



NLRB Reverses Course, Rules that Unions Cannot File Lawsuits on Behalf of Employees it Seeks to Represent during the Critical Period before Election

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Among other rights, Section 7 of the National Labor Relations Act (the Act) protects the rights of employees and unions to engage in litigation, lobbying, or other activities to obtain or enforce rights under the Act, as well as other state and federal wage and hour and employment laws. Section 7 protects a union's right to file suit on behalf of employees it does not represent, but those rights are not boundless as demonstrated by the Board's recent decision in *Stericycle, Inc.*

In *Stericycle, Inc.*, a union filed an election petition seeking to represent an employer's dispatchers and drivers in mid-November 2008. Five days later, union-affiliated lawyers filed a collective action lawsuit on behalf of 16 of those employees alleging that the employer had violated provisions of the federal Fair Labor Standards Act and California law. After the union won the election, the employer filed an objection to the union's conduct and asserted that the union's filing and funding of the lawsuit during the critical period before the election impermissibly influenced the election's outcome.

Before *Stericycle*, the Board had ruled in *Novotel New York*, 321 N.L.R.B. 624 (1996), that a union was permitted to provide free legal services in employment law cases during the preelection period before a representation election. Appellate courts, however, had criticized the *Novotel* rationale. In particular, in *Freund Baking Company v. NLRB*, the D.C. Circuit held that unlike representation before the Board, which the court found necessary to ensure a fair election, a suit for unpaid wages was akin to the union giving away "free samples" of the benefits it would attempt to secure through collective bargaining. The court concluded that the First Amendment did not protect the representation in employment litigation because "the parties to a representation election do not retain their full panoply of rights during the critical period."

Although the current Board is generally viewed as pro-labor, in *Stericycle* it overruled *Novotel* and threw out the union's election victory. The Board found "that a union engages in objectionable conduct warranting a second election by financing a lawsuit filed during the narrow time period—known as the 'critical period'—between the date of the filing of the representation petition and the date of the election, which states claims under Federal or State wage and hour laws or other similar employment law claims on behalf of employees in the unit."

In its decision, the Board also provided some guidance on the scope of impermissible conduct during the critical period. According to the Board majority, unions may "inform employees about their rights [under labor and employment laws], assist them in identifying violations, urge them to seek relief, and even refer them to competent counsel," who may then file suit during the critical period, as long as the union does not fund it. Notably, Board Member Hayes objected to what he viewed as the majority's attempt to provide unions a "manual on how they can provide gratuitous benefits to voters before and during the critical period without engaging in objectionable conduct."

The Board's decision in *Stericycle, Inc.* resolves a long-running conflict between its guidelines and influential appellate court decisions. This decision provides greater clarity for both employers and unions, and strengthens the principle that labor law should prevent contestants in a representation election from taking actions that might interfere with the voters' free and fair choice.



More Information

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