Legal Alert: NLRB Assesses Litigation Expenses Against Employer in Unfair Labor Practice Case

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Executive Summary: Among a series of cases decided by the NLRB before Member Becker's recess appointment ended, the pro-labor Board held that an employer who engages in bad faith conduct will be liable for the litigation expenses of both the Board's General Counsel and the affected union.

In *Camelot Terrace*, 357 NLRB No. 161, the employer excepted to an administrative law judge's recommendation that it reimburse both the General Counsel and the Service Employees International Union (SEIU) for litigation costs and expenses associated with bringing two consolidated cases before the judge and, subsequently, the Board.[1] The Board, however, adopted the judge's recommendation, stating:

The [employer]'s abrogation of their settlement agreements, defiance of their legal obligation to bargain, refusal to resolve [the two] [c]ases short of trial, and reliance on transparently non-meritorious defenses caused the General Counsel and the [SEIU] to expend resources needlessly and burdened the Board's processes unnecessarily.

Due to the "many egregious unfair labor practices found by the judge and not contested by the [employer]," coupled with the Board's claim that it had "inherent authority to control its own proceedings," the majority held that the Board could award litigation expenses under the "bad faith" exception to the American Rule. Under the American Rule, parties are generally responsible for their own litigation expenses.

Citing to past NLRB decisions, the Board analogized this "inherent authority" to a federal court's "inherent authority to preserve the integrity of the proceedings and manage [its] own affairs." The Board reasoned that since a federal court could award attorneys' fees against a party for bad faith conduct, an administrative agency such as the Board could similarly award litigation expenses to both the charging party (i.e., union) and the General Counsel. Accordingly, because it was undisputed that the employer exhibited a pattern of bad faith conduct, it had to reimburse the General Counsel and the SEIU for litigation costs and expenses.

In his dissent, Member Hayes rejected the majority's position, holding that "an agency must establish 'clear statutory authority' for its claim of congressional authorization to impose fee awards." In support of his dissent, he noted that both the D.C. Circuit and the Supreme Court have held that no

such support for imposition of litigation costs exists in either the text of the National Labor Relations Act or its legislative history. Therefore, according to Member Hayes, the Board lacked authority under Section 10(c) of the Act to fashion such a fee-shifting order.[2]

Member Hayes also attacked the majority's decision for three other reasons. First, the "inherent authority" theory on which the majority relied lacked support in the federal courts. Indeed, he argued, since federal courts have repeatedly rejected the contention that Section 10(c) establishes "clear support" for a fee-shifting order, creating such power through "inherent authority" makes no sense. Second, the Board, as an administrative agency, fundamentally differs from the federal courts because its powers are delimited by an authorizing statute. Finally, no reasonable construction of the Act would permit Board Members, as political appointees lacking life tenure, to invoke inherent powers previously reserved only for federal judges.

Employers' Bottom Line:

Although awarding litigation expenses such as attorneys' fees has been a remedy rarely used by the Board, this recent decision reveals that it may be gaining favor. In the past, it was common practice for the respective parties in unfair labor practice proceedings to bear the responsibility of covering their own expenses. As a result, an employer could put forth a vigorous defense with little fear that the Board could shift all litigation expenses solely to the employer. This heretofore extraordinary remedy, however, may gain traction with both the Board's General Counsel and unions and may have a chilling effect on an employer's decision to vigorously defend against unfair labor practice charges, for fear of having to bear the whole cost of litigating the issue. Therefore, it is vital that an employer ensure it is complying with its legal obligations in collective bargaining, as any perceived "bad faith" conduct now carries the specter of much higher potential costs to the employer.

If you have any questions regarding this Legal Alert or other labor or employment related issues, please contact the author, Heath Edwards, hedwards@fordharrison.com, an attorney in our Atlanta office, or the Ford & Harrison attorney with whom you usually work.

[1] The employer did not challenge the judge's ruling that it committed numerous Section 8(a)(1) and 8(a)(5) violations by engaging in bad faith bargaining.

[2] Section 10(c) empowers the Board to order a party guilty of an unfair labor practice "to take such affirmative action . . . as will effectuate the policies of this Act."