

# **NLRB Wants Employer to Pay Union's Bargaining Expenses – Aggressive Push For Broader Use of “Enhanced Remedies” Continues**

Article By:

Donald S. Krueger

Steven M. Swirsky

---

One of the hallmark initiatives of NLRB General Counsel Richard F. Griffin Jr. has been the pursuit of more aggressive remedies in response to what the General Counsel considers to be egregious unfair labor practices (“ULP”) activity. While his predecessors and prior Board members spoke of “special remedies” that they would seek to impose in what they deemed extraordinary cases, General Counsel Griffin and today’s National Labor Relations Board (“NLRB” or “Board”) are much more frequently arguing for and directing remedies that go beyond those that the NLRB routinely imposed over the first 75 years following passage of the National Labor Relations Act (the “Act” or the “NLRA”).

## **The General Counsel Wants Guitar Center Stores to Pay the Union's Bargaining Expenses**

On July 24, 2015, Peter Sung Or, Regional Director Region 13 issued a [Consolidated Complaint](#) (pdf) against Guitar Center Stores, Inc., a nationwide retail chain, accusing the company of bargaining in bad faith in its negotiations with the Retail Wholesale and Department Store Union (“Union”) for contracts at the Chicago, New York and Las Vegas locations where the Union represents sales employees. The Complaint consolidates seven ULP charges involving negotiations at those locations for collective bargaining agreements. In addition to seeking the traditional remedy of an order directing the employer to bargain in good faith, the Complaint also calls for a Board order that would require the company “to reimburse the Union for its costs and expenses incurred in collective bargaining for all negotiations from July 2013 forward, including for example, reasonable salaries, travel expenses, and per diems” incurred by the Union. The Complaint does not call for a date when the obligation to pay the Union’s bargaining expenses would conclude, but apparently the General Counsel wants the employer to pay these costs until negotiations are completed and contracts are reached at each of these locations.

## **This Case Reflects the General Counsel's Decision to Pursue “Enhanced Remedies” Much More Routinely**

---

This case reflects decisions by the NLRB and its General Counsel to take a much more aggressive approach in seeking what are arguably punitive remedies against employers who are alleged to have violated the Act and to more aggressively seek injunctive relief in the federal courts against what the General Counsel and Board believe to be serious ULP activity. Section 10 of the Act gives the Board broad authority to remedy ULPs in order to effectuate the purposes of the Act and to encourage collective bargaining. However, the Supreme Court has long interpreted this authority as being entirely remedial—the Board has no authority to issue punitive remedies such as fines or damages other than back pay. Traditionally, the Board has ordered an employer who violated the Act to: (i) cease and desist the conduct found to be unlawful; (ii) cease and desist from violating the Act in any like or related manner; (iii) take appropriate affirmative action, e.g., rehire, bargain in good faith; expunge records, make employees whole, and (iv) post a notice to employees for 60 days. In truly egregious and rare cases, the Board has ordered an employer to bargain with a union without an election where an employer commits such serious unfair labor practices that a fair election cannot be held and where the union can show that a majority of employees supported the union before the unfair labor practices—so-called *Gissel* [Bargaining Order](#) (pdf). The Board also has authority to seek Section 10(j) injunctive relief in appropriate cases. Here too, the General Counsel is continuing to exercise his discretion to recommend (pdf) and pursue such relief far more than in the past.

Starting in 2006, the General Counsel began a series of initiatives involving bargaining for initial contracts and undocumented aliens, in which the General Counsel has sought to expand the scope of the Board's traditional remedies in cases of "extraordinary and flagrant violations." [See "NLRB Reiterates Its Position That Undocumented Workers Are Entitled To 'Conditional Reinstatement' in Unfair Labor Practice Cases](#). These new remedies include: (i) extension of the certification year for bargaining with a newly certified union, (ii) gaining access to the employer's property, (iii) notice reading by Board agents or Company officials, (iv) imposing a schedule for bargaining; (v) requiring reports of bargaining status, and (vi) reimbursement of bargaining or litigation costs.

As a result of these initiatives, labor unions, as well as the General Counsel are starting to request that the Board award bargaining expenses as part of the remedy in cases where the Board finds that an employer has bargained in bad faith. NLRB General Counsel Griffin recently commented on this trend at the Annual Midwinter meeting of the ABA Labor and Employment Section when he stated that "[t]his is a continuation of previous initiatives by the Office of the General Counsel (citations omitted). The relief may be requested by the Charging Party or *sua sponte* by the Regional Director, when the Regional Director believes such relief may be appropriate." [See General Counsel Memorandum GC-15-05, at 25](#) (pdf).

It is not yet clear how the federal courts will view the Board's increased awarding of enhanced remedies since at this point there have been very few cases in which such Board orders have been subject to judicial review. While the Supreme Court has long and unequivocally held that the Board cannot impose punitive remedies, recent court of appeals cases appear to cast doubt on where the line is drawn. On May 8, 2015 the D.C. Court of Appeals in a case entitled [FallBrook Hospital Corporation v NLRB](#) upheld the Board's authority to award bargaining costs in a case in which the Board had found an employer to have engaged in what it referred to as an egregious case of bad faith bargaining. Citing the Board's discretion in fashioning remedies for violations of the Act, and the great degree of deference that the Courts are to afford the Board's interpretation of the Act, the Court noted that the Hospital had not only committed a large number of ULPs but also had acted in an "obstinate and pugnacious manner" in its negotiations with its employees' union representative and had bargained with a "closed mind" and, in the course of the parties' negotiations had "put up a series of roadblocks designed to thwart and delay bargaining." For these reasons the Court deferred to the Board and enforced its order directing the Hospital to reimburse the union for its expenses and

costs over the course of the negotiations.

## What's Next?

Given, all of this, it is no surprise that unions are increasingly asking for the Board to pursue these and other types of enhanced remedies when they file ULP charges and over the course of Board proceedings. Whether and where the Board will draw a bright line differentiating between what it will consider to be an egregious violation which it believes justifies and requires enhanced remedies and more routine hard bargaining cases, in which it will hold traditional remedies are adequate is yet unknown. Also unknown is whether the Board is prepared to issue orders calling for such enhanced remedies when it is a union, not an employer, that has bargained in bad faith, is also unknown at this stage.

©2025 Epstein Becker & Green, P.C. All rights reserved.

---

National Law Review, Volume V, Number 219

Source URL: <https://natlawreview.com/article/nlrb-wants-employer-to-pay-union-s-bargaining-expenses-aggressive-push-broader-use-e>