

# NLRB Loses Again . . . This Time Perhaps Temporarily

September 11, 2012

On September 5, 2012, in *NLRB v. State of Arizona and Save Our Secret Ballot*, Judge Frederick J. Martone of the U.S. District Court for the District of Arizona rejected the federal preemption challenge by the National Labor Relations Board (NLRB) to the provision in the Constitution of the state....

On September 5, 2012, in *NLRB v. State of Arizona and Save Our Secret Ballot*, Judge Frederick J. Martone of the U.S. District Court for the District of Arizona rejected the federal preemption challenge by the National Labor Relations Board (NLRB) to the provision in the Constitution of the state of Arizona requiring that union representation elections be conducted by secret ballot. The court held that since the provision had not yet been applied in a case or controversy, the NLRB challenge that it was preempted by the National Labor Relations Act (NLRA) was premature and speculative. The court refused to rule on the merits until after the law has been applied and challenged.

Neither side should pop the corks on the victory champagne just yet. The issue is far from being finally resolved, and there is something in the court's decision that is comforting to both sides. In effect, the court said, the litigants live to fight another day when the law actually is applied.

## Background

During the heat of the legislative battle in Washington, D.C. over congressional consideration of the Employee Free Choice Act's card check requirement, which would have eliminated most secret ballot elections for union representation in favor of a simple card signing recognition process for certification, several state legislatures adopted secret ballot protection laws in 2010. Arizona was among four that enacted such legislation.

The NLRB chose to challenge only the Arizona law based on federal preemption and ignored formal legal challenges to similar laws in South Carolina, South Dakota, and Utah. Article 2 § 37 of the Arizona Constitution provides: "[t]he right to vote by secret ballot for employee representation is fundamental and shall be guaranteed where local, state or federal law permits or requires elections, designations or authorizations for employee representation."

The NLRB challenged the Arizona law on the basis that it substituted a state forum to protect employee representation rights, a task that Congress assigned exclusively to the NLRB. In its original complaint, the NLRB argued that Article 2 § 37 was also preempted because it eliminated the possibility of voluntary recognition of a union. However, it amended the complaint to remove this argument after the state represented in earlier stages of the litigation that Article 2 § 37 guarantees a secret ballot election when the voluntary recognition option is not selected.

### Procedural Decision in Arizona

The federal district court's decision acknowledged that the NLRA provides two paths for choosing a bargaining representative. "A bargaining representative may be voluntarily recognized by an employer if there is convincing evidence of majority support. Alternatively, the NLRB may certify a union as the bargaining representative after it conducts a secret ballot election. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306-307, 95 S. Ct. 429, 432-33 (1974)."

The court acknowledged the general rule of NLRA preemption set forth by the U.S. Supreme Court in *San Diego Bldg. Trades Council v. Garmon*. First, "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."

Yet, the court also acknowledged exceptions. "State regulation of activity will not be preempted under *Garmon* if the activity is 'a merely peripheral concern' of the NLRA, or if it 'touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction,' we cannot infer that Congress removed the state's power to act."

The state of Arizona argued that the right to secret ballot elections for its citizens was within the exception under *Garmon* based on a state interest that was deeply "rooted in local feeling and responsibility" to rebut the NLRB's preemption contention. Noting that Article 2 § 37 had never been applied, the court was presented with a facial challenge to a law for which there "is a basic uncertainty about . . . how it will be enforced." Therefore, the court ruled, quoting from the Arizona Supreme Court, that it "would be inappropriate" to assume that Arizona courts will construe, and enforce, Article 2 § 37 "in a way that creates a conflict" with the NLRA. Thus, the court held that as a procedural matter, and without deciding the substance of the case on the merits, it could not conclude as a matter of law that Article 2 § 37, on its face, is preempted by the NLRA. The court noted somewhat ominously: "Our ruling today, however, should not be construed to foreclose as-applied challenges if and when they materialize." Stay tuned.

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