

# Court Repudiates NLRB's Award of Attorney's Fees and Expenses for Their 'Deterrent Effect'

**Jackson Lewis**

Article By

[Suellen Oswald](#)

[Howard M. Bloom](#)

[Philip B. Rosen](#)

[Jackson Lewis P.C.](#)

[Labor & Collective Bargaining Blog](#)

- [Litigation / Trial Practice](#)
- [Labor & Employment](#)
- [D.C. Circuit \(incl. bankruptcy\)](#)

Friday, July 8, 2016

The United States Circuit Court of Appeals for the District of Columbia has determined that the National Labor Relations Board lacks inherent power and the authority under Section 10(c) of the National Labor Relations Act to order an award of attorneys' fees and litigation expenses to itself and a labor union.

The Board found that the employer, a hotel operator, had committed, in the words of the Court, a "host of severe and pervasive unfair labor practices" and ordered the employer to pay the attorneys' fees and litigation expenses of the NLRB's General Counsel and the International Longshore & Warehouse Union Local 142 based on the Board's "inherent power" to control its proceedings. *HTH Corporation*, 361 NLRB No. 65 (2014). The Board also contended that these remedies were "clearly compensatory" (rather than punitive) and needed to preserve the integrity of Board processes, serve as a deterrent to violations of Board Orders, and to protect the rights of parties.

However, on May 20, 2016, the three-judge Circuit Court of Appeals panel denounced the Board's rationale and denied enforcement of that part of the Board's order. Writing for the Court, Judge Williams said the NLRB is a creature of statute with powers limited to those set forth in the NLRA. Concurring, Judge Henderson agreed the Board's only power is that which is granted by Congress and "contrary to

the Board's apparent belief, it is not a court of law or equity." The Court noted that, due to statutory constraints on its authority, the Board may only impose remedies that are remedial and not punitive. The Court rejected the Board's assertion that it has "inherent authority" to control and maintain the integrity of its own proceedings through an application of the bad-faith exception to the American rule and order payment of attorneys' fees and litigation expenses. Although the NLRB had not argued the applicability of Section 10(c) (which authorizes the Board to "take such affirmative action...as will effectuate the policies" of the Act), the Court decided it was appropriate to determine whether the Board's remedy was authorized by that Section because, among other things, "the distinction between inherent authority and implicitly granted authority [under Section 10(c)] is a subtle one."

The Court found that "any attempt to rest on the compensatory character of a fee award" collides with the basic underpinnings of the "American rule" that parties are free to assert rights and defenses and each bears its own expenses. In addition, the Court noted "the Supreme Court has consistently classified application of the bad-faith exception to the American rule as punitive," citing *Hall v. Cole*, 412 U.S. 1, 5 (1973).

The Court also rejected the Board's claim that ordering payment of fees and expenses serves "as a deterrent to violations" of its orders, noting that such a remedy flies in the face of Supreme Court precedent. In *Republic Steel Corp v. NLRB*, 311 U.S. 7, 12 (1940), the Supreme Court "firmly rejected the Board's reliance on deterrent effect" when it ordered a party to pay another's expenses, noting if "a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end."

The Court expressly did not decide whether the power to shift fees in cases of a party's bad faith may be implicit in a provision of the NLRA other than Section 10(c), so it is not inconceivable that the Board in the future may seek to order fee-shifting based on its reading of another statutory provision.

Jackson Lewis P.C. © 2019

**Source URL:** <https://www.natlawreview.com/article/court-repudiates-nlrb-s-award-attorney-s-fees-and-expenses-their-deterrent-effect>