Zinsergram a/k/a Legal Update

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COURT OF APPEALS STRIKES DOWN NLRB NOTICE POSTING RULE

On May 7, 2013, for the second time in a 6-month period, the U.S. Court of Appeals for the D.C. Circuit has reversed a decision of the NLRB due to that agency's practice of ignoring the First Amendment of the Constitution of the United States. (See story below concerning *Santa Barbara News-Press*.)

The notice-posting rule would require nearly 6 million Employers to post a paper notice on their properties and websites, serving as a virtual roadmap on "how to unionize." The rule declares that it is an unfair labor practice for an Employer to fail to post the notice.

The rule contains two additional enforcement devices. The Board may suspend the running of the 6-month statute of limitations for the filing of any unfair labor practice charge concerning the notice. Additionally, the Board may consider an Employer's "knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue." On April 17, 2012, the rule was enjoined pending this appeal.

The Court of Appeals totally vacated the Board's notice-posting rule. The Court went right to §8(c) of the National Labor Relations Act. That section was passed in 1947 as part of the Taft-Hartley Act. 8(c) was implemented because Congress believed the NLRB was regulating Employers' speech too restrictively. The Court stated, "From one vantage, §8(c) merely implements the First Amendment… but §8(c) enactment also manifests a Congressional intent to encourage free debate on issues dividing labor and management." The Court noted that §8(c) not only protects the right of free speech under the First Amendment, but also "serves a labor law function of allowing Employers to present an alternative view and information that a union would not present."

The Court ruled that forcing Employers to post the notice is *compelled speech* in violation of the First Amendment of the Constitution of the United States. The Board stated:

> *Instead, the Board's rule requires Employers to disseminate such information, upon pain of being held to have committed 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. First Amendment law acknowledges this apparent truth: "all speech inherently involves choices in what to say and what to leave unsaid…" Some of the*

Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say… The First Amendment freedom of speech includes the right to speak freely and the right to refrain from speaking at all… just as the First Amendment may prevent government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views… Plaintiffs here, like those in other compelled speech cases, object to the message that government has ordered them to publish on their premises. They see the poster as one-sided, as favoring unionization, because it fails to notify employees of their rights to decertify a union, to refuse to pay dues to a union in a right-to-work state, and to object to payment of dues in excess of the amounts required for representational purposes.

The Court further explained that §8(c) necessarily protects – as against the Board – the right of Employers not to speak. "That is why, for example, a company official giving a non-coercive 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."

The Court also summarily struck down the part of the rule that allowed the tolling of the statute of limitations. Referring to it as "bad wine of recent vintage," the Court noted that there is nothing in the legislative history of the 1947 Amendments justifying authority for the rule. Rejecting the NLRB's argument that employees lack knowledge of the National Labor Relations Act, the Court stated, "Even today, Courts do not generally recognize lack of knowledge of the law as a basis for equitable tolling."

In this writer's opinion, the NLRB ignores and harbors hostility toward the First Amendment rights of Employers under §8(c) of the National Labor Relations Act.

The Court with this decision proves once again that the First Amendment rights of Employers are paramount.

SANTA BARBARA NEWS-PRESS VINDICATED BY D.C. CIRCUIT

On December 18, 2012, the U.S. Court of Appeals for the D.C. Circuit granted *Santa Barbara News-Press*' Petition for Review and vacated an entire adverse decision of the National Labor Relations Board that had determined the discharge of eight employees, among other allegations, violated the National Labor Relations Act. The Court of Appeals reversed, finding the discharges to be lawful.

This case began in 2006. The newsroom employees at *Santa Barbara News-Press* had engaged the Teamsters in an effort to take over the content of the newspaper. Certain employees hung a sign over the freeway urging the public to "Cancel your newspaper today;" other employees continually wrote biased articles. *Santa Barbara News-Press* discharged all of them.

The employees and the NLRB categorized the dispute as one of "autonomy" and "journalism ethics," but the court chastised both, stating, "The power to so characterize them is

not a power to conjure editorial control out of the Publisher's hands." The court made clear, "The First Amendment affords a ***publisher***, not a reporter, absolute authority to shape a newspaper's content."

The court criticized the NLRB because it "recognized the First Amendment problem in the present case, only to dismiss it out of hand." In particular, the court derided the NLRB's decision because "it sanctions [the newspaper] for trying to discipline employees who sought to remain on its payroll and at the same time call on newspaper readers of Santa Barbara to cancel their subscriptions because [the newspaper] would not knuckle under to the employees' demands for editorial control."

The court noted that public statements and testimony of employees demonstrated that the actions of employees were rooted almost entirely upon controlling the content of the newspaper and the employees' subjective beliefs of newspaper quality. The resulting disparagement of the newspaper was not protected; the newspaper acted within its rights to discharge the offending employees to protect its editorial control.

The court did not buy the NLRB argument that even if the employees' goal of content control is unprotected, the NLRB decision should stand because the employees *also* wanted to negotiate a contract over wages, etc.

The court explained that simply wrapping an unprotected goal with an arguably protected goal does not serve to prevent an Employer from taking adverse employment action against an employee as a result of the unprotected goal. Using a rather apt analogy, the court explained, "A truly pornographic film would not be rescued by inclusion of a few verses from the Psalms." In the same way, the employees' main dispute over newspaper content control was not cured "by simply adding 'a few verses' of wage demands."

Also, the court relied on reasoning from the 9th Circuit involving the NLRB's failed attempt at an injunction in this case, recognizing that it was impossible to parse the newspaper's "animus toward the union generally from its desire to protect its editorial discretion. The motives necessarily overlapped in this case."

In a stinging rebuke to the NLRB, the D.C. Circuit ruled, "The Board's analysis was tainted by its mistaken belief that employees had a statutorily protected right to engage in collective action" to control the content of the *Santa Barbara News-Press*.

Neither the NLRB nor the Teamsters Union petitioned the Court for a rehearing; neither petitioned the U.S. Supreme Court to hear the case.

Editor's note: The Zinser Law Firm represented *Santa Barbara News-Press.*