



On June 29, Jung agreed to pay area wages and all picketing ceased. Jung's attorney told the Union that it was agreeing to pay a "coerced" amount, and that the Employer would "recover this coerced premium in a Section 303/Sherman Act lawsuit against the Union."

The Region concluded that the Union was engaged in lawful primary area standards picketing and dismissed the charges. The Office of Appeals affirmed the dismissals. In the meantime, on July 14 and 29, Jung and Oakes filed a Section 303 lawsuit in the United States District Court for the Northern District of Illinois. The lawsuit alleged that the Union's conduct constituted a violation of Section 303(a) because such conduct violates Sections 8(b)(4) and 8(e) of the Act.

[*FOIA Exemption 5*

.] [*FOIA Exemptions 6 and 7(c)*] statement quoted above that, if credited, constituted some evidence that the picketing was for an objective other than area standards, notwithstanding the view of the Region and the Office of Appeals that it was insufficient evidence of a violation of Sections 8(b)(4) and 8(b)(7).

After the parties completed discovery, on March 4, 2002, Magistrate Judge Edward Bobrick, of the U.S. District Court, Northern District of Illinois, granted the Union's motion for summary judgment. In that decision the court found that the Employers failed to follow the rules of summary judgment and instead, in their brief, dwelled on their right to a jury trial and did not discuss the defendant's manner of picketing. It appears that the Employers did not present any evidence to support its claim that the Union violated Section 8(b)(4)<sup>3</sup> and, according to the judge, "plaintiffs' own 'statement of facts,' . . . consists of two paragraphs of legal argument." In the absence of any argument or evidence on behalf of the Employer, the judge analyzed the case under the Moore Dry Dock standards. Applying those standards, the judge found that the picketing was a lawful dispute over area standards. The U.S. Court of Appeals for the Seventh Circuit dismissed the Employers' appeal on June 5, 2003.

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<sup>3</sup> The judge's decision does not mention an alleged violation of Section 8(b)(7).

**ACTION**

We conclude that the lawsuit was not baseless, and that there is insufficient evidence to assert that the suit would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome" such that an argument could be made that the lawsuit, although not baseless, was an unfair labor practice.

In BE & K, the Supreme Court reconsidered the circumstances under which the Board could find a concluded suit to be an unfair labor practice.<sup>4</sup> Previously, in Bill Johnson's Restaurants, the Court held that in order for the Board to halt the prosecution of an *ongoing* lawsuit, it had to find that the suit lacked a reasonable basis in fact or law and was brought for a retaliatory motive.<sup>5</sup> At the same time, however, it said that a *completed* lawsuit could be charged as an unfair labor practice under a lesser, alternative standard. Namely, it could be charged as an unfair labor practice if the litigation was unsuccessful (resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit) and was filed with a retaliatory motive.<sup>6</sup> The Court in BE & K reconsidered and rejected that alternative standard, because the class of lawsuits sanctioned would include a substantial portion of suits that involved "genuine petitioning" protected by the Constitution.<sup>7</sup> The Court thus indicated that the Board could no longer rely on the fact that the lawsuit was ultimately unsuccessful, but must determine whether the lawsuit, regardless of its outcome on the merits, was reasonably based.<sup>8</sup> The Court in BE & K explained that this Constitutional protection is warranted in any case in which a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal.<sup>9</sup> In such cases petitioning, the Court said, "is genuine both objectively and subjectively."<sup>10</sup>

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<sup>4</sup> 122 S.Ct. at 2397.

<sup>5</sup> 461 U.S. at 731, 742-743.

<sup>6</sup> Id. at 747, 749.

<sup>7</sup> 122 S.Ct. at 2399.

<sup>8</sup> Id. at 2399-2402.

<sup>9</sup> Id. at 2401 (emphasis in original).

<sup>10</sup> Id.

The Court left open the question of whether, and under what circumstances, a lawsuit that was reasonably based as an objective matter might be considered an unfair labor practice. As to that question, a majority of the Court, in *dictum*, indicated that there could be no violation for a reasonably based lawsuit unless one could find that the suit would not have been filed "but for" a motive to impose litigation costs on the defendant, regardless of the outcome of the case, in retaliation for protected activity.<sup>11</sup>

The Court in Bill Johnson's articulated the basic standards for determining whether a lawsuit is baseless. It explained that while "genuine disputes about material historical facts should be left for the state court, plainly unsupported inferences from the undisputed facts and patently erroneous submissions with respect to mixed questions of fact and law may be rejected."<sup>12</sup> Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."<sup>13</sup> Thus, a lawsuit can be deemed baseless only if it presents unsupported facts or unsupported inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

In the instant case, there was a credibility dispute concerning [FOIA Exemptions 6 and 7(c)] testimony that Barnes stated that the Union was picketing because Jung did not have clearance from Local 301 to work within its jurisdiction. If the court had credited [FOIA Exemptions 6 and 7(c)] an inference that the picketing was unlawful would not be "plainly unsupported." Thus, the court could have concluded, based on statements like one made by Union agent Barnes, that JBT did not have "clearance" from Local 301 to work in its jurisdiction, that the Employers correctly alleged that the Union had a secondary object of forcing allocation of work to Illinois employers who contribute to fringe benefit trust funds that actually provide revenue to

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<sup>11</sup> Id. at 2402. Two of those Justices opined that the decision in BE & K implies that the Court, in an appropriate case, will rule that the Board can never find a reasonably based lawsuit to be unlawful. Id. at 2402-2403 (Scalia, concurring).

<sup>12</sup> Bill Johnson's, 461 U.S. at 746, n.11.

<sup>13</sup> Id. at 746.

Local 301's treasury, and were not "area standards" claims.<sup>14</sup>

It appears, however, that the court had no opportunity to rule on the credibility of that statement since it was not brought to the court's attention in the Employers' brief in opposition to the Union's motion for summary judgment. Since there has been no judicial determination of the credibility of the key statement buttressing the Employers' claim against the Union, we cannot say that those claims were "plainly unsupported." Thus, we cannot say that a concluded lawsuit was baseless when the critical issue was not fully explored and the adverse decision could be nothing more than the result of poor advocacy.

Since the lawsuit must be viewed as reasonably based, its filing cannot be found to be a violation unless, at a minimum, it can be shown that the Employers would not have filed the suit but for a motive to impose costs on the Union, regardless of the outcome of the suit, in retaliation for protected area picketing. We agree with the Region that the evidence does not support a finding of the requisite retaliatory motive. The only evidence suggesting a finding of retaliatory motive is the statement of the Employer's attorney that it would file a lawsuit to recover the "coerced amounts" that Jung agreed to pay in wages to stop the picketing. In light of our conclusion that the lawsuit may have been reasonably based, we agree with the Region that this statement did not necessarily disclose a motive of retaliation, but could instead be viewed as the Employer's genuine desire to retrieve through the court payments that it reasonably believed were coerced by the Union's picketing.

For the above reasons, we conclude that the lawsuit cannot be considered baseless; nor can its filing otherwise be found to constitute an unfair labor practice. Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.

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<sup>14</sup> As we noted in the November 17, 2000, memorandum in this case, the Region's dismissal of the Section 8(b)(4) and 8(b)(7) charges against Local 301 had no preclusive effect in the Section 303 case and the Employers were free to pursue their claims against the Union in court notwithstanding the Region's dismissal of the charges.