under the National Labor Relations Act[15] ("the Act") to issue decisions when the Board consisted of only two members.[16] The Court reasoned that a two-member Board failed to meet the statutory requirements for a quorum, and, thus, the two-member group lacked the authority to issue any decisions.[17] While *New Process Steel* only directly affected six cases, the impact of the Court's decision effectively rendered 595 decisions and orders issued by the two-member group illegitimate.[18]

The majority of the Court based its decision on an interpretation of the statutory language of the Act and on the legislative history of the statute in its current form.[19] Interestingly, any reference to *Chevron* deference was absent from the Court's opinion.[20] Furthermore, although the dissent pointed out that four of the five circuits that had addressed this issue found in favor of the Board's authority, the majority ignored this point.[21]

As the dissent pointed out, and the majority conceded, the Board had previously made decisions when it consisted only of two members.[22] However, the majority distinguished these prior instances of two-member Boards by noting that the issue before the Court involved a protracted period of time: twenty-seven months.[23] The dissent countered by arguing that the Taft-Hartley Act of 1947 increased the membership of the Board from three to five members as a means "to increase the Board's efficiency by permitting multiple

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15. National Labor Relations Act §1, 29 U.S.C § 151 (1947).

16. New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2635-36 (2010) (holding that a two-member group cannot exercise the delegation authority provided under 29 U.S.C. § 153(b)).

17. 130 S. Ct. at 2640. (determining that the Board may delegate its powers "only to a 'group of three or more members'" otherwise two members could permanently circumvent the statutory quorum requirement) (citing 29 U.S.C. § 153(b) (1982)).

18. *See infra* Part IV.

19. 130 S. Ct. at 2640-41.

20. *Compare* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984) (holding that where the statutory language is "ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute") *with* 130 S. Ct. at 2640-41 (conceding that "there are two different ways to interpret" the statute and that "the Government's reading of the delegation clause is textually permissible in a narrow sense" but rejecting the agency's interpretation as "structurally implausible").

21. *See* 130 S. Ct. at 2648 (noting that even the court that reached the same result as the majority rejected a three member requirement).

22. *See* New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2650 (2010) ("Those two-member Boards issued [three] published decisions in 1936 (reported at 2 N.L.R.B. 198-240); 237 published decisions in 1940 (reported at 27 N.L.R.B. 1-1395 and 28 N.L.R.B. 1-115); and 225 published decisions in 1941 (reported at 35 N.L.R.B. 24-1360 and 36 N.L.R.B. 1-45)"); *see also* 130 S. Ct. at 2642 n.3.

23. 130 S. Ct. at 2642 n.3 ("[T]he two-member Board at issue in this case, extending over two years, is unprecedented in the history of the post-Taft-Hartley Board").

three-member groups to exercise the full powers of the Board."[24] However, the majority dismissed the argument that the legislative history of the Act indicated a "congressional objective of Board efficiency," and simply concluded that "if Congress had wanted to allow the Board to continue to operate with only two members, it could have kept the Board quorum requirement at two."[25] While the dissent argued that the legislative history of the Act indicated that granting authority to a two member quorum of the three member Board was in line with the legislative purpose of the 1947 amendments, they failed to fully expand their analysis of this history.[26]

BACKGROUND OF *NEW PROCESS STEEL*

On August 25, 2006, the District Lodge 34, International Association of Machinists and Aerospace Workers, AFL-CIO, was certified as the exclusive bargaining unit for the employees at New Process Steel, LP plant in Butler, Indiana.[27] After nearly a year of negotiating, the representatives for both the employees and the employer reached a tentative agreement.[28] The employer's negotiators, however, refused to sign this agreement until it was approved by the employees.[29] The Union held a ratification meeting, and pursuant to its internal ratification procedures, the contract was authorized and subsequently executed by the employer.[30] Later, the employer repudiated the contract after learning of the ratification procedures utilized by the Union.[31] Subsequently, the employer withdrew recognition from the Union as the exclusive bargaining unit for its employees.[32]

The Union filed a complaint with the Board, which found that the Respondent and the Union reached a binding collective-bargaining agreement, effective August 12, 2007, and that the Respondent unlawfully repudiated that agreement on September 11, 2007.[33] The Board further found, as a matter of

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24. 29 U.S.C. § 153 (1975) (amending the Wagner Act to increase the National Labor Relations Board membership from three to five); *accord* 130 S. Ct. at 2651 (referring to Senate reports that the ability to operate the Board in panels of three would allow the Board to "dispose of cases expeditiously") (citing S.Rep. No. 105-80, at 8 (1947)).

25. 130 S. Ct. at 2644. (characterizing to a two-person board as "hard to imagine" given the Congressional limit of a three-person delegation).

26. *See id.* at 2651 (arguing that Congress intended to preserve the extraordinary practice of two-member panels during the 1947 amendments).

27. New Process Steel, LP, 353 N.L.R.B. 13 at 3 (2008).

28. *See id.* at 2 (noting that the parties had reached an initial collective bargaining agreement).

29. *See id.* at 4.

30. *See id.* at 5 (indicating that the parties met on Aug. 12, 2007).

31. New Process Steel, LP, 353 N.L.R.B. 13 at 5-6 (claiming that the union representatives had falsely told the employer that a valid agreement existed, when a majority of individuals had not voted for the contract, and there were insufficient votes to initiate a strike).

32. *See* New Process Steel, LP, 353 N.L.R.B. 25 at 1 (2008).

33. *See* 353 N.L.R.B. 13 at 8 (2008) (holding that since the employer did not bargain with the union over the ratification procedure to be used, the employer could not reject the collective bargaining agreement based on the Union's choice of ratification procedure.).

law, that the Respondent unlawfully withdrew recognition from the Union on September 12, 2007, in violation of sections 8(a)(5) and (1) of the Act.[34] In seeking appellate review, New Process Steel did not merely challenge the orders of the Board, but it also "challenged the authority of the two-member Board to issue the orders."[35] New Process Steel argued that since the Board had only two members when it issued its decisions, the Board failed to meet the statutorily required quorum of three.[36]

The Seventh Circuit found in favor of the Board, concluding "that the then-sitting two members constituted a valid quorum of a three-member group to which the Board had legitimately delegated its powers."[37] The Seventh Circuit's decision was in agreement with four prior challenges to the two-member Board's authority.[38] However, on the same day as the *New Process Steel* decision, the D.C. Circuit Court issued a contrasting opinion wherein the court found that the two-member Board did not have decision-making authority.[39] Furthermore, the D.C. Circuit Court concluded that the NLRA's quorum requirement was necessarily tied to the membership requirement and, therefore, the power of the Board to delegated its authority was suspended.[40]

Based on this four to one circuit court "split" as to "whether, following a delegation of the Board's powers to a three-member group, two members may continue to exercise that delegated authority once the group's (and the Board's) membership falls to two,"[41] the Supreme Court "granted certiorari to resolve

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34. 353 N.L.R.B. 25 at 1; National Labor Relations Act §1, 29 U.S.C § 151 (1947) (establishing the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce, including employer refusal to accept the procedure of collective bargaining); National Labor Relations Act § 8(a), 29 U.S.C. § 158 (2006) (establishing that an employer's refusal to bargain collectively with the representatives of the employees shall be an unfair labor practice).

35. New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2639 (2010) ; *accord* Kelli Ann Kleisinger & Richard A. Bales, *The Validity of the Two-Member NLRB*, 6 SETON HALL CIR. REV. 261, 268 (2010) ("recent petitioners have attempted to overturn the NLRB's rulings based, not on the merits of their cases, but rather on the invalidity of the two-member panel").

36. 29 U.S.C. § 153(b) (1988).

37. New Process Steel, LP v. NLRB, 564 F.3d 840, 845-47 (7th Cir. 2009) (placing the burden on New Process to find statements in the legislative history that forbade the board from operating with a quorum of two, or showed that congress was specifically concerned with the delegation of power to board members whose terms were about to end).

38. *Compare* Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36, 41 (1st Cir. 2009) (holding that 29 U.S.C. § 153(b) grants the NLRB authority to "act with only two members, both of whom were part of a three-member group to which the board validly delegated all of its authority"); *and* Snell Island SNF LLC v. NLRB, 568 F.3d 410, 424 (2d Cir. 2009); *with* Narricot Indus., L.P. v. NLRB, 587 F.3d 654, 660 (4th Cir. 2009); *and* Teamsters Local Union No. 523 v. NLRB, 590 F.3d 849, 852 (10th Cir. 2009).

39. *See* Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009) (holding that the three member quorum requirement must be satisfied "at all times" and the board cannot circumvent this requirement by delegating its authority).

40. *See id.* at 473–75 (finding a director's powers are suspended whenever the membership of the board falls below the quorum requirement, which in this case, the Court found to be three).

41. New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2638 (2010).

the conflict."[42] Although the Court ultimately agreed with the conclusion of the D.C. Circuit Court, finding that the two-member Board lacked authority to issue any decisions or orders, the Court declined to adopt the circuit court's reasoning.[43] Instead, the Court based its decision on what it considered to be "the only way to harmonize and give meaningful effect to all of the provisions" of the Act.[44]

Briefly stated, Stevens' analysis of the Act sounds more like Scalia's textualist approach to interpreting statutes than Stevens' usual intentionalist approach.[45] Such a radical departure from a long established adherence to the intentionalist approach may be difficult to explain unless such departure was necessary to achieve a desired outcome. That is, an intentionalist analysis would have produced a finding that the Court did not want and therefore Stevens, in the twilight of his long and consistent pro-intentionalism career on the Court, had no choice but to join the textualists to find in favor of New Process Steel.

LEGISLATIVE HISTORY/INTENT OF TAFT-HARTLEY ACT

While both the majority and dissent in *New Process Steel* acknowledged that the Taft-Hartley Act of 1947 was intended, at least in part, to increase the efficiency of the Board, neither opinion discussed the notion that a five member Board would increase the efficiency of the Board if it could delegate its authority to a group of three members—when only had two members present.[46] Additionally, the majority's argument that the Act added two members to increase efficiency misrepresents the arguments of the drafters of the Act as it

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42. *Id.* at 2639. (granting certiorari to resolve the split between the D.C. Circuit Court and four other circuit courts).

43. *Compare* 130 S. Ct. at 2636 (performing an extensive review of legislative history to determine congressional intent) *with* New Process Steel v. NLRB, 564 F.3d 840, 846 (7th Cir. 2009) (holding that the plain meaning of the Act allowed the delegation to the two person panel to be effective and no review of legislative history was necessary).

44. 130 S.Ct. at 2640.

45. Ronald Turner, *On the Authority of the Two-Member NLRB: Statutory Interpretation Approaches and Judicial Choices*, 27 HOFSTRA LAB. & EMP. L.J. 13, 19 (2009) (citations omitted). Intentionalism is the method of statutory interpretation that "seeks to discern the meaning and understanding of a statutory provision as held by the legislature and the legislators who enacted the law" through an analysis of the "statutory text and/or in legislative history (conference and committee reports, floor debates, statements by a bill's sponsors and cosponsors, etc.)." Championed by Justice Antonin Scalia, textualism is the method of statutory interpretation, " that argues that '[t]he text is the law, and it is the text that must be observed.'" *Id.* at 22 (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 1, 22 (Amy Guttman ed., 1997) (stating that textualism supports the interpretation that "the authoritive statement is the statutory text, not the legislative history or any other extrinsic material.").

46. *See* New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2644-45 (2010) (stating the objective of the statute was for efficient operations when the board is at full power).

was originally introduced to Congress.[47] In fact, "[in] the conference report, Senator Taft was advocating a seven-member Board which would in turn work in two panels of three members each."[48] The House bill, on the other hand, sought to abolish the old Board, and, therefore, "the increase from three to five Board members appears to be an obvious compromise between the House and Senate versions" of the Act.[49] Opponents to the bill, including Senator James E. Murray of Montana, argued that "[e]nlarging the Board [to seven members] is subject to the danger that it may make the Board unwieldy and interfere with efficient administration," and thus, Senator Murray concluded that the Board should only consist of a maximum of five members.[50]

When learning of the alterations to the Senate bill by the conference report, Senator Morse expressed his regret that the Bill would only increase the Board members to a total of five. He stated that:

> "even seven members might be considered insufficient; but at least a seven-man board would permit the Board to function as is provided for [his] section of the bill on a departmentalized basis of three members per department, leaving one member of the Board free to carry on much of the administrative work of the Board."[51]

However, the majority of Congress found Senator Morse's concerns to be groundless.[52] A reasonable conclusion is that the majority of Congress believed that the five member Board could nominally create two panels of three, with one member, probably the Chair as a member of both groups. In actuality, each panel would only need to have the quorum of two members present to decide cases. The suggestion that the legislative intent of the Act was to increase efficiency is also supported by a Washington Post article that was published

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47. *See* Turner, *supra* note 45, at n. 106 (quoting 93 CONG. REC. 3837 (Apr. 23 1947) (remarks of Sen. Taft); *see also* 93 CONG. REC. 1911 (Mar. 10, 1947) (remarks of Sen. Morse) (arguing that the intention of the Taft Hartley drafters was to allow the NLRB to sit in multiple panels of 3 not in a single large panel).

48. John E. Higgins, Jr., *Labor Czars-Commissars-Keeping Women in the Kitchen-The Purpose and Effects of the Administrative Changes Made By Taft-Hartley*, 47 CATH. U. L. REV. 941, 946 (1998); *see also* 93 CONG. REC. 5117, 5148 (May 12, 1947), *reprinted in* 2 NLRB, Legislative History of the Labor-Management Relations Act, 1947 at 1500 (1948) [hereinafter "NLRB, Legislative History of 1947"] (remarks of Sen. Aiken) ("The Senate measure would increase the NLRB to seven members.") ; 93 CONG. REC. 5117, 5146 (May 12, 1947), *reprinted in* 2 NLRB, Legislative History of 1947 at 1495 (remarks of Sen. Ball) ("[T]he new seven-member National Labor Relations Board which is to be set up.") ; 93 CONG. REC.5117, 5130 (May 12, 1947), *reprinted in* 2 NLRB Legislative History of 1947 at 1467 (remarks of Sen. O'Mahoney) ("So we now have reported by the committee a measure which proposes to increase the membership of the National Labor Relations Board from three to seven . . .").

49. Higgins, *supra* note 48, at 946 (noting that "there was surprisingly little discussion of the size of the Board in the debates").

50. 93 CONG. REC. 4139, 4158 (April 25, 1947), *reprinted in* 1 NLRB, Legislative History of 1947 at 1052 (1948) (remarks of Sen. Murray).

51. 93 CONG. REC. 6395, 6442 (June 5, 1947), *reprinted in* 2 NLRB, Legislative History of 1947 at 1562 (1948) (remarks of Sen. Morse).

52. Gerard D. Reilly, *The Legislative History of the Taft-Hartley Act,* 29 GEO. WASH. L. REV. 285, 300 (1960) (noting that Congress quickly overrode the veto of President Truman to ensure that the bill was passed in the form reported by the conference).

concurrently with the congressional debates over the passage of the Act.[53]

Therefore, even a cursory review of the legislative history of the Act reveals that the intent behind increasing the size of the Board was to increase efficiency through the use of multiple panels composed of members of the Board.[54] These smaller groups would mirror the old Board under the Wagner Act in that they would have three members with a quorum of two.[55] A reasonable interpretation of the Act, one which Justice Stevens rejected in the majority opinion in *New Process Steel*, is that Congress granted the Board the authority to delegate "all powers of the board" in a three member group with a quorum of two.[56] This would reflect an intent to allow such a group to act just as the old Board did.[57] Such an interpretation "harmonizes" and "gives meaningful effect" to the history and intent of the legislation in question.[58]

VALIDITY OF TWO MEMBER PRE-TAFT-HARTLEY DECISIONS

From the enactment of the Wagner Act in 1935 until the passage of the Taft-Hartley Act in 1947, the statutory requirements called for a three member board, with two members constituting a quorum.[59] Over the course of twelve years, there were three periods when the Board had only two members.[60] During these periods, the two-member Boards issued nearly 500 decisions.[61] The precedential value of these decisions is evidenced by the quantity of times these cases have been cited by state high courts,[62] federal district

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53. *Senate Labor Bill*, WASHINGTON POST, (April 26, 1947) *reprinted in* 93 CONG. REC. 5096, 5108 (May 9, 1947), *reprinted in* 2 NLRB Legislative History of 1947, at 1457 (1948) ("The Taft bill would give the NLRB seven members instead of three, making possible two panels consisting of three or more members to speed up the disposition of cases.").

54. Higgins, *supra* note 48, at 946-47 (providing a thorough outline of the intention of the drafters and supporters of the Act to increase the effectiveness of the Board by utilizing several small panels).

55. *See* 29 U.S.C. § 153(b) (2006) (stating that the Board under the Wagner Act provided for five members with the ability to delegate all powers to three members).

56. *Id.*

57. *Contra* New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2644 (2010) (holding that if Congress wanted the Board to act as it previously did it would not have changed the quorum requirement from two to three).

58. *Contra id*. at 2640, (stating that reading the word "continuously" into the delegation clause "is the only way to harmonize and give meaningful effect to all of the provisions in § 3(b)").

59. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 451 (1935) (codified as amended at 29 U.S.C. § 153 (2006)).

60. 130 S. Ct. at 2650; *see Members of the NLRB Since 1935,* NATIONAL LABOR RELATIONS BOARD, *available at* https://www.nlrb.gov/members-nlrb-1935 (denoting that the NLRB had two members on three separate occasions: 9/01/36 – 9/22/36; 8/27/40 – 11/25/40; 8/28/40 – 10/10/41).

61. 130 S. Ct. 2635, 2650 (2010).

62. *See, e.g.*, Vlasic Farms, Inc. v. Pennsylvania Labor Relations Bd., 565 Pa. 555 (Pa. 2001); Hotel & Rest. Emp. & Bartenders Union, Local No. 339 v. Boca Raton Club, 73 So. 2d 867 (Fla. 1954).

courts,[63] federal circuit courts,[64] and the U.S. Supreme Court.[65]

Significantly, Justice Stevens consistently maintained the validity of two-member Board decisions under statutory language prior to Taft-Hartley. Indeed, he was not only a member of the majority opinion in *NLRB v. Hendricks County Rural Elec. Membership Corp.*,[66] but he also authored the dissent in *Action Automotive Inc.*,[67] in which he cited to the two-member Board decision, *Botany Worsted Mills*, as authority.[68] Justice Stevens explained this confirmation of the pre-Taft-Hartley, two-member Board decisions and his corresponding denial of later, two-member Board decisions, as a result of Congress' "change" in the statute from "provid[ing for a Board quorum of two" to a Board quorum of three.[69] A comparison of the two statutes reveals that Congress did not merely change the Board's quorum requirement, but, rather, it also provided the Board with the authority to delegate all of its powers to panels whose composition and quorum mirrored that of the old Board.[70]

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63. *See*, *e.g.*, Air Canada v. NMB, No. 79 Civ. 4401 (CES), 1980 WL 73570 (S.D.N.Y. Nov. 14, 1980); New Bedford Loomfixers' Union v. Alpert, 110 F. Supp. 723 (Mass. Dist. Ct. 1953).

64. *See, e.g.*, Hunter Douglas, Inc. v. NLRB, 804 F.2d 808 (3d Cir. 1986); Montgomery Ward & Co., Inc. v. NLRB, 668 F.2d 291 (7th Cir. 1981); Westward-Ho Hotel Co. v. NLRB, 437 F.2d 1110 (9th Cir. 1971); NLRB v. Gen. Tube Co., 331 F.2d 751 (6th Cir. 1964); Douds v. Int'l Longshoremen's Ass'n, 241 F.2d 278 (2d Cir. 1957); NLRB v. Darlington Veneer Co., 236 F.2d 85 (4th Cir. 1956); NLRB v. Bemis Bro. Bag Co., 206 F.2d 33 (5th Cir. 1953); Whiting Corp. v. NLRB, 200 F.2d 43 (7th Cir. 1952); NLRB v. Clara-Val Packing Co., 191 F.2d 556 (9th Cir. 1951); Jones & Laughlin Steel Corp. v. NLRB, 146 F.2d 833 (5th Cir. 1945); NLRB v. Poultrymen's Serv. Corp., 138 F.2d 204 (3d Cir. 1943); Lebanon Steel Foundry v. NLRB, 130 F.2d 404 (D.C. Cir. 1942).

65. *See, e.g.*, NLRB v. Action Auto., Inc., 469 U.S. 490, 499 (1985); NLRB v. Hendricks Cnty. Rural Elec. Membership Corp., 454 U.S. 170 (1981); U.S. v. Ryan, 350 U.S. 299 (1956); Bethlehem Steel Co. v. N.Y. State Labor Relations Bd., 330 U.S. 767 (1947); NLRB v. E.C. Atkins & Co., 331 U.S. 398 (1947); Polish Nat'l Alliance of U.S. v. NLRB, 322 U.S. 643 (1944); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

66. 454 U.S. 170 (reviewing a decision made by a two member board).

67. 469 U.S. at 500 (citing a decision made by the two-member Board).

68. 27 N.L.R.B. 129 (1940) (holding that Botany Mill's employees have the right to collectively bargain) ("wherever possible, it is obviously desirable that, in determination of the appropriate unit, we render collective bargaining of the Company's employees an immediate possibility").

69. New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2644 (2010) ("[I]t is unsurprising that two members regularly issued Board decisions prior to Taft-Hartley, because the statute then provided for a board quorum of two") (citing 29 U.S. C. § 153(b)).

70. *Compare* Nat'l Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) ("[V]acancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members, shall at all times, constitute a quorum."), *with* Labor-Management Relations (Taft-Hartley) Act, 29 U.S.C. § 153(b) (2006) ("[B]oard is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . [V]acancy in the Board shall not impair the right of the remaining members to exercise all of the power 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").

When comparing these two statutes, it is clear that Congress intended to: 1) grant the Board the authority to delegate all of its powers to a three member group; 2) maintain the Board's authority to act despite a vacancy; and 3) increase the Board's quorum requirement to three, while explicitly stating that a delegee group's quorum requirement was two.[71] Thus, a plain reading of the text would be that a group to which the Board delegated authority needs only two members present to validly act. In *New Process*, the majority stated that if this is what Congress intended when enacting the Act,it could have added explicit, clarifying language to the statute that a delegee group could continue to act, despite the Board's membership falling below the quorum requirement.[72] Rather, the majority argued that "a straightforward understanding of the text" evidences a requirement that the "delegee group . . . *maintain* a membership of three."[73] It is ironic that the majority considered reading a term such as "maintain" as "straightforward."[74]

The majority also raised the concern that to adopt the government's reading "allows two members to act as the Board *ad infinitum*, which dramatically undercuts the significance of the Board quorum requirement by allowing its permanent circumvention."[75] This is perhaps the most intellectually dishonest statement posited by the majority because the delegation of authority to the two-member Board specified that all of the powers "would be revoked when the Board's membership returned to at least three members."[76] Therefore, the Court's concern about the Board's ability to circumvent the statute is misplaced, since the circumvention could only last as long as the President and Congress would allow through delays in the nomination and appointment process of additional Board members.[77]

The majority's argument, that the Board incorrectly interpreted the Act when it found that a two-member panel was permitted to issue decisions until additional members were confirmed to the Board, is misguided. A careful and plain reading of the 1935 and 1947 statutes together, along with the legislative history of the 1947 Act, reveal that Congress intended, and statutorily provided, for two-member delegations to act with all the powers of the Board.

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71. *See* 29 U.S.C. § 153 (2006).

72. *See* 130 S. Ct. at 2644.

73. *Id.* at 2642 (emphasis added).

74. New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2642 (2010).

75. *Id.* at 2639.

76. App. Addendum to Br. for Pet'r at 4(A), 5(A)(7)(a); *see also* New Process Steel, 130 S. Ct. 2635 (2009).

77. *See* 130 S.Ct. at 2639 (noting that Presidential recess appointments of new delegates automatically terminated the two member delegation).

EFFECTS

The direct result of the *New Process Steel* decision is that six Board decisions in which the Board found against the employer were vacated.[78] However, the impact of this ruling is that all 595 decisions and orders of the Schaumber-Liebman Board were essentially declared invalid.[79] To gain a better understanding of the true impact of the Court's ruling, one must analyze the types of cases, or perhaps more appropriately, the types of protected rights that the Court's decision affected. It must be noted that although the two-member Board issued nearly 600 decisions and orders, it was aware of the difficulties involved in a two-member, decision-making body. Thus, the Board strove "to issue decisions during this time period only in areas where the cases [were] more factually intensive or the law [was] more-clearly settled, and [had] avoided as far as possible controversial issues."[80]

An analysis of the six cases directly affected by the *New Process* decision reveals that each case involved underlying claims of substantive rights of unions and that each of the cases were originally decided by the Board in favor of the unions.[81] Five of the circuit courts upheld the challenged Board decisions,[82] while the D.C. Circuit reversed the Board's decision and found in favor of the employer.[83] Lest one conclude that this was a mere anomaly, a more in depth analysis of the substantive rights cases reveals that the six cases were in representative of the pro-union decisions of the two-member Board.[84]

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78. New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2645 (2010)*;* New Process Steel, L.P., 353 N.L.R.B. 13 (2008);Laurel Baye Healthcare of Lake Lanier, 352 N.L.R.B. 30 (2008); Ne. Land Servs., 352 N.L.R.B. 89 (2008); Snell Island SNF, 352 N.L.R.B. 106 (2008); Narricot Indus., 353 N.L.R.B. 82 (2009); Interstate Bakeries Corp., 353 N.L.R.B. 14 (2008).

79. *See* Alvin P. Blyer, *Some Current Thinking at the Board from Brooklyn and Beyond*, 28 HOFSTRA LAB. & EMP. L.J. 175, 175 (2010) (noting the Court's decision invalidated more than 500 cases decided by the two member board between 2007- 2010 because the Board lacked authority to rule on these decisions).

80. Robert Bonsall & David J. Murphy, *The New"Obama National Labor Relations Board: Attack, Retreat or Both?* EMP. L. INST. 38TH ANNUAL COURSE HANDBOOK, Ch.. 25 (2009) (on file with author).

81. *See* New Process Steel*,* 353 N.L.R.B. 13 (2008) (holding that employer violated section 8(a)(5) by failing to collectively bargain with Union); Laurel Baye Healthcare, 352 N.L.R.B. 30 (2008) (finding that employer used unfair labor tactics by failing to collectively bargain with Union before making drastic policy changes); Ne. Land Servs., 352 N.L.R.B. 89 (2008) (holding that employer violated § 8(a)(1) by using overly broad employee contracts); Snell Island SNF, 352 N.L.R.B. 106 (finding that employer used unfair labor tactics by refusing to bargain with Union); 353 N.L.R.B. 82 (2009) (holding that employer violated § 8(a)(5) after refusing to recognize Union); Narricot Indus., 353 N.L.R.B. 14 (2008) (finding that employer engaged in unfair labor practices by discriminating against an employee who had not joined a particular Union).

82. *See* Teamsters Local Union No. 523 v. NLRB, 590 F.3d 849 (10th Cir. 2009) (affirming the Board's decision against the employer); Narricot Indus., v. NLRB, 587 F.3d 654 (4th Cir. 2009); Snell Island SNF v. NLRB, 568 F.3d 410 (2d Cir. 2009); New Process Steel, 564 F.3d 840 (7th Cir. 2009); Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36 (1st Cir. 2009).

83. *See* 564 F.3d at 472-73 (holding that the two member board lacked a quorum and therefore lacked authority).

84. *See infra* Part IV.

Although the two-member Board issued 595 decisions and orders, this paper will focus on the 429 published decisions of the two-member Board.[85] Of these decisions, eighty-seven cases dealt with issues other than allegations of employer violations of union/worker rights, namely, twenty-nine involved issues of union certification or decertification,[86] thirty-nine involved claims by members against their own unions or claims made by one union against another union,[87]

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85. Melissa Hart, *Business-Like: The Supreme Court's 2009-2010 Labor and Employment Decisions*, 14 EMP. RTS. & EMPL. POL'Y J. 207, 207 (2010) (stating that while almost 600 Board decisions were called into question after the *New Process Steel* decision, the practical consequences are not significantly damaging).

86. *See* Parsec, Inc., 353 N.L.R.B. 96 (2009); Rockspring Dev., Inc., 353 N.L.R.B. 105 (2009); Durham Sch. Servs., L.P., 353 N.L.R.B. 129 (2009); DLC Corp, 353 N.L.R.B. 130 (2009); Reg'l Emergency Med. Servs., Inc., 354 N.L.R.B. 20 (2009); Goffstown Truck Ctr., Inc., 354 N.L.R.B. 49 (2009); Chenega Integrated Sys., L.L.C., 354 N.L.R.B. 56 (2009); Sequoias Portola Valley, 354 N.L.R.B. 74 (2009); Colgate Scaffolding & Equip. Corp., 354 N.L.R.B. 76 (2009); Unisys Corp., 354 N.L.R.B. 92 (2009) Cardinal Health Care, Inc., 352 N.L.R.B. 19 (2008); Aircraft Servs. Int'l, Inc., 352 N.L.R.B 23 (2008); Butler Asphalt L.L.C, 352 N.L.R.B. 32 (2008); Bally's Park Place Inc., 352 N.L.R.B. 51 (2008); Trump Plaza Assocs., 352 N.L.R.B. 76 (2008); Fresenius USA Mfg., Inc., 352 N.L.R.B. 86 (2008); Foxwoods Resort Casino, 352 N.L.R.B. 92 (2008); Magic Beans, LLC, 352 N.L.R.B. 107 (2008); Lily Transp. Corp., 352 N.L.R.B. 121 (2008); Coca-Cola Enters., Inc., 352 N.L.R.B. 123 (2008); Foster Poultry Farms, 352 N.L.R.B. 136 (2008); Anchor-Harvey Components, L.L.C, 352 N.L.R.B. 140 (2008); We Care Transp., L.L.C, 353 N.L.R.B. 9 (2008); Air Serv. Corp., 353 N.L.R.B. 11 (2008); Swissport USA, Inc., 353 N.L.R.B. 18 (2008); PPG Aerospace Indus., Inc., 353 N.L.R.B. 23 (2008); Charter Sch. Admin. Servs., Inc., 353 N.L.R.B. 35 (2008); Primeflight Aviation Servs., Inc., 353 N.L.R.B. 45 (2008); Global Aviation Servs., L.L.C, 353 N.L.R.B. 57 (2008).

87. *See* SSA Marine Inc., 355 N.L.R.B. 3 (2010); Laborer's Local 1072, 355 N.L.R.B. 6 (2010); Elevator Constructors Local 8, 355 N.L.R.B. 13 (2010); Operating Eng'rs Local 324, 353 N.L.R.B. 85 (2009); Elec. Workers Local 47, 353 N.L.R.B. 113 (2009); Michigan Laborer's Dist. Council, 353 N.L.R.B. 114 (2009); Am. Postal Workers Union Area Local 984, 353 N.L.R.B. 124 (2009); Stagehands Referral Serv., 354 N.L.R.B. 7 (2009); Iron Workers, Local 378, 354 N.L.R.B. 19 (2009); Elec. Workers Local 71, 354 N.L.R.B. 46 (2009); Plasterers Local 262, 354 N.L.R.B. 47 (2009);Teamsters Local 886, 354 N.L.R.B. 52 (2009); Chicago Reg'l Council of Carpenters, 354 N.L.R.B. 73 (2009); Elec. Workers Local 42, 354 N.L.R.B. 78 (2009); Operating Eng'rs Local 150, 354 N.L.R.B. 89 (2009); Carpenters Local 1780, 354 N.L.R.B. 101 (2009); Carpenters, 354 N.L.R.B. 104 (2009); Operating Eng'rs Local 150, 354 N.L.R.B. 112 (2009); Laborers Local 1184, 354 N.L.R.B. 113 (2009); Carpenters Local 43, 354 N.L.R.B. 122 (2009); Mason Tenders Local Union # 388, 352 N.L.R.B. 2 (2008); Int'l Alliance of Theatrical Stage Emps., 352 N.L.R.B. 7 (2008); Aircraft Servs. Int'l, Inc., 352 N.L.R.B. 23 (2008); United Workers of Am., 352 N.L.R.B. 45 (2008); Int'l Union of Operating Eng'rs, 352 N.L.R.B. 54 (2008); Int'l Ass'n of Machinists and Aerospace Workers, District Lodge 776, 352 N.L.R.B. 57 (2008); Int'l Union of Operating Eng'rs, 352 N.L.R.B. 77 (2008); Nat'l Postal Mail Handlers Union, 352 N.L.R.B. 91 (2008); Puget Sound Area Local #298, 352 N.L.R.B. 98 (2008); Local One-L, 352 N.L.R.B. 114 (2008); Laborers Int'l Union of N. Am., Local Union 578, 352 N.L.R.B. 118 (2008); Lorge Sch., 352 N.L.R.B. 119 (2008); Elec. Workers Local 3, 352 N.L.R.B. 124 (2008); Int'l Alliance of Theatrical Stage Emps., 352 N.L.R.B. 128 (2008); Auto Workers Local 155, 352 N.L.R.B. 130 (2008); Graphic Commc'n Local 17B, 353 N.L.R.B. 4 (2008); Interstate Bakeries Corp., 353 N.L.R.B. 14 (2008); Food & Commercial Workers Local 4, 353 N.L.R.B. 47 (2008); Laborers Local 6, 353 N.L.R.B. 62 (2008).

and nineteen involved purely procedural issues.[88] The remaining 342 published cases involved various substantive rights of workers and can be broken down into the following four categories according to the underlying claims of each case: 1) violations of 8(a)(1) only; 2) violations of 8(a)(3) or a combination of 8(a)(1) and 8(a)(3) violations; 3) violations of 8(a)(5) or a combination of 8(a)(1) and 8(a)(5) violations; or 4) a combination of alleged violations of multiple sections of the Act.[89]

To gain a better perspective on each of these categories, and, thus, a true understanding of the impact of the Court's *New Process Steel* decision, this paper will classify the decisions within each category according to whether the Board's decision favored the Union, the employer, or was a split decision in which the Board resolved some claims in favor of the Union and others in favor of the employer. Such an analysis reveals a strong pattern of the Board's decisions and thus, perhaps, a possible motivation for the Court's *New Process Steel* decision.[90]

The Act sets forth the rights and obligations of both employers and labor unions.[91] Generally, claims brought before the Board deal with certification elections or unfair labor practices.[92] Section 8(a) sets forth the specific actions of employers deemed to be unfair labor practices and, thus, result in the Board imposing an appropriate remedy, such as an order of backpay,[93]

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88. *See* Expert Elec., Inc., 355 N.L.R.B. 12 (2010); Sleepy's Inc., 355 N.L.R.B. 21 (2010); CNN Am., Inc., 353 N.L.R.B. 94 (2009); SS1 Entm't, L.L.C., 353 N.L.R.B. 115 (2009); Horizon Contract Glazing, Inc., 353 N.L.R.B. 118 (2009); Metro Demolition Contracting Corp., 354 N.L.R.B. 48 (2009); Milwaukee City Ctr., L.L.C, 354 N.L.R.B. 77 (2009)); CNN Am. Inc., 352 N.L.R.B. 40 (2008); N.Y. Newspaper Printing Pressmen's Union No. 2, 352 N.L.R.B. 63 (2008); CNN Am., Inc. 352 N.L.R.B. 64 (2008); Bashas' Food City, 352 N.L.R.B. 82 (2008); CNN Am., Inc., 352 N.L.R.B. 85 (2008); Toering Elec. Co., 352 N.L.R.B. 102 (2008); Honeywell Elec. Materials Mfg., L.L.C., 352 N.L.R.B. 135 (2008); Carson Trailer, Inc., 352 N.L.R.B. 144 (2008); Faurecia Auto. Seating, 353 N.L.R.B. 5 (2008); Fluor Daniel, Inc., 353 N.L.R.B. 15 (2008); Shane Steel Processing, Inc., 353 N.L.R.B. 58 (2008); Long Island Head Start Child Dev. Servs., 353 N.L.R.B. 70 (2008).

89. *See* 29 U.S.C. § 158(a)(1) (2006) (preventing employer interference in the section 7 rights attributed to employees); 29 U.S.C. § 158 (a)(3) (2006) (preventing employers from encouraging or discouraging employees from participation in Unions); 29 U.S.C. § 153(a)(5) (2006) (requiring employers to collectively bargain with employee's Union representatives).

90. *See* Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1002 (2006) (discussing how judicial decisions can be affected by the judge's own perception of real world models of fairness in employment practices).

91. National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151- 69 (1953).

92. Philip M. Borger, *Hold the Salt: Should Non-Genuine Applicants be Treated as Employees Under the NLRA? Toering Electric Co., 351 N.L.R.B. 18, 2007 WL 2899733 (Sept. 29, 2007)*, 77 U. CIN. L. REV. 1247, 1250 (Spring 2009) (describing the Board's role in remedying unfair labor practices under the NLRA).

93. *See* Aneco Inc. v. NLRB, 285 F.3d 326, 329 (4th Cir. 2002) (discussing the Board's ability to order backpay for an employer's unlawful labor practices as a way to restore the employee to a pre-discrimination position).

reinstatement,[94] expungement of written disciplinary reports from personnel file,[95] or an affirmative order to bargain.[96]

8(a)(1) violations

Section 8(a)(1) of the Act prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed by section 7."[97] Section 7 rights include:

> the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157 (2006). The two-member Board decided thirty-nine cases involving allegations of 8(a)(1) violations, with thirty decisions favoring the unions,[98] three decisions favoring employers,[99] and six split decisions.[100]

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94. *See* Golden Day Sch., Inc. v. NLRB, 644 F.2d 834, 841 (9th Cir. 1981) (finding that in certain circumstances "reinstatement [is] clearly necessary to vindicate the purposes of the act, deter future violations, and preserve industrial peace").

95. *See* Wal-Mart Stores, Inc. v. NLRB, 400 F.3d 1093, 1100 (8th Cir. 2005) (upholding but while still limiting the NLRB's order expunging references to disciplinary actions for protected activity from the employee's personnel file).

96. NLRB v. Goya Foods of Fla., 525 F.3d 1117, 1133 (11th Cir. 2008) (justifying an affirmative order to bargain because Goya's unfair labor practices had hindered Union's ability to successfully negotiate).

97. 29 U.S.C. § 158(a)(1) (2006).

98. *See* CSS Healthcare Servs., Inc., 355 N.L.R.B. 5 (2010); Bryant Health Ctr., Inc., 353 N.L.R.B. 80 (2009); White Oak Manor, 353 N.L.R.B. 83 (2009); McElroy Coal Co., 353 N.L.R.B. 108 (2009); Woodbury Partners, L.L.C., 353 N.L.R.B. 112 (2009); Tom Arand, 353 N.L.R.B. 128 (2009); Family Healthcare, Inc., 354 N.L.R.B. 29 (2009); Hearn Constr., 354 N.L.R.B. 37 (2009); Tex. Dental Ass'n, 354 N.L.R.B. 57 (2009); Coastal Insulation Corp., 354 N.L.R.B. 70 (2009); Fortuna Enters., L.P., 354 N.L.R.B. 95 (2009); Tex. Dental Ass'n, 354 N.L.R.B. 107 (2009);Trump Marina Assocs., 354 N.L.R.B. 123 (2009); Knightsbridge Heights Rehab Care Ctr., 352 N.L.R.B. 5 (2008); Biosource Landscaping Servs., L.L.C., 352 N.L.R.B. 6 (2008); Mega Force Prods. Corp., 352 N.L.R.B. 27 (2008); Crowne Plaza Hotel, 352 N.L.R.B. 55 (2008); Windstream Corp., 352 N.L.R.B. 68 (2008); Dickens, Inc., 352 N.L.R.B. 84 (2008); Tecumseh Packaging Solutions, Inc., 352 N.L.R.B. 87 (2008); Ne. Land Servs. 352 N.L.R.B. 89 (2008); Loyalhanna Care Assoc., 352 N.L.R.B. 105 (2008); Stanadyne Auto. Corp., 352 N.L.R.B. 117 (2008); Walgreen Co., 352 N.L.R.B. 137 (2008); Sacred Heart Med. Ctr., 353 N.L.R.B. 19 (2008); Case Farms of N.C. Inc., 353 N.L.R.B. 26 (2008); Alton H. Piester, L.L.C., 353 N.L.R.B. 33 (2008); Forest Hills Supermarket, Inc., 353 N.L.R.B. 37 (2008); Ashley Furniture Indus., 353 N.L.R.B. 71 (2008); Harco Asphalt Paving, Inc., 353 N.L.R.B. 74 (2008).

99. *See* Akal Sec., Inc. 354 N.L.R.B. 11 (2009); Corr. Corp. of Am., 354 N.L.R.B. 105 (2009); Mega Force Prods. Corp., 352 N.L.R.B. 70 (2008).

100. *See* Saigon Gourmet Rest., Inc. 353 N.L.R.B. 110 (2009); Venetian Casino Report, L.L.C., 354 N.L.R.B. 9 (2009); Susan Oles, DMD, 354 N.L.R.B. 13 (2009); Superior Protection, Inc., 354 N.L.R.B. 12 (2009); Cnty. Waste of Ulster, 354 N.L.R.B. 54 (2009); Brighton Retail, Inc., 354 N.L.R.B. 62 (2009).

These cases involved allegations of a variety of unfair labor practices, including allegations of using threats to deter union representation or strikes,[101] prohibiting communication regarding unions,[102] or creating the impression of surveillance to discourage participation in or support for the union.[103] Thus, in deciding cases within this category, the two-member Board found, in whole or in part, that the employers had violated section 8(a)(1) of the Act in thirty-three out of the thirty-six cases that dealt with substantive rights of the unions.

Violations of Section 8(a)(3) or Sections 8(a)(1) & 8(a)(3)

Section 8(a)(3) of the Act provides that an employer commits an unfair labor practice if it discriminates "in regard[s] to hir[ing] or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[104] The two-member Board decided eighty-seven cases involving violations of 8(a)(3), or combined claims of 8(a)(1) and 8(a)(3) violations,[105] with fifty-four decisions favoring

101. *See, e.g.*, Biosource Landscaping Servs, 352 N.L.R.B. 6 (2008) (threatening plant closure if Union voted in as representative); Kingsbridge Heights, 352 N.L.R.B. 5 (2008) (threatening to delay reinstatement if employees went on strike).

102. *See, e.g.*, Forest Hills Family Foods, 352 N.L.R.B. 37 (2008) (denying union access to property); Sacred Heart Med. Ctr., 352 N.L.R.B. 19 (2008).

103. *See, e.g.*, Susan Oles, DMD, 354 N.L.R.B. 13 (2009) (interrogating and threatening employees about their protected activities by implying that their activities were under surveillance); Harco Asphalt Paving, Inc., 353 N.L.R.B. 74 (2008) (threatening to call or actually contacting the police to remove union representatives, photographing representatives, and claiming it would obtain restraining orders).

104. 29 U.S.C. § 158(a)(3) (1988).

105. *Id.* at § 158(a)(1)-(3).

the unions,[106] ten decisions favoring the employers,[107] and twenty-three split decisions.[108] These cases involved a variety of unfair labor practices, including refusing to rehire union workers,[109] refusing to hire union

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106. *See* Universal Laundries & Linen Supply, 355 N.L.R.B. 17 (2010); Transp. Solutions, Inc., 355 N.L.R.B. 22 (2010); Cadence Innovation, LLC, 353 N.L.R.B. 77 (2009); Post Tension of NV, Inc., 353 N.L.R.B. 87 (2009); Mid-States Express, 353 N.L.R.B. 91 (2009); Paint Am. Servs., Inc., 353 N.L.R.B. 100 (2009); Ridgeview Indus., 353 N.L.R.B. 119 (2009); Diversified Enters., 353 N.L.R.B. 120 (2009); MSK Cargo/ King Express, 353 N.L.R.B. 121 (2009); Extreme Servs. Corp., 354 N.L.R.B. 6 (2009); Los Angeles Airport Hilton Hotel & Towers, 354 N.L.R.B. 17 (2009); Camelot Terrace, Inc., 354 N.L.R.B. 24 (2009); Cadence Innovation, LLC, 354 N.L.R.B. 28 (2009); Inland Press, 354 N.L.R.B. 36 (2009); John Succi Gen. Contractors, 354 N.L.R.B. 38 (2009); KY River Med. Ctr., 354 N.L.R.B. 42 (2009); Vishal Constr., Inc., 354 N.L.R.B. 43 (2009); Legacy Health Sys., 354 N.L.R.B. 45 (2009); Powellton Coal Co., 354 N.L.R.B. 60 (2009); Phoenix Finishing, Inc., 354 N.L.R.B. 64 (2009); Regal Health & Rehab Ctr., Inc., 354 N.L.R.B. 71 (2009); Regency Grande Nursing & Rehab. Ctr., 354 N.L.R.B. 75 (2009); Global Sign Indus., 354 N.L.R.B. 81 (2009); Parksite Grp., 354 N.L.R.B. 90 (2009); Empire State Weeklies, Inc., 354 N.L.R.B. 91 (2009); Signman, Inc., 354 N.L.R.B. 96 (2009); Gerhard's Appliances, Inc., 354 N.L.R.B. 124 (2009); Aluminum Casting & Eng'g Co., 352 N.L.R.B. 1 (2008); HWH Trading Corp., 352 N.L.R.B. 4 (2008); Found. Coal W., 352 N.L.R.B. 22 (2008); Paint Am. Servs., 352 N.L.R.B. 31 (2008); KY River Med. Ctr., 352 N.L.R.B. 33 (2008); McBurney Corp., 352 N.L.R.B. 35 (2008); Midwest Generation, EME, LLC, 352 N.L.R.B. 36 (2008); Mays Elec. Co., 352 N.L.R.B. 49 (2008); Solartec, Inc., 352 N.L.R.B. 52 (2008); Frye Electric, Inc., 352 N.L.R.B. 53 (2008); Gelita USA Inc., 352 N.L.R.B. 59 (2008); Pennant Foods Co., 352 N.L.R.B. 62 (2008); Glen Rock Ham, 352 N.L.R.B. 69 (2008); Allied Mech., 352 N.L.R.B. 110 (2008); Barstow Cmty. Hosp., 352 N.L.R.B. 125 (2008); John T. Jones Constr. Co., 352 N.L.R.B. 126 (2008); M.V.M., Inc., 352 N.L.R.B. 133 (2008); Jerry Ryce Builders, 352 N.L.R.B. 143 (2008); Air Mgmt. Servs., 352 N.L.R.B. 145 (2008); Camelot Terrace, Inc., 353 N.L.R.B. 20 (2008); ADB Util. Contractors, 353 N.L.R.B. 21 (2008); Sawgrass Auto Mall, 353 N.L.R.B. 40 (2008); United Plasterers, LLC, 353 N.L.R.B. 44 (2008); St. George Warehouse, 353 N.L.R.B. 50 (2008); Midwest Psychological Ctr., 353 N.L.R.B. 51 (2008); Laborers Local 6 (Anderson Interiors), 353 N.L.R.B. 64 (2008); Wilkett Enters., LLC, 353 N.L.R.B. 72 (2008).

107. *See* Tower Auto. Operations USA I, LLC, 355 N.L.R.B. 1 (2010); Fluor Daniel, Inc., 353 N.L.R.B. 79 (2009); Trade Fair Supermarkets, 354 N.L.R.B. 16 (2009); Tinney Rebar Servs., 354 N.L.R.B. 61 (2009); Murrill Elec., LLC, 352 N.L.R.B. 96 (2008); Blue Diamond Growers, 353 N.L.R.B. 6 (2008); Domsey Trading Corp., 353 N.L.R.B. 12 (2008); Horizon Contract Glazing, Inc., 353 N.L.R.B. 16 (2008); New York Post, 353 N.L.R.B. 30 (2008); Faurecia Exhaust Sys., 353 N.L.R.B. 34 (2008).

108. *See* Cintas Corp., 353 N.L.R.B. 81 (2009); Green Valley Manor, LLC, 353 N.L.R.B. 92 (2009); Trump Marina Hotel Casino, 353 N.L.R.B. 93 (2009); Loparex LLC, 353 N.L.R.B. 126 (2009); United Plasterers, LLC, 354 N.L.R.B. 55 (2009); Action Carting Envtl. Servs., 354 N.L.R.B. 84 (2009); DPI New England, 354 N.L.R.B. 94 (2009); Starbucks Coffee Co., 354 N.L.R.B. 99 (2009); Allstate Power Vac, Inc., 354 N.L.R.B. 111 (2009); Desert Springs Hosp. Med. Ctr., 352 N.L.R.B. 16 (2008); Baptista's Bakery, 352 N.L.R.B. 72 (2008); Piner's NAPA Ambulance Serv., 352 N.L.R.B. 74 (2008); RCC Fabricators, Inc., 352 N.L.R.B. 88 (2008); Wal-Mart Stores, 352 N.L.R.B. 103 (2008); McBurney Corp., 352 N.L.R.B. 112 (2008); E. Buffet Rest., 352 N.L.R.B. 116 (2008); Inn at Fox Hollow, 352 N.L.R.B. 127 (2008); Post Tension of NV, Inc., 352 N.L.R.B. 131 (2008); Honeywell Elec. Materials Mfg., LLC, 352 N.L.R.B. 135 (2008); Hanson Material Serv. Corp., 353 N.L.R.B. 10 (2008); The Cont'l Grp., 353 N.L.R.B. 31 (2008); Dr. Rico Perez Prods., 353 N.L.R.B. 43 (2008); Chinese Daily News, 353 N.L.R.B. 66 (2008).

109. *See, e.g.*, Vishal Constr., Inc., 354 N.L.R.B. 43 (2009) (finding that the employer had discriminated against union workers with poor rehire practices); Post Tension of NV, Inc., 353 N.L.R.B. 87 (2009) (holding that the employer had violated Section 8(a)(1) of the Act by, among other things, threatening striking workers with difficult rehire processes).

members,[110] or discharging members.[111] Thus, the two-member Board found that the employers violated section 8(a)(3) or sections 8(a)(1) and 8(a)(3) of the Act in seventy-seven out of the eighty-seven cases dealing with these rights.

VIOLATIONS OF 8(A)(5) OR COMBINATIONS OF 8(A)(1) & 8(A)(5)

Section 8(a)(5) provides that an employer commits an unfair labor practice if it refuses "to bargain collectively with the representatives of his employees." The two-member Board decided 159 cases within this this category, resulting in 135 decisions in favor of the unions,[112]

110. *See, e.g.*, John Succi Gen. Contractors, 354 N.L.R.B. 38 (2009); Inland Press, 354 N.L.R.B. 36 (2009) (finding an employer's refusal to hire a union worker violated Section 8(a)(3)).

111. *See, e.g.*, Trump Marina Hotel Casino, 353 N.L.R.B. 93 (2009) (holding that the employer's threat to fire union members violated Section 8(a)(1)); Mid-States Express, Inc., 353 N.L.R.B. 91 (2009) (finding that the employer's threat to close the plant constituted a violation of the Section 8(a)(1)).

112. *See* LBE, Inc., 354 N.L.R.B. 125 (2010); CG's Law & Janitorial Serv., 354 N.L.R.B. 126 (2010); Fred Meyer Stores, 354 N.L.R.B. 127 (2010); Am. Benefit Corp., 354 N.L.R.B. 129 (2010); ABB Inc., 355 N.L.R.B. 2 (2010); Holcomb & Hoke Mfg. Co., 355 N.L.R.B. 4 (2010); Aloft Chicago O'Hare, 355 N.L.R.B. 9 (2010); McCarthy Constr. Co., 355 N.L.R.B. 10 (2010); Aramark Educ. Servs., 355 N.L.R.B. 11 (2010); ADF, Inc., 355 N.L.R.B. 14 (2010); Drawn Metal Prods. Div. Co., 355 N.L.R.B. 15 (2010); New Country Audi, Inc., 355 N.L.R.B. 16 (2010); Narricot Indus., 353 N.L.R.B. 82 (2009); Sheehy Enterprises, Inc., 353 N.L.R.B. 84 (2009); Coastal Cargo Co., 353 N.L.R.B. 86 (2009); Triple A Fire Prot., 353 N.L.R.B. 88 (2009); Asher Candy, Inc., 353 N.L.R.B. 95 (2009); Cardi Corp., 353 N.L.R.B. 97 (2009); Lakeland Neurocare Ctr., 353 N.L.R.B. 106 (2009); Resistflame Acquisition Co., 353 N.L.R.B. 107 (2009); Essex Valley Visiting Nurses Ass'n, 353 N.L.R.B. 109 (2009); N. Oakland Med. Ctr., 353 N.L.R.B. 111 (2009); S. Power Co., 353 N.L.R.B. 116 (2009); Five Star Interiors, LLC, 353 N.L.R.B. 122 (2009); Divi Carina Bay Resort, 353 N.L.R.B. 131 (2009); PDK Invs., LLC, 354 N.L.R.B. 1 (2009); Monmouth Care Ctr., 354 N.L.R.B. 2 (2009); Wrangell Seafoods, Inc., 354 N.L.R.B. 3 (2009); Long Beach Press-Telegram, 354 N.L.R.B. 4 (2009); New York Presbyterian Hosp., 354 N.L.R.B. 5 (2009); Hartford Head Start Agency, 354 N.L.R.B. 15 (2009); Rochelle Waste Disposal, LLC, 354 N.L.R.B. 18 (2009); M&B Servs., 354 N.L.R.B. 21 (2009); Hartzheim Dodge Hayward, 354 N.L.R.B. 22 (2009); Mays Printing Co., 354 N.L.R.B. 23 (2009); Santa Cruz Skilled Nursing Ctr., 354 N.L.R.B. 25 (2009); Eagle Ray Electric Co., 354 N.L.R.B. 27 (2009); Cook DuPage Transp. Co., 354 N.L.R.B. 31 (2009); Cox Ohio Publ'g, 354 N.L.R.B. 32 (2009); A & C Healthcare Servs., 354 N.L.R.B. 33 (2009); Spartan Indus., Inc., 354 N.L.R.B. 34 (2009); Postal Serv., 354 N.L.R.B. 58 (2009); Liberty Source W, LLC, 354 N.L.R.B. 59 (2009); Fuel Sys., Inc., 354 N.L.R.B. 63 (2009); Shasta Reg'l Med. Ctr., 354 N.L.R.B. 65 (2009); Courtesy Bus Co., Inc., 354 N.L.R.B. 66 (2009); Dodge Printing, LLC, 354 N.L.R.B. 67 (2009); Fremont Med. Ctr. & Rideout Mem'l Hosp., 354 N.L.R.B. 68 (2009); Thoele Asphalt Paving, 354 N.L.R.B. 69 (2009); Mercedes-Benz of Orlando, 354 N.L.R.B. 72 (2009); Compucom Sys., Inc., 354 N.L.R.B. 87 (2009); Fred Meyer Stores, 354 N.L.R.B. 88 (2009); Harmon Auto Glass, 354 N.L.R.B. 98 (2009); Hartzheim Dodge, Inc., 354 N.L.R.B. 100 (2009); APS Events, LLC, 354 N.L.R.B. 102 (2009); Supreme Delivery Serv., 354 N.L.R.B. 103 (2009); Compass Grp. N. Am., 354 N.L.R.B. 106 (2009); Eagle Ray Electric Co., 354 N.L.R.B. 109 (2009); Spring Air W., LLC, 354 N.L.R.B. 110 (2009); Crete Cold Storage, 354 N.L.R.B. 114 (2009); LBE, Inc., 354 N.L.R.B. 115 (2009); Bristol Hosp. EMS, 354 N.L.R.B. 116 (2009); E.A. Sween Co., 354 N.L.R.B. 117 (2009); Columbus Components Grp., LLC, 354 N.L.R.B. 118 (2009); Aerosol Specialties, LLC, 354 N.L.R.B. 119 (2009); Countywide Landfill, 352 N.L.R.B. 3 (2008); Windstream Corp., 352 N.L.R.B. 9 (2008); Proper Steel Erectors, Inc., 352 N.L.R.B. 11 (2008); Publ'n Printing Co., 352 N.L.R.B. 12 (2008); Quanta, 352 N.L.R.B. 13 (2008); Nat'l Broad. Co., 352 N.L.R.B. 15 (2008); Lorge Sch., 352 N.L.R.B. 17 (2008); Ralph's Grocery Co., 352 N.L.R.B. 18 (2008); Clarke Mfg

twelve decisions in favor of the employers,[113] and twelve split decisions.[114] These cases involved allegations of conduct such as the employer refusing to bargain with the exclusive bargaining agent of its employees,[115] or employers

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352 N.L.R.B. 25 (2008); N. Am. Linen, LLC, 352 N.L.R.B. 26 (2008); Shane Steel Processing, 352 N.L.R.B. 28 (2008); Area Trade Bindery Co., 352 N.L.R.B. 29 (2008); Laurel Baye Healthcare of Lake Lanier, LLC, 352 N.L.R.B. 30 (2008); Nat'l Fabco Mfg., 352 N.L.R.B. 37 (2008); California Gas Transport, 352 N.L.R.B. 38 (2008); Casino Aztar, 352 N.L.R.B. 41 (2008); Seneca Falls IGA, 352 N.L.R.B. 43 (2008); Coastal Int'l Sec., Inc., 352 N.L.R.B. 46 (2008); Washington Sprinkler Co., 352 N.L.R.B. 48 (2008); ABS Heating & Cooling, 352 N.L.R.B. 50 (2008); Bashas' Food City, 352 N.L.R.B. 56 (2008); Tech Valley Printing, 352 N.L.R.B. 58 (2008); Hosp. Pavia Perea, 352 N.L.R.B. 60 (2008); Essex Valley Visiting Nurses Ass'n, 352 N.L.R.B. 61 (2008); Hamilton Sunstrand, 352 N.L.R.B. 65 (2008); Legal Servs. of N. California, 352 N.L.R.B. 66 (2008); Benjamin Franklin Plumbing, 352 N.L.R.B. 71 (2008); Air Climate Sys., Inc., 352 N.L.R.B. 75 (2008); Palm Beach Metro Transp., LLC, 352 N.L.R.B. 79 (2008); Am. Standard Cos., 352 N.L.R.B. 80 (2008); Tech Valley Printing, Inc., 352 N.L.R.B. 81 (2008); Allied Mech., 352 N.L.R.B. 83 (2008); Talmadge Park, Inc., 352 N.L.R.B. 90 (2008); Bloomfield Health Care Ctr., 352 N.L.R.B. 94 (2008); Bally's Atl. City, 352 N.L.R.B. 95 (2008); Alta Vista Reg'l Hosp., 352 N.L.R.B. 100 (2008); Stockbridge Country Manor, 352 N.L.R.B. 104 (2008); Shores Acres Rehab. & Nursing Ctr., 352 N.L.R.B. 106 (2008); Goya Foods of FL, 352 N.L.R.B. 109 (2008); First Transit, Inc., 352 N.L.R.B. 111 (2008); Proper Steel Erectors, Inc., 352 N.L.R.B. 113 (2008); Verizon N., Inc., 352 N.L.R.B. 120 (2008); Structure Tone, Inc., 352 N.L.R.B. 132 (2008); Town & Country Plumbing & Heating, 352 N.L.R.B. 139 (2008); Trump Plaza Hotel & Casino, 352 N.L.R.B. 146 (2008); Union-Tribune Publ'g Co., 353 N.L.R.B. 2 (2008); Metro. Home Health Care Inc., 353 N.L.R.B. 3 (2008); Carambola Beach Resort, 353 N.L.R.B. 8 (2008); New Process Steel, LP, 353 N.L.R.B. 13 (2008); Postar Coal Co., 353 N.L.R.B. 17 (2008); Beverage Dispensing Sys., 353 N.L.R.B. 22 (2008); Laurel Bay Health & Rehab. Ctr., 353 N.L.R.B. 24 (2008); New Process Steel, LP, 353 N.L.R.B. 25 (2008); Wilshire Plaza Hotel, 353 N.L.R.B. 29 (2008); Foxwoods Resort Casino, 353 N.L.R.B. 32 (2008); Rochelle Waste Disposal, 353 N.L.R.B. 38 (2008); Lily Transp. Corp., 353 N.L.R.B. 42 (2008); Countywide Landfill, 353 N.L.R.B. 49 (2008); SPE Util. Contractors, LLC, 353 N.L.R.B. 52 (2008); Saint Mary Home, 353 N.L.R.B. 53 (2008); Austin Printing Co., 353 N.L.R.B. 54 (2008); First Student, Inc., 353 N.L.R.B. 55 (2008); Five Star Interiors, LLC, 353 N.L.R.B. 56 (2008); Shane Steel Processing, LLC, 353 N.L.R.B. 59 (2008); Prof'l Janitorial Serv. of Houston, 353 N.L.R.B. 65 (2008); Agencia de Publicaciones de Puerto Rico, Inc., 353 N.L.R.B. 68 (2008); Kingsbridge Heights Rehab. & Care Ctr., 353 N.L.R.B. 69 (2008); Acme Press, 353 N.L.R.B. 73 (2008); Bentonite Performance Minerals, LLC, 353 N.L.R.B. 75 (2008); Racetrack Food Servs., Inc., 353 N.L.R.B. 76 (2008).

113. *See* NV Energy, Inc., 355 N.L.R.B. 7 (2010); NY Post, 353 N.L.R.B. 67 (2008); Aramark Corp., 353 N.L.R.B. 98 (2009); Amalgamated Credit Union, 354 N.L.R.B. 30 (2009); Brink's USA, 354 N.L.R.B. 41 (2009); Myers Investigative & Sec. Servs., 354 N.L.R.B. 51 (2009); Long Island Head Start Child Dev. Servs., 354 N.L.R.B. 82 (2009); Knight Protective Servs., 354 N.L.R.B. 86 (2009); Pabst Theater Found., 354 N.L.R.B. 121 (2009); Cimato Bros., Inc., 352 N.L.R.B. 99 (2008); Catskill Mech. Corp., 352 N.L.R.B. 101 (2008); Postal Serv., 352 N.L.R.B. 122 (2008).

114. *See* Regency Heritage Nursing & Rehab. Ctr., 353 N.L.R.B. 103 (2009); Chrysler, LLC, 354 N.L.R.B. 128 (2010); Kieft Bros., Inc., 355 N.L.R.B. 19 (2010); Capital Iron Works Co., 355 N.L.R.B. 20 (2010); Medco Health Solutions of Spokane, 352 N.L.R.B. 78 (2008); SPE Util. Contractors, LLC, 352 N.L.R.B. 97 (2008); Whitesell Corp., 352 N.L.R.B. 138 (2008); Quebecor World Mt. Morris, 353 N.L.R.B. 1 (2008); Positive Electric Enters., 353 N.L.R.B. 27 (2008); TNT Logistics N. Am., Inc., 353 N.L.R.B. 41 (2008); Pavilions at Forrestal, 353 N.L.R.B. 60 (2008); Harmon Auto Glass, 352 N.L.R.B. 24 (2008) (holding that Respondent withheld information from the Union and failed to properly bargain prior to changing employment conditions).

115. *See, e.g.*, A&C Healthcare Servs., 354 N.L.R.B. 33 (2009) (holding that after purchase through a bankruptcy auction, the new interim operations manager informed

making unilateral changes to the terms and conditions of employment.[116] In deciding cases within this category, the two-member Board found, in whole or in part, that the employers had violated section 8(a)(5) or sections 8(a)(1) and 8(a)(5) of the Act in 147 out of the 159 cases dealing with these substantive rights of the unions.

Allegations of Violations of Multiple Sections of the Act

The fourth category includes the remainder of the substantive rights cases that included allegations of violations of multiple sections of the Act. The two-member Board decided fifty-seven cases involving allegations of violations of multiple sections of the Act resulting in denial of substantive rights, which resulted in thirty-eight decisions in favor of the unions,[117] four decisions favoring the employer,[118] and fifteen split decisions.[119] When deciding cases

all individuals employed by the purchased company that they would continue their work on a ninety day probationary basis with the same wages but no health or other benefits, which modified their current wage, hour, and benefit agreements); M&B Servs., Inc., 354 N.L.R.B. 21 (2009) (finding respondent company failed to pay employees a wage increase in adherence with the current collective bargaining agreement without prior notice to the Union, and without providing the Union with the opportunity to bargain for the wage increase).

116. *See*, *e.g.*, Amalgamated Credit Union, 354 N.L.R.B. 30 (2009); Mays Printing Co., 354 N.L.R.B. 23 (2009) (positing that unfair labor practices existed against employer who continued to deduct health insurance premiums from employees' paychecks without providing the health insurance benefits described in the 2007–2010 collective-bargaining agreement).

117. *See* Copper Craft Plumbing, 354 N.L.R.B. 108 (2009); Atlas Refinery, Inc., 354 N.L.R.B. 120 (2010); Quanta, 355 N.L.R.B. 8 (2010); Cnty. Waste of Ulster, 353 N.L.R.B. 89 (2009); Spectrum Health-Kent Cmty. Campus, 353 N.L.R.B. 99 (2009); Iberia Rd. Markings, Corp., 353 N.L.R.B. 101 (2009); Manhattan Health Clean, 353 N.L.R.B. 104 (2009); KSM Indus., 353 N.L.R.B. 117 (2009); SPE Util. Contractors, LLC, 353 N.L.R.B. 123 (2009); Turtle Bay Resorts, 353 N.L.R.B. 127 (2009); Stevens Creek Chrysler Jeep Dodge, 353 N.L.R.B. 132 (2009); Cherry Auto Parts, 354 N.L.R.B. 10 (2009); Superior Prot., Inc., 354 N.L.R.B. 12 (2009); Greensburg Mfg., 354 N.L.R.B. 35 (2009); Standard Plumbing & Appliance Co., 354 N.L.R.B. 40 (2009); Fuel Sys., Inc., 354 N.L.R.B. 44 (2009); Beaird Indus., 354 N.L.R.B. 50 (2009); Seafood Wholesalers, Ltd., 354 N.L.R.B. 53 (2009); Mammoth Coal Co., 354 N.L.R.B. 83 (2009); Raymond Interior Sys., 354 N.L.R.B. 85 (2009); Regency Grande Nursing & Rehab. Ctr., 354 N.L.R.B. 93 (2009); N & R Quality Care, LLC, 354 N.L.R.B. 97 (2009); San Luis Trucking, Inc., 352 N.L.R.B. 34 (2008); Bloomfield Health Care Ctr., 352 N.L.R.B. 39 (2008); SFO Good-Nite Inn, LLC, 352 N.L.R.B. 42 (2008); AM Prop. Holding Corp., 352 N.L.R.B. 44 (2008); Coastal Int'l Sec., Inc., 352 N.L.R.B. 47 (2008); Wheeling Brake Block Mfg. Co., 352 N.L.R.B. 67 (2008); Engineered Steel Concepts, 352 N.L.R.B. 73 (2008); Dedicated Servs., 352 N.L.R.B. 93 (2008); A.J. Mech., Inc., 352 N.L.R.B. 108 (2008); Wayneview Care Ctr., 352 N.L.R.B. 129 (2008); GFC Crane Consultants, 352 N.L.R.B. 142 (2008); Eugene Iovine, Inc., 353 N.L.R.B. 36 (2008); Catskill Mountain Mech. Corp., 353 N.L.R.B. 46 (2008); Wiers Int'l Trucks, Inc., 353 N.L.R.B. 48 (2008); BSC Dev. BUF, 353 N.L.R.B. 63 (2008) Laborers' Local 731 (Tully Constr.), 352 N.L.R.B. 20 (2008) (relying on collective bargaining agreements to hold that the employees represented by the Laborers and Engineers Union were able to continue performing the disputed work).

118. *See* Stepan Co., 352 N.L.R.B. 14 (2008) (holding for the employer because the information requested by the Union was not for bargaining purposes, but rather to further unfair labor practice litigation); *see also* Scenic Hills Nursing Ctr., 353 N.L.R.B. 102 (2009); Siro Die Casting, Inc., 354 N.L.R.B. 8 (2009); Laborers Local 79 (JMH Dev.), 354 N.L.R.B. 14 (2009).

119. *See* PPG Aerospace Indus., 355 N.L.R.B. 18 (2010); Garner/Morrison, LLC, 353

within this category, the two-member Board found, in whole or in part, that the employers had violated at least one section of the Act in fifty-three out of the fifty-seven cases dealing with these substantive rights of the unions.

Therefore, when considering all of the substantive rights cases, the two-member Board found that the Employers had violated, in whole or in part, the substantive rights of the Unions in 313 out of 342 cases. In other words, the two-member Board found employer violations of union/worker rights in nearly ninety-two percent of the cases it decided, and, therefore, the Court's *New Process Steel* decision, in overturning these earlier decisions by the NLRB, can be seen as a victory for employers.[120] When viewed from this perspective, any analysis of the Court's decision in *New Process Steel* must address the fact that the decision has strong ramifications for the rights of unions and for the labor movement as a whole. Therefore, one must inquire as to whether these results were a factor in the Court's decision.

CAUSES

As straightforward as it may be to identify the direct and indirect effects of the Court's decision, the causes of the decision are a bit more ambiguous. There are several possible explanations for the Court's reasoning in *New Process Steel*. To understand the possible motivations behind the Court's decision, it is necessary to look not only at what the Court said, but also at what it did not say, and perhaps more importantly, who was instrumental in drafting the majority's decision. First, it must be recognized that the case involved an administrative agency's interpretation of its regulating statute. As such, it is essential to examine the Court's silence on the *Chevron* doctrine.[121] Additionally, this opinion was authored by Justice Stevens and joined by Justice Scalia, two Justices who have consistently been at odds over cases involving an administrative agency's interpretation of a statute and the proper approach for the judiciary to utilize in analyzing legislation.[122] Second, the

N.L.R.B. 78 (2009); Palmer House Hilton, 353 N.L.R.B. 90 (2009); Spurlino Materials, LLC, 353 N.L.R.B. 125 (2009); Galicks, Inc., 354 N.L.R.B. 39 (2009); Alan Ritchey, Inc., 354 N.L.R.B. 79 (2009); Quickway Transp., Inc., 354 N.L.R.B. 80 (2009); Hercules Drawn Steel Corp., 352 N.L.R.B. 10 (2008); Postal Serv., 352 N.L.R.B. 115 (2008); Alcoa, Inc., 352 N.L.R.B. 141 (2008); Dietrich Indus., Inc., 353 N.L.R.B. 7 (2008); Hanson Aggregates BMC, Inc., 353 N.L.R.B. 28 (2008); United Parcel Serv., Inc., 353 N.L.R.B. 39 (2008); Matros Automated Elec. Constr. Corp., 353 N.L.R.B. 61 (2008); Laborers Local 169 (Frehner Constr. Co.), 352 N.L.R.B. 8 (2008) (finding that the Union refused to collectively bargain with the Company).

120. *C.f.*, Nguyen v. U.S., 539 U.S. 69 (2003) (allowing an appeal from a criminal conviction on the grounds that the three judge panel was improper when one judge was not an article III judge). The judgments vacated by *New Process Steel* opens up the possibility that employers in those cases will repudiate negotiations and contracts ordered by the Board.

121. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (holding that the agency, through its varying interpretations of the word "source," consistently viewed the term flexibly). It was not the agency, but rather the Court of Appeals, that read the statute inflexibly. Since Congress did not provide a definition for "source," the Court believed that it should not, either.

122. *See* NLRB v. KY River Cmty. Care, Inc., 532 U.S. 706, 725 (2001) (differing in part from Justice Scalia's majority opinion, primarily on the bases of Scalia's non-deference to the Board's interpretation of ambiguous language in the Act and stating that

decision greatly impacted and stripped away the rights of unions, causing one to examine whether the Court was motivated by an anti-labor attitude.

Possible Cause #1 – Narrowing of Chevron Doctrine

Justice Stevens, writing for the majority in *Chevron*, explained how the judiciary should approach questions of the legitimacy of decisions made by administrative agencies.[123] According to Stevens, this *Chevron* deference analysis proceeds, first with

> "the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statue, as would be necessary in the absence of an administrative interpretation. Rather if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[124]

The majority opinion in *New Process Steel*, written by Justice Stevens, based its decision on the statutory construction analysis of the Taft-Hartley Act of 1947 as it amended the Wagner Act of 1935.[125] Therefore, it is surprising that Steven's decision is silent in regards to the *Chevron* doctrine of judicial deference to administrative agency decisions. Indeed, the entire analysis of New Process Steel revolved around whether the NLRB, an executive agency, was permitted to interpret the NLRA.[126] The fact that Stevens was the Justice who crafted the *Chevron* doctrine in 1984 is only part of the peculiarity of the *New Process Steel* decision.

Justice Stevens' opinion in *Chevron* can be seen as a landmark decision as it was instrumental in establishing a legal framework, largely governed by the Court's deference to an agency's role in interpreting and implementing statutes. However, there has been confusion among federal courts as to "when, and how, to apply the two-step *Chevron* analysis."[127] In fact, during this time "there's been a battle between its author, Justice Stevens, and Justice Scalia about the decision's significance."[128]

"it is settled law that the NLRB's interpretation of ambiguous language in the National Labor Relations Act is entitled to deference").

123. *See* 467 U.S. at 837.

124. *Id*. at 843.

125. *See* New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2639-45 (2010).

126. *The Supreme Court, 2009 Term-Leading Cases*, 124 HARV. L. REV. 380, 387 (2010) ("The Court's failure to refer to Chevron, deference, a lack of ambiguity, or even the possibility that the statute could be ambiguous is fairly unique among opinions addressing assertions of jurisdictional authority, particularly with the NLRB and in a case presenting no constitutional question").

127. Todd Garvey, CONG. RESEARCH SERV., THE JURISPRUDENCE OF JUSTICE JOHN PAUL STEVENS: THE CHEVRON DOCTRINE (May 26, 2010), *available at* http://www.fas.org/sgp/crs/misc/R41260.pdf

128. Deborah N. Pearlstein, *A Measure of Deference: Justice Stevens From* Chevron

This disagreement was strikingly apparent in an earlier decision, *I.N.S. v. Cardoza-Fonseca*. Justice Stevens, writing for the majority, stated that:

> "[t]he judiciary is the final authority on issues on statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court employing traditional rules of statutory construction ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[129]

While agreeing with the majority's conclusion, Justice Scalia wrote a concurrence in which he lambasted the majority for "badly misinterpret[ing] *Chevron*" through its "exhaustive investigation of the legislative history of the Act" which he considered to be "an ill-advised deviation" from the *Chevron* principle.[130] Indeed, when "the language of a statute is clear, that language must be given effect."[131] Accordingly, whereas Scalia views deference broadly,[132] Stevens has sought to apply deference on issues falling within the agency's expertise and has sought to deny deference on issues of statutory construction, something he holds to be in the expertise of the judiciary.[133] Justice Scalia, on the other hand, has objected to the view that courts' interpretation of a statute should take precedence "whenever they face 'a pure question of statutory construction for the courts to decide.'"[134]

Indeed, the question of when to apply *Chevron* has been a continued point of disagreement between Justices Stevens and Scalia, as has the question of how to apply the doctrine. Specifically, Scalia and Stevens have put forth differing arguments as to what courts should look at when analyzing legislative history.[135] While Justice Scalia embodies the "textualist" approach, arguing "for a strict 'plain meaning' approach . . . that resists looking beyond the dictionary meaning of the specific words Congress chose to use in the legislation," Stevens has embodied the "intentionalist" approach, consistently looking "at the full history of a statute . . . in order to effectuate Congress' purpose."[136] In opposition to

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to Hamdan, 43 U.C. DAVIS L. REV. 1063, 1068 (2010).

129. Immigration Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) .

130. *Id.*

131. *Id.*

132. *See* Negusie v. Holder, 129 S. Ct. 1159, 1168-69 (2009) (giving deference to an agency's interpretation of an ambiguous statute as long as the agency's choice is "is soundly reasoned, not based on irrelevant or arbitrary factors").

133. *See id*. at 1171 ("Courts are expert at statutory construction, while agencies are experts at statutory implementation.").

134. 480 U.S. at 454-55.

135. *Compare* Turner, *supra,* at note 45 (defining intentionalism as the method of statutory interpretation that "seeks to discern the meaning and understanding of a statutory provision as held by the legislature and the legislators who enacted the law" by looking at the statutory text and/or legislative history), with *id*. at 22 (defining textualism as the method of statutory interpretation, that argues the text is the law and that the text is what must be observed).

136. *See* Robin Kundis Craig, *Administrative Law in the Roberts Court: The First Four Years*, 62 ADMIN. L. REV. 69, 144-45 (Winter 2010) (examining the relationship between the Court, Congress, and federal agencies in light of the *Chevron* doctrine); Turner, *supra,*

Scalia's push for a purely textual approach, Justice Stevens argued in *Zuni Public School District No. 89 v. Dept. of Education*, that "[t]here is no reason why [the judiciary] must confine [itself] to . . . the statutory text if other tools of statutory construction provide better evidence of congressional intent."[137] Statements such as this beg the question of why Stevens did not look to "better evidence of congressional intent" in *New Process Steel*.

Justices Scalia and Stevens have stood at opposite ends of the analytical spectrum on when to apply *Chevron* deference and on which theory of legislative interpretation, textualism or intentionalism, is the proper approach for the judiciary.[138] This polarity presents the question of how these two Justices came together in the majority opinion in *New Process Steel*, a decision based on an analysis of legislative text, history, intent, and an executive agency's statutory interpretation. Did Justice Scalia finally concede that *Chevron* deference doesn't apply in cases of statutory construction? Did Stevens concede that the judiciary need not look to legislative history to determine congressional intent? Or did this case present the opportunity for these Justices to compromise, adopting a textualist approach without deference, to achieve a goal that they did agree on, limiting the rights of labor unions.

POSSIBLE CAUSE #2 – LIMITING UNION RIGHTS

Justice Stevens has long been hailed as the liberal justice of the Supreme Court who has consistently fought for individuals' liberty interests, stating that the concept of liberty interest is a "premise that appears throughout [Stevens'] tenure on the Court and stands as a pillar of his judicial philosophy."[139] However, for all of the hype of Justice Stevens as a liberal Justice, he has rarely been a friend to unions and has, at times, been the most vocal opponent of the rights of organized labor.[140] For example, in 2008, Stevens authored the majority opinion in *Chamber of Commerce v. Brown*,[141] in which the right of employers to engage in non-coercive speech about unionization was protected. A California law characterized as one designed to "prevent the state from

note 45 (defining intentionalism and textualism).

137. 550 U.S. 81, 105 (2007). *See also* ROBERT JUDD SICKELS, JOHN PAUL STEVENS AND THE CONSTITUTION, THE SEARCH FOR BALANCE 26 (1988) ("A more usual for(m) of deference to Congress, for Stevens, is to study the legislative history of a statute in detail in order to adhere faithfully to the lawmakers' will.").

138. For a discussion of the "textualist-intentionalist divide" *see* Garvey, *supra* note 127 (finding that the textualist-intentionalist divide is particularly important when analyzing congressional intent).

139. Bill Barnhart & Gene Schlickman, JOHN PAUL STEVENS:, AN INDEPENDENT LIFE 204 (2010).

140. Chamber of Commerce v. Brown, 554 U.S. 60 (2008). *See also* Assoc. Gen. Contractors v. Carpenters, 459 U.S. 519 (1983) (holding that the District Court was correct in finding the complaint to be insufficient); Edward J. Debartolo Corp. v. NLRB, 463 U.S. 147 (1983) (determining "the Board has not yet decided whether the handbilling in this case was proscribed by the Act. It rested its decision entirely on the publicity proviso and never considered whether, apart from that proviso, the union's conduct fell within the terms of § 8(b)(4)(ii)(B)"); Patternmakers v. NLRB, 473 U.S. 95 (1985).

141. 554 U.S. 60 (2008).

subsidizing employers' efforts to thwart unionization" was struck down.[142]

In 1980, Stevens authored a concurrence in *NLRB v. Retail Store Emp. Union, Local 1001*,[143] arguing for the Court to discard the previous distinction between "signal picketing" and "publicity picketing," which effectively makes both forms of picketing illegal. This effectively stripped the unions of yet another technique they could utilize to protect workers' rights. Although this was only a concurrence, Stevens' reasoning was later approved by Justice Powell in a subsequent decision.[144] Additionally, Justice Stevens, as the author of several majority opinions, has argued in favor of the employer in *Associated General Contractors v. Carpenters*,[145] and *Edward J. Debartolo Corp. v. NLRB*.[146] Additionally, he wrote for the dissent in *Patternmakers v. NLRB*.[147]

Although the 2010 case of *Citizens United v. FEC* dealt with campaign funding by corporations and labor unions, Scalia's eight-page concurrence referred solely to the issue of the rights of corporations (twenty-eight separate references), and did not refer to unions once.[148] On the other hand, Stevens' fifty-page dissent repeatedly refers to the case as one dealing with the rights of both corporations and labor unions.[149] One possible explanation for this discrepancy is that whereas Scalia was interested in protecting the rights of corporations to contribute to political campaigns, Stevens viewed corporations and unions as equally destructive to the rights of individuals.[150]

One of the most indicative examples of Justice Stevens' views on unions comes from the dissent he authored in *NLRB v. Action Automotive, Inc.*, in which he opined that "[a]nti[-]union sentiment may be based on religious views, political convictions, individual respect or hostility, or family considerations."[151] Stevens continued, stating that section 7 of the Taft-Hartley Act of 1947 provides "equal protection for the employee's right *not* to join a

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142. *Labor Unions Lose: Justices Restore Employers' Free-Speech Rights*, THE SAN DIEGO UNION-TRIBUNE (July 16, 2008) http://www.signonsandiego.com/uniontrib/20080716/newslz1ed16middle.html. (discussing Gov. Gray Davis's and the legislators reasons for passing this law related to the union).

143. 447 U.S. 607 (1980).

144. Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982) ("We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment. It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment").

145. 459 U.S. 519 (1983).

146. 463 U.S. 147 (1983).

147. 473 U.S. 95 (1985).

148. *See* Citizens United v. FEC, 130 S. Ct. 876, 925-29 (2010) (arguing that the dissent has a distorted view about the role of the corporation in society).

149. *See id*. at 929-79 ("The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution").

150. *C.f.*, *id.* (allowing for the possible interpretation that Stevens regarded unlimited union contributions to political campaigns to be improper and dangerous).

151. 469 U.S. 490, 499 (1985).

union as for the right to support a union."[152] Thus, Stevens has consistently put forth the argument that the rights of individuals need to be protected from labor unions. Therefore, from this perspective, *New Process Steel* presented Justice Stevens with the opportunity to vacate hundreds of pro-union decisions with a single stroke of the pen. While the case presented Stevens with the ability to base his reasoning on statutory construction, the fact that the results are so pitted against the rights of unions leads to the reasonable conclusion that Justice Stevens took this opportunity to thwart the American labor movement prior to his retirement from the bench.

CONCLUSION

While Justice Stevens is technically correct in suggesting that Congress can prevent the recurrence of the devastating effects of the *New Process Steel* decision by amending the statute to allow a two-member Board to decide cases, the state of the national attitude towards the labor movement makes such an amendment highly improbable.[153] For example, recent attempts by the governors of Wisconsin and Ohio to end collective bargaining rights for public employees has been described as just "the tip of the iceberg" of a pervasive anti-union attitude in government.[154] In a March 2011 vote in the House for an amendment that would defund the NLRB for approximately six months, "the House leadership supported abolishing the right of both private sector and public sector workers to bargain collectively."[155] Thus, it appears unlikely that the legislative branch would support any amendment that may empower the Board or aid the labor movement.

The fact that *New Process Steel* came before the Court in the waning days of Justice Stevens' tenure on the bench may explain why he felt compelled to so abruptly abandon his intentionalist approach to legislative analysis, ensuring the narrowing of the *Chevron* doctrine while simultaneously accomplishing a minimization of the rights of labor unions.[156] To adhere to the principle of intentionalism that he had long argued in favor of would, at best, have curried only a concurrence from Justice Scalia, with the other four dissenters still disagreeing with the result. It would thereby deny Stevens a majority of the Court.

Thus, it appears that this case presented Justice Stevens with an opportunity to confront and settle two issues of law that he had consistently fought for during

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152. *Id.* at 500 (emphasis in original).

153. New Process Steel, LP v. NLRB, 130 S. Ct. 2635, 2644-45 (2010) ("If Congress wishes to allow the Board to decide cases with only two members, it can easily do so").

154. Harold Meyerson, *Wisconsin Just Tip of Anti-Labor Iceberg*, CAPITAL TIMES, March 2, 2011, at 28, *available at* 2011 WLNR 4125591.

155. *Id.* (noting that the decline of private sector union membership to 6.9 percent has resulted in the growth of "resentment toward unionized public sector workers . . . [thereby] creating a political opportunity for Republicans to mount their assault").

156. The classification of Stevens's abandonment as "abrupt" is based on his dissent in *Citizens United*, 130 S. Ct. at 952-53, issued less than five months prior to *New Process*, in which he provided a thorough analysis of legislative history to glean the intent of the legislature.

his half-century on the bench. With this end in sight, Stevens abandoned the use of legislative history to understand legislative intent, omitted any discussion of deference to an administrative agency's interpretation of its regulatory statute, and, fleetingly acknowledged the sheer magnitude of injustice that the decision will heap upon the American labor movement, positing an unrealistic solution. Justice Stevens concludes his opinion by cautioning that agreement with the Board's interpretation of the Act would mean that the Board is authorized "to create a tail that would not only wag the dog, but would continue to wag after the dog died."[157] Fearful of this result, Justice Stevens crafted a decision that not only cut off the tail, but also cut the dog's legs off in the process, thereby ensuring the stagnancy, and perhaps the ultimate demise, of the American labor movement.

157. 130 S. Ct. at 2645.