JONES DAY

MAY 2013

NLRB REMAINS WINLESS IN RECENT RULEMAKING LITIGATION: D.C. CIRCUIT STRIKES DOWN NLRB'S NOTICE POSTING RULE

NLRB POSTING RULE HELD INVALID

On May 7, in a decision relying on three significant cases in which Jones Day represented parties and another case in which a Jones Day lawyer filed an *amicus* brief, the U.S. Court of Appeals for the D.C. Circuit vacated a National Labor Relations Board (NLRB or Board) rule requiring nearly all U.S. private employers to post a notice informing employees of their right under the National Labor Relations Act (NLRA or Act) to join labor unions and engage in other concerted activities. *Nat'l Ass'n of Mfrs. v. NLRB*, Case No. 12-5068 (D.C. Cir. May 7, 2013). This case was the latest in a series of decisions invalidating NLRB rulemakings. In May 2012, a D.C. federal district court vacated a NLRB "quickie election" rule intended to accelerate union elections. Similarly, in April 2012, a Federal district court in South Carolina held that the NLRB lacked authority to promulgate the same posting rule at issue in *National Association of Manufacturers*.

The Board's notice posting rule applied to all employers subject to the NLRA, regardless of whether their employees were represented by a union. The rule required employers physically to post a notice that informed employees of their rights under the NLRA, provided contact information for the Board, and included details regarding basic NLRB enforcement procedures. The content of the notice, which was available on the NLRB website, was dictated by the Board.

National Association of Manufacturers is the second major decision involving the NLRB from the D.C. Circuit this year. In *Noel Canning*, the D.C. Circuit held that President Obama's recess appointments of Richard Griffin, Sharon Block, and Terence Flynn to the National Labor Relations Board were invalid exercises of the U.S. Constitution's Recess Appointments Clause. (*Noel Canning v. NLRB*, Case No. 12-1115 (D.C. Cir. Jan. 25, 2013)). *National Association of Manufacturers* addresses *Noel*

© 2013 Jones Day. All rights reserved. Printed in the U.S.A.

Canning and states, for the first time, that former member Craig Becker's appointment to the NLRB is also constitutionally invalid under Noel Canning. The Obama Administration recently petitioned the Supreme Court for review of the Noel Canning decision.

POSTING RULE'S ENFORCEMENT MECHANISMS WERE NOT AUTHORIZED BY THE STATUTE

The posting rule included three enforcement mechanisms. First, the rule declared that an employer's failure to post the notice was an unfair labor practice under Section 8(a)(1) of the Act. Second, the rule stated that the Board could consider an employer's "knowing and willful refusal to comply" with the posting requirement as evidence of unlawful motive in other unfair labor practice cases. Third, the rule provided that Section 10(b)'s six-month limitations period for filing an unfair labor practice charge could be suspended if an employer failed to post the notice.

POSTING RULE VIOLATED EMPLOYERS' FREE SPEECH RIGHTS

The D.C. Circuit held that all three enforcement provisions violated the NLRA. With respect to the first two enforcement provisions, the Court focused on Section 8(c) of the NLRA, which provides that "[t]he expressing of any views, argument, or opinion, or dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice" as long as "such expression contains no threat of reprisal or force or promise of benefit." See 29 U.S.C. § 158(c). The Court explained 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."

The D.C. Circuit turned to First Amendment jurisprudence to support its Section 8(c) analysis. First, the Court noted that the First Amendment grants the same protection to the "dissemination" and the "creation" of messages. While the Board argued that the notice posting was "Board speech" rather than speech by an employer, the Court noted that Section 8(c) also addresses "dissemination" and, under First Amendment law, dissemination of messages created by others is entitled to the same protection as the creation of messages. Second, the Court observed that the right to disseminate speech "necessarily includes the right to decide not to disseminate it"—for example, by refusing to post employee notices in the workplace. The Court relied on analogous First Amendment cases holding that states cannot require public school children to say the Pledge of Allegiance or require drivers to display a state motto on their license plates.

Despite the Court's extensive discussion of First Amendment case law, the D.C. Circuit based its holding in the explicit language of Section 8(c) of the NLRA. Specifically, the Court noted that it did not address whether Section 8(c)'s protections were more broad or more narrow than the First Amendment and only held that "[l]ike 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."

While the Court concluded that the posting rule violated Section 8(c), the decision did not alter the D.C. Circuit's earlier decision upholding an Executive Order requiring government contractors to post similar employee notices, where unfair labor practice liability under the NLRA was not implicated. (*UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003)). Because the rule at issue in *National Association of Manufacturers* made an employer's failure to post its prescribed notice an unfair labor practice—and because it treated such failure to post as evidence of an unfair labor practice—the rule violated the explicit language of Section 8(c) and was accordingly invalid.

The Court also rejected the third enforcement mechanism in the Board's posting rule, which would have tolled the Section 10(b)'s six-month statute of limitations for unfair labor practices if the employer did not post the notice. The Board attempted to justify its position by relying on its "intuitive sense" that if employees were unaware of their rights under the NLRA because the employer failed to post a notice, the limitations period should be equitably tolled.

The Court explained that for the Board to demonstrate that it could modify the limitations period in Section 10(b), it must demonstrate that Congress would have had a basis for anticipating such a modification when Section 10(b) was enacted in 1947. The Court concluded that the Board wholly failed to meet this standard. Further, the Court noted that ignorance of the law was not generally accepted as a basis for equitable tolling in 1947 and remains a generally unaccepted basis for equitable tolling under current law. As a result, the Court held that the Board's final enforcement provision was contrary to the requirements of the Act and could not stand.

The panel unanimously concluded that because all three of the rule's enforcement mechanisms violated the NLRA, the entire rule must be invalidated. The Court noted that while it could have severed the portion of the rule containing the notice from the enforcement mechanisms, "the Board would not have issued a posting rule that depended solely on voluntary compliance"—an option the Board rejected in the preamble to the final rule.

TWO JUDGES FIND THAT THE NLRB LACKS STATUTORY AUTHORITY TO ISSUE ANY POSTING RULE

While Judge Randolph declined to reach the issue, Judge Henderson, joined by Judge Brown, issued a concurring opinion noting that they would have held that the rule was not a valid exercise of the Board's rulemaking authority under Section 6 of the NLRA. In their view, Section 6 of the NLRA does not grant authority to the NLRB to issue any posting rule.

Because the entire rule was invalid, Senior Circuit Judge Randolph, who wrote the Court's opinion, declined to address the related issue regarding the Board's authority under Section 6 of the NLRA.

RELATED ISSUES

As noted above, Jones Day lawyers participated in numerous cases directly bearing on the NLRB's authority and the labor and First Amendment cases cited favorably in *National Association of Manufacturers*. Jones Day represented the U.S. Chamber of Commerce in *Chamber of Commerce v. Brown*, a 2008 decision involving a California statute that the United States Supreme Court held was preempted by the NLRA. Our partner Willis Goldsmith argued the case before the U.S. Supreme Court. The *Brown* decision was heavily relied upon by the D.C. Circuit in finding that the NLRB posting rule violated the employer's free speech rights. Jones Day and Mr. Goldsmith also represented the U.S. Chamber as *amicus* in *Healthcare Association of New York State v. Pataki,* a 2006 case addressing Section 8(c) issues, relied on by *National Association of Manufacturers*. Additionally, Jones Day's Noel Francisco argued the *Noel Canning* case in the D.C. Circuit, in which the court found that the three recess appointments by President Obama to the NLRB were invalid. Mr. Francisco likewise argued the *R.J. Reynolds* case relied upon by the D.C. Circuit; in that case, the court invalidated an FDA rule requiring graphic warnings on cigarette labels as unconstitutional compelled speech under the First Amendment. Jones Day continues to participate in these very important decisions and other cases challenging controversial actions by the NLRB.

WHAT HAPPENS NEXT?

The NLRB has 45 days to ask the D.C. Circuit to rehear the *National Association of Manufacturers* case en banc and 90 days from the entry of judgment to petition the Supreme Court for a writ of certiorari. In the meantime, the Board's notice posting rule is null and void. As a reminder, however, the D.C. Circuit's ruling did not affect Executive Order 13496, which requires certain Federal contractors and subcontractors to post notices informing employees of their rights under Federal labor laws.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Aaron L. Agenbroad
San Francisco
+1.415.875.5808
alagenbroad@jonesday.com

Doreen S. Davis
New York
+1.212.326.3833
ddavis@jonesday.com

Lawrence C. DiNardo
Chicago
+1.312.269.4306
lcdinardo@jonesday.com

Patricia A. Dunn
Washington
+1.202.879.5425
pdunn@jonesday.com

Brian W. Easley
Chicago
+1.312.269.4230
beasley@jonesday.com

Robert L. Ford
San Francisco
+1.415.875.5740
rlford@jonesday.com

Willis J. Goldsmith
New York
+1.212.326.3649
wgoldsmith@jonesday.com

George S. Howard Jr.
San Diego
+1.858.314.1166
gshoward@jonesday.com

Jessica Kastin
New York
+1.212.326.3923
jkastin@jonesday.com

G. Roger King
Columbus
+1.614.281.3874
rking@jonesday.com

F. Curt Kirschner Jr.
San Francisco
+1.415.875.5769
ckirschner@jonesday.com

E. Michael Rossman
Columbus
+1.614.281.3866
emrossman@jonesday.com

James S. Urban
Pittsburgh
+1.412.394.7906
jsurban@jonesday.com

Stanley Weiner
Cleveland
+1.216.586.7763
sweiner@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.