05-2570-cv

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

HEALTHCARE ASSOCIATION OF NEW YORK STATE, NEW YORK STATE ASSOCIATION OF HOME AND SERVICES FOR THE AGING, INC., NEW YORK STATE HEALTH FACILITIES ASSOCIATION, INC., NYSARC, INC. and UNITED CEREBRAL PALSY ASSOCIATIONS OF NY,

Plaintiffs-Appellees,

v.

GEORGE E. PATAKI, GOVERNOR OF THE STATE OF NEW YORK, ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK and LINDA ANGELLO, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES AND FOR AFFIRMANCE OF THE DISTRICT COURT

Glenn M. Taubman, Esq.
c/o National Right To Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

05-2570-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HEALTHCARE ASSOCIATION OF NEW YORK STATE, et alia
Plaintiffs-Appellees,

v.

GEORGE E. PATAKI, GOVERNOR, et alia
Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, amicus curiae National Right to Work Legal Defense Foundation, Inc., hereby states that it has no parent corporation, nor does any publicly held corporation own any stock in it.

Respectfully submitted,

Glenn M. Taubman, Esq.
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

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I. INTEREST OF THE *AMICUS*[1]

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a charitable, legal aid organization formed to protect the Right to Work, freedoms of speech and association, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. United Auto Workers v. Nat'l Right to Work Legal Def. Found. Inc., 781 F.2d 928, 934-35 (D.C. Cir. 1986); Nat'l Right to Work Legal Def. & Educ. Found. Inc. v. United States, 487 F. Supp. 801, 808 (E.D.N.C. 1979); see also George v. Baltimore City Pub. Sch., 117 F.R.D. 368, 370-371 (D. Md. 1987) (certifying a class of nonunion employees who were represented by a Foundation staff attorney).

Through the staff attorneys that it employs, the Foundation provides free legal assistance to workers who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation's staff attorneys have served as counsel to individual employees in many Supreme Court cases concerning the right to refrain from joining or supporting a labor organization. Through these cases, the Foundation has established important precedents protecting employee rights in the workplace against the abuses of compulsory

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[1] Pursuant to Fed. R. App. P. 29(a), the Foundation states that all parties have consented to the filing of this brief.

unionism. These cases include: Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Communications Workers v. Beck, 487 U.S. 735 (1988); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Ellis v. Railway Clerks, 466 U.S. 435 (1984); and Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Cases litigated by Foundation staff attorneys in this Circuit include Andrews v. Educ. Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987).

Most recently, the Foundation's legal aid program has been at the forefront of efforts to expose so-called "neutrality agreements" and the manner in which these agreements strip employees of their freedom to choose or reject unionization. See Dana Corp., 341 N.L.R.B. No. 150 (2004); Patterson v. Heartland Indus. Partners, LLP, 225 F.R.D. 204 (N.D. Ohio 2004); Dana Corp., NLRB Case No. 7-CA-46965 (ALJD Apr. 11, 2005), appeal pending, accessible at http://www.nlrb.gov. Additionally, the Foundation maintains an active website to educate employees and the public that so-called "neutrality statutes" and "neutrality agreements" do not foster employee free choice, but rather are designed to herd employees into unionization without allowing them to make a free and informed choice. http://www.nrtw.org/d/na.htm

In sum, the purpose of this brief is to inform the Court that the individual employees receiving the Foundation's legal assistance do not want their employers

gagged by laws like New York Labor Law section 211-a, do not want to be pressured into supporting unionization, do not want their home addresses and other personal information to be given to union organizers, and do not want their employers pressured into waiving secret-ballot elections supervised by the National Labor Relations Board.

In this brief, the Foundation will not repeat arguments likely to be raised by the Healthcare Association of New York State and the other appellees who ably litigated the case below and enabled the district court to reach the appropriate result. Instead, the Foundation will provide this Court with *the employees'* perspective on the key issue underlying this case, to wit: that "neutrality" statutes and "neutrality agreements" violate employees' § 7 rights because they render one or more parties mute and thereby foist union representation on workers without allowing them to make a free and informed choice.

The perspective of individual employees is critical because they are the only parties possessing § 7 rights to choose or reject unionization. Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers."); Pattern Makers League v. NLRB, 473 U.S. 95 (1985) ("voluntary unionism" is the

paramount policy of the NLRA).[2] The State of New York and the labor unions which support section 211-a do not have § 7 rights under the NLRA. Thus, although employees' § 7 rights and interests are entitled to paramount consideration in evaluating section 211-a, those interests are ignored in both the statute and the brief submitted on behalf of Defendants-Appellants George E. Pataki et alia (hereafter referred to jointly as "Pataki").

II. ARGUMENT

New York Labor Law section 211-a is a state-enforced "neutrality" regulation. This Court's review of such regulations must take into account the factual and legal landscape that exists in New York and throughout this country, whereby labor unions and their political allies seek to create fifty different state labor laws in order to circumvent various NLRA rights, protections and strictures of which they disapprove. As the Ninth Circuit recognized in Chamber of

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[2] Section 7 of the NLRA, 29 U.S.C. § 157, states (emphasis added):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Commerce v. Lockyer, 422 F.3d 973, 978 n.4 (9th Cir. 2005), laws like section 211-a are "part of a state-by-state effort to de facto rewrite the NLRA."

This is demonstrated by the wide variety of neutrality schemes that are cropping up in jurisdictions across this country. See, e.g., Healthcare Ass'n v. Pataki, ___ F. Supp. 2d ___, 2005 WL 1155687 (N.D.N.Y. May 17, 2005); Aeroground, Inc. v. City & County of San Francisco, 170 F. Supp. 2d 950 (N.D.Cal. 2001); Chamber of Commerce v. Lockyer, 225 F. Supp. 2d 1199 (C.D. Cal. 2002), aff'd, 364 F.3d 1154 (2004), rehearing granted, opinion withdrawn, 408 F.3d 590 (2005), affirmed, 422 F.3d 973 (9th Cir. 2005); Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County, 359 F. Supp. 2d 749 (E.D.Wis. 2005), appeal pending, 7th Cir. Case No. 05-1531; Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206 (3d Cir. 2004); Dana Corp., 341 N.L.R.B. No. 150 (2004); Patterson v. Heartland Indus. Partners, LLP, 225 F.R.D. 204 (N.D. Ohio 2004).[3] So what exactly is "neutrality," and why do unions and their political allies so covet it?

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[3] See also Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, Lab. Law. (Fall 2000); Daniel Yager & Joseph LoBue, Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century, 24 Emp. Rel. L.J. 21 (Spring 1999).

A) WHAT IS "NEUTRALITY"?: Unions' demands for neutrality statutes and for negotiated neutrality agreements have grown exponentially over the past decade, and the reasons are not surprising. Unions face a steady decline in the number of employees choosing union representation when given a free choice in secret-ballot elections supervised by the NLRB, and financial self-interest has driven unions to search for new ways of acquiring additional dues paying members.[4] Because of unions' inability to succeed in secret-ballot elections, they eagerly seek neutrality statutes and neutrality agreements to "grease the skids" to unionization in a particular workplace. But there is nothing "neutral" about neutrality statutes, as the Ninth Circuit recently noted in striking down a state law

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[4] In 2003, 12.9% of wage and salary workers were union members, down from 13.3 % in 2002, according to the U.S. Department of Labor's Bureau of Labor Statistics. http://www.bls.gov/news.release/union2.nr0.htm (Jan. 21, 2004). The number of persons belonging to a union fell by 369,000 in 2003, to a total of 15.8 million. The union membership rate has steadily declined from a high of 20.1% in 1983, the first year for which comparable union data is available. For example, in 1982, the Steelworkers union claimed 1.2 million members, but by 2002 the number was 588,000. In 1982 the United Auto Workers claimed 1.14 million members, by 2002 only 700,000. As of today, only 8.2% of the private sector workforce is unionized, and the other 91.8% does not appear to be flocking to join. IBM Corp., 341 N.L.R.B. No. 148, at 19 n.9 (2004). In UFCW Local 951 (Meijer, Inc.), 329 N.L.R.B. 730 (1999), Texas A & M labor economist Morgan O. Reynolds testified that the single largest factor hindering union organizing is *employee* resistance. According to Prof. Reynolds, polling data commissioned by the AFL-CIO indicates that two-thirds of employees are not favorably disposed towards unions. (Hearing Transcript, pp. 1382-83).

similar to section 211-a. "The statute carries a false air of evenhandedness." Lockyer, 422 F.3d at 978.

Indeed, given the unions' failures in the secret-ballot electoral process regulated by the NLRB, it is not surprising that the AFL-CIO's General Counsel has urged unions to demand state neutrality legislation and "use strategic campaigns to secure recognition . . . outside the traditional representation processes."[5] By design, individual employees have few legal protections "outside the traditional representation processes," and thus little possibility of protecting their § 7 rights to refrain from the union organizing campaigns targeting them.

"Neutrality" serves to increase union ranks only because it silences all employer speech and limits what employees can hear and learn about the union that covets them. The gagging of the employer often leads to an increase in union coercion and intimidation against employees. See Glenn Taubman, "Neutrality Agreements" and the Destruction of Employees' Section 7 Rights, 6 Engage: Federalist Soc'y J. 101 (2005). As far as individual employees are concerned, there is nothing "neutral" about neutrality statutes and neutrality agreements.

Although "neutrality" statutes and "neutrality agreements" take many

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[5] Jonathan P. Hiatt & Lee W. Jackson, Union Survival Strategies for the Twenty-First Century, Lab. L.J., Summer/Fall 1996, at 176.

different forms, they include common provisions that greatly impinge upon employees' § 7 right to choose or reject unionization in a knowing and informed manner. These provisions include the following:

1) Many "neutrality agreements" contain "confidentiality" provisions which limit what employees can be told about the terms of the agreement, or even the existence of the agreement. For example, such "confidentiality" provisions are found in the neutrality agreements signed by two major national employers, Dana Corporation and Freightliner Corporation, with the United Auto Workers union.[6] But see Merk v. Jewel Food Stores Div. of Jewel Cos., 945 F.2d 889, 893-96 (7th Cir. 1991) (secret agreements violate federal labor policy); Aguinaga v. UFCW, 993 F.2d 1463, 1470-71 (10th Cir. 1993) (same). Here, when employees of New York health care facilities are suddenly hit with one-sided union organizing campaigns, will they know that their employers have been gagged by section 211-a? Not likely. As in the agreements described in footnote 6, they will be asked to decide on unionization while being kept in the dark about the motivation

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[6] See http://www.nrtw.org/20050215freightliner.pdf, http://www.nrtw.org/20050228freightliner.pdf and http://www.nrtw.org/20050215letter.pdf. For example, on August 13, 2003, Dana Corporation and the United Auto Workers union (UAW) announced a neutrality agreement which they termed a "partnership," except that the "terms of the agreement were not disclosed by agreement of the parties." See http://www.dana.com/news/pressreleases/prpage.asp?page=1295

and operation of the union that covets them.

2) Commonly, neutrality agreements place severe limits on what employers can say about the particular union or unionization in general. This is the particular evil of section 211-a. As Judge McCurn astutely observed:

> Section 7 of the NLRA gives employees a host of rights, including the right to join a labor union. Basically under that statute employees also have the right to refuse to join a union. It is difficult, if not impossible to see, however, how an employee could intelligently exercise such rights, especially the right to decline union representation, if the employee only hears one side of the story–the union's. Plainly hindering an employer's ability to disseminate information opposing unionization "interferes directly" with the union organizing process which the NLRA recognizes.

Healthcare Ass'n v. Pataki, ___ F. Supp. 2d ___, 2005 WL 1155687*16 (N.D.N.Y. 2005) (citations omitted).[7]

3) Many neutrality agreements require the employer to provide the unions with employees' names, addresses, salary information, work histories and other personal information. Employees are rarely (if ever) asked if they approve of the disclosure of their personal information. Even if the employees disapprove, the

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[7] In addition to silencing all speech not favorable to the union, many neutrality agreements require the employer to affirmatively participate with the union in joint "captive audience" speeches, where the employer is required to extol the union as its new "partner" and explain why having the union will increase business opportunities, implying that jobs will be lost without the union. See http://www.nrtw.org/d/jci_captive.htm, which is the text of such a captive audience speech delivered by the management of Johnson Controls Corporation at the behest of the United Auto Workers.

employer is legally obligated to provide the information over their objection. See, e.g., Hotel & Rest. Employees Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2d Cir. 1993) (enforcing the terms of a neutrality agreement). Armed with personal information about the employees, union officials are able to make "home visits" and apply other pressure to cajole (or coerce) employees into signing union authorization cards.

4) Most neutrality agreements provide the union with physical access to the employees in the workplace, allowing further pressure on them to sign union authorization cards. Armed with a list of who has signed union authorization cards and who has not, unions bring undue pressure to bear on individual employees. In one recent NLRB case concerning the enforcement of a neutrality agreement, an employee subject to a UAW "card check" campaign attested as follows:

> The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.

Declaration of Clarice K. Atherholt in Support of Her Decertification Petition, filed with the NLRB in Dana Corp., 341 N.L.R.B. No. 150 (2004).

5) Finally, most neutrality agreements contain "card check" provisions, whereby employers waive secret-ballot elections conducted by the NLRB and instead agree to recognize the union based upon signed authorization cards procured by the union. Both the Supreme Court and the NLRB have recognized the inherent unreliability of such "card check" systems, especially when compared to the "gold standard" of NLRB-supervised secret-ballot elections.

> We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.

NLRB v. Gissel Packing Co., 395 U.S. 575, 604 (1969); Dana Corp., 341 N.L.R.B. No. 150 (2004) (granting review on the issue of whether employees retain the right to demand a secret-ballot election even after the union and employer announce "voluntary recognition").

Through these "card check" provisions, unions excise the NLRB from the union representational process, and extinguish employees' ability to vote their consciences in private via a secret ballot. Thus, the use of "card checks" and the waiving of secret-ballot elections inevitably lead to an increase in union coercion and intimidation, as employees are pressured into signing authorization cards that

are counted as "votes" for unionization. The Supreme Court has recognized the illicit pressures brought to bear by unions against employees who refuse to sign an authorization card. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 306 (1974) (there exists "rational, good-faith grounds for distrusting authorization cards"); id. at 315 n.5 (Stewart, J., dissenting) (discussing "the possibility of undue peer pressure or even coercion in personal card solicitation"). These pressures are magnified when employees must work under "neutrality" regulations that they neither sought nor approved.

In short, unions are acutely aware that state neutrality statutes and neutrality agreements, in all their various permutations, stop employers from providing even truthful information in response to employees' questions and thereby "grease the skids" towards unionization of a given workplace. Such state-mandated regulations and negotiated agreements strike at the heart of employees' § 7 right to freely choose *or refrain* from unionization.

B) SECTION 211-a IS NOT NEUTRAL: It was against this background that the State of New York enacted section 211-a at the express urging of labor

unions,[8] and it is against this background that this Court is called upon to uphold the district court's well-reasoned analysis, which protects employees' right to hear all sides of the story regarding the union that covets them. Because "the National Labor Relations Act pivots on the notion that employers *and employees* may freely discuss their views about union organizing efforts," Lockyer, 422 F.3d at 983 (emphasis added), the Ninth Circuit recognized that:

> The exercise of free speech in these campaigns should not be unduly restricted by narrow construction. It is highly desirable that *the employees* involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right.

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[8] For example, one local union in New York described section 211-a in its newspaper as follows:

NY State to Public Institutions: No Money for Union Busting

> New York this week passed a law preventing hospitals and other entities that receive state funds from using that money to fight union organizing drives. New York AFL-CIO President and Local 3 member Denis Hughes joined other union leaders in the bill-signing ceremony with Governor George Pataki. The "Union Neutrality Bill," which was opposed by the health care industry and the Business Council of New York State, requires companies that receive state funding to keep financial records and submit to audits to make sure no money is used to discourage organizing drives. Under the law, state funds cannot be used to educate supervisors on anti-union positions, or to hire attorneys, employees, or consultants who will coordinate an anti-organizing effort. "This legislation begins to allow the labor movement to have a level playing field in its efforts to organize workers," Hughes said.

http://www.ibew.org/stories/02daily/0210/021004.htm

Id. at 984 (emphasis added).

Neither the State of New York nor any particular union asked health care employees if they wish to be grist for a "neutrality" law that serves only to hasten their unionization. Yet, section 211-a limits what the employees can be told about the union, and, at least indirectly, ratchets up the pressure on employers to provide unions with the rest of their wish list: employees' home addresses and personal information; in-plant access to the employees; captive audience speeches; and ultimately, substituting the "card check" process for secret-ballot elections supervised by the NLRB, thus eliminating employees' ability to vote their consciences in private. Thus, section 211-a is not neutral. It allows the heavy hand of New York State to tilt a scale that belongs only to employees. It does this by silencing dissent and hastening the unionization of employees whether or not they approve. It is for these reasons that the Court must affirm the district court's ruling that section 211-a is in direct conflict with the structure, policies and purposes of the NLRA.

C) EMPLOYEE RIGHTS ARE SACRIFICED BY SECTION 211-a:

The Supreme Court has long recognized that free speech and debate by all parties are central to the purposes of the NLRA. Thomas v. Collins, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the

advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."); Gissel Packing, 395 U.S. at 617 ("an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board").

Indeed, federal labor policy promotes robust debate in the context of union representation elections. Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 62 (1966) (citations omitted) (in a union organizing context, "cases involving speech are to be considered against the background of a profound commitment to the principle that debate should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks"); see also Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) (protecting employees' right of assembly in the workplace to petition their legislators); Lee v. NLRB, 393 F.3d 491, 494-95 (4th Cir. 2005) (protecting employees' right under § 7 to wear, or refuse to wear, union insignia on their work uniforms). Federal labor policy does not favor "gag orders" and other limits on free speech and the free exchange of ideas.

Applying this established law, the district court below recognized the real purpose of section 211-a: shutting down one party's speech in order to limit the § 7 right of employees to freely choose or reject unionization.

> [S]ection 7 of the NLRA gives employees a host of rights, including the right to join a labor union. Basically under that statute employees also have the right to refuse to join a union. It is difficult, if not impossible to see, however, how an employee could intelligently exercise such rights, especially the right to decline union representation, if the employee only hears one side of the story–the union's. Plainly hindering an employer's ability to disseminate information opposing unionization "interferes directly" with the union organizing process which the NLRA recognizes.

Healthcare Ass'n v. Pataki, ___ F. Supp. 2d ___, 2005 WL 1155687*16 (citations omitted); see also International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 737-38 (1961) ("there could be no clearer abridgment of § 7 of the Act" than to allow a representative to be forced upon an unwilling majority).

In Lockyer, the Ninth Circuit similarly recognized that employees cannot exercise their § 7 rights in a state-imposed information vacuum. "It is highly desirable that employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right." Id. at 984. The court further held that "by discouraging employer speech, California directly usurps the ability of the NLRB to administer elections that will foster fair and free *employee* choice. 422 F.3d at 987 (emphasis added).

In direct challenge to the federal labor policy of robust free speech and debate by all parties, the unions and their allies in the New York legislature have created a regime in which section 211-a overrides the NLRA and substitutes an incompatible state regulatory process. As the Ninth Circuit recognized in

Lockyer, laws like section 211-a are "part of a state-by-state effort to de facto rewrite the NLRA." Id. at 978, n.4. The regulatory regime of section 211-a subverts employees' right to voluntary unionism by imposing costly and arbitrary limits on what they can hear from their employer. Contrary to the claim by Pataki et alia that section 211-a has only an "incidental" effect on employees' § 7 rights (Brief at 14), such state-enforced gag orders have direct and negative consequences on employees' § 7 rights.

For example, in 1985, the President's Commission on Organized Crime found that the Hotel Employees and Restaurant Employees International Union (among other unions) "has a documented relationship with the Chicago "Outfit" of *La Cosa Nostra* at the international level and subject to the influence of the Gambino, Colombo, and Philadelphia *La Cosa Nostra* families at the local level."[9] But what if an employee learns of this sordid history and asks his employer about it, or questions its impact on the union's current structure and intentions? The "neutrality" mandated by section 211-a prevents the employer from responding truthfully to employee questions about the union's past criminal activities and its current purposes and motivations. Service Employees Int'l Union v. St. Vincent

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[9] "The Edge: Organized Crime, Business, and Labor Unions," report of the President's Commission on Organized Crime (Irving R. Kaufman, Chairman).

Med. Center, 344 F.3d 977 (9th Cir. 2003) (union alleges various employer speech violates the neutrality agreement); Int'l Union, UAW v. Dana Corp., 697 F.2d 718 (6th Cir. 1983) (same); Int'l Union, UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002) (same). Such limitations on employer free speech are intentionally designed to squelch debate and keep employees in the dark about the history and motives of the union that covets them.

The New York State legislature has no legitimate interest in halting employer-employee exchanges of information about any union. Indeed, § 8(c) of the NLRA, 29 U.S.C. § 158(c), was designed to "implement[] the First Amendment," Gissel Packing, 395 U.S. at 617, and thereby encourage such exchanges of information, not squelch them. Housekeepers, orderlies and maintenance workers seeking truthful information about a particular union and the effects of unionization in their workplace are entitled to truthful answers from their employer and a full debate about the nature and motivations of the union seeking their allegiance, not rote incantations like "we do not oppose the union, and we can say nothing else by order of the State of New York."

Employer silence extracted by the New York state legislature and enforced by the attorney general does not enhance employees' ability to make a free and informed decision under § 7 to accept or reject unionization. Instead, by

purposefully keeping employees in the dark and limiting all debate, the gag rules created in section 211-a prevent the free flow of ideas that are critical to informed decision making and employee freedom of choice. See Thomas v. Collins, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.").

D) RESPONSE TO THE BRIEF OF PATAKI: Appellants Pataki et alia admit that only employees possess § 7 rights under the NLRA. (Brief at 42). However, Pataki et alia claim that employees' § 7 rights are neither implicated nor adversely affected by a ban on employer speech. (Brief at 42-43). This argument is flawed for many of the reasons already discussed herein. Employees are unable to properly exercise their § 7 right to choose or refrain from unionization if one of the other parties is silenced. Vigorous debate during union organizing drives is not just "desirable" (as admitted by Pataki et alia at page 43 of their Brief), but is in fact necessary if employees are to exercise their rights in a thoughtful and informed way. "[A]n overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers *and employees* have the ability to engage in open and robust debate concerning unionization." Lockyer, 364 F.3d at 1166 (emphasis added), rehearing granted, opinion withdrawn, 408

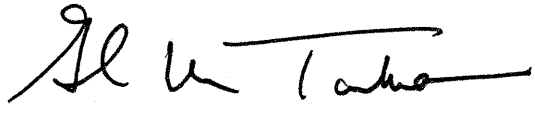
F.3d 590, aff'd, 422 F.3d 973 (9th Cir. 2005). As demonstrated above, however, allowing such thoughtful and informed choice via secret-ballot elections supervised by the NLRB is not in the interests of many labor unions and their political allies.

Thus, the argument by Pataki et alia that section 211-a "has at best an incidental effect on the unionization process" is false. (Pataki Brief at 14). To the contrary, and despite the high sounding rhetoric about protecting the public fisc, the *only* purpose of section 211-a is to skew the union representational process and hinder employees' § 7 right to freely choose or reject unionization. While this may be a goal of unions and their political allies, it is directly contrary to the goals of the NLRA. See Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 737-38 (1961) ("there could be no clearer abridgment of § 7 of the Act" than to allow a representative to be forced upon an unwilling majority). As one member of the NLRB recently stated, "unions exist at the pleasure of the employees they represent. Unions represent employees; employees do not exist to ensure the survival or success of unions." MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 475 (1999) (Member Brame, dissenting).

III. CONCLUSION

The judgment of the district court should be affirmed. In direct challenge to the NLRA's policy favoring free speech and debate, section 211-a places a gag on one of the many debating parties and thereby harms employees' § 7 right to choose or reject unionization in a free, fair, knowing and intelligent manner.

Respectfully submitted,



Glenn M. Taubman, Esq.
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel of Record for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE - Fed. R. App. 32

I hereby certify that this amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4997 words, according to the automatic word count of WordPerfect 11.0. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Word Perfect 11.0 in a 14-point font in Times New Roman for text in the body and in the footnotes.

Dated this 23rd day of November, 2005.

Glenn M. Taubman, Esq.