D.C. Circuit Strikes Down NLRB Poster Requirement

?By former Associate Jack Blum

On the heels of its ruling that the National Labor Relations Board (NLRB) has lacked a quorum to act since January 3, 2012, the U.S. Court of Appeals for the District of Columbia Circuit again last week rebuked the NLRB by holding that it lacks the authority to require employers to post a notification of employees' unionization rights on their premises and websites. The NLRB's poster rule would have required over six million employers across the nation to post an 11 x 17 inch notice informing employees of, among other things, their right to:

? form, join or assist a union

? bargain collectively

? discuss wages, benefits and other terms and conditions of employment with a union or their co-workers

? take action to improve working conditions

? strike and picket

? choose not to engage in these activities.

In a unanimous decision, a three-judge panel of the D.C. Circuit held that the NLRB had no authority to require employers to post this notice. The court's opinion concentrated on the three enforcement mechanisms that the NLRB's rule had enacted for its poster requirement: (1) Classifying an employer's failure to post the notice as an unfair labor practice under the National Labor Relations Act (NLRA); (2) Treating an employer's failure to post the notice as evidence of anti-union animus, a required element of other unfair labor practices; and (3) Suspending the six-month limitations period to file unfair labor practice charges for employees working in premises where the notice was not posted.

The court focused on Section 8(c) of the NLRA, which states that expressing or disseminating views, opinions or arguments cannot constitute or be evidence of an unfair labor practice so long as no threats of reprisal or force, or promises of benefits, are made. Comparing Section 8(c) to the First Amendment of the U.S. Constitution, the court held that displaying the NLRB's poster constituted "compelled speech," and that declaring an employer's refusal to display the NLRB's message constitutes an unfair labor practice ran afoul of Section 8(c)'s protections. In essence, the court found the NLRB poster rule to be equivalent to requirements that West Virginia schoolchildren recite the Pledge of Allegiance and citizens of New Hampshire display "Live Free or Die" on their license plates, both of which were struck down by the U.S. Supreme Court in landmark First Amendment decisions.

The unanimous panel then concluded that the third enforcement mechanism - suspending the NLRA's six-month statute of limitations - was not contemplated by Congress when it created that statute of limitations in 1947, and was therefore beyond the NLRB's authority to enact. Having struck down each of the NLRB's three enforcement mechanisms, the court decided that the poster requirement must also fail because the NLRB would not have issued it on a solely voluntary basis with no penalties for noncompliance. The court accordingly invalidated the poster requirement along with the three penalties.

Two members of the panel went even further in a concurring opinion. Judges Karen Henderson and Janice Rogers Brown explained that while they agreed the NLRB could not enact the penalties enumerated in the poster rule, those judges would also hold that the NLRB had no authority to enact the poster requirement in any form. Specifically, Judges Henderson and Brown found that the poster requirement was not necessary to carry out any of the NLRA's provisions, and therefore was beyond the

NLRB’s rule-making authority.

With this decision, the D.C. Circuit became the second federal court, though the first at the appellate level, to invalidate the NLRB’s poster rule. The U.S. Court of Appeals for the Fourth Circuit is set to weigh in on the question, and if its opinion differs from the D.C. Circuit’s, the poster rule would seem certain to join the NLRB’s recess appointments before the U.S. Supreme Court. As always, Paley Rothman will keep you updated as the situation develops.

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