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

Advice Memorandum

DATE: November 20, 2001

TO : Robert H. Miller, Regional Director
Joseph P. Norelli, Regional Attorney
Alan B. Reichard, Assistant to the Regional Director
Region 20

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

SUBJECT: Cable Car Charters
Case 20-CA-30251-1

This Bill Johnson's[1] case was submitted for advice as to whether the Employer's dismissed federal suit for declaratory relief, seeking to avoid its bargaining obligation with the Union, violated Section 8(a)(1).

BACKGROUND AND FACTS

Briefly, the Union was certified in 1993 to represent a unit of the Employer's chartered motorized "cable car" employees. The parties entered into a collective-bargaining agreement, which was extended and expired in February 1999 after the Employer gave the Union notice of termination in October 1998. Meanwhile, in 1996 the Board entered an order finding, inter alia, that the Employer had violated Section 8(a)(5) by making unilateral changes to employee scheduling in 1993 after the Union was certified, and ordered the Employer to cease and desist from refusing to bargain with the Union. 322 NLRB 554 (1996). The Ninth Circuit enforced that order. Nos. 97-70069, 97-70253 (February 20, 1998)(unpublished mem.).

On March 10 and November 20, 2000, the Board filed in the Ninth Circuit a petition and an amended petition against the Employer for an adjudication in civil contempt of the enforced Board order, alleging the Employer discriminatorily refused to hire two employees and refused to bargain with the Union by both failing and refusing to provide relevant information requested by the Union, and by dealing directly with employees. The information allegations were the subject of a Union unfair labor practice charge, upon which the Region issued a complaint; that complaint was withdrawn in favor of litigating the

[1] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

matter in the contempt proceeding. That contempt proceeding is still pending.

On June 5, 2001, the Employer filed the instant complaint for declaratory relief in federal district court, alleging that it should be relieved of any obligation to negotiate with the Union, as of the Employer's October 1998 notice of termination of the parties' agreement, because of "changed circumstances." The Employer pointed to high turnover in the unit since the 1993 Board election; the elimination because of business necessity of certain unit classifications; and an alleged dramatic decrease in the amount of unit work. The Employer specifically alleged that in February 1999 and at other times the Union had urged the Employer to negotiate a new agreement, but that no new agreement had been negotiated.[2] The Employer claimed that the court had jurisdiction to proceed under Section 301, 29 USC Sec. 185.

The Union filed a motion to dismiss, arguing that the court lacked jurisdiction and that the question of whether a bargaining obligation existed was within the Board's jurisdiction. The Board, through the Special Litigation Branch on September 17, moved to intervene in the case and moved to dismiss the Employer's action, arguing that: (1) the action was an impermissible collateral attack on the Ninth Circuit judgment and the pending Board contempt petition; (2) the district court lacked Section 301 jurisdiction because the action was not based on a contract; and (3) the action was precluded by the Board's primary, if not exclusive, jurisdiction over representation issues. On September 20, 2001, the court entered an order granting the Union's motion to dismiss the Employer's suit on the basis that it lacked jurisdiction because there was no matter of a contractual nature for the court to determine, and because the Board was the appropriate body with which to pursue a claim resolving the Employer's bargaining obligations. The court directed the clerk to terminate all pending motions, including the Board's motions to intervene and to dismiss. The 30-day period within which to appeal the September 20 order of dismissal has passed.

While the Employer's action was pending, it filed an RM petition on July 12, 2001, questioning the Union's

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[2] The Employer's sole owner testified in a deposition in the contempt proceeding that it was his view that the October 1998 notice of contract termination would allow the Employer to unilaterally sever its bargaining relationship with the Union, not just terminate the contract.

majority status. The Region dismissed that petition on August 20 because of the unlawful unremedied conduct, alleged in Union ULP charges, being litigated in the contempt proceeding.

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent settlement, alleging that the Employer unlawfully filed a meritless suit against the Union to retaliate against its employees for having selected and maintained the Union as their collective bargaining representative.

Under the Supreme Court's analysis in Bill Johnson's, above, 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.[3] In Alberici Construction,[4] it was noted that

> [t]he Board has 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.[5]

In determining whether a lawsuit has a retaliatory motive, the Board takes into consideration factors such as whether

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[3] See generally Teamsters Local 776 (Rite Aid), 305 NLRB 832, 834 (1991), enf'd. 973 F.2d 230 (3d Cir. 1992), cert. denied 113 S.Ct. 1383 (1993)("retaliatory motive" prong of Bill Johnson's test is met "if the actual motive of the lawsuit is to retaliate against or frustrate the exercise of a statutory right").

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

[5] Id. at 1200, citing Summitville Tiles, 300 NLRB 64, 65 (1990); Machinists Lodge 91 (United Technologies), 298 NLRB 325, 326 (1990), enf'd 934 F.2d 1288 (2d Cir. 1991), cert. den. 502 U.S. 1091 (1992); and Phoenix Newspapers, 294 NLRB 47, 49 (1989).

the lawsuit is motivated by and directly aimed at protected activity[6] and the baselessness of the lawsuit.[7]

Here, the Employer's action is clearly meritless as it was dismissed and the time for appeal has expired. The action was retaliatory both because of its meritlessness and because on its face it was aimed at employees' Section 7 representational activities, i.e., initially selecting and maintaining the Union as their Section 9(a) representative. The complaint expressly mentions the repeated, unfulfilled Union requests to negotiate a new contract, and specifically mentions the direct dealing being addressed in the contempt proceeding, which was originally brought to the Board's attention by Union charges. It is thus clear that the Employer's suit is aimed at its employees' continued exercise of Section 7 representational rights. In these circumstances, where the dismissed suit can be attacked as unlawful under the traditional Bill Johnson's "meritless/retaliatory" test, we would not argue that the suit was also unlawful as preempted or as seeking an unlawful objective.[8]

B.J.K.

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[6] 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).

[7] 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).

[8] [*FOIA Exemption 5*

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