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

Advice Memorandum

DATE: June 21, 2001

TO : Dorothy L. Moore-Duncan, Regional Director
Daniel E. Halevy, Regional Attorney
John D. Breese, Assistant to Regional Director
Region 4

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

SUBJECT: Silvi Concrete Products, Inc.
Case 4-CA-29115 512-5009-6700
512-5009-6767
737-0150

This case was submitted for advice on whether the Employer's lawsuit nominally attacking an unprotected Union threat to strike was baseless and retaliatory under Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

FACTS

On March 29, 2000,[1] the Union, Teamsters Local 469, filed the instant charge. On May 23, the Region deferred it pending resolution of the lawsuit described below.

The Employer operates concrete plants in a number of locations in Pennsylvania and New Jersey. The Employer contracted with Madison Construction, a general contractor, to produce ready-mixed concrete from the Employer's Fairless Hills plant for Madison's construction site in Hopewell, New Jersey.

The Union represents the Employer's employees at its Englishtown, New Jersey plant. The Employer's Fairless Hills drivers and plant maintenance employees are unrepresented despite the Union's organizing efforts. On December 22, 1999, the Union filed a petition in Case 4-RC-19871 to represent the Fairless Hills drivers. On January 28, the Union lost the election; the Region certified the results on February 8.

On January 21, during the above proceedings, the Employer filed Case 00-CV-408 in the United States District Court for the Eastern District of Pennsylvania. The complaint alleged that a Union threat to picket, described

[1] All dates are in 2000 unless otherwise indicated.

infra, violated Section 303 and also interfered with a contractual and economic relationship under Pennsylvania state tort law. The court dismissed the entire complaint, without prejudice, because the Employer's counsel failed to inform the Union of a settlement conference.

On April 20, the Employer refiled essentially the same complaint as Case 00-CV-2075. This complaint alleged, in par. 10, that the Union, by its secretary-treasurer O'Keefe, "threatened a strike line at Madison Construction if the Teamsters did not win" the election of January 28.[2] Paragraph 16 of the complaint states

> As a result of the unlawful [secondary] conduct of [the Union], Silvi's good will and valued relationship with its client has been unjustifiably harmed.

Paragraph 19 of the complaint, relating to the state tort, claims that the Union's unlawful conduct resulted in the Employer's having "incurred damages and losses in excess of $100,000.00."

The Union never did picket at Madison's Hopewell site. Around July, the Employer fulfilled its contract to deliver ready-mixed concrete to Madison at Hopewell with no trouble from the Union.

During discovery in the above suit, the Employer admitted that it had suffered no quantifiable damages because of the Union's threat. On September 18, in its answer to interrogatory 4, the Employer said that it was seeking punitive damages, even though its court complaint contained no request for punitive damages.

On October 23, the court instructed the parties to brief the issue of whether the Employer's tort claim was preempted. In response, the Employer withdrew that claim. On November 8, the court awarded summary judgment to the Union on the remaining Section 303 claim. The court reasoned that Section 303 gives rise only to an action for damages, and that the kinds of damages the Employer sought to demonstrate were speculative and uncertain. The court also dismissed the tort claim, albeit without ruling on its merits and without prejudice to the Employer's refiling.

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[2] The Employer asserted that the Union made the threat to Madison's president Dolente on January 10 or 11, and that Dolente later told the Employer's president that the Union wished Dolente to communicate its threat to the Employer.

The Employer has not refiled that claim nor appealed any portion of the court's disposition.

Union secretary-treasurer O'Keefe asserts that during the period March-June 2000, he asked the Employer to withdraw the lawsuit. The Employer allegedly gave three conditions for doing so. The Union must agree to (1) not picket the Employer for five years; (2) not attempt to organize the Employer's Fairless Hills employees for five years; and (3) terminate the Englishtown plant bargaining agreement midterm and renegotiate it with wage concessions. The Union refused to agree to these conditions.

The Employer contends that its lawsuit did not retaliate against protected activity and instead was a lawful response to the Union's unprotected conduct, i.e., the January 10 or 11 threat to picket if the Union lost the election.

ACTION

We conclude that both Counts of the suit are meritless and filed in retaliation against the Union's organizing activities at the Fairless Hills plant and representational activities at the Englishtown plant.

Under the Supreme Court's analysis in Bill Johnson's, supra, the Board can find a suit that has concluded to be an unfair labor practice if: (1) the lawsuit was without merit, and (2) the plaintiff filed the suit with a retaliatory motive. In determining whether a lawsuit has a retaliatory motive, the Board takes into consideration factors such as the baselessness of the lawsuit;[3] whether the lawsuit is motivated by and directly aimed at protected activity;[4]

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[3] Bill Johnson's Restaurants, 461 U.S. at 747. See also Diamond Walnut Growers, 312 NLRB 61, 69 (1993), enfd. 53 F.3d 1085 (9th Cir. 1995); Phoenix Newspapers, 294 NLRB at 49 (1989).

[4] BE & K Construction, 329 NLRB No. 68, slip op. at 10 (September 30, 1999)(lawsuit aimed at union's legislative lobbying, suit filing, and instituting grievance and arbitration proceedings); Summitville Tiles, 300 NLRB at 65 (lawsuit motivated by employees' and union's filing of Board charges and state court lawsuit against employer); H.W. Barss Co., 296 NLRB 1286 (1989)(lawsuit aimed at lawful picketing).

prior animus against the defendant in the lawsuit;[5] and whether the lawsuit seeks damages in excess of mere compensatory damages.[6]

We first conclude that both Counts of the suit are meritless. Count 1, the Section 303 allegation, is meritless as dismissed by the court and not appealed.[7] This Count is also baseless because, as also noted by the district court, the Employer failed to establish the essential element of actual, compensatory damages.[8]

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[5] Summitville Tiles, 300 NLRB at 66; Machinists Lodge 91 (United Technologies), 298 NLRB at 326.

[6] See, e.g., Petrochem Insulation, Inc., 330 NLRB No. 10, slip op. at 5 (1999), enfd. ___F.3d____, 2001 WL 61078 (D. C. Cir. 2001); Diamond Walnut Growers, 312 NLRB at 69; Phoenix Newspapers, 294 NLRB at 49-50; H.W. Barss Co., 296 NLRB at 1287.

[7] Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199 (1992), enf. den. on other grounds 15 F.3d 677 (7th Cir. 1994); Bakery, Confectionery & Tobacco Workers International Union, Local 6 (Stroehmann Bakeries, Inc.), 320 NLRB 133, 139 (1995); Summitville Tiles, supra, 300 NLRB at 65 (1990).

[8] Section 303 suits do not lie where there is no injury. See Teamsters, Local 20 v. Morton, 377 U.S. 252, 260 (1964). Section 303 explicitly restricts plaintiffs to the class of persons "who shall be injured in [their] business or property by reason of any violation of" Section 8(b)(4). See Feather v. United Mine Workers of America, 711 F.2d 530, 537 (3rd Cir. 1983), and its discussion of "by reason of." Where, as here, plaintiff can demonstrate no injury resulting from the unlawful conduct, Section 303 suits cannot succeed. Matson Plastering Company, Inc. v. Plasterers and Shophands Local No. 66, 852 F.2d 1200, 1202-1203 (9th Cir. 1988), cert. denied 488 U.S. 994 (1988). While courts have at times awarded nominal damages, they have done so only where there are actual damages but their amount could not be determined with sufficient confidence. Iodice v. Calabrese, 409 F.Supp. 389 (S.D.N.Y. 1976); Hyatt Chalet Motels, Inc. v. Salem Building & Construction Trades Council, 298 F.Supp. 699, 700 (D.Ore. 1968). Although the Employer pleaded damages, it was never able to show that it had sustained any attributable to the Union's misconduct.

Count 2, the tort of interference with a contractual and economic relationship, is meritless as withdrawn. The Board has held that withdrawal of a claim, without any adjudication on the merits, gives rise to a rebuttable presumption that it lacked merit.9 The plaintiff-respondent then has "the burden of rebutting the inference that the suit lacked merit..." Id. at 255. The Employer's summary withdrawal of the tort allegation raises a presumption that it has no merit. Since the Employer has not shown that this allegation had merit or otherwise attempted to rebut the Vanguard[9] presumption, this allegation also is meritless.

We conclude that this suit was unlawfully filed in retaliation against the Union's future organizing activities at the Fairless Hills plant and future representational activities at the Englishtown plant. We find the suit unlawfully retaliatory under Bill Johnson's even though it is retaliatory against Section 7 conduct in futuro.

To "retaliate" against another generally means to respond to past action of the other.[10] In Bill Johnson's, however, the employer sued employees who picketed both before and after the employer filed the lawsuit. The employer sought both monetary damages and forward looking injunctive relief.[11] The lawsuit in Bill Johnson's also was labeled "retaliatory" in the complaint, id. at 735; the question before the Supreme Court, id. at 737; and the Court's holding, id. at 744, 747 and 748. It is clear from both the facts of Bill Johnson's and the text of the decision that the Supreme Court understood that lawsuits can chill future conduct.[12]

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[9] Vanguard Tours, 300 NLRB 250, 1990), enf. denied in relevant part 981 F.2d 62 (2nd Cir. 1992).

[10] The American College Dictionary, 1970, at 1035 ("to return like for like.")

[11] Bill Johnson's Restaurants, supra. 249 NLRB at 162.

[12] The Court said, at 740:

> As the Board observed, by suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit.... Furthermore, as the Court of Appeals in the present case noted, the chilling effect of a state

The Court was aware that lawsuits are often more than mere responses to past activity and that such lawsuits can be seized upon to interfere with future protected activity. Since the Court said nothing to intimate that its holdings are applicable only when there was actual past protected activity, we apply its holding to this case.

The Employer argues that its suit is not retaliatory against this protected activity because the suit nominally attacks the Union's unprotected threat to strike. We conclude to the contrary that the Employer's asserted motive, the threat to picket at Madison if the Union lost the election at Fairless Hills, is pretextual.

The Employer refiled the suit on April 20 despite the fact that the Union never acted upon the picket threat after it lost the January 28 election. The Employer persevered in appearing to attack that picket threat even after it had completed its work at the Madison site, and even after it had admitted that it had sustained no quantifiable damages. The Employer arguably could have reasonably inferred in January with the election then pending that the Union might engage in the secondary picketing it threatened. The Employer's picket fear became less rationale, however, as the months passed to April when it refiled this suit. The Employer's fear of a picket line at Madison evaporated when that project ended, around July.

The Employer evinced its underlying, true motive for this suit when it proposed the conditions for its withdrawal, viz., the Union’s promise not to engage in future protected activity. The Employer's first condition sought a ban on all picketing, including lawful primary picketing. This condition is a wholesale expansion upon the Union's previous, single threat to unlawfully picket at Madison, undermining that limited threat as a basis for the suit. The Employer next sought an explicit promise to deny the Fairless Hills employees representation by this Union, in retaliation against such Section 7 activity. Finally, the Employer sought to deprive employees at Englishtown of the benefits of their current collective-bargaining agreement, a direct attack on Section 7 activity. See NLRB v. City Disposal Systems, 465 U.S. 822 (1984).

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lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief.

We conclude, in agreement with the Region, that Rule 408 of the Federal Rules of Evidence (FRE) does not bar the admission of the parties' settlement negotiations as evidence of the Employer's motive in filing and maintaining the lawsuit. Rule 408 FRE bars the introduction of statements made in compromise negotiations for the purpose of proving the liability, invalidity, or amount of a claim. The Rule does not bar a trier of fact from considering the contents of settlement discussions for a variety of other purposes, including inferring the objective of a lawsuit.[13]

The baseless, meritless nature of this lawsuit is additional evidence that it was unlawfully retaliatory.[14] Where, as here, the lawsuit seeks relief that never has been or no longer is necessary, the Board has drawn the same inference.[15] And where, as here, the lawsuit seeks punitive damages, the Board draws the same inference.[16] In sum, the Employer's asserted basis for filing the suit is pretextual

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[13] Carney v. American University, 151 F.3d 1090, 1095-1096 (D.C. Cir. 1998), citing Resolution Trust Corporation v. Blaisdell, 154 F.R.D. 675 (D. Ariz. 1993) (evidence of settlement negotiations admissible to prove retaliatory motive) and also citing 23 Wright & Graham, Federal Practice and Procedure, Evidence, Sec. 5314 (Rule 408 inapplicable when, inter alia, unfair labor practice committed in settlement discussions); Regional Construction Corporation, 333 NLRB No. 42 (2001) (In finding lawful a state court motion to amend a consent order to restrain mass picketing, ALJ described how experienced labor counsel negotiated reserved gate system).

[14] See Petrochem Insulation, Inc., 330 NLRB No. 10 (1999), slip op. at 5, enfd. 240 F.3d 26, 32-34 (D.C. Cir. 2001).

[15] See, e.g., Vanguard Tours, Inc., supra, 300 NLRB at 255 (employer continued suit after it broke strike); New Jersey Bell Telephone Co., 308 NLRB 277, 281 (1992) (employer filed "defiant trespass" suit against employee who had promptly left the premises when instructed to do so).

[16] Petrochem Insulation, Inc., slip op. at 6; International Union of Operating Engineers, Local 520 (Alberici Construction), supra.

and the underlying motive is retaliatory against Section 7 activity.[17]

The Employer defends its lawsuit by citing Rondout Electric, Inc., 329 NLRB No. 87 (1999), where the Board found that a state criminal prosecution of nonemployee organizers who entered the employer's office was not unlawfully retaliatory. We find Rondout distinguishable because the employer's objective there was to deal with an unprotected trespass, and not with protected activity. In contrast, the Employer's suit here was retaliatory against protected activity.

In sum, the Region should issue complaint, absent settlement, alleging that the Employer, by filing and maintaining its lawsuit, violated Section 8(a)(1). The Region should seek as appropriate relief reimbursement of the Union's legal expenses in defending the lawsuit. BE&K Construction Co., above, 329 NLRB No. 68, slip op. at 11-12.

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[17] The above circumstances also demonstrate that the Employer at least had a "mixed motive" for filing its suit, i.e., a motive against both the picket threat and the Union's organizational and representational activities. The Employer has not demonstrated that it would have filed this suit even in the absence of the Union's organizing and representational activities. Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).