# NLRB General Counsel: Ease Make Whole Relief Burden of Proof in Duty of Fair Representation Cases

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Unions will have greater exposure to "make whole" relief awards for violating their duty of fair representation under the National Labor Relations Act (NLRA) if National Labor Relations Board (NLRB) General Counsel (GC) Peter Robb has his way.

The GC has announced that he intends to ask the NLRB to overrule its current standard for proving an individual's entitlement to make whole relief against a union, as explained in the NLRB's decision in *Ironworkers Local Union 377 (Alamillo Steel)*, 326 NLRB 375 (1998). In Memorandum GC 20-09 *Guidance Memorandum on Make Whole Remedies in Duty of Fair Representation Cases* (June 26, 2020), the GC announced that he will seek to persuade the NLRB to adopt a clearer standard that will make it easier for the GC to prove an employee's entitlement to relief from their union.

## Duty of Fair Representation Defined

A union has a "duty of fair representation" to the employees it represents. This duty includes an obligation to process employee grievances in good faith. In 2018, the GC laid out his view of when a breach of the duty has occurred. In GC Memorandum 19-01 *General Counsel's Instructions Regarding Section 8(b)(1)(A) Duty of Fair Representation Charges* (October 24, 2018), the GC observed that:

- [A] union breaches its duty of fair representation to the bargaining unit it represents by engaging in conduct which is arbitrary, discriminatory or in bad faith.
- [A] union's mere negligence, alone, does not rise to the level of arbitrary conduct.
- On the other hand, perfunctory or arbitrary grievance handling (such as little or no investigation in connection with a discharge grievance) can constitute more than mere negligence.
- [A] union's failure to provide information relating to a bargaining unit member's grievance also may violate the law.
- Additionally, non-action may amount to a willful and unlawful failure to pursue a grievance.
- The Board examines the totality of the circumstances in evaluating whether a union's grievance processing was arbitrary.

In a later memorandum, the GC noted that a union can decide not to pursue a grievance, and the GC will not question it "unless there is evidence that those decisions were made in bad faith or involved gross negligence, or where there could be no reasonable basis for the union's decision." Memorandum GC 19-05 *General Counsel's Clarification regarding Section 8(b)(1)(A) Duty of Fair Representation Charges* (March 26, 2019).

## Make Whole Relief Under Current Standard

If an employee believes their union has breached its duty of fair representation, they may file an unfair labor practice charge with the NLRB. If, after an investigation, that charge is found to be meritorious, the GC will issue an unfair labor practice complaint. Unless there is a settlement, the case will go to trial in front of an Administrative Law Judge (ALJ).

On top of having to prove that the union breached its duty, under existing law, the GC (who prosecutes unfair labor practice charges) also must prove the employee "would have prevailed" if the union had not failed to properly process the grievance. If the GC proves that, the union is liable for any "increase in damages" caused by its misconduct.

The GC has had difficulty proving that the employee "would have prevailed." The GC also has had difficulty determining and proving the "increase in damages caused by the union's misconduct." In the new Memorandum, the GC called the current standard an "unrealistic burden" that "almost ensures that employees will not be made whole for the misconduct of their exclusive bargaining

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## Practices

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representative." In particular, the GC criticized the guesswork required by the current standard:

More than 20 years after the issuance of the decision in *Alamillo Steel*, experience has shown that requiring Counsel for the General Counsel to show a grievant would have prevailed in a particular grievance/arbitral forum with which the grievant has no familiarity or experience and possesses little of the information known by the union and the employer, is difficult at best. Nor is it workable to require the General Counsel to engage in guesswork to assess any possible increase in damages caused by the union's unlawful conduct. The unduly high and difficult standard imposed on the General Counsel in these cases has prevented wronged employees from achieving not only make whole relief, but often, any relief at all, thereby permitting this type of illegality with impunity.

## Make Whole Relief – GC's Proposed Standard

The GC will ask the NLRB to adopt a standard requiring the GC to establish that the grievance the employee wanted to pursue has "arguable merit," an easier standard to prove than the "would have prevailed" *Alamillo Steel* standard. If the GC succeeds in doing so, the burden will shift to the union to establish that the grievance was not meritorious. If the union does not meet its burden, the union will be liable to make the employee(s) whole for the "full amount he or she would have received had the grievance been lawfully processed." The GC explained that such a remedy is proper because under these circumstances the union's actions (or failure to act) caused the harm to the employee.

## What This Means to Employers

In his 2018 and 2019 Memoranda, the GC made clear that unions should have in place a grievance tracking mechanism to protect against meritorious fair representation claims. No doubt many unions have heeded the GC's advice. Further, if the GC succeeds in persuading the NLRB to create a more lenient make whole damages standard for union misconduct, unions will be motivated to become even *more* diligent in pursuing and prosecuting grievances. Employers could face added time and expense handling more grievances.

Given these developments, unionized employers should consider pursuing grievance avoidance strategies, including supervisory training, and accuracy and consistency in interpreting and applying the collective bargaining agreement.

Please contact a Jackson Lewis attorney with any questions about this development or the NLRB.