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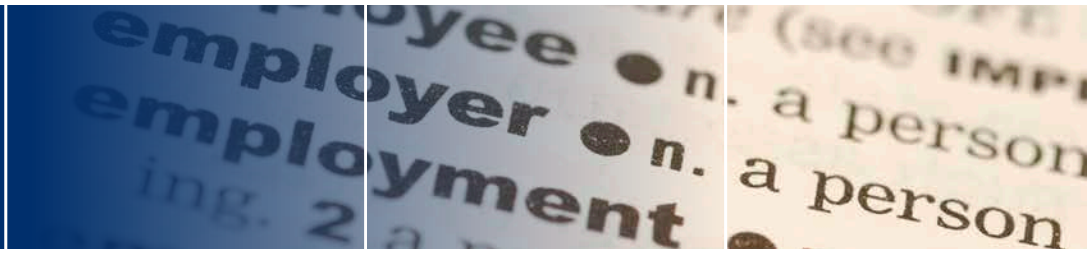

NEWSLETTER
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Civil Litigation and Other Nontraditional Union Tactics in Labor-Management Disputes; Legal Protection Available to "Secondary Targets"

Traditionally, unions seeking to organize an employer's workforce will petition the National Labor Relations Board (NLRB or the Board) for a secret ballot election in which a company's employees make their wishes known. Some unions, dissatisfied with the traditional approach, seek alternative methods of workforce organization, such as mandatory employer recognition of unions on the basis of signed authorization cards alone. *See* "Union Boon and Employer Bane: Employee Free Choice Act Would Represent a Change in Labor Management Relations," *New Jersey Law Journal*, Vol. CXCVI, July 2009 (Donovan, Kevin C.).

Other times, a union targeting one employer will seek to exert pressure against a second employer. The goal is to persuade that secondary entity to pressure the primary employer into agreeing to union demands. That pressure may come in the form of the union filing civil lawsuits or taking other legal action against the secondary, forcing it to expend valuable time and resources fending off the litigation. One recent case illustrates what such "secondary" employers can do to fight against the use of litigation as a tool in labor disputes, while another recent case provides a cautionary note to such employers who resort to litigation in their own defense against nontraditional union pressure tactics. *Continued*

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Waugh Chapel South Case: We (Unions) Can Sue You, But You Cannot Sue Us

The dispute leading to *Waugh Chapel South, LLC v. United Food & Commer. Workers Union Local 27*, 728 F.3d 354 (4th Cir. 2013), arose from the fact that Waugh Chapel South (WCS), a commercial real estate entity, was developing a shopping center. One of the tenants was to be Wegmans Food Markets, a non-union supermarket chain. Intense union opposition to Wegmans spilled over to WCS. As recounted in the complaint that WCS subsequently filed, a union executive threatened WCS that if Wegmans did not unionize, "we will fight every project you [WCS] develop where Wegmans is a tenant."

According to WCS, the unions involved thereafter "directed and funded a barrage of legal challenges at every stage of the projects' development." While not brought in the name of the unions, alleged surrogate plaintiffs brought a total of 13 legal challenges against the shopping center project. These included claims based on environmental or tax issues and claims asserting common law nuisance, as well as numerous challenges to building permits granted to WCS. Most of the legal actions were dismissed by the challengers before the merits were reached, a number of them after WCS subpoenaed union financial records (apparently seeking evidence that the unions were funding the legal actions).

As noted, the real union target was not WCS, but the non-unionized Wegmans chain. WCS was simply being dragged into the dispute to pressure Wegmans, albeit at significant cost to WCS and a real threat to its development plans. The key, however, is that in labor law parlance, WCS was a "secondary" target of the unions' efforts.

Union action against a so-called secondary employer implicates the "secondary boycott" provisions of the National Labor Relations Act (NLRA). That law applies to efforts to "exert pressure on an unrelated, secondary or neutral employer in order to coerce the secondary employer to cease dealing with the primary employer, thereby advancing the union's goals indirectly." *R.L. Coolsaet Constr. Co. v. Local 150, Int'l Union of Operating Eng'rs, AFL-CIO*, 177 F.3d 648, 655 (7th Cir. 1999) (internal quotations omitted). Significantly, federal law permits a civil action for damages against a labor organization that is found to have engaged in unlawful secondary activity.

Title 29, § 187 of the United States Code ("Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages") provides that:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended [the secondary boycott section].

(b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

In response to the union litigation barrage, WCS commenced a § 187 action.

The unions claimed that WCS's lawsuit had to be dismissed, arguing that their legal efforts against the developer were protected by the First Amendment. Indeed, long-settled federal law protects activity that can be characterized as citizens petitioning their government for redress. That protection encompasses litigation brought before courts and administrative agencies. *Continued*

Relying on that principle, a federal district court dismissed WCS's complaint as barred by the right of the unions to petition government.

Constitutional protection does not, however, extend to "sham" litigation, such as is found when a party can show "a pattern of baseless, repetitive claims … emerge[s] which leads the factfinder to conclude that the administrative and judicial processes have been abused."

Relying on the sham litigation exception, the Sixth Circuit reversed the lower court's dismissal, reinstating WCS's claims against the unions. In finding evidence of sham litigation, the appeals court noted that the "vast majority" of the legal challenges had failed, suggesting that they had been filed without regard to the merits and simply for harassment against a secondary employer (WCS) in violation of federal labor law.

The court also noted that many of the suits were withdrawn "under suspicious circumstances":

> [I]n the nine appeals of the building and grading permits, plaintiffs voluntarily dismissed their suits – according to WCS – to avoid complying with subpoenas of financial records that would have revealed that the unions were directing and paying for the litigation. *Waugh Chapel South*, 728 F.3d at 365.

The court of appeals thus allowed WCS to pursue its own litigation against the unions in an attempt to win damages for the union's alleged use of the legal system to pursue a campaign of unlawful secondary activity against it.

Allied Mechanical Services Case: If You (Employer) Fight Back Against Secondary Activity with a Lawsuit, the NLRB May Punish You

While WCS has won its day in court, employers must be aware that filing litigation against unions can lead to a claim that the employer's lawsuit is actually retaliation against the union in violation of the NLRA. Labor organizations are protected under the NLRA for a variety of actions that are deliberately designed to cause economic harm to employers. Care must be taken to ensure that any litigation against unions is well founded and reasonably based.

This caution is highlighted by a case decided in October 2013. While in the *Waugh Chapel South* case we saw the unions claiming a First Amendment right to file litigation against an employer, in the recent case an employer had been found guilty of violating federal labor law for filing a defensive suit against unions, and only won vindication on appeal.

In *NLRB v. Allied Mechanical Services, Inc.*, Nos. 12-1235/12-1351 (6th Cir. Oct. 30, 2013), Allied, a construction company, believed that it was being blackballed by several unions because it had not entered into a collective bargaining agreement acceptable to one particular local union. The blackballing, according to Allied, came in the form of the other unions shutting Allied out from the benefits of a job-targeting fund that subsidized chosen contractors, allowing them a competitive advantage when bidding for construction jobs.

Using § 187, Allied sued the unions under the secondary boycott provisions of the NLRA. Allied's claims were subsequently dismissed by a federal district court that found that none of the claims stated a viable cause of action. The Sixth Circuit Court of Appeals affirmed that dismissal. That did not end the dispute, however. Once they had prevailed in court, the unions went before the NLRB, filing an unfair labor practice (ULP) charge alleging that Allied had violated the NLRA by the mere fact of filing its federal suit.

It is of note that, unlike the unions involved in the *WCS* case, Allied had not embarked on a campaign of numerous lawsuits nor filed its suits then dropped them after its target had been forced to significant legal expense, actions suggesting that they had only been designed to harass and impose costs upon it adversaries. Rather, Allied had filed a single suit, raising what it argued were legitimate claims against unlawful secondary activity targeting it.

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Nevertheless, in considering the unions' ULP charge against Allied, the Board stressed, among other things, (1) Allied's contentious history with the local union that had been pressing it for a labor agreement, (2) Allied's history of unfair labor practices against the unions involved, and (3) a past statement by an Allied executive that he intended "to get even" with the unions. The Board acknowledged that Supreme Court precedent limited the situations in which employers could be held liable under the NLRA for civil suits filed against unions, due to First Amendment protections. Nevertheless, the Board decided that Allied's civil action had no reasonable basis, concluding that it was filed in retaliation for the unions' past protected activities. The Board ordered Allied, among other things, to reimburse the unions for their expenses, including attorneys' fees, incurred in defending Allied's suit.

The same court of appeals that had previously affirmed dismissal of Allied's civil action refused to uphold the NLRB's sanctions. Just as the court in the *Waugh Chapel South* case had recognized, the *Allied* court stressed that the First Amendment protects a litigant's right to file a lawsuit as part of citizens' rights to petition government for redress of their grievances. Significantly, the *Allied* court refused to afford the Board the judicial deference traditionally granted to its determinations when deciding labor law matters. The court ruled that the Board's acknowledged expertise in labor law did not extend to deciding essentially constitutional law issues. The court appeared to be somewhat uncomfortable with the idea of an administrative body making decisions that could punish what might be constitutionally protected resort to the judicial system.*

Reviewing the record on its own, then, the court of appeals examined Allied's original complaint and the legal theories and facts supporting it. The court reasoned that just because Allied had lost in court on a motion to dismiss did not mean that its theories of recovery were so unreasonable as to be objectively baseless. In addition, while acknowledging the ill will between Allied and the unions that had arisen during a contentious relationship, the court was not convinced that the evidence of retaliation relied on by the NLRB was persuasive. Citing the Supreme Court's warning in another case, in which the Board had found an employer liable for damages for filing a civil action against a union, that "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred," *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 534 (2002) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73-74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)), the court of appeals found that the record indicated that any "retaliatory motive" arose from the normal ill will that is not uncommon in litigation.

> The evidence cited by the Board may have proved that there was such ill will between Allied and Local 357 as to rise to the level of "hatred." But none of the evidence offers support for the proposition that Allied's reasonably based suit was filed without regard for the merits and was instead only intended to cost the unions money.

The court thus refused to enforce the Board's findings against Allied. The fact remains, however, that Allied had no doubt been put to significant expense in fighting the ULP charge and subsequent Board order all the way to the court of appeals, and quite possibly was chilled from filing any future civil actions in defense of its rights under the NLRA. *Continued*

* The five Board members are appointed by the President with the consent of the Senate. It should be noted that the traditional partisan wrangling over the perceived "leanings" of Board nominees – pro–management versus pro-union - has been accompanied in recent years by allegations of some that the current Obama-appointed Board has adopted an unusually aggressive pro-union stance. *See President Obama's Pro-Union Board: The NLRB's Metamorphosis from Independent Regulator to Dysfunctional Union Advocate*, Staff Report, U.S. House Of Representatives, 112th Congress Committee on Oversight and Government Reform December 13, 2012, *http://hr.cch.com/eld/NLRB-Report-FINAL-121312.pdf*. Union supporters disagree, but the fact remains that the Board is the subject of sharply divergent perceptions within the two camps (management and labor).

CONCLUSIONS

These cases illustrate, first, that employers are not defenseless in the face of unconventional union tactics, including union-inspired lawsuits that may be designed to impose burdensome costs on their target. At the same time, however, employers wishing to fight back by themselves using the courts against perceived unlawful union tactics, especially those targeted against secondary employers, must proceed cautiously, ensuring that their complaints have a reasonable basis under the sometimes complicated principles of the NLRA. Employers also must seek to ensure that they have not placed themselves in a position in which a union can claim that the lawsuit has nothing but a retaliatory motive behind it. Such situations call for careful analysis of the facts and legal theories supporting any lawsuit. That being said, the NLRA's prohibitions on certain actions targeting secondaries should be kept in mind by employers who face unlawful union threats to their businesses.

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