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The Practical (and Legal) Implications of the NLRB's Unwritten "Three-Vote Rule"

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For the first time since President Trump fired Member Wilcox in January 2025, the National Labor Relations Board has the statutory quorum necessary to issue decisions and shape labor law across the United States. The National Labor Relations Act structures the Board to have five members and requires at least three confirmed members to issue binding decisions in representation cases and unfair labor practice proceedings. Following Wilcox's firing, the Board lacked the required three-member quorum, leaving it unable to act for much of 2025 into early 2026.

The Board Regains Its Quorum

The Board lacked a quorum for most of 2025, before the U.S. Senate approved the nominations of Scott Mayer and James D. Murphy as Board members on December 18, 2025. When sworn in on January 7, 2026, these members restored the Board's quorum and with it the statutory authority to issue decisions and exercise all Board power.

That the Board is again functional raises the question for how (and how soon) the new Republican majority will approach decisions issued during the previous administration or by prior Democrat-majority boards. Most labor relations observers are familiar with the fact that in recent decades when the Board majority flips from Democrat to Republican appointees, or vice versa, it is typical for the NLRB to engage in what the agency itself once described as "policy oscillations" on many labor law issues. Generally, Republican majority boards incline toward employer-friendly interpretations of labor law, while Democrat majority boards tend to issue more labor-friendly decisions.

However, while the Board now has the three members necessary for a statutory quorum, and a Republican majority, it must work through some 500-plus backlogged unfair labor practice charges and representation disputes that accumulated during the nearly year-long period without a quorum. More importantly, because only three members are seated, the new majority is only 2-1, with two Board vacancies and no pending nominees from the President.

The Unwritten "Three-Vote Rule" and Its Consequences

This matters, because the Board has a historical practice of reversing existing precedent only when three

members vote in favor of doing so. Although unwritten and not codified in the Act, this practice (which I'll call the "three-vote rule") could render futile any effort to formally and explicitly overrule a significant existing precedent, even though the Board has shifted politically. Stated simply, if the new Republican majority adheres to this unwritten policy, unless the lone remaining Democrat-appointed member (Member Prouty) agrees, the Board cannot (or at least will not) overturn that precedent.

Unfortunately for employers, it appears the new majority intends to follow this tradition. For example, on January 28, in a footnote in *Lodi Volunteer Ambulance Rescue Squad, Inc.*, 374 NLRB No. 26 (2026), members Murphy and Mayer "agree[d] to apply" existing Biden-era precedent "in the absence of a three-member majority to overrule it." This was despite that case (*Thryv, Inc.*, 372 NLRB No. 22 (2022)) itself departed from longstanding Board precedent when it announced novel remedies including restoring eliminated positions, reinstating employees, backpay and compensation for other harms incurred because of unlawful discharges.

If the new majority continues to abide by the "three vote rule," this means that for the foreseeable future many significant pro-union decisions are likely to remain in place, at least until President Trump nominates and the Senate confirms a fourth member to the Board. In sum, while the new Board majority may signal a more pro-business agenda, the Board's tradition requiring three votes to overturn precedent means major changes are unlikely. This raises the interesting and complex question of whether the Board's unwritten three-vote rule violates the Act or the Constitution.

Potential Statutory and Constitutional Concerns

As to the former, the practice – which is not unbroken – appears to run contrary to the explicit language of the Act, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board[.]" 29 U.S.C. §153(b). Thus, the plain text of the statute indicates that a vacancy (or two) "shall not impair" the right of a validly constituted three-member Board from "exercis[ing] *all* of the powers of the Board[.]" *Id*. (emphasis added). Because the word "all" means the entirety, and because the powers of the Board surely include the right (even duty) to overrule existing precedent to the extent it conflicts with the views of a valid Board majority, the unwritten practice of refusing to do so *based on a vacancy* arguably violates the Act, as it impairs the remaining members' rights to exercise all the powers of the Board. Indeed, in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 681 (2010), the Supreme Court construed the "vacancy clause" as "operat[ing] to provide that vacancies do not impair the ability of the Board to take action, so long as the quorum is satisfied."

In fact, the Board has not followed this tradition in the rulemaking context and has acknowledged the rule "is not based on the Act itself, nor has it been codified in a Board rule or statement of procedure." 76 Fed. Reg. 80138, 80145 (December 22, 2011). It has further stated:

Nothing in the text of the Act or its legislative history suggests that, even if the Board has a lawful quorum, certain Board powers may be exercised only if approved by at least three Members. Put somewhat differently, *there is no statutory basis to argue that a three-Member quorum of the Board must act unanimously – as opposed to acting by majority vote as is typical – in order properly to exercise the Board's powers*. *Id*. (emphasis added).

As to the constitutional concerns, the three-vote rule is surely arbitrary and capricious and may even violate the due process clause of the Constitution. Presumably in any particular case a Board member must independently evaluate both the merits and the law and render his or her own detached and considered judgment. To the degree it differs from a member's responsibility to exercise independent judgment, the unwritten three-vote rule places a thumb on the scale and compels a majority of a valid quorum to acquiesce in a remedy or decision contrary to its own interpretation of the Act.

Considerations for Employers

These and other legal matters may now be ripe for review, and an employer caught in this unusual situation should consider whether to challenge any Board order based on the three-vote rule on the basis that the practice runs contrary to the individual duty of every Board member to discern the law's meaning for him or herself and faithfully apply it in every case that comes before him or her. At a minimum, there is a clear basis to challenge a valid quorum's refusal to act by majority vote.

That said, in the meantime and as a practical matter, unless and until the Board expands beyond its current three members, employers should recognize the reality that the three-vote rule may in many respects, keep tilted in favor of unions and against employers the labor law playing field.