EANJ Employers Association of New Jersey
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3142-AA07

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Re: Proposed Rules Governing Notification of Employee Rights under the National Labor Relations Act

Dear Mr. Heltzer:

The Employers Association of New Jersey (EANJ) hereby submits its comments on the above referenced matter. The Notice of Proposed Rulemaking (the "Notice") proposes, among other things, a regulation requiring employers subject to the National Labor Relations Act (NLRA or the "Act") to post notices informing their employees of their rights under the NLRA. The National Labor Relations Board (the "Board") believes that many employees protected by the NLRA are unaware of their rights. The proposed rule also establishes the size, form and content of the notice and sets forth provisions regarding sanctions and remedies that may be imposed by the Board if an employer fails to comply with the obligations under the rule. However, for the reasons explained herein the rule 1) violates section 8 (c) of the NLRA and 2) exceeds the Board's authority under section 10 to promulgate rules under the Act.

I. The poster requirement violates section 8(c) of the NLRA because it compels an employer to provide information to employees that it has a constitutional right to refrain from doing.

As the Notice states, section 6 of the Act, 29 U.S.C. 156, provides that the board shall have the authority to promulgate rules "as may be necessary to carry out [the] Act." The Board interprets section 6 as authorizing the above mentioned rule. The Board was created by Congress "to advance the public interest in eliminating obstructions to interstate commerce." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-08 (1959). Congress had found that strikes and other forms of industrial strife and unrest, as well as unequal bargaining power between employer and employee, burdened and obstructed commerce. 29 U.S.C. 151. Thus, the Act was passed to eliminate these obstructions, encourage collective bargaining and to prescribe and protect certain worker rights. Id. The Act expressly empowers the Board in section 10 of the Act "to prevent any person from engaging in any unfair labor practice affecting commerce." 29 U.S.C. 160. While the Act provides various procedures to prevent such practices, it is clear from the plain reading of the NLRA that the Board's power is limited to preventing unfair labor practices affecting commerce.

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

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predictions about what might happen if employees were to unionize. *Gissel Packing Co.,* 395 U.S.575 (1968). This constitutional right to speech also allows employers to convene mandatory meetings so that those opinions can be expressed. *NLRB 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 of 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, 111 (1983), citing *Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S.132, 144 (1976).

The proposed rule compels employers to speak with its employees about unionization and collective bargaining. It also regulates the content of that speech. The proposed 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) 1 of the Act.

While the proposed 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 employer 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 opinions then it is also not constitutionally authorized to compel employer speech when it calculates to remain silent. The Notice 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 (1948). 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. Id. 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.

The fact that other federal statutes contain a poster requirement does not permit the Board to exceed its authority. *See* Notice at 6. Indeed, the absence of such an express requirement in the NLRA is dispositive that the Board lacks the authority to impose such a requirement. As noted above, the express purpose of the Act is eliminating obstructions to interstate commerce. The Act empowers the Board to prevent unfair labor practice that could obstruct commerce. Section 8 (c) of the Act guarantees free speech which encompasses the expression of opinions,

predictions, and information and the right to refrain from such speech, thus preserving the market balance between the employer's property interest and the employee's interest in collective action. In the absence of an unfair labor practice charged by an outside party or under narrowly prescribed circumstances (see Notice at 6, footnote 5) the Board has no authority to compel an employer to provide information to its employees about unionization or collective bargaining.

II. 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.

As noted above, the purpose of the NLRA is 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."

Section 8 (a) of the Act defines "unfair labor practices." In relevant part, it shall be an unfair labor practice under section 8 for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the [concerted] rights ... ;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it ... ;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ... ;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees ....

Under section 2 (6) and (7) 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 NLRA 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 Notice makes no finding that the failure to post NLRA 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 Notice 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 Notice 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. *See* Notice pp. 8-9. 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 Notice 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. In this regard, the Notice takes note of the decline in private-sector unionization, with union membership dropping from the 35 percent at its peak in 1955 to about 8 percent in 2010. But this decline cannot be attributed to any recent changes in the law since the basic legal doctrines have scarcely changed since the passage of the Taft Hartley Act in 1947.

Generally speaking, there are four interconnected reasons to explain the decline in union membership. First, with employers free to give or refrain from giving opinions about labor unions, many have adopted human resources practices that include health care and retirement benefits, objective performance appraisals, merit-based pay and profit-sharing. Second, the nature of industry and the workforce have evolved so that it is difficult for workers with different interests and backgrounds to find common cause in labor unions. Third, increased labor mobility across geographical regions inhibits union organizations. Fourth, and perhaps more important, global free trade means that efforts to push up wages through collective bargaining results in outsourcing to foreign supplies.

A possible legislative remedy to stem the tide of this decline was stymied when the Employee Free Choice Act failed to pass in the U.S. Senate in 2009. In January, 2009, President Obama signed Executive Order 13496, which requires government contractors to post information about NLRA-rights, the content of which has been adopted verbatim by the proposed rule here. According to the U.S. Department of Labor, Office of Labor-Management Standards (the "Department"), the president's authority for issuing Executive Order 13496 was established pursuant to the Procurement Act, 40. U.S.C. 101, *et. seq.* This assertion has been vigorously contested. In supporting the president's authority, the Department conceded that a workplace poster setting out NLRA rights falls outside the scope of section 8 of the Act, and therefore was not to subject to preemption by the Act. See 29 C.F.R. 471 at 28370. Accordingly, the Department at least has conceded that there is no relation between a poster setting out NLRA rights and unfair labor practices. If there where such a relation, Executive Order 13496 would be preempted by the Act under the well-settled rule in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

The Notice contends that section 10 of the Act authorizes the proposed rule. But as referenced above, section 10 limits the Board's authority "to prevent[ing] any person from engaging in any unfair labor practice affecting commerce." The proposed rule has no relation to preventing unfair labor practices and concedes as much considering the absence of any competent evidence demonstrating such a relationship. Instead the proposed rule seeks to promote unionization. While the merits of such a policy are subject to intense political debate, it is undeniable that only the executive and legislative branches have the constitutional authority to advance such a policy. In contrast, the Board is a creature of the Act and has a clearly defined statutory role to prevent unfair labor practices by acting, in relevant part, as an adjudicator of labor-management disputes. The Act can be amended by an act of Congress and unless preempted the president can advance a policy to promote unionization. But the Board cannot exceed its authority to do so, as the proposed rule seeks to do.

Conclusion

For the aforementioned reasons, EANJ urges the Board not to adopt the proposed rule.

Respectfully,

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For the Employers Association of New Jersey