

# NLRB: Outsized Payment to Union Supporter to Waive Reinstatement in Board Settlement Not Unlawful Bribe

**Labor Relations Update** on **January 10, 2020**

[\*Shamrock Foods Company\*, 369 N.L.R.B. No. 5 \(January 7, 2020\)](#) is the latest in the National Labor Relations Board's series of employer-friendly decisions. In *Shamrock Foods*, the Board held that an employer did not violate Sections 8(a)(3) and (1) of the National Labor Relations Act by offering and entering into a settlement agreement with an unlawfully-discharged employee who waived his right to remedial reinstatement in exchange for a large cash payment. In doing so, the Board affirmed its longstanding policy favoring the compromise and settlement of unfair labor practice charges.

## **Factual Background**

During an active campaign by a union to organize a distribution warehouse, the employer fired an employee, a key figure in the union's campaign. An administrative law judge later found this discharge to be unlawful. The employee remained active in the union's efforts after his discharge, and soon became a focal point for union supporters, who picketed with signs including the slogan, "Workers United to Bring [Employee] Back". Thereafter, as part of an NLRB injunction proceeding, a federal court issued an order reinstating the employee to his position while the matter was in litigation. Union supporters viewed the order as a win, and distributed flyers around the warehouse.

Initially, the employer complied with the court order and offered the employee reinstatement. The employer then changed its position and offered the employee a settlement of \$178,000 in exchange for waiving his right to reinstatement. The figure also included settlement of a separate disability charge the employee had filed with the EEOC over his termination. The employee rejected the offer and countered with \$350,000 as well as 3 years of medical coverage. Eventually, the two parties agreed on \$214,270.30, which the employee accepted. This settlement figure represented more than four times the amount of remedial back pay the employee could have received as part of the NLRB litigation. The employer stated several times during negotiations that it did not want the employee back.

The union filed additional charges alleging the settlement constituted an unlawful bribe in violation of the Act.

## **Analysis**

In determining whether the settlement agreement constituted an unlawful bribe in violation of the NLRA, the Board noted that this was an “unusual case warranting careful scrutiny.”

The Board found substantial evidence that the employer had used the settlement offer as a means of preventing the employee from returning to work. The evidence was clear the employer knew that the employee was a well-known and active supporter of the union’s efforts. In addition, the employer was not raising typical defenses to remedial reinstatement—that employee’s work was deficient, or that his reinstatement would cause friction with other employees or management. The employer also knew that the employee’s reinstatement had become a prominent issue among warehouse employees, and its prevention would deal a setback to the union’s efforts. Finally, the employer offered the employee more than four times the amount of his lost pay and related expenses, and failed to present any witnesses to explain its reasons for offering such a large sum. The Board noted that put together, these facts raise “at least a colorable basis for finding that [employer’s] settlement offer to [the employee] was unlawful.”

However, the Board distinguished several cases in which they had declined to give effect to settlement agreements conditioned upon prospective waivers of Section 7 rights. In this case, the employee waived no rights; he was only asked to decline re-employment.

The Board also found significant that the employee had independently negotiated with the employer regarding the settlement figure, and had the option of refusing, forcing his employer to reinstate him or be held in contempt. Finally, though the settlement figure was substantially larger than the sum of the employee's remedial back pay, it also included compensation for the resolution of his disability claim with the EEOC.

In reaching its conclusion, the Board emphasized its longstanding policy to encourage compromise and settlement, as established in [Independent Stave](#) and related cases.

Ultimately, given the evidence on both sides, the Board decided that its policy favoring settlements tipped the scale, and adopted the ALJ's dismissal of the union's allegation.

## **Takeaways**

This is an interesting case involving an allegation that an employer used its economic resources to buy-off a union supporter. Absent the context of a settlement of NLRB litigation, this payment clearly would be an unlawful bribe. However, making such a payment as part of a settlement made it acceptable. Parties settle litigation for all sorts of reasons, and this is not the first time an employer has been willing to pay a premium to have an employee waive reinstatement.

The case does put a spotlight onto the competing interests in NLRB settlements. The union clearly saw the outsized payment as a deliberate attempt to thwart its organizing efforts by removing a strong pro-union adherent. The employer had openly expressed that it did not want the employee to come back to work. The employee, for his part, had a price he was willing to accept to waive reinstatement, and that figure ultimately was met by the employer.

In the end, the strong preference to settle litigation won out. If the union's allegation had been found to have merit, the settlement payment would be put into jeopardy and the employee might have been faced with reinstatement to a job with some lower amount of backpay.

The Board's decision was a continuation of a long line of cases approving settlements in which the employee waives reinstatement in exchange for a larger remedial payment from the employer.

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- **Mark Theodore**  
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- **Joshua S. Fox**  
Partner
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Associate