



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

January 13, 2011

The Honorable Marty J. Jackley
Attorney General
State of South Dakota
1302 E Hwy 14, Suite 1
Pierre, SD 57501-8501

Re: Preemption of State of South Dakota Constitution Article 6, Section 28
by the National Labor Relations Act

Dear Mr. Jackley:

I am writing to apprise you of the National Labor Relations Board's conclusion that a recently approved amendment to the South Dakota Constitution, Article 6, Section 28 (attached) ("the Amendment"), conflicts with the rights afforded individuals covered by the National Labor Relations Act. 29 U.S.C. 151, *et seq.* ("NLRA"). The purpose of this letter is to explain the Agency's position and to advise you that I have been authorized to bring a civil action in federal court to seek to invalidate the Amendment. See NLRB v. Nash-Finch Co., 404 U.S. 138, 144-147 (1971) (authorizing the NLRB to seek declaratory and injunctive relief to invalidate state laws that conflict with the NLRA). I also want to express our willingness to first discuss any alternative you can see to satisfy the Agency's desire to preclude persons from relying upon the Amendment so as to interfere with employees' rights under the NLRA.

The NLRA, enacted by Congress in 1935, is the primary law governing relations between employees, employers, and unions in the private sector. The NLRA implements the national labor policy of assuring "full freedom" in the choice of employee representation and encouraging collective bargaining as a means of maintaining industrial peace. 29 U.S.C. § 151. Section 7 of the NLRA guarantees the right of employees to organize and select their own bargaining representatives, as well as the right to refrain from all such activity. *Id.* at § 157. This Section 7 right of employees to select their own representatives is a "fundamental right." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

Congress could have conditioned that fundamental Section 7 right on the employees' choice "surviv[ing] the crucible of a secret ballot election." NLRB v. Gissel Packing Co., 395 U.S. 575, 598-599 n.14 (1969) (*Gissel*). But Congress did not do so. Section 9(a), 29 U.S.C. § 159(a), the section that defines the conditions under which a

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union may obtain the status of “exclusive representative,” requires only that the union be “designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes.” As a result, “[a]lmost from the inception of the Act . . . it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation” Gissel, 395 U.S. at 596-597.

The recent Amendment to the South Dakota Constitution, Article 6, Section 28, approved by voters on November 2, 2010, conflicts with the employee rights and employer obligations set forth in the NLRA. Federal law provides employees two different paths to vindicate their Section 7 right to choose a representative: certification based on a Board-conducted secret ballot election *or* voluntary recognition based on other convincing evidence of majority support. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 309-310 (1974); Gissel, 395 U.S. at 596-597. Article 6, Section 28, by contrast, allows only one path to union representation. It states that a secret ballot vote is guaranteed where federal law permits or requires an election for a designation or authorization of employee representation. By closing off an alternative route to union representation authorized and protected by the NLRA, this Amendment creates an actual conflict with private sector employees' Section 7 right to representatives of their own choosing. The Amendment is therefore preempted by operation of the Supremacy Clause of the United States Constitution. See U.S. Const. art. VI, cl. 2; Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54, 468 U.S. 491, 501 (1984); Livadas v. Bradshaw, 512 U.S. 107, 134-135 (1994) (finding conflict preemption where a state policy had "direct and detrimental effects on the federal statutory rights of employees"); NLRB v. State of North Dakota, 504 F. Supp. 2d 750, 758 (D.N.D. 2007) (finding statute requiring non-union members to pay the union for the costs of processing their grievances preempted as a matter of law because in actual conflict with employee rights under the NLRA).

The inevitable consequence of this Amendment is that South Dakota employers are placed under direct state law pressure to refuse to recognize – or withdraw recognition from – any labor organization lacking an election victory. In addition, employees unhappy with a union designated by the majority of their fellow employees and recognized by their employer in accordance with federal law could bring state court lawsuits against their employer and union claiming a violation of their constitutional rights. Cf. Adcock v. Freightliner LLC, 550 F.3d 369, 371, 373-375 (4th Cir. 2008) (upholding employer-union card check agreement in the face of a legal challenge brought by individual employees). In these circumstances, the Amendment impairs important federal rights of employees, employers, and unions covered by the NLRA in South Dakota.

If you agree with our legal position, I would welcome a judicially sanctioned stipulation concerning the unconstitutionality of the Amendment, so as to conserve state and federal resources. The Attorney General of Wisconsin recently executed such a stipulation in a preemption case. See Final Stipulation in Metro. Milwaukee Ass'n of

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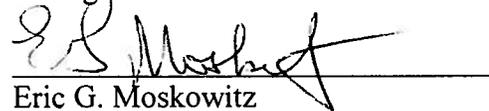
Commerce v. Doyle, Case No. 10-C-0760 (E.D. Wis. Nov. 4, 2010) avail. at
www.wispolitics.com/1006/Final_Stipulation.pdf (last visited Jan. 10, 2011).

In light of the significant impact of this Amendment, I request that any response to this letter on behalf of South Dakota be made within two weeks. Absent any response, I intend to initiate the lawsuit.

Please feel free to contact directly Mark G. Eskenazi, the attorney assigned to this matter (202) 273-1947), Deputy Assistant General Counsel Abby Propis Simms (202) 273-2934), or myself with any questions or to discuss the Board's position. Thank you for your attention to this matter. I look forward to hearing from you.

Sincerely yours,

LAFE E. SOLOMON
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Enclosure

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South Dakota Codified Laws Currentness

Constitution of South Dakota (Refs & Annos)

▣ Article VI. Bill of Rights (Refs & Annos)

→ § 28. Right to vote by secret ballot

The rights of individuals to vote by secret ballot is fundamental. If any state or federal law requires or permits an election for public office, for any initiative or referendum, or for any designation or authorization of employee representation, the right of any individual to vote by secret ballot shall be guaranteed.

CREDIT(S)

History: Amendment proposed by SL 2010, ch 1, § 2, approved Nov. 2, 2010.

HISTORICAL NOTES

SL 2010, ch 1, designated as Constitutional Amendment K, was approved on November 2, 2010, by a vote of 241,896 for and 63,783 against.

Const. Art. 6, § 28, SD CONST Art. 6, § 28

Current through the 2010 Regular Session, 2010 general election, and Supreme Court Rule 10-07

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