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

# Advice Memorandum

DATE: March 21, 2006

TO : Frederick Calatrello, Regional Director
Region 8

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

SUBJECT: ER Advance Ceramics
Case 8-CA-36318

This case BE & K[1] case was submitted for advice as to whether the Employer violated Section 8(a)(1) by filing and maintaining a lawsuit, which the state court has since dismissed, seeking to compel an employee's compliance with an arbitration subpoena. We agree with the Region that it should dismiss the charge absent withdrawal because the Employer's lawsuit, although unsuccessful, was reasonably based and there is no evidence that it was filed solely to impose the costs of litigation on the employee.

## FACTS

The Employer and the Glass, Molders, Pottery, Plastics and Allied Workers International and its Local 241 (the Union) have a collective bargaining agreement that provides for grievance/arbitration of employment disputes.

In April, 2005,[2] the Charging Party and Employee B had a verbal altercation. The Charging Party filed a grievance alleging that Employee B had shouted profanities at her and that the Employer had created a hostile work environment by permitting that kind of behavior. The Employer investigated, concluded that there was a pattern of such behavior by Employee B, and suspended her. As a result, the Union withdrew the Charging Party's grievance. Employee B then filed a grievance, which the Union agreed to pursue, alleging that Employee B was disciplined without due cause.[3] This grievance was soon thereafter scheduled for arbitration on December 14.

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[1] BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

[2] All dates hereafter are in 2005 unless otherwise noted.

[3] The Union asserts that it pursued this grievance, despite its apparent inconsistency with the earlier grievance, because the Employer's discipline of Employee B was overly harsh.

In October, the Charging Party was discharged at the Union's request, pursuant to the union security clause, after she sought withdrawal of her authorization card. The Charging Party filed a Section 8(a)(3) and 8(b)(2) charge, the Region found merit to the charge, and the Employer and Union reached an informal settlement with the Charging Party which resulted in her reinstatement on November 23rd and the payment of $2,857 in backpay.

On December 8, the Employer's secretary approached the Charging Party while she was working and handed her a notice from the Post Office regarding a letter that had been delivered to the Employer's postal box for her. Three other employees (plus Employee B) were given similar notices; when they went to the Post Office to retrieve these letters, they discovered that the letters were subpoenas to appear in Employee B's arbitration hearing. The Charging Party has testified that she did not go to the Post Office to pick up her letter because she was reluctant to sign for something in the Employer's postal box, and because she did not think this was a subpoena since she had been handed a subpoena directly by the Employer's secretary when she had been required to testify in an earlier arbitration proceeding.

An Employer supervisor has testified that he subsequently informed the Charging Party that she was required to appear at the hearing, and that the Charging Party told him she would not attend. The Charging Party has testified that, in a lunchroom conversation involving her and the other subpoenaed employees (except Employee B), the supervisor told them all that they did not have to appear. One of these other employees corroborates the Charging Party's testimony, but the other two have testified that they don't remember what was said in the lunchroom conversation and that the supervisor had earlier told them that the Charging Party did have to appear even though they did not. In fact, the Employer had formally excused the other subpoenaed employees from testifying because they had entered into factual stipulations that rendered their testimony unnecessary.[4] On December 7, the Employer sent the Union a letter confirming that the three other subpoenaed employees did not have to attend the hearing, but that the Charging Party was still required to attend. The Employer asserts that it did not enter into a stipulation with the Charging Party because she was the chief witness, and only eyewitness, to the events at issue in the arbitration.

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[4] The Employer did not release Employee B from her subpoena, and she testified at the hearing.

The Charging Party did not attend the December 14 hearing. The arbitrator informed the Employer's counsel that, in the absence of the Charging Party's testimony, the arbitration would have to be continued at another date and that the Employer's counsel should seek subpoena enforcement in a court of competent jurisdiction.

The Employer filed a petition for contempt in the Columbiana Court of Common Pleas seeking to compel the Charging Party's testimony and seeking compensatory damages of $2270 in attorney's fees for the costs of a second hearing and the costs of its petition for contempt. On February 6, 2006, the court dismissed the petition based on its determination that service of the subpoena was improper under the Ohio Rules of Civil Procedure, which do not authorize service of a subpoena by certified mail. The court rejected the Employer's argument that the Charging Party had "actual notice" of the subpoena, even though she was not properly served, and distinguished cases finding individuals in contempt where they had received subpoenas despite improper service; unlike in those cases, there was no evidence that the Charging Party ever actually saw the subpoena. The court assessed all costs against the Employer-Petitioner. The Employer decided not to appeal, and this judgment is now final.

ACTION

We conclude that the Employer's lawsuit was reasonably based, and that there is insufficient evidence to assert that the Employer had the kind of retaliatory motive that would render a reasonably based suit unlawful. Accordingly, the Region should dismiss the charge, absent withdrawal.

In BE & K, the Supreme Court reconsidered the circumstances under which the Board could find a concluded suit to be an unfair labor practice.[5] Previously, in Bill Johnson's Restaurants, the Court had articulated two standards for evaluating lawsuits, one for ongoing suits and one for concluded suits.[6] For ongoing lawsuits, the Bill Johnson's Court held that the Board may halt the prosecution of the suit if it lacks a reasonable basis in fact or law and was brought for a retaliatory motive.[7] For concluded suits, the Court held that if the litigation resulted in a

[5] Id. at 2397.

[6] 461 U.S. at 747-749.

[7] Id. at 748-749.

judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit, the Board could find a violation if the suit was filed with a retaliatory motive.[8] Thus, even if a concluded suit had been reasonably based, the Board could find an unfair labor practice if the suit was unsuccessful and retaliatory.

In BE & K, the Court rejected the Bill Johnson's standard for adjudicating unsuccessful but reasonably based lawsuits.[9] The Court reasoned that the standard was overly broad because the class of lawsuits punished included a substantial portion of suits that involved genuine petitioning protected by the Constitution.[10] The Court thus indicated that the Board could no longer rely on the fact that the lawsuit was ultimately meritless, but must determine whether the lawsuit, regardless of its outcome on the merits, was reasonably based.[11]

The BE & K Court also considered the Board's standard of finding retaliatory motive in cases in which "the employer could show the suit was not objectively baseless."[12] The Court held that inferring a retaliatory motive from general evidence of antiunion animus, in a reasonably based but meritless case, would condemn genuine petitioning in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal[.]"[13] In dictum, however, a majority of the Court left open the possibility that an unsuccessful but reasonably based lawsuit might be considered an unfair labor practice if a litigant would not have filed it "but for a motive to impose the costs of the litigation process, regardless of the outcome."[14]

As the Court in BE & K did not re-articulate the standard for determining whether a lawsuit is baseless, the standard set forth in Bill Johnson's remains authoritative.

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[8] Id. at 747, 749.

[9] 122 S.Ct. at 2397, 2400, 2402.

[10] Id. at 2399.

[11] Id. at 2399-2402.

[12] Id. at 2400.

[13] Id. at 2401.

[14] Id. at 2402. See also id. at 2403 (Breyer, J., concurring).

In Bill Johnson's, the Court ruled 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.[15] 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."[16] Thus, a lawsuit can be deemed baseless only if it presents unsupportable facts or unsupportable inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

Here, we conclude that the Employer's petition for contempt was reasonably based both in law and fact. Thus, while it is clear that the Employer's service of the subpoena was improper, the Employer had a reasonably based argument that the Charging Party had actual notice of the subpoena and simply chose not to attend. Since "actual notice" is a concept recognized by Ohio courts (although the court found that it should not apply where it was clear that the subpoenaed invidual never saw any subpoena document), we would not find the Employer's legal theory to be "plainly foreclosed" or "frivolous." Moreover, assuming that the Employer's legal theory regarding actual notice had been accepted by the court, there was a genuine issue of material fact, stemming from a credibility dispute regarding the Charging Party's conversations with her supervisor, as to whether the Charging Party had actual notice that she was being required to appear.[17]

With regard to retaliatory motive, it has not been established that the Employer's reasonably based suit was filed in retaliation for the Charging Party's earlier charge-filing or to "impose the costs of litigation" on her. Although the timing of the suit shortly after the Charging Party's reinstatement pursuant to settlement of her earlier charge would ordinarily be suspect, it is no more than coincidental where the arbitration date had already been set by the arbitrator and the arbitrator instructed the Employer to secure enforcement of the subpoena before resuming the hearing. Likewise, while the similarity between the amount

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[15] 461 U.S. at 744-746. See also Beverly Health & Rehabilitation Services, Inc., 331 NLRB 960, 963 (2000).

[16] Id.

[17] See Beverly, supra.

of backpay the Charging Party received and the damages being sought in the contempt proceeding might ordinarily be suspicious, it is no more than coincidental where the damages sought were not punitive but merely the actual costs of continuing the arbitration proceeding and filing the contempt motion. Finally, there is no evidence of Employer animus toward the Charging Party for her charge-filing, and no evidence that the Employer discriminatorily recused other witnesses while requiring the Charging Party to testify; as the individual who had filed the grievance against Employee B, and the only eyewitness to the events at issue, her testimony, unlike that of the other employees, was critical.

Accordingly, the Region should dismiss the charge absent withdrawal.

B.J.K.