

Bakery, Confectionery & Tobacco Workers' International Union, Local 6 and Stroehmann Bakeries, Inc. Case 4-CB-6576

December 18, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

Upon a charge filed by Stroehmann Bakeries, Inc. (Stroehmann) on April 1, 1992, the General Counsel of the National Labor Relations Board issued a complaint on February 26, 1993, against the Respondent, Bakery, Confectionery & Tobacco Workers' International Union, Local 6 (Respondent), alleging that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act.

The General Counsel's complaint alleges that on about May 2, 1991, the Respondent filed a civil complaint against the National Labor Relations Board in U.S. District Court for the Eastern District of Pennsylvania. The General Counsel's complaint further alleges that on about September 10, 1991, the Respondent amended its district court complaint to include a cause of action against Stroehmann. The General Counsel's complaint alleges that the Respondent requested the district court to find Stroehmann in breach of a Stipulated Election Agreement entered into in Case 4-RC-17212, in which the Respondent sought to represent a unit of Stroehmann's employees. The Respondent requested that the court order Stroehmann to pay damages to the Respondent "in an amount equal to accrued union dues for all bargaining unit employees as of January 25, 1990" The General Counsel's complaint alleges that the Respondent maintained the civil lawsuit with an "object of forcing imposition of a union security obligation incompatible with a Board determination that Respondent lacked representative status" with respect to Stroehmann's employees, and in addition maintained the lawsuit because Stroehmann's employees exercised their rights under the Act. The General Counsel's complaint alleges that by this conduct, the Respondent has been restraining and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act and thereby has violated Section 8(b)(1)(A) of the Act.

On December 20, 1993, Stroehmann, the Respondent, and the General Counsel jointly moved the Board to transfer the proceedings to the Board, without benefit of a hearing before an administrative law judge, and submitted a proposed record consisting of the parties' stipulation of facts with attached exhibits.¹ On Feb-

ruary 25, 1994, the Acting Executive Secretary, by direction of the Board, issued an Order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the Respondent and the General Counsel filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, Stroehmann, a Pennsylvania corporation, with a facility located in West Hazleton, Pennsylvania, is engaged in the production, sale, and distribution of baked goods. During the 12 months prior to the issuance of the Board complaint, Stroehmann, in the course and conduct of its business operations, sold and shipped goods valued in excess of \$50,000 to customers located outside the Commonwealth of Pennsylvania. We find that Stroehmann is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

The issue presented is whether the Respondent violated Section 8(b)(1)(A) of the Act by maintaining its amended civil action in Federal district court.

A. *Facts*

1. The Board representation proceedings

On November 28, 1989, the Respondent filed with the Board's Region 4 (NLRB Region 4) a representation petition seeking a Board election in a unit of all production and maintenance employees employed at Stroehmann's facility in West Hazleton, Pennsylvania. Pursuant to a Stipulated Election Agreement entered into by Stroehmann and the Respondent and approved by NLRB Region 4 on December 20, 1989, an election was held in the above-described unit on January 25, 1990. The tally of ballots showed that 41 votes were cast for the Respondent and 40 votes were cast against the Respondent, with 2 challenged ballots, a sufficient number to affect the results of the election.

The Respondent challenged the ballots of voters Mark Stauffer and Shawn Gallagher, contending that neither was eligible to vote in the election. The Regional Director for NLRB Region 4 conducted an investigation of the challenged ballots and on May 8,

¹On January 13, 1994, the General Counsel filed with the Board an "INDEX AND DESCRIPTION OF FORMAL DOCUMENTS" that included, inter alia, the charge, complaint, and the answer in this

proceeding. These documents had been inadvertently omitted from the parties' proposed record.

1990, issued a report recommending that the challenge to the ballot of Stauffer be sustained, finding that Stauffer was ineligible to vote due to his status as a part-time, casual employee.

The Regional Director found that Shawn Gallagher was eligible to vote, however, and accordingly recommended that the Respondent's challenge to his ballot be overruled, and that his ballot be opened and counted. The Regional Director's investigation revealed the following facts. Gallagher worked for Stroehmann an average of over 35 hours per week from June 15 through December 23, 1989. During the first week in December 1990, Gallagher notified Stroehmann that he planned to work only 2 more weeks because he was starting college on January 23, 1990. The *Excelsior*² list of eligible voters forwarded by Stroehmann to the Respondent prior to the election contained a typed notation next to Gallagher's name indicating that he had quit as of December 23, 1989. Upon subsequent inquiry by his supervisor as to whether he would work during the school year, Gallagher responded that he was unsure. Gallagher thereafter worked 8 hours during the week ending January 6, 1990, and worked 15 hours during the week ending January 13, 1990. In mid-January, Gallagher notified Stroehmann of his decision to work weekends while in school, and he was thereafter regularly employed on weekends by Stroehmann, and full time during vacations.

Based on the facts established in the investigation, the Regional Director found that Gallagher was eligible to vote in the January 25, 1990 election because he continued his employment with Stroehmann on a regular part-time basis after becoming a full-time student on January 23, 1990, and because he was employed on the voter eligibility date of December 16, 1989. The Regional Director explained that Gallagher had employee status on the date of the election since he never carried out his decision to quit his employment. The Regional Director further considered and rejected the Respondent's contention that the Employer should be precluded from disputing Gallagher's eligibility because the *Excelsior* list had designated Gallagher as "Quit." The Regional Director noted, inter alia, that the parties' Stipulated Election Agreement provided that voter eligibility will not be controlled by a quit, or discharge for cause, of a listed employee when the disputed employee is rehired or reinstated before the election date. The Regional Director accordingly recommended that the Respondent's challenge to Gallagher's ballot be overruled, and that his ballot be opened and counted.

²In *Excelsior Underwear*, 156 NLRB 1236 (1966), the Board articulated the rule requiring an employer to provide all parties to the election with the names of eligible voters.

The Respondent thereafter filed exceptions with the Board to the Regional Director's recommendation regarding the voting eligibility of Gallagher. On July 5, 1990, the Board, by a three-member panel composed of former Chairman Stephens, and former Members Cracraft and Oviatt, affirmed the Regional Director's recommendation, and directed NLRB Region 4 to open and count the ballot of Gallagher and to prepare a revised tally of ballots. The Board explained, inter alia, that the Employer's notation on the *Excelsior* list that Gallagher had quit did not constitute substantial non-compliance with the *Excelsior* rule.

On July 13, 1990, the Board denied the Respondent's motion for reconsideration and oral argument. Pursuant to the Board's direction, NLRB Region 4 opened and counted the ballot cast by Gallagher, which was against the Respondent. Gallagher's ballot thus caused a tie vote and prevented the Respondent from receiving a majority of the ballots cast in the representation election. A Certification of Results of Election issued on July 23, 1990.

Pursuant to a representation petition filed by the Respondent on December 20, 1990, in Case 4-RC-17530, another election was held in the above-described unit of Stroehmann's employees on January 31, 1991. The tally of ballots showed 52 against the Respondent and 33 votes in favor, with insufficient challenged ballots to affect the results of the election. A Certification of Results of Election issued on February 11, 1991.

2. The Respondent files suit in Federal district court

On about May 1, 1991, the Respondent filed a lawsuit in U.S. District Court for the Eastern District of Pennsylvania, naming as defendants the National Labor Relations Board, former Chairman Stephens and former Members Cracraft and Oviatt, as well as Peter Hirsch, Regional Director for Region 4. On about September 10, 1991, the Respondent filed an amended complaint against the above-named NLRB defendants, and in addition named Stroehmann as a defendant.

The cause of action in the amended complaint against the NLRB defendants alleged that they had failed in the January 25, 1990 representation election to compel Stroehmann to fulfill its *Excelsior* obligations and had failed to remedy Stroehmann's "intentional misrepresentation" on the *Excelsior* list with respect to voter Gallagher. The amended complaint alleged that the NLRB defendants accordingly had acted outside their statutory powers, and had violated the due process rights of the Respondent. The Respondent requested that the court issue a mandamus order directing the Board to declare null and void the ballot cast by Shawn Gallagher in the January 25, 1990 election,

and to issue a Certification of Representative showing that the Respondent had won that election.

The amended complaint also included a cause of action against Stroehmann. It alleged that the Stipulated Election Agreement, entered into by Stroehmann and the Respondent and approved by NLRB Region 4 prior to the January 25, 1990 election, required Stroehmann to prepare and distribute an *Excelsior* list identifying all employees eligible to vote. It further alleged that by erroneously noting on the list that Gallagher had quit, and by failing to thereafter advise the Respondent that he may in fact be eligible to vote, Stroehmann had engaged in “willful and intentional breach of contract designed to thwart the Union’s ability to effectively campaign.” The Respondent requested that the court declare that Stroehmann was in willful breach of the Stipulated Election Agreement, and requested an award of monetary damages “in an amount equal to accrued union dues for all bargaining unit employees as of January 25, 1990 [the date of the first election],” and in addition requested an award of attorney’s fees.

The Respondent’s amended complaint contained an additional cause of action against Stroehmann alleging that, by failing to abide by the terms of the Stipulated Election Agreement, Stroehmann was in breach of a state contract under the laws of Pennsylvania. The Respondent requested the same relief as in its first contract claim described above.

Both Stroehmann and the NLRB defendants moved to dismiss the amended complaint on jurisdictional grounds. On January 8, 1992, United States District Court Judge Thomas N. O’Neill Jr. referred the matter to United States Magistrate Judge M. Faith Angell.

On April 9, 1992, Magistrate Judge Angell issued a report recommending that the defendants’ motions to dismiss be granted. The Respondent thereafter filed objections to the magistrate’s report and recommendations.

On July 13, 1992, Judge O’Neill, issued a memorandum and order adopting the magistrate’s recommendations, and granting the defendants’ motions to dismiss the amended complaint.³ The judge explained that Federal district courts generally lack jurisdiction to review Board representation proceedings except in extraordinary circumstances when the Board determination was “made in excess of its delegated powers and contrary to a specific prohibition in the Act.” *Leedom v. Kyne*, 358 U.S. 184, 188 (1958). The judge determined that the Board’s application of the *Excelsior* list rule and determination that Gallagher was eligible to vote was not in contravention of a specific provision of the Act but rather was within the Board’s wide discretion to conduct representation proceedings.⁴ The judge ac-

cordingly concluded that the Respondent had failed to set forth a claim under *Leedom v. Kyne* justifying departure from the normal jurisdictional rule prohibiting district court jurisdiction over Board representation proceedings.

The judge likewise dismissed for lack of subject matter jurisdiction the Respondent’s contract claim premised on Stroehmann’s alleged failure to abide by the Stipulated Election Agreement. The judge explained that the Stipulated Election Agreement is part of the election process, and accordingly that disputes regarding the Stipulated Election Agreement implicate representational issues that are within the exclusive jurisdiction of the Board. The judge observed that the Respondent cited no authority for the proposition that an allegation of a breach of a Stipulated Election Agreement justifies departure from the normal rule prohibiting district court jurisdiction over Board representation proceedings.

The judge also adopted the magistrate’s recommendation denying Stroehmann’s motion to assess sanctions, under Rule 11 of the Federal Rules of Civil Procedure, against the Respondent. The magistrate explained in her report, inter alia, that the Respondent’s contract claim based on an alleged breach of a Stipulated Election Agreement was not frivolous, but rather was a novel legal claim that did not warrant the imposition of Rule 11 sanctions.

3. The instant proceeding

On April 1, 1992, Stroehmann filed the unfair labor practice charge against the Respondent in this proceeding. On February 26, 1993, the complaint issued against the Respondent, alleging as set forth above, that the Respondent unlawfully maintained its Federal district court lawsuit. The General Counsel requested as a remedy, inter alia, a Board Order requiring the Respondent to reimburse Stroehmann for all reasonable expenses and legal fees, plus interest, that Stroehmann incurred in defending against the district court lawsuit.

B. Contentions of the Parties

1. The General Counsel

The General Counsel contends that the Respondent’s maintenance of its lawsuit in Federal district court was unlawful, because the lawsuit is preempted by the National Labor Relations Act. The General Counsel cites the principle that Federal district courts lack jurisdiction to review Board representation proceedings unless a claim can be made under *Leedom v. Kyne*, supra, that the Board acted in excess of its delegated powers and contrary to a specific prohibition in the Act. The General Counsel reasons that because the Federal district court held that the Respondent here failed to establish such a basis for the assertion of jurisdiction by

³ *Bakery Workers Local 6 v. NLRB*, 799 F.Supp. 507 (E.D. Pa. 1992). The Respondent did not appeal to the Third Circuit.

⁴ See, e.g., *NLRB v. A. J. Tower*, 329 U.S. 324, 330–332 (1946).

the district court, the Respondent's district court suit is preempted.

The General Counsel further submits that the Respondent's maintenance of the district court proceeding was unlawful because the lawsuit had an objective that is illegal under Federal labor law. It is argued that the lawsuit was in derogation of the Board's exclusive jurisdiction over representation proceedings, and was accordingly an unlawful attempt to undermine the Board's decision in the representation proceedings. The General Counsel further argues that the district court lawsuit had an illegal objective under Federal labor law because the Respondent, in its request for damages in the amount of union dues on behalf of unit employees retroactive to the date of the initial representation election, sought union dues from Stroehmann on behalf of employees it does not represent.

The General Counsel further contends that assuming arguendo that the Federal district court lawsuit is neither preempted nor vested with an illegal objective, the lawsuit is nevertheless unlawful under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). The Court in *Bill Johnson's* established that the Board may enjoin the filing of a civil lawsuit as an unfair labor practice if the lawsuit (1) lacks a reasonable basis in fact or law; and (2) was filed with a retaliatory motive. *Id.* at 748-749. The General Counsel asserts that the Respondent's district court lawsuit lacked a reasonable basis because it sought, without any supporting or even colorable legal authority, retroactive union dues from Stroehmann based on the Board's refusal to certify the Respondent as having won the January 25, 1990, representation election. The General Counsel further submits that the district court lawsuit, filed only after the Respondent had lost the second representation election held on January 31, 1991, was motivated by the Respondent's desire to retaliate against employees for rejecting unionization and declining representation. The General Counsel argues that the fact that employees are not the defendants in the lawsuit does not preclude a finding that the Respondent's lawsuit coerced and restrained employees in violation of the Act.

The General Counsel argues in addition that the appropriate remedial Order in this case should require the Respondent to reimburse Stroehmann for its legal fees incurred in responding to the district court lawsuit. The General Counsel submits that the court's refusal to award Rule 11 sanctions to Stroehmann in the district court proceeding does not bar the General Counsel's request for attorney's fees in this case, because the two causes of action are not identical. The General Counsel thus contends that Stroehmann's request for Rule 11 sanctions was premised on the Respondent's contract claims, while the General Counsel's present request for attorney's fees is based upon the Respondent's alleged violation of Section 8(b)(1)(A) of the Act.

2. The Respondent

The Respondent argues that its lawsuit seeking court review of the Board's representation proceedings was a legitimate exercise of its first amendment right to petition the Government for redress of grievances. The Respondent submits that a Board decision holding its maintenance of the lawsuit to be unlawful would infringe upon its first amendment rights.

The Respondent further submits that its lawsuit did not have an illegal objective of seeking to impose upon Stroehmann a union-security obligation. The Respondent contends that its requested relief of damages "in an amount equal to accrued union dues" was merely a formula by which to measure damages to be paid to the Respondent and was not tantamount to a request for the imposition of a union-security clause. The Respondent emphasizes that it did not in its lawsuit assert allegations or request a remedy that would impose a union-security obligation on any employee or on Stroehmann. The Respondent argues that even had the court granted its request for a mandamus order certifying it as the representative of the petitioned-for bargaining unit, that order would not have resulted in the imposition of a union-security obligation on Stroehmann or on any employee.

The Respondent in addition argues that its lawsuit had a reasonable legal basis, and was not filed with a retaliatory motive, and accordingly is not unlawful under the two-prong test set forth in *Bill Johnson's*, supra. The Respondent contends that the reasonable basis of its lawsuit is established by the district court's holding that the Respondent had advanced a novel, nonfrivolous legal claim, and thus held that Rule 11 sanctions against the Respondent were inappropriate. The Respondent further contends that its district court suit was not filed with a retaliatory motive. The Respondent submits that its amended complaint did not seek any remedy against any employee nor did it seek to retaliate against any employee for the exercise of rights under the Act. Rather, the Respondent contends that it filed the lawsuit because of its belief that the Board failed to exercise its statutory duties, and that the Respondent "sought only to remedy a taint to the election process brought about by the employer's machinations of the *Excelsior* list."

The Respondent additionally contends that a remedial Order directing the Respondent to reimburse Stroehmann for attorney's fees is not appropriate in view of the district court's determination that the Respondent's lawsuit set forth a nonfrivolous legal claim. The Respondent contends that the district court's denial of Rule 11 sanctions must be given preclusive effect as to an award of attorney's fees in the instant proceeding, because each request presents essentially the same issues and Stroehmann should not be per-

mitted by the Board to obtain the relief the district court denied.

C. Discussion

We find, for the reasons set forth below, that the Respondent did not violate Section 8(b)(1)(A) of the Act by maintaining its lawsuit in Federal district court pursuant to its amended complaint.

A lawsuit may not be condemned by the Board as an unfair labor practice unless the General Counsel establishes that the lawsuit lacks a reasonable basis in fact or law and that the lawsuit was filed with a retaliatory motive. *Bill Johnson's*, supra, 461 U.S. at 748–749; *LP Enterprises*, 314 NLRB 580 (1994). The Court explained in *Bill Johnson's*, however, that its two-prong analysis does not apply to lawsuits that are preempted by the National Labor Relations Act, or that have an objective that is illegal under Federal law. *Bill Johnson's*, supra at 737 fn. 5. As set forth above, the General Counsel here argues alternatively that the Respondent's district court lawsuit is unlawful because it is preempted by the Act, had an illegal objective under Federal law, and cannot pass muster under the two-prong test set forth in *Bill Johnson's*. We shall address each of these contentions in turn.

1. The preemption issue

We find that the Respondent's district court action against the NLRB defendants and Stroehmann was preempted by the National Labor Relations Act. We further find, however, for the reasons set forth below, that the Respondent's maintenance of its preempted lawsuit was not an unfair labor practice.

It is fundamental that the statutory scheme set forth in Section 9 of the Act authorizes the Board to investigate election petitions, to hold hearings to determine whether a question of representation exists, to conduct representation elections by secret ballot among eligible voters, and to certify the results of the election. In setting forth this statutory scheme, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A. J. Tower*, supra at 330.

It is likewise fundamental that Board Orders in representation proceedings are not directly reviewable in court. Rather, to obtain judicial review of such an Order, an employer must refuse to bargain with the union after it has been certified, and then argue its case in a Federal court of appeals after the Board has found the employer to have committed an unfair labor practice by refusing to bargain with the union. *Boire v. Greyhound Corp.*, 376 U.S. 473, 476–477 (1964); *Goethe House New York v. NLRB*, 869 F.2d 75, 77 (2d Cir. 1989), cert. denied 493 U.S. 810 (1989). It is ac-

cordingly "hornbook law" that, except in the rarest of circumstances, Federal district courts are without jurisdiction to entertain direct appeals of Board actions in representation cases. *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1311 (D.C. Cir. 1984).

The Supreme Court in *Leedom v. Kyne*, supra, promulgated a narrow exception to the jurisdictional rule forbidding district court review of Board Orders in representation cases. The Court held in *Kyne* that district courts could properly exercise jurisdiction over Board conduct that is "in excess of its delegated powers and contrary to a specific prohibition in the Act." *Id.* at 188. The Court has cautioned that the *Kyne* exception is a narrow one characterized by extraordinary circumstances,⁵ and applies only when the Board has violated a clear and specific statutory mandate. *Kyne*, supra at 188–189.

The Respondent's cause of action against the NLRB defendants in its district court suit sought to invoke the court's jurisdiction over the Board's representation proceeding under the aegis of *Leedom v. Kyne*. The district court rejected the Respondent's contention, finding that the Respondent had not established that the Board's actions in the underlying representation proceeding violated a clear and mandatory provision of the Act or that the Board's actions were an attempt to exercise a power that had been specifically withheld by the Act. Accordingly, the district court's jurisdiction to adjudicate the Respondent's claim was preempted by the statutory scheme authorizing the Board to conduct representation proceedings subject only to judicial review in the courts of appeals. See *Food & Commercial Workers Local 400 v. NLRB*, 694 F.2d 276, 278–279 (D.C. Cir. 1982). The district court itself thus recognized that the Respondent's lawsuit did "not meet the requirements of *Leedom v. Kyne* and thus does not justify departure from the normal jurisdictional rule prohibiting district court jurisdiction over Board representation proceedings." *Bakery Workers Local 6 v. NLRB*, 799 F.Supp. at 511.

We likewise must conclude that the district court was preempted by the National Labor Relations Act from adjudicating the Respondent's asserted contract claim against Stroehmann premised on the Stipulated Election Agreement in the underlying representation election. The district court correctly recognized that "[b]ecause the Stipulated Election Agreement is part of the election process, disputes regarding the Agreement implicate representational issues and therefore fall within the exclusive jurisdiction of the Board." *Bakery Workers Local 6 v. NLRB*, supra, 799 F.Supp. at 512. The district court's jurisdiction to adjudicate the Respondent's claim based on the Stipulated Election Agreement was thus preempted by the well-established statutory scheme providing for judicial review

⁵ *Boire v. Greyhound*, supra at 479.

by the courts of appeal of Board conduct of representation proceedings only in the circumstances set forth above. Accordingly, the district court accordingly appropriately dismissed the Respondent's asserted contract claim for lack of subject matter jurisdiction.

Thus, we find, in agreement with the General Counsel, that the Respondent's lawsuit was preempted by the Act. We also agree with the General Counsel that a preempted lawsuit "enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), *enfd.* 973 F.2d 230 (3d Cir. 1992), *cert. denied* 113 S.Ct. 1383 (1993). "Rather, the 'normal' requirements of established law apply." *Loehmann's Plaza I*, 305 NLRB 663, 671 (1991).⁶ In other words, if the Respondent's preempted lawsuit is unlawful under traditional NLRA principles, it can be condemned as an unfair labor practice. Under settled principles, a violation of Section 8(b)(1)(A) is established if it is shown that the union's conduct has a reasonable tendency to restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.⁷

Several considerations persuade us that that test was not met here. The lawsuit was filed against the NLRB and the Employer, not the employees. The lawsuit did not seek to impose a collective-bargaining agreement or a union-security obligation upon Stroehmann's employees. The lawsuit sought monetary damages from the Employer, not dues from the employees. Concededly, the lawsuit sought certification of the Respondent. The Respondent's pursuit of this relief, however, would not reasonably tend to restrain or coerce employee exercise of Section 7 rights. If the lawsuit failed, there would be no certification. If the lawsuit succeeded, the Respondent would be declared the bargaining representative, even though the Board found that it lacked majority status. In *Curtis Brothers*, however, the Supreme Court held that peaceful picketing by a union, which does not represent a majority of the employees, to compel immediate recognition as the employees' exclusive bargaining agent, does not constitute restraint or coercion within the meaning of Section 8(b)(1)(A).⁸ A fortiori, peaceful invocation of judicial processes for that objective should not be deemed restraint or coercion.⁹

⁶Reversed on other grounds in *Loehmann's Plaza II*, 316 NLRB 109 (1995) (Members Browning and Truesdale dissenting). The *Loehmann's Plaza I* principle set forth above remains valid Board law. See, e.g., *Be-Lo Stores*, 318 NLRB 1, 10 (1995).

⁷See, e.g., *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852-853 (3d Cir. 1964), *cert. denied* 379 U.S. 826 (1964).

⁸*NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274 (1960).

⁹Member Truesdale agrees with his colleagues that the Respondent's "peaceful invocation of judicial processes . . . should not be deemed restraint or coercion," but only for the following reasons. Contrary to his colleagues, Member Truesdale does not find that the Respondent's objective in filing the lawsuit was to be declared the

In sum, we conclude that the General Counsel's preemption theory does not provide a sufficient basis for finding a violation of the Act here because statutory restraint or coercion is lacking.¹⁰ The General Counsel, however, still has two alternative arguments that need to be addressed. We will turn next to the General Counsel's illegal objective theory.

2. The illegal objective issue

We further find that the Respondent's lawsuit did not have an objective that was illegal under Federal law. The Respondent maintained that its lawsuit fell within the limited authority of the district court under *Leedom v. Kyne* to act in circumstances when the Board has violated its statutory mandate. The Respondent's claims against Stroehmann were likewise an effort to establish a new basis for invoking district court jurisdiction by characterizing its claims arising from the Stipulated Election Agreement as contractual rather than representational. The Respondent thus sought to invoke district court jurisdiction pursuant to a well-established, albeit narrow, exception to the Board's primary jurisdiction to decide representational matters, and made an additional attempt to craft a novel basis for invoking district court jurisdiction. The Respondent's lawsuit thus did not, in effect, seek to circumvent the primary jurisdiction of the Board to decide the representational issues arising from the Respondent's efforts to gain representative status with respect to Stroehmann's employees. Rather the Respondent by its lawsuit sought to come within an exception to the Board's primary jurisdiction.

This case is accordingly unlike *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832 (1991), *enfd.* 973 F.2d 230

unit employees' bargaining representative even though it lacked majority status. In Member Truesdale's view, the Respondent brought the lawsuit to vindicate its claim that it actually won the election and would have been certified as the collective-bargaining representative of the unit employees but for the fact that the Board acted outside its statutory powers in the election by failing to compel Stroehmann to fulfill its *Excelsior* obligations and by failing to sustain the challenge to employee Gallagher's ballot on the ground that his name did not appear on the *Excelsior* list. If the court found merit in the Respondent's argument and ordered the Board to void Gallagher's ballot, the Respondent would win the January 25, 1990 election and be certified as the unit employees' bargaining representative. Obviously, there could be no restraint or coercion of employees' rights if the Respondent then represented the unit employees in bargaining with Stroehmann.

¹⁰Cases cited by the General Counsel are distinguishable on this basis. In *Rite Aid*, *supra*, the union lawsuit, if successful, would have resulted in the application of the terms of a collective-bargaining agreement, including a union-security provision, to employees the Board had excluded from the bargaining unit. Similarly, in *Teamsters Local 952 (Pepsi Cola Bottling)*, 305 NLRB 268 (1991), the union filed grievances, and a suit to compel arbitration of them, seeking to apply the terms of a collective-bargaining agreement to employees outside the bargaining unit. Thus, in *Rite Aid* and *Pepsi Cola*, unlike the situation here, violations of Sec. 8(b)(1)(A) were established under settled NLRA principles.

(3d Cir. 1992), cert. denied 113 S.Ct. 1383 (1993), cited by the General Counsel. In *Teamsters Local 776*, the Third Circuit enforced the Board's Order finding that the union's Federal district court lawsuit had an illegal objective because it sought to enforce an arbitral award that was contrary to a Board unit clarification decision. The Third Circuit agreed with the Board that, because it is well established that a Board unit determination takes precedence over an arbitrator's decision,¹¹ the union's maintenance of its lawsuit in the face of the superior Board authority had the unlawful objective of circumventing the Board's jurisdiction over representation issues. The Third Circuit explained that the union was pursuing an action that it could not win regardless of the evidence it produced in Federal district court because of the settled primacy of the Board decision over the conflicting arbitral award. 973 F.2d at 236. In contrast, the Respondent's lawsuit here did not seek to circumvent Board jurisdiction, but rather sought to invoke district court jurisdiction based on the authority of a decision of the United States Supreme Court. Nor was the Respondent's lawsuit necessarily doomed from the outset; in particular, its contract claim raised an issue that had not previously been addressed.

Furthermore, we find no merit in the General Counsel's complaint allegation that the Respondent's lawsuit had an illegal objective of forcing imposition of a union-security obligation incompatible with a Board determination that the Respondent lacked representative status with respect to Stroehmann's employees. The sole basis for the General Counsel's claim is the Respondent's request in its district court suit for damages "in an amount equal to accrued union dues for all bargaining unit employees" from the date of the first election. The Respondent's request for monetary damages is not tantamount, however, to seeking the imposition of a union-security obligation. Even if this request had been granted by the district court, it would not have imposed upon Stroehmann's employees an obligation to tender dues and fees to the Respondent. Nor would it have authorized the Respondent to seek the discharge of an employee for failure to do so and Stroehmann would be under no obligation to effectuate such discharge. We accordingly cannot conclude that the Respondent's lawsuit had an illegal objective of imposing a union-security obligation upon Stroehmann's employees based solely on the request in its contract claims against Stroehmann for monetary damages in an amount equal to accrued union dues.

We now turn to the General Counsel's contentions: Assuming arguendo that the Respondent's lawsuit was not preempted and did not have an illegal objective, the lawsuit is unlawful under the two-pronged *Bill Johnson's* test.

3. The *Bill Johnson's* analysis

As set forth above, the Court in *Bill Johnson's* held that the Board may not condemn a lawsuit as an unfair labor practice unless two conditions are met: (1) the lawsuit lacked a reasonable basis in fact or law, and (2) the lawsuit was filed with a retaliatory motive. The Court further directed that when, as here, the lawsuit resulted in a judgment adverse to the plaintiff, the Board may proceed to consider whether the lawsuit was filed with retaliatory intent, and if such intent is present, find a violation of the Act and order appropriate relief. *Bill Johnson's*, supra, 461 U.S. at 747. As the Board has explained:

[We have] consistently interpreted *Bill Johnson's Restaurants* to hold that if the plaintiff's lawsuit has been finally adjudicated and the plaintiff has not prevailed, its lawsuit is deemed meritless, and the Board's inquiry, for purposes of resolving the unfair labor practice issue, proceeds to resolving whether the respondent/plaintiff acted with a retaliatory motive in filing the lawsuit.

Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199, 1200 (1992), enf. denied on other grounds 15 F.3d 677 (7th Cir. 1994).

The district court here granted the defendants' motions to dismiss the Respondent's amended complaint. No appeal was taken from the district court's decision. Accordingly, the district court's judgment adverse to the Respondent constituted a final adjudication establishing that the Respondent's lawsuit was meritless. The merits of the suit have thus already been adjudicated against the Respondent, and the sole question remaining before us is whether the Respondent filed its district court lawsuit with a retaliatory motive. See *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325, 326 (1990), enf. sub nom. *NLRB v. Aeronautical Industrial District Lodge No. 91*, 934 F.2d 1288 (2d Cir. 1991), cert. denied 112 S.Ct. 1161 (1992).

We have carefully considered the record in this case and cannot find that the General Counsel has met his burden of establishing that the Respondent's filing of its district court lawsuit was motivated by a desire to retaliate against the exercise of Section 7 rights. The sole evidentiary basis cited by the General Counsel in support of his assertion that the lawsuit was filed with a retaliatory motive is that the Respondent did not initiate its district court action until the petitioned-for unit employees had failed to select the Respondent to represent them in the second election conducted on January 31, 1991. The General Counsel submits that the Respondent sued Stroehmann "directly in response to the election loss" and accordingly that the lawsuit was motivated by a desire to retaliate against the employees for declining union representation.

¹¹ *Carey v. Westinghouse*, 375 U.S. 261, 272 (1964).

We note that the Respondent did not file its district court complaint until approximately May 2, 1991, more than 3 months after the January 31, 1991 election, and it did not amend its complaint to name Stroehmann as a defendant until September 10, 1991. This attenuated time frame is not at all probative as to whether the district court lawsuit was filed with an intent to retaliate against the employees' vote against the Respondent on January 31, 1991. Indeed, the timing sequence involved herein does not warrant any inference of causation between the results of the second representation election and the filing of the lawsuit, and falls well short of establishing retaliatory motive.¹²

The General Counsel has not pointed to any additional evidence in support of his contention that "[i]t was the employees' rejection of the Union [in the second election] . . . which triggered the lawsuit." We accordingly find that the General Counsel has not sat-

¹² Compare *American Pacific Concrete Pipe Co.*, 292 NLRB 1261, 1262 (1989) (retaliatory motive found when state court lawsuit was filed by employer 1 day before Board backpay hearing and the employer surprised the discriminatee with the news it was suing him just before the backpay hearing commenced); *Johnson & Hardin Co.*, 305 NLRB 690, 692 (1991) (retaliatory motive found when the respondent did not file criminal complaints against union representatives until "shortly" after it received the unfair labor practice charge the union had filed against it).

isfied his burden of proving that the Respondent filed its lawsuit with retaliatory intent.

For all the above reasons, we find that the Respondent's maintenance of its preempted district court lawsuit was lawful, that the lawsuit did not have an illegal objective under Federal law, and that the lawsuit is not unlawful under the two-prong test set forth in *Bill Johnson's*. We shall accordingly dismiss the General Counsel's complaint.

CONCLUSIONS OF LAW

1. Stroehmann Bakeries, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Bakery, Confectionery, & Tobacco Workers' International Union, Local 6 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.¹³

ORDER

The complaint is dismissed.

¹³ In view of our finding that the Respondent did not violate the Act as alleged in the complaint, we need not address the General Counsel's request for remedial relief.