Zinsergram a/k/a Legal Update

By L. Michael Zinser
The Zinser Law Firm, P.C.

The NLRB has gone rogue! The Obama NLRB treats the Constitution and Congress as mere inconveniences. Expediency and whatever is good for unions are the agency's current standards. The *modus operandi* of the NLRB: "We are going to do what we want to do; try and stop us if you can."

NLRB NOTICE POSTING RULE VIOLATES FIRST AMENDMENT

Proving for the second time in a 6-month period that the First Amendment rights of Employers are paramount, on May 7, 2013, the U.S. Court of Appeals for the D.C. Circuit reversed a decision of the NLRB due to that agency's practice of ignoring the First Amendment of the Constitution of the United States.

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 Section 8(c) of the National Labor Relations Act, passed in 1947 as part of the Taft-Hartley Act. Section 8(c) was implemented because Congress believed the NLRB was regulating Employers' speech too restrictively. The Court stated, "From one vantage, Section 8(c) merely implements the First Amendment… but Section 8(c) enactment also manifests a Congressional intent to encourage free debate on issues dividing labor and management." The Court noted that Section 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 Section 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 Section 8(c) of the National Labor Relations Act.

On June 14, 2013, another court – the U.S. Court of Appeals for the 4th Circuit – ruled in a different case that the NLRB exceeded its authority when promulgating its notice-posting rule. The Court noted that other discrimination laws specifically provide for notice posting; the National Labor Relations Act does not. The Court concluded that Congress' continued exclusion of a notice-posting requirement under the NLRA could fairly be considered "deliberate action." Therefore, Section 6 of the NLRA did not give the NLRB the authority to issue the rule.

U.S. SUPREME COURT TO DECIDE NLRB RECESS APPOINTMENTS ISSUE

As previously reported in this column, on January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit struck down as unconstitutional President Obama's recess appointments of three NLRB members. The Court ruled that President Obama's NLRB appointments were not made during "the recess," as the term is used in the Constitution. Second, the vacancies filled by the President's "recess appointments" did not "happen" during "the recess" of the Senate, as required under the Constitution.

On May 16, 2013, the U.S. Court of Appeals for the 3rd Circuit found the appointment of former NLRB member Craig Becker to be unconstitutional for the same reason.

Last week, the Supreme Court agreed to hear *NLRB v. Noel Canning,* the D.C. Circuit case. The Supreme Court will address the unconstitutionality of President Obama's recess appointments to the NLRB.

The U.S. Court of Appeals for the D.C. Circuit is considered the second most influential federal court in the country, just behind the U.S. Supreme Court. After the Noel Canning decision, one would think that the NLRB would pay attention. However, the pro-union agency went rogue. NLRB Chairman Mark Pearce announced that the NLRB would "continue to perform [its] statutory duties and issue decisions" – in other words, ignore the D.C. Circuit.

This writer believes that the U.S. Supreme Court will uphold the D.C. Circuit's decision.

NLRB QUICKIE ELECTION RULE

At the end of calendar year 2011, the NLRB issued its new Quickie Election Rule – designed to dramatically curtail an Employer's ability to exercise its First Amendment Right to communicate its views about why employees should *not* vote to be represented by labor unions. In its rush to pass this rule, only two of the three sitting Board members voted and passed the rule. This was in total disregard of a U.S. Supreme Court decision, which stated that there had to be at least three Board members for the NLRB to have a quorum. The U.S. District Court for the District of Columbia ruled that the rule was invalid for failure to satisfy the quorum requirement. Thus, the rule was enjoined. That remains the current status as I write this article. Any day now, the Court of Appeals could weigh in on this issue.

ACTING NLRB GENERAL COUNSEL

Lafe Solomon was first nominated for the position of NLRB General Counsel in June 2011. The Senate has refused to confirm him since then – and is not likely to ever do so, given his track record. As a result, later in 2011, the President named Solomon as Acting General Counsel. How long can someone be "Acting" General Counsel? In view of the fact that two Circuit Courts of Appeal have ruled that the Obama recess appointments are unconstitutional, Acting General Counsel Solomon was recently asked to suspend all proceedings in a case involving Cablevision. He denied this request in a May 28, 2013 letter to Cablevision's Counsel. Acting General Counsel Solomon intends to continue issuing complaints and churning out pro-union decisions for as long as he can.

THE NLRB AND SOCIAL MEDIA, EMPLOYEE HANDBOOKS

As I have written in this column before, the NLRB is overly protective of employees who use social media. Unions are increasingly using social media to organize employees. Therefore, the NLRB is doing everything it can to protect employees' use of this medium. We can expect social media litigation at the NLRB to be here for a long time. This writer believes that the

Courts of Appeal will reverse many of the NLRB's decisions on social media. Unfortunately, it will take a couple of years for all of this to shake out.

Meanwhile, the NLRB continues to scrutinize employee handbooks, looking for policies it believes have a chilling effect on employees' rights under the National Labor Relations Act. These attempts to rewrite your handbooks are desperate attempts to try to make the NLRB relevant with an ever-decreasing caseload.

CONCLUSION

The NLRB is going to continue to do whatever is best for unions. The NLRB and unions are counting on most Employers being unwilling to spend the money to appeal these clearly unfair decisions. Employers that want to preserve their Management Rights, as well as their rights under the Constitution of the United States of America, will have to consider taking cases to the U.S. Court of Appeals.