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## *When May the NLRB's Counsel Settle a Case and Withdraw the Complaint?*

by Jay E. Grenig

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**National Labor Relations Board**

v.

**United Food and Commercial Workers Union**

(Docket No. 86-594)

*Argued October 5, 1987*

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The National Labor Relations Act provides that it is an unfair labor practice for an employer or labor organization to infringe in specified ways upon the rights guaranteed employees under the Act. An unfair labor practice case is initiated by filing a charge with the National Labor Relations Board (NLRB) Regional Director for the region in which the alleged unfair labor practice occurred. After the charge is filed, the Regional Director investigates it, obtaining evidence from both the charging party and the person against whom the charge is filed. If the charge is then found to lack merit, it may be withdrawn by the charging party or dismissed by the Regional Director.

If the Regional Director concludes that the charge may have merit, he or she normally affords an opportunity for an informal settlement agreement to be negotiated. If a settlement cannot be reached, the Regional Director issues a complaint. The charged party must file an answer and is entitled to a hearing before an administrative law judge. That recommended decision is subject to review by the NLRB.

The NLRB's regulations provide that a complaint may be withdrawn before the hearing by the regional director on his own motion. Under the regulations, a charging party who objects to the terms of an informal settlement may present objections to the Regional Director and may appeal to the General Counsel in the event that the Regional Director rejects the objections and accepts the settlement.

### **ISSUES**

This case presents two important questions concerning the procedural requirements which apply to settlement of an unfair labor practice charge by the General Counsel: Is a charging party who is dissatisfied with the

settlement of an unfair labor practice charge after the complaint is issued but before the hearing is held entitled to an evidentiary hearing on objections to the settlement? Is the General Counsel's decision to withdraw a complaint before the hearing starts subject to judicial review?

### **FACTS**

In 1984, the United Food and Commercial Workers (UFCW) Union filed various unfair labor practice charges with the National Labor Relations Board's Pittsburgh Regional Office against Charley Brothers, Inc., the owner and operator of a grocery store in Mars, Pennsylvania, and against the United Steelworkers of America. Challenging the representational status of the United Steelworkers, the UFCW claimed that when the employer, Charley Brothers, and the Steelworkers entered into a collective bargaining agreement, the Steelworkers did not represent a majority of the employees. It also asserted that Charley Brothers had contributed financial support and other assistance to the Steelworkers.

The Regional Director issued complaints against Charley Brothers and the Steelworkers. Six days before the hearing was scheduled to begin, the Regional Director reached an informal settlement in which Charley Brothers and the Steelworkers agreed to remedy the unfair labor practices alleged in the charges. The UFCW objected to the proposed settlement, asserting that the remedies agreed to in the settlement were inadequate and the Regional Director rejected the objections. Responding to the UFCW's appeal from the Regional Director's determination, the General Counsel refused to invalidate the settlement.

The UFCW then sought judicial review from the United States Court of Appeals for the Third Circuit. The Third Circuit held it had jurisdiction to review the General Counsel's action and that the General Counsel had erred by denying the UFCW's request for an evidentiary hearing concerning its objections to the settlement (788 F. 2d 178 (1986)). The National Labor Relations Board and the General Counsel then sought review by the Supreme Court.

### **BACKGROUND AND SIGNIFICANCE**

The Third Circuit and the U.S. Court of Appeals for the District of Columbia Circuit have concluded that

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judicial review of the General Counsel's decision is authorized by the National Labor Relations Act. The Sixth Circuit has held that it was without jurisdiction to review the General Counsel's decision to withdraw the unfair labor practice complaint.

The courts of appeals have adopted three conflicting approaches to the need for an evidentiary hearing when the charging party objects to an unfair labor practice settlement. Some courts have concluded that the charging party need only be given an opportunity to state its objections and, if its objections are rejected, a statement of the reasons why. Other courts have indicated that an evidentiary hearing must be held if the charging party's objections raise a dispute over a material fact. The Third Circuit has held that the charging party always must be accorded an evidentiary hearing.

The Supreme Court's decision in this case should resolve these conflicts. If the Court rules in favor of the NLRB, the decision will make it easier for the General Counsel to secure informal settlements, since the parties to the settlement could avoid the costs of a hearing and appeals.

A ruling by the Court requiring judicial review of informal settlements and requiring an evidentiary hearing whenever a charging party objects to a settlement might discourage settlements. Also, such a ruling would give the party filing the charges a greater voice in whether a case should be settled or should go to hearing.

#### **ARGUMENTS**

*For the National Labor Relations Board (Counsel, Andrew J. Pincus, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)*

1. The General Counsel's decision to enter into an informal settlement and withdraw a complaint prior to

hearing is not subject to judicial review.

2. A charging party is not automatically entitled to an evidentiary hearing.

*For United Food and Commercial Workers Union (Counsel of Record, George Murphy, 1775 K Street, NW, Washington, DC 20006; telephone (202) 223-3111)*

1. Once the National Labor Relations Board's formal, adjudicatory process is initiated, the National Labor Relations Act requires the Board's approval before an unfair labor practice complaint can be resolved by settlement.
2. The General Counsel's settlement of the case and withdrawal of the complaint without Board approval is subject to judicial review.
3. Where the General Counsel's decision upholding an informal settlement turns on the question of whether the charging party had shown that the informal settlements would not dissipate the effects of the violations of the Act, it is appropriate for a court to require the NLRB to hold an evidentiary hearing on the objections.

#### **AMICUS ARGUMENTS**

*In Support of the National Labor Relations Board*

The Chamber of Commerce of the United States filed a brief arguing that the General Counsel's decision to withdraw an unfair labor practice complaint pursuant to an informal settlement agreement is an exercise of prosecutorial authority granted by statute and is not subject to judicial review. According to the Chamber of Commerce, subjecting prosecutorial decisions of the General Counsel to judicial review would discourage settlement and prolong the resolution of labor disputes.