

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF)
MANUFACTURERS)
1331 Pennsylvania Ave., Suite 600)
Washington, D.C. 20004-1790)

and)

COALITION FOR A DEMOCRATIC)
WORKPLACE)
901 7th Street NW, 2nd Floor)
Washington, D.C. 20001)

Plaintiff,)

v.)

NATIONAL LABOR RELATIONS BOARD,)
MARK PEARCE, CRAIG BECKER and)
BRIAN HAYES in their official capacities)
as Members of the Board, and LAFE)
SOLOMON, in his official capacity as Acting)
General Counsel of the Board)
1099 14th St. N.W.)
Washington, D.C. 20570-0001)

Defendants.)

Case: 1:11-cv-01629

JUDGE AMY BERMAN JACKSON

AMENDED COMPLAINT

1. This action is brought by the National Association of Manufacturers (“NAM”) and the Coalition for a Democratic Workplace (“CDW”) (together, “Plaintiffs”) to declare unlawful and set aside the promulgation of a Final Rule by the National Labor Relations Board (“NLRB” or the “Board”) entitled “Notification of Employee Rights Under the National Labor Relations Act (the “Rule”). The Rule was issued by the Board on August 30, 2011, 76 Fed. Reg. 54006. The Rule requires employers subject to the jurisdiction of the

National Labor Relations Act (“NLRA” or the “Act”) to post notices informing their employees of certain rights under the Act.

2. The Board-ordered notices set forth in the Rule are framed in such a way as to lack neutrality and unfairly encourage and promote unionization. The imposition of such a notice requirement, 75 years after passage of the Act, constitutes a massive, unprecedented and unlawful expansion of the Board's jurisdiction. The Rule adversely affects nearly six million businesses by forcing them to promote unionization of their workforces upon pain of otherwise committing an unfair labor practice, also newly created by the Board in the Rule. The Board's promulgation of the Rule is plainly “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”, in direct violation of the National Labor Relations Act and the Administrative Procedure Act (the “APA”), 5 U.S.C. 701, et seq., and must therefore be enjoined and set aside.

PARTIES

3. Plaintiff, the NAM is the preeminent manufacturing association in the United States, as well as the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector in all 50 states.

4. The NAM, as well as most of the 12,000 manufacturing companies represented by NAM, are employers covered under Section 2(2) of the NLRA, 29 U.S.C. § 152(2). The NAM and a majority of its members are directly affected by the Rule issued by the Board and challenged in this action.

5. Plaintiff CDW represents millions of businesses of all sizes from every industry and every region of the country. The CDW's membership includes hundreds of employer associations as well as individual employers and other organizations. Included within the CDW's membership and represented by the CDW are many employers who will be required

to comply with the unauthorized Rule at issue in this case. Many such member employers reside in and do business in this judicial district. As representatives of employers on whom the NLRB is attempting to impose an unprecedented and unauthorized Notice posting requirement, and as employers themselves, NAM and the Coalition have standing to bring this action.

6. Defendant NLRB is an independent agency of the United States. The agency's jurisdiction is limited by Congress under the NLRA to conducting representation elections and investigating and adjudicating unfair labor practice charges brought by the Board's General Counsel. 29 U.S.C. § 151, *et seq.*

7. Defendant Mark Pearce is Chairman of the Defendant Board, and Defendants Craig Becker and Brian Hayes are members of the Board. Defendant Lafe Solomon is Acting General Counsel of the Board. They are each sued in their official capacities pursuant to 5 U.S.C. § 703.

JURISDICTION AND VENUE

8. The Court has Federal Question jurisdiction in this action pursuant to 28 U.S.C. § 1331 (1993) because this action arises under the provisions of the NLRA, 29 U.S.C. § 151, *et seq.* and the First Amendment to the Constitution.

9. This Court has jurisdiction to review a final agency action by the Board under the APA, 5 U.S.C. §§ 701-706, 5 U.S.C. § 703 and 28 U.S.C. §§ 1331 and 1337.

10. Venue is proper in this district under 28 U.S.C. § 1391(e) because the Board is an agency of the United States, its headquarters are located in the District of Columbia, and a substantial part of the acts and omissions giving rise to the claims in this action, including issuance of the challenged Rule, occurred or failed to occur at the Board's headquarters. The Plaintiffs principal offices are also located in the District of Columbia as are a number of their member employers.

11. The Court is authorized to award declaratory and injunctive relief under the APA, 5 U.S.C. §§ 701-706 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

FACTS

12. On December 22, 2010, the Board published a Notice of Proposed Rulemaking in the Federal Register, stating therein an intention to impose the notice posting requirement that ultimately became the Rule. 75 Fed. Reg. 80410. The Board purported to act under its authority granted by Section 6 of the Act, 29 U.S.C. § 156, to promulgate such rules as are necessary to carry out the provisions of the Act. As further explained below, however, there are no provisions of the Act which are carried out by the Rule as issued by the Board and the Act's provisions in fact do not authorize the Rule.

13. After considering public comments on the proposed rule, the Board issued the Rule on August 30, 2011. The Rule was published in the Federal Register on August 30, 2011, at 76 Fed. Reg. 54006 (2011). The Rule is to be codified at 29 C.F.R. Part 104. A copy of the Rule is attached hereto and incorporated by reference.

14. The Rule constitutes a final agency action.

15. The effective date of the Rule is November 14, 2011.

FIRST CAUSE OF ACTION

16. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-15 as if fully rewritten herein.

17. In both the Notice of Proposed Rulemaking and the Final Rule, the Board cites Section 6, 29 U.S.C. § 156 of the NLRA as authority to promulgate and issue the Rule.

18. Section 104.20(a) of the Rule provides in pertinent part that “[a]ll employers subject to the NLRA must post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information containing

basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this Part.” (“Notice”). The Rule also provides for electronic posting of the Notice. The Appendix to Subpart A of 29 C.F.R. Part 104 of the Rule sets forth the text of the Notice.

19. Neither Section 6 nor any other sections of the NLRA contain any provisions granting the Board the authority to promulgate and issue a specific rule requiring employers to post a notification of employee rights under the NLRA. The Rule, therefore, has been promulgated in excess of the Board's statutory authority under the NLRA. The Rule is also arbitrary and capricious.

20. The Rule must therefore be held unlawful and set aside under the APA, 5 U.S.C. §§ 706(2)(A) and 706(2)(C).

21. Unless implementation of the Rule is enjoined, Plaintiffs, their members and all other employers subject to the Board's jurisdiction will suffer immediate, irreparable harm for which no adequate remedy at law exists.

22. Enjoining the Rule is in the public interest and presents no harm to the Board.

SECOND CAUSE OF ACTION

23. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-22 as if fully rewritten herein.

24. The Board's authority to administer the provisions of the NLRA is triggered only when a representation petition is filed pursuant to Section 9(c)(1), 29 U.S.C. § 159(c)(1) or an unfair labor practice charge is filed and processed pursuant to Section 10(b) 29, U.S.C. § 160(b).

25. Neither Section 6 nor any other section of the NLRA contains any specific provision granting the Board the authority to assert jurisdiction over any employer absent the filing of a representation petition or unfair labor practice charge.

26. Neither Section 6 nor any other section of the NLRA grants the Board the authority to require an employer to post any notice in the absence of the filing of a representation petition under Section 9(c)(1) of the NLRA or an unfair labor practice charge under Section 10(b) of the NLRA against such employer. The Rule, therefore, has been promulgated in excess of the Board's statutory authority under the NLRA.

27. The Rule must therefore be held unlawful and set aside under the APA, 5 U.S.C. § 706(2)(C).

28. Unless implementation of the Rule is enjoined, Plaintiffs, their members and all other employers subject to the Board's jurisdiction will suffer immediate, irreparable harm for which no adequate remedy at law exists.

29. Enjoining the Rule is in the public interest and presents no harm to the Board.

THIRD CAUSE OF ACTION

30. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-29 as if fully rewritten herein.

31. Section 104.210 of the Rule states in pertinent part that “[f]ailure by [employers] to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by NLRA § 7, 29 U.S.C. 157, in violation of NLRA § 8(a)(1), 29 U.S.C. 158(a)(1).” Section 104.210 of the Rule further provides that “the Board will determine whether an employer is in compliance [with the Rule] when a person files an unfair labor practice charge alleging that the employer has failed to post the employee notice required [under Subpart B of the Rule].”

32. Section 104.210 of the Rule purports to create a new unfair labor practice where an employer covered under the NLRA fails to post a Notice.

33. The Board has no authority under Section 6 or any other provision of the NLRA to create and promulgate a new unfair labor practice where an employer covered under the NLRA fails to post a Notice. The Rule, therefore, has been promulgated in excess of the Board's statutory authority under the NLRA.

34. The Rule must therefore be held unlawful and set aside under the APA, 5 U.S.C. § 706(2)(C).

35. Unless implementation of the Rule is enjoined, Plaintiffs, their members and all other employers subject to the Board's jurisdiction will suffer immediate, irreparable harm for which no adequate remedy at law exists.

36. Enjoining the Rule is in the public interest and presents no harm to the Board.

FOURTH CAUSE OF ACTION

37. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-36 as if fully rewritten herein.

38. Section 102.214(a) of the Rule provides for the tolling of the statute of limitations for unfair labor practice charges. Section 102.214(a) provides in pertinent part that “[w]hen an employee files an unfair labor practice charge the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six (6) months after the occurrence of the allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful.”

39. Section 10(b) of the NLRA, 29 U.S.C. § 160(b), however, provides in pertinent part that “[n]o complaint shall issue based upon any unfair labor practice charge occurring more than six (6) months prior to the filing of the charge with the Board and service of a copy thereof upon a person against whom such charge is made unless the person aggrieved thereby

was prevented from filing such charge by reason of service in the armed forces, in which event the six (6) month period shall be computed from the day of his discharge.”

40. The tolling of the statute of limitations as provided for in Section 104.214(a) of the Rule is not limited to charges filed where the aggrieved person was prevented from filing such charge by reason of service in the armed forces.

41. Section 102.214(a) purports to toll the six (6) month statute of limitations for filing an unfair labor practice charge set forth in Section 10(b) of the NLRA, 29 U.S.C. 160(b) where an employer covered by the NLRA fails to post a Notice.

42. The Board has no authority under Section 6 or any other provision of the NLRA to promulgate and issue a Rule tolling the statute of limitations for filing an unfair labor practice charge. The Rule, therefore, has been promulgated in excess of the Board's statutory authority under the NLRA.

43. The promulgation and issuance of Section 104.214(a) of the Rule also violates Section 10(b) of the NLRA, 29 U.S.C. § 160(b).

44. The Rule must therefore be held unlawful and set aside under the APA, 5 U.S.C. § 706(2)(C).

45. Unless implementation of the Rule is enjoined, Plaintiffs, their members and all other employers subject to the Board's jurisdiction will suffer immediate, irreparable harm for which no adequate remedy at law exists.

46. Enjoining the Rule is in the public interest and presents no harm to the Board.

FIFTH CAUSE OF ACTION

47. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-46 as if fully rewritten herein.

48. The Rule's requirement that all employers post the Notice, the creation of a new unfair labor practice and the tolling of the statute of limitations contained in § 10(b) of the NLRA, 29U.S.C. § 160(b) all are in excess of the powers delegated by the Board by Congress and contrary to the specific provisions of the NLRA.

49. The Rule must therefore be held unlawful and set aside as an executive agency action in excess of its delegated powers.

50. Unless implementation of the Rule is enjoined, Plaintiffs, their members and all other employers subject to the Board's jurisdiction will suffer immediate, irreparable harm for which no adequate remedy at law exists.

51. Enjoining the Rule is in the public interest and presents no harm to the Board.

SIXTH CAUSE OF ACTION

52. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-51 as if fully rewritten herein.

53. The Rule requires Plaintiffs and all employers subject to the Board's jurisdiction to post the Notice containing certain specific information regarding employee rights.

54. Failure to post the Notice subjects Plaintiffs and all employers within the Board's jurisdiction to prosecution for unfair labor practice charges. Thus, the Rule compels Plaintiffs and all employers subject to the Board's jurisdiction to engage in speech they would not otherwise issue in violation of their rights under the First Amendment and Section 8(c) of the Act, 29 U.S.C. § 158(c) to refrain from speaking or expressing certain views.

55. The Board's promulgation and enforcement of the Rule absent statutory authority is contrary to Section 8(c) of the Act, 29 U.S.C. § 158(c) and will coerce speech by Plaintiffs, their members and all other employers subject to the Board's jurisdiction in violation of the First Amendment to the Constitution.

56. The Rule must therefore be held unlawful and set aside under the First Amendment, Section 8(c), 29 U.S.C. § 158(c) and the APA, 5 U.S.C. §§ 706(2)(A) and 706(2)(C).

57. Unless implementation of the Rule is enjoined, Plaintiffs, their members and all other employers subject to the Board's jurisdiction will suffer immediate, irreparable harm for which no adequate remedy at law exists.

58. Enjoining the Rule is in the public interest and presents no harm to the Board.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court enter judgment against Defendant:

A. Declaring that the Board exceeded its authority under Section 6 of the NLRA to require employers to post the Notice.

B. Declaring that the Board exceeded its authority under Section 9(c)(1) of the NLRA by requiring employers who the Board has not found to have committed an unfair labor practice or with respect to whom a representation petition has not been filed to post the Notice.

C. Declaring that the Board violated Section 10(b) of the NLRA by providing for the tolling of the statute of limitations for filing an unfair labor practice charge pursuant to Section 102.214(a) of the Rule.

D. Declaring that the Board has no authority under Section 6 or any other provision of the NLRA to require employers to post the Notice electronically.

E. Declaring that under the APA the Rule is null and void *ab initio* and in its entirety.

F. Preliminarily and permanently enjoining the Board from implementation, enforcement and application of the Rule.

G. Awarding Plaintiffs their attorney's fees and costs of this litigation.

H. Granting such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

/s/ Peter N. Kirsanow

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was filed electronically on the 23rd day of September, 2011 in accordance with the Court's Electronic Filing Guidelines. Notice of this filing will be sent to all parties by operation of the Court's Electronic Filing System. Parties may access this filing through the Court's Filing System.

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