

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 26, 2004

TO : Martin M. Arlook, Regional Director
Region 10

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Land-O-Sun Dairies d/b/a Pet Dairy
Case 10-CA-33930

240-3367-1787

This case was submitted for advice as to the warrant for issuing complaint regarding a settled lawsuit.

We conclude that the instant charge should be dismissed, absent withdrawal, in light of the parties' settlement agreement waiving all claims based upon the lawsuit or the prosecution of the lawsuit.

FACTS

Teamsters Local Union 549 (the Union) represents a unit of production and maintenance employees and office clerical employees at the Kingsport, Tennessee facility of Pet Dairy (the Employer). In August 2002, the Employer filed a federal civil lawsuit against the Union, the Union's president, T.C. Bundrant, and the Teamsters International Union,¹ alleging that Bundrant, acting on behalf of the Union, defamed an Employer official and tried to get that official fired by filing frivolous grievances and charges with public agencies, including the NLRB, and by making damaging statements to other Employer management officials, including allegations of sexual harassment by the targeted Employer official. The lawsuit sought \$2,000,000 in compensatory damages and \$1,000,000 in punitive damages.

The Union's answer to the lawsuit complaint denied all of the Employer's substantive allegations. In addition, the Union filed a motion to dismiss the lawsuit or, in the alternative, for summary judgment.

In September 2002, the Union filed the charge in the instant case, alleging that the Employer's lawsuit violated Section 8(a)(1) of the Act because it was baseless and retaliatory. After a preliminary investigation, the Region

¹ The International was later dismissed from the suit.

held the charge in abeyance pending disposition of the lawsuit.

In November 2003, the United States District Court for the Eastern District of Tennessee granted the Union's motion for summary judgment in part, dismissing the lawsuit's allegations involving grievances and charges with public agencies, holding that the Union's conduct in such fora were covered by a quasi-judicial privilege. The Court did not dismiss the lawsuit's allegations of defamation involving oral statements made with actual malice, however, ruling that the Employer should be allowed to present proof of such conduct.

In January 2004, the parties settled the remaining allegations of the lawsuit, and the lawsuit was dismissed. The settlement agreement, signed by Bundrant and the Union's Secretary Treasurer, stated, inter alia:

Whereas, the parties hereto have decided that settlement of the lawsuit and a total waiver of all claims by all parties as to the others is the best course of action;

* * * * *

Each party waives any and all claims that it may have against any other party, its agents, assigns, employees, attorneys, or all other persons or entities, arising from the nucleus of events that preceded the lawsuit, or based upon the lawsuit itself or the prosecution thereof.

As part of the settlement, Bundrant executed a letter of apology in which he noted that, "[w]hile I don't remember using the term 'sexual harassment' in describing your conduct . . . , persons employed by Land-O-Sun however remember differently," and stated that the Employer official had not engaged in any sexual harassment.

The Union has declined to withdraw the charge in the instant case. Despite the Region's request, the Union has presented no factual or legal argument as to why the Board should not defer to the parties' non-Board settlement under Independent Stave Co.²

² 287 NLRB 740 (1987).

ACTION

We conclude that the instant charge should be dismissed, absent withdrawal, in light of the parties' settlement agreement waiving all claims based upon the lawsuit or the prosecution of the lawsuit.

In Independent Stave, the Board outlined the factors to be considered in determining whether to defer to a private non-Board settlement. The Board stated that it would examine all the surrounding circumstances including, but not limited to, whether: (1) the parties have agreed to be bound; (2) the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) the respondent has a history of violations of the Act or has breached past unfair labor practice settlement agreements.³

In the instant case, it is undisputed that the parties, including the Union and Bundrant himself, agreed to be bound by the broadly-worded agreement that covers "any and all claims . . . based upon the lawsuit itself or the prosecution thereof," and that states it was intended as "a total waiver of all claims by all parties as to the others." This clearly covers the instant charge, which solely concerns the Employer's prosecution of the lawsuit against the Union and Bundrant and was pending when the parties executed the settlement.

We also conclude that the parties' settlement agreement meets the second Independent Stave factor, i.e., whether the agreement is reasonable in light of the violations alleged and the risks inherent in litigation. In particular, we note that, while the lawsuit allegations involving the Union's grievances and charges with public agencies have been dismissed based on the court's ruling that they were covered by a quasi-judicial privilege, the Employer's defamation allegations survived the Union's summary judgment motion. In allowing those allegations to go forward, the Court applied the proper defamation standard in a labor dispute, requiring the Employer to prove that any defamatory statement had been made with actual malice.⁴ In addition,

³ Id. at 743.

⁴ See, e.g., Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (plaintiff can recover damages in libel action arising out of otherwise protected activity if malice and actual injury can be shown).

Bundrant's letter of apology, executed as part of the settlement, indicates that the Employer may well have had a factual basis for its lawsuit, as he acknowledges that while not remembering use of the term "sexual harassment" in describing the official's conduct, others working for the Employer "remember differently." Thus, there would be risks inherent in litigating an unfair labor practice complaint, particularly given the Board's restricted view of its role in defamation lawsuits, requiring only a small quantum of evidence to demonstrate that a suit is reasonably based.⁵ Accordingly, the settlement agreement, requiring each party to forego its claims, was reasonable and, indeed, the Charging Party Union has presented no argument as to why this was not a reasonable settlement.

Finally, the third and fourth factors set forth in Independent Stave clearly support deferral. There is no allegation of fraud, coercion, or duress by any party in executing the severance agreement, and the Employer has no history of violations of the Act or breaches of past unfair labor practice settlement agreements.

Accordingly, we conclude that all of the Independent Stave factors favor deferral to the parties' January 2004 settlement agreement, and the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

⁵ See, e.g., Beverly Health & Rehabilitation Services, Inc., 331 NLRB 960 (2000), reconsideration denied 336 NLRB 332 (2001) (even where there were no actual credibility conflicts created by testimony, "a genuine issue of material fact exists by virtue, at the least, of the 'proper inferences to be drawn from disputed facts' about the Unions' statements"); Citizens Publishing & Printing Co., 331 NLRB 1622 (2000), enfd. 263 F.3d 224 (3d Cir. 2001).