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NLRB Sustains An Employer's Right to Sue A Union

By: Jill Tobia Sorger, Esq.

Introduction:

In a recent decision that is sure to have many implications for construction industry employers, the National Labor Relations Board (NLRB) sustained an employer's right to bring a reasonably based lawsuit against a union. Prior to this ruling, which followed a decision of the United States Supreme Court, employers often faced unfair labor practice charges before the NLRB based on their initiation of lawsuits against unions that ultimately proved unsuccessful. Unions consistently used the threat of filing an unfair labor practice charge, and its attendant imposition of liability for the union's legal fees, to block legitimate employer lawsuits against the union. However, this recent NLRB decision alters this aspect of labor-management relations and gives employers a recourse against what they may legitimately believe to be a union's unprotected and illegal activity.

BE&K Decision:

In *BE&K Construction Company v. NLRB*, a construction company had filed a lawsuit against several unions for conduct which was allegedly designed to impermissibly delay the company's project. Subsequently, BE&K's Complaint was dismissed, either by the Court or voluntarily, on all grounds. Thereafter, the unions filed a Charge with the NLRB alleging an unfair

labor practice against the company since the company's lawsuit ultimately failed. The NLRB, consistent with its prior rulings, found that because the lawsuit ultimately failed, there existed a retaliatory motive and therefore the employer was guilty of committing an unfair labor practice and was responsible to pay the unions' legal fees.

The practical impact of this old analysis was that employers were hesitant to file lawsuits against unions unless they were certain that they would ultimately be successful in court – a prediction that is almost impossible to make with certainty at the onset of legal proceedings – or else face liability to the union for an unfair labor practice for which the remedy includes reimbursement of the union's attorneys fees incurred in defending the lawsuit. As recognized by the NLRB in its recent decision, this result undoubtedly blocked the filing of legitimate lawsuits against unions; thereby putting the union at a distinct advantage. A case in point is that despite the initial unfavorable ruling against the company at the NLRB, the unions in the *BE&K* matter ceased their conduct as a result of BE&K's lawsuit.

In changing its prior approach, the NLRB on remand found that: "the filing and maintenance of a reasonably based lawsuit does not violate the National Labor Relations Act, regardless of whether the lawsuit is ongoing or completed, and regardless of the motive for initiating the lawsuit." Accordingly, even if the employer's lawsuit ultimately proves unsuccessful, no unfair labor practice will be found by the NLRB unless it can be established that the lawsuit was completely baseless and intended merely to force the union to incur litigation costs. As a result, a lawsuit can only be the

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basis for an unfair labor practice in very limited circumstances and will not be found where the employer has a reasonable basis for bringing the same.

Advice for Employers:

The *BE&K* ruling allows employers to freely pursue reasonably based court actions against a union for conduct legitimately deemed by the employer to be unprotected and illegal, such as concerted activity to delay or interfere with the progress of a job in order to damage the employer to the union's advantage. While litigation should in most cases only be used as a last resort, there are occasions where the same is a necessary and effective way to thwart unprotected and illegal union conduct. Accordingly, employers should be aware that this avenue is available to them and consult legal counsel if faced with a predicament where the same can be utilized.

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