

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

# Advice Memorandum

DATE: August 31, 2004

TO: Rochelle Kentov, Regional Director  
Region 12

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

SUBJECT: Brandon Regional Hospital  
Case 12-CA-23921

The Region submitted this case to determine whether, under the analysis set forth in BE & K and Bill Johnson's, the Employer unlawfully sued the Union over conduct that in large part forms the basis of a consolidated Section 8(b)(4) and 8(g) complaint. In these circumstances, we conclude that the Employer did not violate the Act by initiating and maintaining its suit.

### **FACTS**

On July 29, 2004,<sup>1</sup> the Regional Director issued a consolidated complaint in Cases 12-CC-1270 and 12-CG-13 against Charging Party Sheet Metal Workers' International Association, Local 15, AFL-CIO. The complaint alleges that the Union violated Section 8(b)(4)(ii)(B) and Section 8(g) of the Act by attempting to force Respondent Galencare, Inc., d/b/a Brandon Regional Medical Center (the Hospital), with which it has no primary labor dispute, to cease doing business with two companies, Massey Metals Company and Workers Temporary Staffing, Inc., with which the Union has primary labor disputes.<sup>2</sup> Specifically, the Union conducted a mock funeral procession in front of the Hospital's main entrance for approximately two hours on March 15, 2004. The procession included a Union agent dressed as an 8 to 9 foot tall grim reaper character carrying a scythe and four Union agents acting as "pallbearers" carrying a coffin, all of whom marched back and forth in front of the Hospital's main entrances as the Union played loud, somber funeral music from speakers mounted on a trailer. The Consolidated Complaint also alleges that the mock funeral procession is "picketing," which the Union engaged in without giving required notices under Section 8(g). The complaint is currently pending a September 27 hearing before an administrative law judge.

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<sup>1</sup> All dates are in 2004 unless specified otherwise.

<sup>2</sup> See Advice Memorandum in those cases dated June 14, 2004.

Although not alleged as unlawful in the outstanding complaint, during the mock funeral procession other Union agents distributed four leaflets to passers-by. Each of the leaflets recited a claim of wrongful death of a Hospital patient resulting from the Hospital's alleged failure to provide a professional standard of care. The Union took the information in the leaflets from publicly available documents concerning the wrongful death lawsuits. All of the leaflets also depicted a cartoon that resembled the mock funeral procession taking place in front of the Hospital, with the caption: "Going To Brandon Regional Hospital Should Not Be A Grave Decision."

On August 9, the federal district court for the Middle District of Florida, Tampa Division, granted the Regional Director's Section 10(1) petition. It enjoined the Union from staging street theater, processions, picketing, patrolling and/or any other manner of conduct calculated to induce individuals not to patronize the Hospital with an object of forcing or requiring the Hospital to cease doing business with Massey Metals and/or Workers Temporary Staffing.<sup>3</sup> The injunction does not prohibit the Union from peacefully handbilling the public without picketing, patrolling or procession.

On March 18, the Hospital filed a Complaint For Damages And Injunctive Relief against the Union and its International in Florida state court. The Hospital alleged that the Union defamed it and tortiously interfered with the its business relationships by conducting the mock funeral march and by distributing the leaflets. The Hospital seeks a temporary injunction, damages, costs of litigation, attorneys fees and costs, and interest, and reserves the right to claim punitive damages as allowed by Florida statute. The Union removed the case to federal District Court for the Middle District of Florida, Tampa Division, based on federal question jurisdiction since the tortious interference cause of action is governed by Section 303 of the Labor Management Relations Act.<sup>4</sup> The Union also filed a Motion for Summary Judgment and Summary Partial Adjudication, arguing that the leaflets accurately reported the malpractice lawsuits, which, in any event, were not

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<sup>3</sup> Kentov v. Sheet Metal Workers' Local 15, Case No. 8:04-CV-1730-T-27TBM. The Union's appeal of the order is currently pending before the 11<sup>th</sup> Circuit.

<sup>4</sup> Galencare, Inc., a Florida corporation, d/b/a Brandon Regional Medical Center v. Sheet Metal Workers International Association et al., Case No. 8:04-CV-821-T-26TGW.

distributed with required malice under the New York Times v. Sullivan<sup>5</sup> standard governing a defamation claim arising from a labor dispute.<sup>6</sup> The District Court denied the motion without prejudice; discovery is scheduled to conclude in April 2005.

The Union has advised the Region that it has no independent evidence that the Hospital filed the lawsuit to retaliate against the Union by imposing the costs of litigation regardless of its outcome.

#### **ACTION**

We conclude that the Hospital's lawsuit is reasonably based because it seeks to enjoin activity that is alleged in the outstanding Section 8(b)(4)/8(g) complaint to be unprotected. Accordingly, and in the absence of any evidence that the Hospital filed its suit solely to impose litigation costs on the Union regardless of outcome, the Region should dismiss this charge, absent withdrawal.

The Supreme Court in Bill Johnson's established the authoritative standard for evaluating the legality of ongoing lawsuits under the NLRA.<sup>7</sup> The Bill Johnson's Court stated that while the Board's inquiry need not be limited to the bare pleadings, the Board could not make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.<sup>8</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>9</sup> Thus, a lawsuit is not baseless if it presents supportable facts or supportable inferences from facts and if its legal issues are not

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<sup>5</sup> 376 U.S. 254 (1964).

<sup>6</sup> The Union has not sought summary judgment with respect to underlying merits of the tortious interference claim.

<sup>7</sup> The Court in BE & K did not supplant the standard that it had articulated in Bill Johnson's for determining the legality of ongoing lawsuits. Rather, in BE & K, the Court rejected the Board's application of the Bill Johnson's standard for adjudicating unsuccessful but reasonably based lawsuits. BE & K, 536 U.S. at 530-37.

<sup>8</sup> 461 U.S. at 744-46.

<sup>9</sup> Id. at 746-47.

"plainly foreclosed" or "frivolous." In doing this, the Board may draw guidance from summary judgment jurisprudence and reject plainly unsupported inferences from the undisputed facts and/or patently erroneous legal arguments.<sup>10</sup>

Here, the state court causes of actions are legally sound and arguably well-pled. The Hospital arguably made out a prima facie defamation claim under Florida state law that requires that a defamation claim state that (1) the defendant cause the publication of a false statement, (2) about the plaintiff, (3) to a third party, that (4) causes injury to the plaintiff.<sup>11</sup> The Hospital has also arguably made out a well-pled claim for tortious interference with a business relationship by pleading the four necessary elements of that tort: (1) the existence of a business relationship; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship.<sup>12</sup>

Significantly, the conduct that is the subject of the Hospital's lawsuit is for the most part the unprotected conduct that formed the basis of the outstanding unfair labor practice complaint against the Union. Thus, the Hospital derived its tortious interference claim directly from the mock funeral procession that allegedly violated Sections 8(b)(4) and 8(g) of the Act. And although the defamation claim also refers to the Union's leaflets which are not alleged as unlawful in the outstanding ULP complaint, the alleged defamation occurred in the context of allegedly unlawful, unprotected activity. Thus, we would not argue that this suit presents "plainly foreclosed" or "frivolous" legal issues.

Accordingly, and without deciding the merits of the court action, we conclude that the Hospital's lawsuit is reasonably based now. Further, assuming the Board concludes at a later date that the Union's conduct was protected, we would not hold this case in abeyance now, in the absence of any evidence that the Hospital would not have filed suit

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<sup>10</sup> Id. at 746 n.11.

<sup>11</sup> Bass v. Rivera, 826 So.2d 534, 535 (FLA. DIST. CT. APP., SECOND DIST. 2002).

<sup>12</sup> Tamiami Trail Tours, Inc. v. J.C. Cotton, 463 So.2d 1126, 1127 (FLA. 1985).

against the Union "but for a motive to impose the costs of the litigation process, regardless of the outcome."<sup>13</sup>

Thus, the instant charge should be dismissed, absent withdrawal.

B.J.K.

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<sup>13</sup> BE & K, at 536-537.