

'Extensive' Anti-Union Bid Merits Bargaining Edict, NLRB Says

By Beverly Banks

Law360 (April 11, 2024, 5:02 PM EDT) – A National Labor Relations Board panel issued a bargaining order against a tank cleaning company that engaged in an "extensive" anti-union campaign, but a dissenting board member said some of the remedies ordered by the majority were "overkill."



A National Labor Relations Board panel found a tank cleaning company illegally fired two workers for their activities within a local of the International Union of Operating Engineers, whose building in Washington, D.C., is pictured. (iStock.com/krblokhin)

David Prouty and Gwynne Wilcox, who made up the NLRB's majority panel Wednesday, **found** Spike Enterprise Inc. illegally terminated Robert Rossey and Cody Franzen for their union activities, calling the firings "hallmark" violations of the National Labor Relations Act.

The firings happened amid International Union of Operating Engineers Local 150's organizing drive to represent workers at three facilities in Illinois, according to board filings. The company performs industrial cleaning services at facilities operated by Exxon Mobil, Valero and Citgo Petroleum, according to the NLRB's decision.

The majority panel said a Gissel bargaining order, linked to the U.S. Supreme Court's 1969 decision in *NLRB v. Gissel Packing Co.*, is justified in this case, supporting an **agency judge's issuance** of the remedy.

"A Gissel bargaining order will protect employees' Section 7 right to choose their bargaining representative because a majority of bargaining unit employees had signed authorization cards expressing their support for the union prior to the

respondent's unlawful conduct," the majority said.

Under a Gissel bargaining order standard, the NLRB can issue a bargaining order when a company's actions make a fair rerun election not possible. The majority panel didn't weigh whether to issue a bargaining order under its Cemex **decision**, which said a company could be subject to a bargaining order for violating the NLRA amid an organizing campaign leading up to the representation vote.

The company waged an "extensive" anti-union campaign in August 2021 to dissuade workers from backing IUOE Local 150, the majority said. According to the board's website, the representation election resulted in an 8-5 vote against unionization with eight challenged ballots. The majority panel Wednesday upheld some of the union's objections to the election.

Prouty and Wilcox also determined that Spike Enterprise illegally threatened a slash to employees' compensation if workers backed the union.

In addition to the bargaining order, the majority panel ordered other expanded remedies, citing the NLRB's decision last year in Noah's Ark Processors in which **a split board outlined** remedies for companies that repeatedly violate the NLRA.

Some of the majority panel's remedies in the present case included ordering Spike Enterprise owner Jeff Hill to sign a notice to workers, having the company mail the notice to workers and requiring reimbursement to Local 150 for the "economic assistance it provided employees who participated in the unfair labor practice strike."

The majority also issued a broad cease-and-desist order against Spike Enterprise.

NLRB member Marvin Kaplan, who is the board's lone Republican, sided with the majority panel's conclusions that Spike Enterprise committed some NLRA violations, including the termination of Rossey. But Kaplan departed from the majority over the termination of Franzen and "excessive remedies" that "could be viewed as punitive."

"Rather than crafting a remedy intended to address the misconduct at issue in this case, my colleagues have ordered numerous extraordinary remedies that can be described, at best, as overkill," Kaplan said.

Kaplan said Franzen's firing was lawful because he didn't pass a test that Exxon Mobil required for new employees on a site.

The Gissel bargaining remedy and broad cease-and-desist orders aren't warranted either, Kaplan argued. Kaplan also challenged the majority's remedies to make Hill sign the notice, require a mailing of the notice and post an explanation of workers' rights. The majority's economic assistance reimbursement remedy to the union is a "nearly unprecedented step," Kaplan said.

Kaplan agreed with having a high-ranking management official or a board agent read the notice to workers, but didn't think Spike Enterprise's owner, labor relations consultant and other management officials should be made to attend the reading.

The majority panel quibbled with Kaplan over his "overkill" comment, saying in a footnote that the NLRB has to "use all of the tools available to us to erase, as much as possible" the impacts of illegal actions.

"If we were derelict in doing so, it would, indeed, be punitive — not to the respondent, but to its employees, who would be harmed for doing something as innocent as exercising their statutorily protected rights," the majority said.

In a statement to Law360 on Thursday, IUOE Local 150's Communications Director Kristine Kavanagh said the union is happy with the NLRB's decision, explaining that Spike Enterprise's "egregious misconduct" led the union to go on strike.

Kavanagh called the majority panel's reimbursement remedy related to the strike a "very significant milestone in protecting workers' rights to organize."

"The remedy sends a powerful message to employers that perpetrate unfair labor practices against their employees for engaging in statutorily protected pro-union conduct," Kavanagh said. "Such employers now face severe financial consequences for their illegal anti-union conduct."

Representatives of the Spike Enterprise and the NLRB did not immediately respond to requests for comment.

Members David Prouty, Gwynne Wilcox and Marvin Kaplan sat on the panel for the NLRB.

The NLRB general counsel's office is represented in-house by Kevin McCormick.

Spike Enterprise Inc. is represented by Gregory H. Andrews, Sarah J. Gasperini and Elliot R. Slowiczek of Jackson Lewis PC.

IUOE Local 150 is represented in-house by Melinda Burleson and Emil Totonchi.

The case is Spike Enterprise Inc. and International Union of Operating Engineers, Local 150, AFL-CIO, case numbers 13-CA-282513, 13-RC-281169 and 14-CA-281652, before the National Labor Relations Board.

--Additional reporting by Emily Brill and Tim Ryan. Editing by Neil Cohen.