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

Advice Memorandum

DATE: November 30, 2001

TO : Peter B. Hoffman, Regional Director
Jonathan B. Kreisberg, Regional Attorney
John S. Cotter, Assistant to Regional Director
Region 34

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

SUBJECT: Sheet Metal Division of Capitol District
Sheet Metal, Roofing & Air Conditioning
Contractors Association, Inc.
Cases 34-CA-9760, 34-CA-9793

Sheet Metal Contractors Association of Northern New Jersey
Cases 34-CA-9761, 34-CA-9794

512-5009-6700
512-5009-6733
512-5009-6767

Associated Sheet Metal & Roofing
Contractors of Connecticut
Cases 34-CA-9762, 34-CA-9795

These Section 8(a)(1) cases were submitted for advice as to whether a meritless lawsuit against Sheet Metal Workers Local 38 (the Union) and the Sheet Metal & Roofing Employers Association of Southeastern New York (SENY) was filed with a retaliatory motive under Bill Johnson's.[1]

FACTS

The Union represents sheet metal workers in various counties in Connecticut and New York. SENY is a multi-employer bargaining agent representing union sheet metal contractors within the Union's jurisdiction. A July 1998 collective-bargaining agreement between the Union and SENY contained the following clause (the Provision):

> To protect and preserve for the Building Trades employees covered by this Agreement all work they have performed and all work covered by the Agreement, and to prevent any device or subterfuge to avoid the protection and

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

> preservation of work; it is agreed that all work requiring sketching and fabrication shall be performed by employees hereunder, either in the shop or on the job site within the geographical jurisdiction of [the Union].

On June 30, 1998, the Charged Parties[2] filed a lawsuit against the Union and SENY in federal district court. The lawsuit alleged that the Provision violated the Sherman Act,[3] the Connecticut and New Jersey antitrust statutes,[4] New York's Donnelly Act,[5] and Sections 8(b)(4)(B) and 8(e) of the Act. Although the Provision had never been enforced against them, the Outside Contractors apparently filed the lawsuit because the Union did not assure them of future non-enforcement, and they estimated their damages at $50 million. They also sought treble damages for the alleged antitrust violations, damages under the Act, injunctive relief, a declaratory judgment, and costs and attorneys' fees.

On July 10, 1998, SENY filed a charge against the Union alleging that the Provision violated Section 8(e).[6] On September 3, 1998, the Regional Director declined to issue a complaint, having determined that the Provision constituted a valid work preservation clause under National Woodwork.[7]

On March 24, 1999, the district court ruled that the Provision violated Section 8(e) and Sections 1 and 2 of the

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[2] Sheet Metal Division of Capitol District Sheet Metal, Roofing & Air Conditioning Contractors Association, Inc.; Sheet Metal Contractors Association of Northern New Jersey; and Associated Sheet Metal & Roofing Contractors of Connecticut. Collectively referred to here as "the Outside Contractors," they are multi-employer bargaining agents that represent union sheet metal contractors outside of the Union's jurisdiction in New York, New Jersey, and Connecticut.

[3] 15 U.S.C. § 1 et seq.

[4] Conn. Gen. Stat. § 35-26 et seq. and N.J. Stat. Ann. § 56:9-1, respectively.

[5] N.Y. Gen. Bus. Law §340.

[6] Case 34-CE-8.

[7] National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612 (1967).

Sherman Act and, accordingly, granted the Outside Contractors' motion for a declaratory judgment that the Provision was void and unenforceable.[8] The court subsequently declined to award attorneys' fees under Section 15 of the Clayton Act,[9] which requires a showing of injury, because the Outside Contractors "ha[d] not demonstrated any injury to their business or property by reason of anything forbidden in the antitrust laws," had "essentially admit[ted] that they suffered no injury...in their memorandum of law," and "did not successfully obtain an award of damages."[10] However, the court did award the Outside Contractors attorneys' fees of $56,298.75 under Section 26 of the Clayton Act, which provides for such a recovery where a plaintiff substantially prevails in obtaining injunctive relief for threatened antitrust violations.[11]

The Union and SENY appealed the district court rulings. On March 21, 2000, the U.S. Court of Appeals for the Second Circuit reversed and remanded "[b]ecause too many of the facts in this case remain unresolved, and because the district court made several errors of law...."[12]

On remand, the district court partially granted the Union's and SENY's motion for summary judgment, denying the Outside Contractors' request for injunctive relief and finding the state law antitrust claims preempted.[13] The court held a bench trial from April 23, 2001 through April 26, 2001. At the close of the Outside Contractors' proof, the district court partially granted the Union's and SENY's motion for judgment on partial findings, and dismissed the Sherman and Donnelly Act claims.[14] Following the trial, the court ruled that the Provision was lawful under Section 8(e) because it "targets work traditionally performed by

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[8] Sheet Metal Div. of Capitol v. Local Union 38, 45 F.Supp.2d 195, 209, 210-211 (N.D.N.Y. 1999).

[9] 15 U.S.C. § 12 et seq.

[10] Sheet Metal Div. of Cap. Dist. v. Loc. Union 38, 63 F.Supp.2d 211, 212-213 (N.D.N.Y. 1999).

[11] Id. at 213-214.

[12] Sheet Metal Div. v. Local 38, 208 F.3d 18, 20 (2d Cir. 2000).

[13] Decision & Order dated March 5, 2001, at 6, 18.

[14] Decision & Order dated May 23, 2001, at 3.

[Union] workers and does not bind non-signatories...."[15] Thus, all of the Outside Contractors' claims were either summarily dismissed or decided against them after the trial. The Outside Contractors did not appeal the district court's decision.

On July 20, 2001, the Union filed charges against each of the Outside Contractors alleging the lawsuit violated Section 8(a)(1) because it was without merit and was brought in retaliation against Section 7 protected activity.[16] On August 7, 2001, SENY also filed charges against each of the Outside Contractors alleging, among other things, that the lawsuit violated Section 8(a)(1) because it was without merit and was brought in retaliation against Section 7 protected activity.[17]

The Outside Contractors contend that the lawsuit did not violate Section 8(a)(1) because it was neither meritless nor retaliatory. They contend that the lawsuit had a reasonable basis, as shown by the district court's first decision, and that the district court's ultimate ruling was in fact a victory because the court found that the Provision did not apply to them. The Outside Contractors further assert that no retaliatory motive can be established because the lawsuit did not receive "unduly bad reviews" from the court,[18] and a trial was required to resolve factual issues. The Outside Contractors also argue that Can-Am Plumbing, Inc.[19] is distinguishable from the instant cases because that case involved a non-union employer suing a union employer in state court, and not union employers suing a union employer in federal court.

ACTION

We conclude that the Outside Contractors' meritless lawsuit is retaliatory within the meaning of Bill

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[15] Id. at 24.

[16] Cases 34-CA-9760, 34-CA-9761, and 34-CA-9762.

[17] Cases 34-CA-9793, 34-CA-9794, and 34-CA-9795.

[18] The Employer quotes from Beverly Health & Rehabilitation Services, JD-166-99, slip op. at 7, complaint dismissal based on no retaliatory motive pending on exceptions before the Board.

[19] 335 NLRB No. 93 (2001) (employer unlawfully maintained and prosecuted a state court lawsuit against a competitor for accepting job targeting funds from a union).

Johnson's. Therefore, absent settlement, the Region should issue a Section 8(a)(1) complaint.

The Region has concluded, and we agree, that the lawsuit is without merit. In Bill Johnson's, the Supreme Court held that the Board may enjoin as an unfair labor practice the filing and prosecution of a state court lawsuit when the lawsuit lacks a reasonable basis in fact or law and is commenced for a retaliatory motive.[20] Once a plaintiff's lawsuit has been finally adjudicated and the plaintiff has lost, the lawsuit is deemed meritless, and the Board then turns to the issue of retaliatory motive. Thus, in Alberici Construction, the Board stated that it 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 determining whether the respondent/plaintiff acted with a retaliatory motive in filing the lawsuit.[21]

Here, all of the Outside Contractors' claims were either summarily dismissed or decided against them after the trial. Thus, under settled Board law, the Outside Contractors' lawsuit was without merit.[22]

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[20] 431 U.S. at 743-744, 748-749.

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

[22] Although the district court stated that it would accord some deference to the Regional Director's refusal to issue complaint in Case 34-CE-8 (Decision & Order dated May 23, 2001, at 19-21), the Regional Director's determination itself is not evidence that the Outside Contractors' suit lacked merit. See, e.g., Edna H. Pagel, Inc. v. Teamsters Local 595, 667 F.2d 1275, 1279-1280 (9th Cir. 1982) (in cases involving issues of fact or contract interpretation, NLRB's refusal to issue complaint not res judicata); Warehousemen's Union Local 206 v. Continental Can Co., 821 F.2d 1348, 1351 (9th Cir. 1987) (same); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1166 (7th Cir. 1984), cert. denied 469 U.S. 1160 (1985) (refusal to issue complaint is no more than exercise of prosecutorial discretion, and is not entitled to be given

In determining whether a lawsuit has a retaliatory motive, the Board considers various factors. For example, the Board examines whether the lawsuit is motivated by and directly aimed at protected activity[23] and whether the lawsuit seeks damages in excess of mere compensatory damages.[24] Additionally, the Board may properly rely upon the fact that the lawsuit was without merit. In this regard, the Supreme Court stated in Bill Johnson's:

> While the Board need not stay its hand if the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous, the Board should allow such issues to be decided by the state tribunals if there is any realistic chance that the plaintiff's legal theory might be adopted.
>
> In instances where the Board must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves meritorious and he has a judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. If judgment goes against the employer in state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and 8(a)(4) unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been

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collateral estoppel effect or to be treated as exercise of primary discretion).

[23] BE & K Construction Co., 329 NLRB 717, 726 (1999), enfd. 246 F.3d 619 (6th Cir. 2001); Summitville Tiles, 300 NLRB 64, 66 (1990); H.W. Barss, 296 NLRB 1286, 1287 (1989).

[24] See, e.g., Federal Security, Inc., 336 NLRB No. 52, slip op. at 1, 7 (2001); Diamond Walnut Growers, 312 NLRB 61, 69 (1993), enfd. 53 F.3d 1085 (9th Cir. 1995); Phoenix Newspapers, 294 NLRB 47, 49-50 (1989); H.W. Barss, 296 NLRB at 1287.

filed in retaliation for the exercise of the employees' § 7 rights.[25]

Applying the above principles to the instant cases, we conclude that the Outside Contractors' lawsuit was filed with a retaliatory motive.

First, we find that the lawsuit was retaliatory because it was motivated by, and directly aimed at, protected activity. Thus, the lawsuit alleged that the Provision violated various statutes, including the Act. However, the district court rejected each of the Outside Contractors' causes of action, including the claim that the Provision was unlawful under Section 8(e). As the Region had earlier determined in dismissing the 8(e) charge, the Provision was a lawfully negotiated collectively-bargained work preservation clause which constitutes Section 7 protected activity. Thus, "[s]ince the suit was aimed directly at protected activity, and necessarily tended to discourage similar protected activity, it was, by definition, retaliatory within the meaning of Bill Johnson's."[26]

Next, we conclude that the Outside Contractors sought excessive damages, which, as set forth above at note 24, the Board has long regarded as evidence of retaliatory motive. Here, the Outside Contractors sought $50 million in damages, even though the Provision had never been enforced against them. In addition, the district court found that the Outside Contractors had failed to demonstrate any injury attributable to an antitrust violation, had essentially admitted in their brief that they suffered no injury, and had not obtained a damages award.[27] Moreover, in the circumstances of this case, some evidence of retaliatory motive can be inferred from the Outside Contractors' request for treble damages for the alleged antitrust violations.[28] Thus, although Section 15

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[25] 461 U.S. at 746-747 (emphasis added). See also Diamond Walnut Growers, 312 NLRB at 69; Phoenix Newspapers, 294 NLRB at 49; BE & K Construction, 329 NLRB at 721.

[26] BE & K Construction, 329 NLRB at 726-727.

[27] In this regard, see H.W. Barss, 296 NLRB at 1287-1288 (Board found retaliatory motive based on, among other things, fact the employer was aware at the time it filed its suit that it had suffered no business losses).

[28] See, e.g., BE & K Contractors v. NLRB, 246 F.3d at 630 (retaliatory motive inferred where, among other things, lawsuit sought treble damages for Section 7 protected

of the Clayton Act mandates an award of treble damages when a plaintiff establishes both a violation and a showing of actual economic harm, both elements are essential to such an award.[29] Since the Outside Contractors here admitted early in the litigation that they had suffered no such economic harm from the alleged antitrust violations, their request for treble damages was frivolous and clearly in excess of damages they could have recovered.

In addition, as stated in Bill Johnson's, the Board may take into account a lawsuit's lack of merit in determining whether it was filed with a retaliatory motive. 461 U.S. at 747. The Court made clear that a lawsuit lacks merit where judgment goes against the employer, where the lawsuit is withdrawn, or where the lawsuit is otherwise shown to be without merit. Ibid. Thus, the district court's summary dismissals and final judgment against the Outside Contractors all fall within the Court's definition of an "unmeritorious" lawsuit. Ibid. Accordingly, the Board may properly consider the fact that the lawsuit was without merit in evaluating whether it evinced a retaliatory motive.

Finally, we find unavailing the Outside Contractors' attempts to distinguish Can-Am Plumbing, which involved a state court lawsuit filed by a non-union employer, from the instant cases, which involve a federal court lawsuit filed by unionized employers. First, the issue in Can-Am Plumbing, as framed by the ALJ, was whether the maintenance and prosecution of a lawsuit by an employer against one of its competitors violated Section 8(a)(1) under Bill Johnson's. 335 NLRB No. 93, slip op. at 3. In holding that the lawsuit violated Section 8(a)(1), neither the ALJ

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activity alleged to be in violation of antitrust laws), citing Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d at 1089 (simple request for punitive damages is factor to be considered in evaluating employer's motive in prosecuting lawsuit).

[29] Rosebrough Monument Co. v. Memorial Park Cemetery, 666 F.2d 1130, 1146 (8th Cir. 1981), cert. denied 457 U.S. 1111 (1982). See also Petrochem Insulation, Inc., 330 NLRB No. 10, slip op. at 5 (1999), enfd. 240 F.3d 26, 34 (D.C. Cir. 2001), cert. denied 122 S.Ct. 458 (2001) (argument that treble damages, as statutory components of RICO and antitrust laws, cannot be evidence of motive even "in part" rejected, because selection of those claims where there was a less drastic alternative of recovering alleged actual losses under Section 303 based on what plaintiffs now alleged was unprotected activity under Section 8(b)(4)).

nor the Board attached any significance to the fact that the suit was brought by a non-union employer against a union employer. Rather, "the lawsuit tend[ed] to interfere with (indeed [was] designed to stop) conduct that is protected by Section 7 (the job targeting program)." Id., slip op. at 1. We therefore find this distinction immaterial. Second, the Board, with circuit court approval, has applied the principles of Bill Johnson's to lawsuits filed in federal court.[30] Thus, we also reject the Outside Contractors' contention that Can-Am Plumbing is inapposite in this regard.

For all of the foregoing reasons, we conclude that the Outside Contractors' meritless lawsuit was filed with a retaliatory motive. Accordingly, absent settlement, the Region should issue a Section 8(a)(1) complaint in the instant cases.

B.J.K.

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[30] See, e.g., BE & K Construction, 329 NLRB at 722 n.24 ("Although Bill Johnson's involved a state court lawsuit, the Board has applied its principles to cases involving allegedly retaliatory federal court suits as well. In applying those principles here, we note that the First Amendment right of access to the courts, which concerned the Court in Bill Johnson's, is implicated just as strongly when the lawsuit at issue is a federal court suit as it is when the suit at issue is a state court suit.") (internal citations omitted).