D.C. Circuit Court Tears Down NLRB Poster Rule

D.C. Circuit Court Tears Down NLRB Poster Rule

Insight — May 14, 2013

The writing's still not on the wall. On May 7, 2013, the U.S. Court of Appeals for the District of Columbia Circuit rejected the National Labor Relations Board's (NLRB) controversial poster rule requiring 6 million private employers to post a government-issued notice advising employees of their union-related rights. The rule remains in limbo pending a related appeal in the U.S. Court of Appeals for the Fourth Circuit, and potential appeal to the U.S. Supreme Court.

Poster Rule and Business Group Backlash

The controversial rule was issued in August 2011 under the NLRB's purported statutory authority to enact rules "necessary" to carrying out the National Labor Relation Act's provisions. The Board had long been empowered under Section 6 of the Act to engage in administrative rulemaking, but had generally eschewed this power to enforce union-related rights through case-by-case adjudication. In justifying its unusual poster rule, the NLRB claimed that many employees were unaware of their union-related rights. It cited the small percentage of unionized employees in the private workforce, and claimed that immigrants and high school students were particularly unlikely to be aware of their workplace rights.

The NLRB poster rule required all private employers covered by the Act—6 million businesses—to post an 11-by-17 inch government-issued notice in "conspicuous places," and on intranet or internet sites used to communicate with employees. The poster advised employees of their rights to organize and join unions, to collectively bargain, and to strike and picket. Failure to post was an unfair labor practice, and could separately be used as evidence of an employer's unlawful motive in other Board cases. The statute of limitations on unfair labor practice charges would also be tolled in cases where employers failed to post.

Business groups excoriated the rule as unbalanced. The poster did not advise employees of their additional rights to decertify unions, to refuse to pay dues in right-to-work states, or to object to dues payments in excess of those needed for representational purposes. The rule also arguably implicated employers' free speech rights, and exceeded the NLRB's Section 6 authority because the Act does not expressly mandate that the Board educate employees about workplace rights. Some groups claimed that the Obama administration was also improperly attempting to bypass the legislative process through substantive rulemaking.

District Court Challenges and the D.C. Circuit Court's Injunction

The rule was originally slated to become effective in November 2011, but

implementation was twice delayed due to litigation in the U.S. District Courts for the Districts of Columbia and South Carolina. In the former case, a district court judge upheld the rule as a valid exercise of the Board's Section 6 power, but invalidated two of its enforcement mechanisms. *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34 (D.D.C. 2012). In the latter case, a judge held that the Board had exceeded its Section 6 authority because the Act nowhere required employers to post notices of employee rights. *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778 (D.S.C. 2012).

Both district court opinions were appealed. Just two weeks before it was finally scheduled to become effective—on April 30, 2012— the D.C. Circuit Court enjoined the rule's enforcement pending resolution of the District of Columbia appeal. The NLRB directed its regional offices to not implement the rule pending resolution of the issues before the D.C. Circuit Court.

D.C. Circuit Court's Opinion

On May 7, 2013, Judges A. Raymond Randolph, Karen Henderson, and Janice Rogers Brown of the D.C. Circuit Court—all Republican appointees—rejected the rule after finding each of its enforcement mechanisms incompatible with the Act.

Writing for the court, Judge Randolph first noted that the Act's free speech provision—Section 8(c)—precluded the NLRB from finding employer speech containing no threat of reprisal or promise of benefit to be an unfair labor practice, or evidence of such a practice. But he found that the poster rule did precisely that. It provided that failure to post was both an unfair labor practice, and could be used as evidence of other unfair labor practices. Drawing on First Amendment jurisprudence, he rejected any claim that the government-issued poster merely reflected the Board's, and not an employer's, speech. First Amendment principles protect both the "dissemination" and the "creation" of messages. They also protect the right not to speak, so the "right to disseminate another's speech necessarily includes the right to decide not to disseminate it." Judge Randolph thus found two of the rule's enforcement mechanisms invalid.

He next held that the rule's purported tolling of the statute of limitations in cases where employers failed to post the notice was incompatible with Congressional intent. The Board failed to prove that in enacting the 6-month statute of limitations on unfair labor practice charges, Congress contemplated potential tolling where employers failed to post, or where employees were unaware of their union-related rights. Judge Randolph thus held that the rule's remaining enforcement mechanism was also invalid.

Because each of its enforcement mechanisms conflicted with the Act, Judge Randolph rejected the rule's notice posting requirement after noting that the NLRB had expressly rejected the option of issuing a rule that depended solely on voluntary compliance.

In a concurring opinion, Judges Henderson and Brown agreed with Judge Randolph's reasoning, but would have taken his decision one step further.

They argued that, regardless of whether the enforcement mechanisms were valid, the NLRB lacked Section 6 authority to issue the poster rule. They urged that the Act invested with Board with only reactive power—such as responding to unfair labor practice charges, or responding to election petitions filed by parties—but not any proactive authority to guard against potential statutory violations. "The NLRA," they concluded, "simply does not authorize the Board to impose on an employer a freestanding obligation to educate its employees on the fine points of labor relations law." *Nat'l Ass'n of Mfrs. v. NLRB*, No. 12-5068 (D.C. Cir. May 7, 2013).

Fourth Circuit Appeal and Potential U.S. Supreme Court Review

While the D.C. Circuit Court firmly rejected the poster rule, the related challenge from South Carolina remains pending before the Fourth Circuit. That court heard oral arguments in the case in March 2013, and the parties have already submitted their differing interpretations of the D.C. Circuit court's opinion in supplemental filings. The Board has not yet updated its website to address the effect, if any, the D.C. Circuit's opinion may have on its own enforcement position.

Regardless of how the Fourth Circuit eventually rules, the NLRB's poster rule seems likely to end up before the U.S. Supreme Court. The writing's still not on the wall, but the Supreme Court is one step closer to posting its own thoughts on the matter.
