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NLRB Signals New Push for Consequential Damages Is Intended to Make Employers Whole, Too

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As we previously reported, National Labor Relations Board ("NLRB" or "Board") General Counsel Jennifer Abruzzo is committed to expanding the remedies utilized by the Board to make employees harmed by an employer's unfair labor practice whole. As part of this commitment, GC Abruzzo has encouraged Regional Offices to consider consequential damages as a possible make-whole remedy to cover the costs of downstream economic losses experienced by workers as a result of an unfair labor practice. As such, the General Counsel's Office has moved forward with seeking consequential damages as part of negotiated settlement agreements.

With respect to one such settlement agreement, the United Mine Workers of America ("UMWA") announced last week that it will challenge the NLRB's $13.3 million damages estimate that the union may be required to pay an Alabama coal company pursuant to an agreement intended to resolve several strike-related unfair labor practice charges. As this case illustrates, the Board's consequential damages initiative is not limited to remedying damages caused by an employer's unfair labor practice—this remedy can also be implemented against a union for damages caused to an employer.

Background

UMWA-represented mine workers at the employer coal company have been on strike for over a year in protest against what the workers deem to be unsatisfactory negotiations for higher wages and improved benefits. Over the course of the year-long strike, the workers have picketed outside of the employer's Alabama coal mines and offices. During this time, UMWA and the employer have filed a number of unfair labor practice charges against each other, including charges alleging that UMWA has engaged in strike misconduct by placing devices like jackrocks in the roads leading into and out of the employer's facilities, blocking the ingress and egress to the mines, threatening security guards at the employer's facilities, and engaging in vandalism of the employer's and replacement worker's property at the employer's worksite.

The UMWA, the employer, and General Counsel's Office negotiated a formal settlement agreement to resolve the strike misconduct ULPs, which the Board approved in June 2022. As stipulated in the settlement agreement, the NLRB Regional Office later issued calculations for the damages UMWA owed to the employer and to the individuals injured by the alleged strike misconduct, totaling over $13 million. Part of the NLRB's calculations included consequential damages for economic losses suffered by the employer, including the costs incurred by the employer to increase security at its facilities as well as the lost revenues to the employer for the unmined coal.

In response to the Regional Office's multi-million dollar projection, the UMWA announced in the first week of August that it would challenge the Board's damages calculations. While the Regional Office has said that its cost assessments are ongoing, assuming the UMWA continues to object to the Regional Office's final damages determination, the parties may litigate the issue of appropriate damages before an administrative law judge.

Takeaways

Although GC Abruzzo's pronouncements concerning consequential damages have centered on her goal of improving the make-whole remedies available to *employees* harmed by an employer's unfair labor practice, this settlement agreement orchestrated by the General Counsel's Office between the UMWA and the coal company indicate that the remedy of consequential damages is intended to make *employers* whole, too.

Moreover, the Board's consequential damages calculations under the negotiated formal settlement agreement illustrate the potentially extreme and costly ramifications of awarding consequential damages. The Board included both direct and indirect economic losses in its calculations, ranging from damages from acts of vandalism to the costs of needing to beef up security at the worksite to the costs associated with lost revenues. This case suggests that the Board is prepared to take an exceptionally broad approach to identifying and remedying downstream economic losses, both to the benefit and detriment of employers and unions alike. As always, we will keep you apprised of the latest updates from the NLRB.

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