Employers Association of New Jersey

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Issue: Does a Notice requiring employers to inform employees about rights under the National Labor Relations Act violate the First Amendment?

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For general information purposes only

On August 30, 2011 the National Labor Relations Board (Board) has issued a Final Rule that will require employers to notify employees of their rights under the National Labor Relations Act (the "Act") as of November 14, 2011.

Private-sector employers (including labor organizations) whose workplaces fall under the National Labor Relations Act will be required to post the employee rights notice where other workplace notices are typically posted. Also, employers who customarily post notices to employees regarding personnel rules or policies on an internet or intranet site will be required to post the Board's notice on those sites. Copies of the notice will be available from the Agency's regional offices, and it may also be downloaded from the NLRB website.

The notice, which is similar to one required by the U.S. Department of Labor for federal contractors, states that employees have the right to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and to refrain from any of these activities. It provides examples of unlawful employer and union conduct and instructs employees how to contact the NLRB with questions or complaints.

You have asked me to evaluate whether the Final Rule violates the First Amendment rights of employers.

In issuing the Final Rule, the Board notes that the notice does not involve employer speech. It states that the government, not the employer, will produce and supply posters informing employees of their legal rights. However, section 8(c) of the Act, also known as the free speech amendment of the Taft Hartley Act codifies the well-settled rule that employers have a constitutional right to express their opinions about unions and collective bargaining, so long as they do not threaten employees with reprisals for their union activities, or promise benefits as an inducement to refrain from them. This constitutional right to speech permits an employer to express objective opinions or predictions about what might happen if employees were to unionize. *Gissel Packing Co.*, 395 U.S.575 (1968). Tills constitutional right to speech also allows employers to convene mandatory meetings so that those opinions can be expressed. *NL RB* v. *United Steel Workers of America*, 357 U.S. 357 (1958). Thus, it is well-settled that an employer is free to communicate with its employees about unionization and collective bargaining. Indeed, the Supreme Court o[the Unites States has held that such speech falls squarely within the zone of conduct intended by Congress to reserve

for market freedom and therefore is not subject to Board regulation. *Golden State Transit Corp.* v. *Los Angeles,* 493 U.S. 103, III (1983), citing *lnt 'I Ass 'n of Machinists* & *Aerospace Workers* v. *Wisconsin Employment Relations Comm 'n,* 427 U.S.I32, 144 (1976).

The Final Rule compels employers to “speak” with its employees about unionization and collective bargaining. It also regulates the content of that speech. The Final Rule does this by requiring all employers subject to the NLRA to "post a copy of a notice advising employees of their rights under the NLRA and providing information pertaining to the enforcement of those rights." The Board also proposes to find an employer that fails or refuses to post the required notice in violation of section 8(a) of the Act.

While the Final Rule does not prevent an employer from advancing a counter argument to repel unionization or collective bargaining, the right *not to speak* is just as protected as the right *to speak.* Both providing information about unionization and collective bargaining and the calculated withholding of such information are subject to a free market choice. Both are governed by a rational assessment about how to allocate resources and both are based on an evaluation of intended outcomes. For example, an employ r may choose to express its opinions or predictions under *Gissel* or decide to hold a "captive audience" meeting under *United Steel Workers.* Both forms of conduct are expressly codified by section 8 (c) of the Act. On the other hand, an employer can calculate various outcomes and strategies and decide not to give and opinion or convene a meeting. Since speaking and not speaking are both subject to the market freedom of choice they are indistinguishable as a matter of constitutional protection. In short, the proposed rule impermissibly regulates the employer's choice whether or not to speak, inform and advise employees.

If the Board is not constitutionally authorized to prevent an employer from expressing an opinion about unionization or collective bargaining or from convening a "captive audience" meeting to hear these op inions then it is also not constitutionally authorized to compel employer speech when it calculates to remain silent. The Final Rule states that the purpose of the poster is to inform and advise employees of their NLRA rights. Implicit in this purpose is the view that employers will still be permitted to express their opinions about unionization and collective bargaining and therefore such advice and information does not fall within the zone of constitutional protection. This implication, however, was rejected outright by the Board in *Babcock* v. *Wilcox Co.,* 77 N.L.R.B. 577,578 (J 948). Prior to the Taft Hartley Act, the Board ruled that an employer could not hold a captive audience meeting. *Clark Bros. Co., 70* N.L.R.B. 802, 804 (1946). In this case, the Board explained that because the employer used its "economic power" to hold an employee group captive and because the employees were "not free to determine whether or not to receive" the employer's information, the employer committed an unfair labor practice. Td. at 805. The Board noted that it was not limiting expression of the employer's opinion but only the "compulsion to listen." Id.

Following the passage of the Taft Hartley Act, the Board repudiated *Clark Bros.,* finding the distinction between "talking" and "listening" "no longer exists." *Babcock* v. *Wilcox Co.* , 77 N L.R.B. at 578. As it follows, speaking and compelling someone to listen to that speech arise out of the same constitutional right as codifies in section 8 (c) of the Act. Likewise, the right to refrain from speech is inseparable from the right to speak. Both are subject to market forces and fall within the zone of conduct intended by Congress to reserve for market freedom and therefore cannot be subject to Board regulation. To suggest that compelled speech is constitutionally permissible because an employer has the right to make a counter argument is a legal fiction. If an employer has the right to convene a captive audience meeting in order to provide information about unionization and collective bargaining then it has an equal right to keep the "cat in the bag" and not provide such information. A mandatory poster subject to a penalty for the failure or refusal to comply violates section 8 (c) of the Act.

In the Final Rule, the Board observes that even if the notice-posting requirement is construed to compel employer speech, the U.S. Supreme Court has recognized that governments have "substantial leeway in determining appropriate information disclosure requirements for business corporations." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 15 n.12 (1985). This discretion is particularly wide when the government requires information disclosures relevant to the employment relationship. Thus, as the D.C. Circuit has observed, "an employer's right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks." *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (*UAW v. Chao*) (citing *Lake Butler*, 519 F.2d at 89).

However, unlike cases where Congress has authorized an agency to promulgate a notice, the Board has no authority to mandate a poster requirement because such a poster is not designed to prevent unfair labor practices or eliminate obstructions to interstate commerce.

The Board concedes that the "National Labor Relations Act does not directly address an employer's obligation to post a notice of its employees' rights arising under the Act or the consequences an employer may face for failing to do so." In fact, the Act makes no mention of any such putative obligation. The Board further acknowledges that the Act "is almost unique among major Federal labor laws in not including an express statutory provision requiring employers routinely to post notices at their workplaces informing employees of their statutory rights." Despite the obvious import of these admissions, the Board concludes that its authority under section 6 of the Act to make rules "necessary to carry out the provisions of the Act" permits promulgation of the Final Rule.

Congress did not give specific statutory authority to the Board to require the posting of a general rights notice when it passed Act, the purpose of which was to eliminate obstructions to interstate commerce and to encourage collective bargaining. Accordingly, the Board is authorized only "to prevent any person from engaging in any unfair labor practice affecting commerce." 29 U.S.C. 160. Thus, by the plain language of the Act, to fall within the Board's rule making authority, the poster requirement must "prevent [an employer] from engaging in any unfair labor practice affecting commerce."

Under section 2 (6) and (7) of the Act respectively, "commerce" means, in relevant part, trade, traffic, commerce, transportation, or communication among the several States ... " The term "affecting commerce" means "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

In *NLRB v. Jones* & *Laughlin Steel Corp* ., 301 U.S. 1 (1937), the Supreme Court held that preserving "labor peace" was a legitimate exercise of Congressional power to regulate interstate commerce. Since the ability of employees to engage in collective bargaining is "an essential condition of industrial peace," the Congress was justified in enacting the Act to the extent that employers that engage in interstate commerce may "refuse to confer and negotiate" with their workers. Thus, the Board's authority is expressly limited to preventing unfair labor practices that would disrupt labor peace.

The Board has make no finding that the failure to post the Act's rights in the workplace disturbs labor peace. Nor does the Notice establish that the failure to post a notice is evidence that an employer is refusing to confer with its workers. Instead, the Board speculates that the poster may dissuade employers from interfering with concerted action but offers no evidence that a poster would prevent an employer from engaging in an unfair labor practice that would "tend to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." The Board also contends that with a poster employees would be better able to exercise concerted rights but the only evidence to support this contention is a *New York Times* article dealing with an employee who lodged a private sex harassment

charge. Short of speculation and hearsay, there is absolutely no finding that the failure to inform employees of their right to engage in concerted activity would "tend to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Having not stated a permissible purpose supporting the poster, the Board makes no pretense about the poster's primary purpose -the promotion of union organization. However well meaning this purpose may be, it is clearly impermissible considering that the authority of the Board is limited expressly to preventing unfair labor practices not the promotion of union organizing.

It is my view that the Final Rule can be challenged on First Amendment grounds.