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DC Circuit Court of Appeals Invalidates NLRB Rights Poster Holding Regulation Violates NLRA

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A federal appeals court has rebuffed the NLRB's attempt to require employers to post in a "conspicuous" place in a workplace a poster that informs employees of their rights under the National Labor Relations Act. The NLRB's rule has been controversial from the start because it did not simply require the posting of a notice of "employee rights." Rather, it included some items that would additionally expand the NLRB's reach over employers by making failure to post the notice both an unfair labor practice and evidence of the employer's "anti-union animus." Further, the rule stated that failure to post may toll the Act's six-month statute of limitations as to other unrelated activities.

Following its promulgation, the rule was immediately challenged in federal district courts in South Carolina and in the District of Columbia. Both federal district courts invalidated the rule. In light of the serious questions about the rule the DC Circuit granted an injunction staying the rule pending the appeal. The South Carolina case is still pending before the Fourth Circuit, *NLRB v. Chamber of Commerce of the United States et al.*, Case No. 12-1757.

The DC Circuit's opinion in *National Association of Manufacturers et al. v. NLRB* (DC Cir. May 7, 2013) found the rule to be invalid because it violates various provisions of the National Labor Relations Act ("Act"). The Court of Appeals rested much of its decision on employer free speech rights guaranteed under Section 8(c) of the Act, 29 U.S.C. §158(c). The court of appeals ruled that two of the three enforcement mechanisms (failure to post as an unfair labor practice and failure to post as evidence of unlawful motive) clearly violated the often ignored free speech provision of the Act. The DC Circuit also ruled that the NLRB cannot simply toll the six-month statute of limitations by regulation.

Board Had a Quorum To Promulgate The Rule

The DC Circuit addressed an issue not raised by either party but which gives some insight into the depth of the recess appointment issue. At the time the rights poster rule was issued, three of the four members of the then existing NLRB (Chairman Liebman and Members Pearce and Hayes) were confirmed by the Senate. The fourth member, Craig Becker, had received a recess appointment. The Court stated, "To the extent that *Noel Canning* applies — we assume, without deciding, that it does — Becker's appointment was constitutionally invalid." The Court ruled that the promulgation occurred as of the date Chairman Liebman signed the final rule on August 22, 2011, shortly before her term expired, meaning the Board had a quorum of three members. The reference does foreshadow a potential future problem for the NLRB: actions and decisions issued by the Board after Chairman Liebman left in August 2011 may be invalid due to a lack of a three person quorum.

The Poster Violates Employer Free Speech

The court noted that the proper starting place is Section 8(c) of the Act, "which seems to us to control much of the case." Section 8(c) provides the employer's right of free speech in matters concerning unions, and is very clear:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit. [Emphasis added.]

The Court held that, "[a]lthough § 8(c) precludes the Board from finding noncoercive employer speech to be an unfair labor practice, or evidence of an unfair labor practice, the Board's rule does both." Slip op. at 14. The Court explained that the notion of free speech includes the right to avoid compelled speech. By requiring an employer to post the notice on pain of being found to have committed an unfair labor practice, the rule violated the employer's right to *not* to speak.

Of course, we are not faced with a regulation *forbidding* employers from disseminating information someone else has created. Instead, the Board's rule requires employers to disseminate such information, upon pain of being held to have committed an unfair labor practice. But that difference hardly ends the matter. The right to disseminate another's speech necessarily includes the right to decide not to disseminate it.

Slip op at 17 (emphasis in original). The Court explained further:

We return then to the question with which we began. Suppose that § 8(c) prevents the Board from charging an employer with an unfair labor practice for posting a notice advising employees of their right not to join a union. Of course § 8(c) clearly does this. How then can it be an unfair labor practice for an employer to refuse to post a government notice informing employees of their right to unionize (or to refuse to)? Like the freedom of speech guaranteed in the First Amendment § 8(c) necessarily protects – as against the Board – the right of employers (and unions) not to speak. This is why, for example, a company official giving a noncoercive speech to employees describing the disadvantages of unionization does not commit an unfair labor practice if, in his speech, the official neglects to mention the advantages of having a union.

Slip op. at 22.

Importantly, the court then went on to hold that the poster rule violates Section 8(c) because it not only makes failure to post an unfair labor practice, it also treats such failure as "evidence of anti-union animus." NLRB case law is rife with findings of "anti-union animus" based on mere opposition to a union, and surely this decision will be cited in future cases as authority that the agency may not merely classify lawful speech as evidence of an unfair labor practice.

NLRB May Not Toll Statute of Limitations By a Failure To Post

The court also addressed the portion of the NLRB's rule that says the statute of limitations under the Act can be tolled by a failure to post. The court found this provision violated Section 10(b) of the Act, 29 U.S.C. §160(b), which states:

[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and with a service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

The Court noted that under the doctrine of "equitable tolling," which was the basis relied upon by the Board in making its rule, it must be rooted in Congressional intent. Section 10(b) was added in 1947, while much of the "equitable tolling" cases arose under unrelated statutes passed decades after the NLRA. The court chastised the Board for its attempt to expand the statute of limitations:

The short of the matter is that the Board has not invoked any authority suggesting that the 1947 Congress intended to allow § 10(b) to be modified in the manner of the Board's tolling rule. Whether one frames the Board's tolling rule as resting on the employer's failure to post the Board's notice or on the charging employee's lack of knowledge of his rights under the National Labor Relations Act, the Board marshaled nothing to show that by 1947 this was a generally accepted basis for tolling limitations periods.

The three judge panel vacated the rule in its entirety. Two of the three judges would have gone farther, questioning whether the NLRB had a right to promulgate any rule requiring a notice posting, separate and apart from the Sections 8(c) and 10(b) issues.

What now? The NLRB has agreed to voluntarily stay enforcement of the rule unless and until the South Carolina federal district court's adverse decision is overturned either by the Fourth Circuit or the Supreme Court. Oral argument was held in the Fourth Circuit case on March 19, 2013. So, if the NLRB decides to seek Supreme Court review of the DC Circuit decision, it may also seek additional time to file a petition for a writ of certiorari, in an effort to know the outcome in the Fourth Circuit case beforehand.

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