

# Employers Beware: Egregious Behavior During Collective Bargaining Can Lead to Paying Attorney's Fees to the Union

## Labor & Employment Law Update

By John Hayes on August 16, 2022

In a continuance of the labor-friendly trajectory of the National Labor Relations Board (NLRB) under the current administration, the 9th Circuit recently issued a decision upholding the right of the NLRB to award legal fees to a union incurred during the collective bargaining process. This ruling should put all unionized employers on notice of the ripple effects of decisions such as this one on their own bargaining.

In *National Labor Relations Board v. Ampersand Publishing, LLC*, the 9th Circuit was wading into a long running dispute between a newspaper and its union, going back to charges filed in 2007. The company was found to have engaged in bad-faith bargaining in 2015 (which included an order for the company to pay the union's bargaining expenses), and lost its appeal in 2017. The parties could not come to an agreement on the amount owed, and the NLRB ordered the company to pay more than \$2 million to remedy its violations, including legal fees, and then petitioned the 9th Circuit to enforce the order. The 9th Circuit rejected the company's argument that prior rulings prohibit the ordering of legal fees by the NLRB, stating that it was limited to "litigation" and fell outside of the bargaining that occurred in this case. The court took a rather narrow view of litigation in finding that the bargaining was not litigation, even though the company was also defending the unfair labor charges at the same time. And therefore the NLRB was justified in pursuing legal fees incurred by the union during bargaining, due to the "unusually aggravated misconduct" by the company.

This opinion, and the fact that the NLRB pursued these fees to a federal appellate court, should put employers on notice of the aggressive measures the Board is taking under the current administration. In fact, the current General Counsel of the NLRB issued guidance in late 2021 urging the various NLRB regions to seek "the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices." She also encouraged the regions to seek "new and alternative" special remedies.

While “consequential” damages and “special” remedies have long been available to the NLRB for unfair labor practices, this specific push to use them to the fullest extent possible – and create new ones – is a recent development.

“Consequential” damages can include interest fees on credit card charges, interest on loans an employee takes out to cover living expenses, penalties incurred from withdrawing from retirement accounts, compensation for loss of a home or car, and compensation for damages to the employee’s credit rating.

“Special” remedies have been found to include the issuance of an apology letter, reading notices out loud to employees in the presence of a NLRB agent, allowing union organizers to come onto company property, and issuing an affirmative bargaining order. This is in addition to requiring employers to reimburse the union for collective bargaining costs (including attorney’s fees).

Some of these novel remedies will likely be appealed to various federal courts. However, in the meantime the NLRB appears to be moving full steam ahead on finding new and creative remedies to level against employers. Employers with unionized workforces should pay close attention to these cases and be aware of their own actions in bargaining. As always, when in doubt, seek the guidance of experienced labor counsel.

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