

NLRB Suffers 2nd Major Defeat As D.C. Circuit Invalidates Posting Rule

May 7, 2013 | [National Labor Relations Board, Labor And Employment](#)



**Gerald F.
Lutkus**

Of Counsel
(Retired)

Savel Court Decision

The Court of Appeals for the D.C. Circuit today struck down one of the centerpieces of the Obama Administration's Labor agenda when it invalidated the NLRB's rule requiring employers to post an NLRB-drafted "Notification of Employee Rights under the National Labor Relations Act." Under that rule, employers failing to post the notice would be subject to an unfair labor practice charge. The D.C. Circuit today held that the NLRB departed from its "historic practice" and "negative attitude" toward promulgating rules for employers and in doing so violated the NLRA.

In reaching its decision, the Court first considered whether its decision in *Noel Canning* which invalidated NLRB action for failure to have a quorum controlled this case. The Court decided that Noel Canning was not dispositive because the Board had a quorum on the date the rule was filed with the Office of the Federal Register. "That the Board may have lost a quorum before its rule was published did not render its rule invalid."

Rather than focus on section 6 of the NLRA with regard to whether the Board even has rulemaking authority, the D.C. Circuit instead turned to those sections of the rule designed to enforce the requirement that employers must post the notice – the unfair labor practice judgment that would result from non-compliance and the tolling of the time limitation for filing ULPs. The Court determined that the Rule violated § 8(c) of the Act "because it makes an employer's failure to post the Board's notice an unfair labor practice, and because it treats such a failure as evidence of anti-union animus in cases involving, for example, unlawfully motivated firings or refusals to hire—in other words, because it treats such a failure as evidence of an unfair labor practice." In addition, the tolling provision was found by the Court to violate section 10(d) of the Act.

Having found all of the enforcement means to be objectionable, the Court delivered the fatal blow to the notice rule find that the posting requirement standing alone was not severable from the Rule. "Here we know that the Board would not have issued a posting rule that depended solely on voluntary compliance. We know this because the Board rejected that regulatory option in the preamble to its final rule. See 76 Fed. Reg. at 54,031. Subpart A must therefore fall along with the rest of the Board's posting rule."

In their concurring opinion joining in the decision written by Judge A. Raymond Randolph, Judges Karen Lecraft Henderson and Janice Rogers

RELATED PRACTICE AREAS

Labor and Employment

Labor Relations

National Labor Relations Board (NLRB)

Brown go one step further and hold that the NLRB's rulemaking process is invalid under section 6 of the NLRA.

A copy of the Court's decision is [available here](#).