UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

National Association of Manufacturers 1331 Pennsylvania Avenue Suite 600 Washington, D.C. 20004-1790 Plaintiff, v. National Labor Relations Board and Mark Pearce, in his official capacity as Chairman of the National Labor Relations Board and Craig Becker, in his official capacity as member of the National Labor Relations Board and Brian Hayes, in his official capacity as member of the National Labor Relations Board and Lafe Solomon, in his official capacity as General Counsel of the National Labor Relations Board 1099 14th St. N.W. Washington, D.C. 20570-0001 Defendants	)	Case No.: Judge:

COMPLAINT

PRELIMINARY STATEMENT

1. This action is brought by the National Association of Manufacturers ("NAM") to declare unlawful and set aside the National Labor Relations Board's ("Board") promulgation of a Final Rule entitled "Notification of Employee Rights Under the National Labor Relations Act" issued by the Board on August 30, 2011, 76 Fed. Reg. 54006, requiring employers subject to the jurisdiction of the National Labor Relations Act ("NLRA") to post notices informing their employees of certain rights under the NLRA (the "Rule"). The Board's promulgation of the Rule is in excess of the Board's statutory jurisdiction, authority, limitations and rights.

PARTIES

2. 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.

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

4. Defendant Board is an independent agency of the United States. Congress has authorized the Board pursuant to the NLRA to conduct representation elections and investigate and adjudicate unfair labor practice charges.

5. Congress also has granted the Board the authority, under Section 6 of the NLRA, to make "such rules and regulations as may be necessary to carry out the provisions" of the NLRA. 29 U.S.C. § 156.

6. Defendant Mark Pearce is Chairman of Defendant Board. He is sued in his official capacity pursuant to 5 U.S.C. § 703.

7. Defendant Craig Becker is a member of Defendant Board. He is sued in his official capacity pursuant to 5 U.S.C. § 703.

8. Defendant Brian Hayes is a member of Defendant Board. He is sued in his official capacity pursuant to 5 U.S.C. § 703.

9. Defendant Lafe Solomon is General Counsel of Defendant Board. He is sued in his official capacity pursuant to 5 U.S.C. § 703.

JURISDICTION AND VENUE

10. 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. § 141 *et seq.*, including, but not limited to, the Board's rulemaking authority under Section 6 thereof, and the rules and regulations promulgated thereunder, including 29 C.F.R. Part 104.

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

12. 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 NAM's principal office is also located in the District of Columbia.

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

FACTS

14. Pursuant to its authority to promulgate rules and regulations as may be necessary to carry out the provisions of the NLRA, the Board published a Notice of Proposed Rulemaking in the Federal Register on December 22, 2010. 75 Fed. Reg. 80410.

15. 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.

16. The Rule constitutes a final agency action.

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

FIRST CAUSE OF ACTION

18. The NAM realleges and incorporates by reference the allegations in paragraphs 1-17 as if fully rewritten herein.

19. In both the Notice of Proposed Rulemaking and the Final Rule, the Board cites Section 6 of the NLRA as authority to promulgate and issue the Rule.

20. Section 6 authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156.

21. 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.

22. Neither Section 6 nor any other sections of the NLRA contain any provisions expressly 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.

23. The Rule must therefore be held unlawful and set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

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

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

SECOND CAUSE OF ACTION

26. The NAM realleges and incorporates by reference the allegations in paragraphs 1-25 as if fully rewritten herein.

27. The Board's authority to administer the provisions of the NLRA is triggered 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 pursuant to Section 10(b) 29, U.S.C. § 160(b).

28. 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.

29. 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.

30. The Rule must therefore be held unlawful and set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

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

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

THIRD CAUSE OF ACTION

33. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1-32 as if fully rewritten herein.

34. 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]."

35. 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.

36. 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.

37. The Rule must therefore be held unlawful and set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

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

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

FOURTH CAUSE OF ACTION

40. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1-39 as if fully rewritten herein.

41. 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."

42. 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."

43. 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.

44. 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.

45. 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.

46. 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).

47. The Rule must therefore be held unlawful and set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

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

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests 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 a 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 a 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 electronic Notice.

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

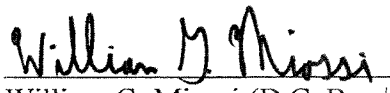
F. Preliminarily and permanently enjoining the Board from implementation, enforcement and application of the Rule.

G. Awarding Plaintiff its 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
Peter N. Kirsanow (0034196)
Maynard A. Buck (0022423)
Patrick O. Peters (0079539)
Kristen M. Cady (0086614)
Benesch Friedlander Coplan & Aronoff LLP
200 Public Square, Ste 2300
Cleveland, OH 44114-2378
Tel: 216-363-4500
Fax: 216-363-4588
E-mail: pkirsanow@beneschlaw.com


William G. Miossi (D.C. Bar # 445265)
Gregory F. Jacob (D.C. Bar # 474639)
Winston & Strawn
1700 K St., N.W.
Washington, DC. 20006
Tel.: 202-282-5000
Fax: 202-282-5100
E-mail: gjacob@winston.com

Counsel for the National Association of Manufacturers