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Is The NLRB Being Unfair To Employers?

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Question mark

It's one thing when representatives of management or members of the GOP or even management-side labor lawyers complain about the unfairness of the current NLRB; but it's an altogether different cat when the Administrative Law Judges that hear NLRB proceedings join in the criticism. For the third time in about a month, another ALJ –Judge Keltner W. Locke – last week expressed his "concerns" about whether the GC was being "fair."

In *Copper River of Boiling Springs*, ALJ Judge Keltner W. Locke dismissed several unfair labor charges brought by the Board against the restaurant employer. What raised his hackles was a charge, added after the original charge was filed, that a manager had threatened to discharge employees for union activities. Yet, as Judge Locke noted, that discussion actually involved a conversation in which the manager considered firing a bartender for breaking the restaurant's no smoking policy. Judge Locke said the claims had to be denied because there was no mention of union activity in the discussion.

Judge Locke wrote in his opinion that "the story she told did not implicate Section 7 rights. The words she attributed to Means did not mention the Union or protected activities, and neither did the words she attributed to the server. Moreover, her testimony did not indicate that there was any mention of union activities or that she had recently engaged in any union activities. Nothing about the context would associate the words with the Union or protected activities."

Judge Locke stated further that "[m]y concern is about fairness, not about whether the allegation meets the notice pleading requirements. It is about a commonsense notion of truth-in-labeling. A can marked "beans" should have at least one bean in it somewhere. Likewise, when the complaint labels a supervisor's remark a "threat to discharge employees for union activities,"the remark should either have the word "union" in it somewhere or at least include a reasonably recognizable reference to union activities."

Locke did uphold one aspect of the NLRB's case against Copper River finding that a manager had instructed an employee to report back to him on the union organizing drive.

In late August, ALJs William Kocol and Paul Buxbaum in opinions in *BCI Coca-Cola Bottling of Los Angeles,* and *Interbake Foods LLC,* criticized the General Counsel's office for the manner in which they had prosecuted claims in those cases.

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