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Court Finds Sham Litigation Violates Secondary Boycott Provisions of NLRA, But NLRA Prohibitions Do Not Apply to Worker Centers

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On August 26, 2013, in *Waugh Chapel South, LLC v. UFCW* (4th Cir. 2013), the U.S. Court of Appeals for the Fourth Circuit delivered a victory, in part, to employers and, in part, to labor. In its decision, the Fourth Circuit expanded the scope of activity subject to the secondary boycott proscriptions of the National Labor Relations Act (NLRA), but limited the type of organizations that are subject to those proscriptions.

Factual Background

In order to advance their organizing efforts against a national grocery chain, the United Food and Commercial Workers Union (UFCW) and the Mid-Atlantic Retail Food Industry Joint Labor Management Fund (Fund) directed numerous legal challenges, including rezoning petitions and environment suits, against Waugh Chapel South, the developer of a real estate project where the grocery chain intended to lease real estate space. Although one rezoning petition was successful, the remaining cases were dismissed or voluntarily withdrawn. While some of the litigation was still ongoing, the developer sued the UFCW and the Fund under Section 303 of the Labor Management Relations Act for engaging in secondary boycott activity in violation of the NLRA. The district court dismissed the litigation.

Victory for Management

The NLRA makes it an unfair labor practice for a labor organization to engage in a secondary boycott, which essentially occurs when a union pressures a secondary or neutral employer to cease doing business with the primary employer that is involved in a dispute with the union. The developer here argued that in advancing its goal to unionize the grocery chain, the UFCW and the Fund exerted secondary pressure on the developer by mounting sham legal challenges to the project's development. The defendants countered that their litigation activity was protected by the *Noerr-Pennington* doctrine, which "safeguards the First Amendment right to 'petition the government for a redress of grievances,' . . . by immunizing citizens from the liability that may attend the exercise of that right."

Effectively expanding the type of activity prohibited under the secondary boycott provisions of the NLRA to sham litigation, the Fourth Circuit rejected the UFCW and the Funds argument and held that the First Amendment does not protect the use of sham litigation to violate federal law. Evaluating the defendants' legal challenges under a holistic approach, the Fourth Circuit further held that because the cases against the developer failed demonstrably; a fact finder could reasonably conclude that the defendants directed the sham litigation. As a result, the court remanded the count against the UFCW to determine whether the UFCW had directed litigation against the developer in order to pressure the grocery chain to unionize.

Victory for Labor

At the same time the court handed a significant victory to employers, it also created a victory for organized labor. The Fourth Circuit remanded only the count against the UFCW because it affirmed the district court's holding that the Fund was not a labor organization, as defined under the NLRA. Only labor organizations and employers can commit unfair labor practices under the NLRA. Section 2(5) of the NLRA defines a "labor organization" as:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (emphasis added). Central to the inquiry of whether an entity is a labor organization is the term "dealing with." The Fourth Circuit found that "dealing" contemplates a bilateral mechanism involving employee proposals concerning the subjects listed in section 152(5), coupled with management consideration of those proposals. The Fourth Circuit further found that the Fund was not "dealing with" the developer because the Fund's charter prohibited it from participating directly in union activities, and the only contact between the developer and the Fund was the alleged unfair labor practice. The court was also not persuaded by the fact that the Fund designated itself as a "labor organization" for tax purposes, because the Internal Revenue Code and the NLRA have different objectives. Therefore, the Fourth Circuit dismissed the count against the Fund.

Implications for Employers

While, at least in the Fourth Circuit, the decision removes the sham litigation weapon from a union's arsenal against secondary employers, the decision essentially encourages entities, commonly known as worker centers, to engage in what would otherwise be unlawful secondary boycotts and other unfair labor practices. The AFL-CIO estimates that there are approximately 230 worker centers in the United States. Under the Fourth Circuit's decision, these worker centers may be able to circumvent the NLRA and engage in secondary picketing and protracted recognitional picketing to achieve their ends. On September 9, 2013, the AFL-CIO demonstrated its reliance on worker centers to invigorate the labor movement by incorporating them into their ranks as nonunion affiliates.[1] Employers can expect that the labor movement will attempt to use worker centers to circumvent some of the employer-protections in the NLRA.[2]

Further developments are likely in this area of law, and it will be interesting to see if the AFL-CIO's efforts to include worker centers in its union ranks could create any difference with respect to the applicability of the NLRA to the worker centers. It also remains to be seen whether other circuit courts will agree with the Fourth Circuit on these legal issues. For employers who find themselves involved in the types of activities directed against the grocery chain here, the best advice is to seek legal counsel as soon as possible. While there may be benefits to filing a charge against a union in these circumstances, other complicated strategic considerations should be evaluated as well.

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1 *See* Richard Berman, The Labor Movement's New Blood, THE WALL STREET JOURNAL (September 12, 2013).

2 For further information on whether a worker center is a labor organization under the NLRA, *see* Stefan Marculewicz & Jennifer Thomas, Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage under the NLRA and LMRDA, 13 ENGAGE 3 (2012).