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

Advice Memorandum

DATE: November 24, 2008

TO : J. Michael Lightner, Regional Director
Region 22

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

SUBJECT: New Jersey Anesthesia Associates 177-1617-2500
22-CA-28327 and 22-CA-28388 177-2401-6750
512-5009-1500
512-5072

The Region submitted this case for advice as to (1) whether a group of doctors (Non-Founders) are excluded from the Act's protection by virtue of their shareholder status; and (2) if the Non-Founders are not excluded, whether the Employer's filing of counterclaims against the Non-Founders, and threats to file a counterclaim against one of the Non-Founders and a request for sanctions against the Non-Founders' attorney and his law firm, violated Section 8(a)(1) in light of BE & K Construction Co.[1]

We conclude that (1) the Non-Founders are not excluded from the Act's protection by virtue of their shareholder status; we reach no conclusion as to whether the Non-Founders are statutory employees as they may be independent contractors; and (2) assuming Non-Founder employee status, the Employer's counterclaims were lawful as reasonably based under BE & K, and its threats to file a counterclaim and sanctions also were lawful as incidental to the pending litigation.

FACTS

New Jersey Anesthesia Association (NJAA or Employer) is a closely held corporation that is comprised of 48 doctors who provide anesthesiology services to area healthcare facilities. Thirty of NJAA's doctors-shareholders are senior members or founding shareholders (Founders). The remaining 18 doctors, who were employed after NJAA's incorporation, are non-founding shareholders (Non-Founders). There is only one class of NJAA stock and

[1] 351 NLRB No. 29 (2007).

each of the doctors owns NJAA stock.[2] During the relevant time period, the 30 Founders possessed 1,430 and the Non-Founders possessed 840 of the outstanding shares, respectively.[3]

NJAA and its shareholders are parties to and are governed by a Shareholders' Agreement that has been in effect since January 2003. Provisions of the Shareholders' Agreement that are relevant here include the shareholders' voting rights, the doctors' compensation structure, and the parties' dispute resolution procedure.

Under the Shareholders' Agreement, actions affecting NJAA's working conditions require a vote by either all shareholders or by NJAA's seven-member Board of Directors, which is currently comprised of three Non-Founders and four Founders. An action affecting a term of employment, management issue, or corporate policy requires either a 66% or 80% vote of all shareholders (Founding and Non-Founders), or a 70% or 80% Board of Directors' vote.[4] In addition to the shareholders' voting rights, the Founders have additional voting rights. By a 33% Founder vote, any decision passed by either the shareholders or the Board of Directors may be reviewed or suspended. Once suspended, the Founders, by majority vote, can veto any action taken by the shareholders or the Board of Directors. Founders may also elect NJAA's future Founders by a 66% vote.

The Shareholders' Agreement includes a Compensation Plan which consists of a mathematical formula that considers NJAA's revenue and expenses (e.g., operating costs, billing, and management services, etc.), to compute a shareholder's compensation. NJAA has a contract with Health Networks Management, LLC (HNM), a third party

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[2] Doctors are eligible to become shareholders and are allowed to purchase ten shares of NJAA stock per year up to a maximum of 50 shares after three years of employment.

[3] When the charges were originally filed, there were 24 Founders and 24 Non-Founders. The number of Non-Founders has since been reduced to 18. At no time did the Non-Founders ever constitute a majority of the shareholders or possess a majority of NJAA's stock.

[4] For instance, a 66% shareholder vote is necessary to establish an employee retirement plan or to remove a Board Member without cause. An 80% shareholder vote is necessary to terminate a shareholder's employment without cause, change rules concerning work assignments and seniority, or to change corporate policy.

company, to provide NJAA with billing and management services. The Founders own HNM.

The final relevant provision in the Shareholders' Agreement is the parties' dispute resolution procedure which provides that any "controversy or claim out of or arising out of or relating to" the Shareholder's Agreement is subject to a mandatory three-step procedure. The first step requires the complainant to make a "good faith" effort to resolve the dispute with the Board. If unsuccessful, the parties may proceed to mediation. If mediation fails, the final step is binding arbitration.

In early 2008,[5] the 18 Non-Founders, pursuant to the dispute resolution procedure's first step, submitted a request to the NJAA Board to discuss HNM's billing practices. The Non-Founders were dissatisfied with the Founders' ownership and control of HNM and the terms of HNM's contract with NJAA to perform billing and other management services. The Non-Founders believed that HNM was artificially inflating NJAA's expenses resulting in the lowering of the doctors' compensation. When the Founders did not respond to the Non-Founders' initial request, the Non-Founders requested mediation.

On March 13, after receiving no response to their mediation request, the Non-Founders filed a Demand for Dispute Resolution (Demand) based on its concern about HNM's billing practices. The Demand also alleged that since the Non-Founders began pursuing the matter, the Founders had retaliated against the Non-Founders by assigning them less lucrative assignments and harassing them.

On April 8, the Board of Directors passed a series of resolutions that replaced the current three-step dispute resolution procedure with a final and binding quasi-judicial trial. In doing so, the first step of the dispute resolution procedure was effectively transformed into a last and final step, which rendered mediation and arbitration moot.

On April 22, the Non-Founders filed the instant Section 8(a)(1) charges alleging NJAA's retaliation against the Non-Founders through case assignments, harassment, denial of Founder status, and threats to file a lawsuit and sanctions for filing the instant unfair labor practices.

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[5] Dates hereafter are 2008, unless noted otherwise.

By letter May 31, the Founders' attorney responded to the Non-Founders' Demand and stated that one of the Non-Founders, [*FOIA Exemptions 6 and 7(C)*], would be the subject of one of its future counterclaims. [*FOIA Exemptions 6 and 7(C)*

.] The attorney asserted that defending this claim had cost NJAA tens of thousands of dollars in legal fees and [*FOIA Exemptions 6 and 7(C)*] conduct in that regard will be the subject of one of the "counterclaims."

On June 6, the Founders filed an answer to the Demand, and included the following counterclaims:

- **Count One** (against all Non-Founders) – For breach of fiduciary duty and breach of the Shareholders' Agreement by, inter alia, filing the instant legal proceedings and taking actions inconsistent with the Shareholders' Agreement;
- **Count Two** (against all Non-Founders) – Knowingly causing NJAA to incur substantial attorneys' fees to contest the Non-Founders "onslaught of contested matters" and by violating the Shareholders' Agreement by causing public litigation and charges to be filed for untoward purposes;
- **Count Three** (against [*FOIA Exemptions 6 and 7(C)*]) – For indemnification and breach of contract for costs incurred by NJAA in [*FOIA Exemptions 6 and 7(C)*
];
- **Count Four** (against all Non-Founders)- Requesting that the "loser pay" the prevailing party's attorneys' fees pursuant to the NJAA's corporate documents; and
- **Count Five** (against all Non-Founders) – Requesting "sanctions and other relief" due to the Non-Founders' filing of frivolous and vexatious litigation.

On June 17, the parties submitted their dispute to an arbitrator to decide whether the Non-Founders' claims were ripe for arbitration, or were subject to preconditions which had not been satisfied under the parties' dispute resolution procedure.

By letter dated June 30 to the Non-Founders' attorney, the Founders' attorney threatened to seek sanctions against the Non-Founders, their attorney, and the attorneys' law firm unless the Non-Founders withdrew all of its pending litigation within 28 days. To date, the Founders have not filed any separate application for sanctions.

On September 17, the arbitrator issued a memorandum and order concluding that the Board of Director's resolutions creating a new dispute resolution procedure

were void and unenforceable. The arbitrator ordered the parties, inter alia, to return to the three-step dispute resolution procedure in the Shareholders' Agreement. The arbitrator specifically made no findings on the merits of the claims contained in the Demand, or the Founders' defenses or counterclaims asserted in its answer. The arbitrator held the arbitration in abeyance pending the parties' fulfillment of the first two dispute resolution steps. The parties have not met pending resolution of the instant charges.

ACTION

The Non-Founders' shareholder status does not exclude them from the Act's protection; however, we reach no conclusion as to whether the Non-Founders are statutory employees as they may be independent contractors. Assuming the Non-Founders are statutory employees, the Employer's counterclaims were lawful as reasonably based under BE & K, and its threats to file a counterclaim against [*FOIA Exemptions 6 and 7(C)*] and for sanctions against the Non-Founders, their attorney, and his law firm, were lawful as incidental to the pending litigation.

I. The Non-Founders' Shareholder Status does not Exclude Them from the Act's Protection

The Board has held that the "mere fact that an employee also has the rights and privileges of a shareholder is not sufficient to debar him from availing himself in his capacity as an employee of the rights of employees to engage in concerted activities for the purposes of collective bargaining."[6] Rather, in cases involving employee-shareholders, the degree of participation in management and/or labor policy formulation and whether the shareholder-employees, as a group, have an effective voice in formulating and determining corporate policy determines whether employees deserve the protection of the Act.[7]

We reach the limited conclusion that the Non-Founders, as minority shareholders of NJAA, do not possess an

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[6] Centurion Auto Transport, Inc., 329 NLRB 394, 398 (1999), quoting Everett Plywood & Door Corp.,105 NLRB 17, 19 (1953) ("[s]tock ownership does not alone preclude the inclusion of employee stockholders in a collective-bargaining unit").

[7] Citywide Corporate Transportation, Inc., 338 NLRB 444, 444 (2002); Alderwood Products Corp., 81 NLRB 136 (1949); Brookings Plywood Corp., 98 NLRB 794, 798 (1952).

effective voice in the formulation of company policy, and thus, are not excluded from the Act's protection.

In Citywide Corporation Transportation, Inc., the Board addressed the threshold issue of whether an employee-shareholder was entitled to the Act's protection when he engaged in union organizing activities.[8] The case involved a cooperative entirely owned by driver/shareholders. A driver/shareholder alleged that he was subjected to interrogation, threats, and denial of work opportunities in violation of Section 8(a)(1) and (3) after the cooperative discovered he had been distributing union literature to other drivers.

In finding that the driver was not an employee protected by the Act, the Board adopted the ALJ's reasoning that the shareholder/employees, as a group, had an effective voice in formulating and determining corporate policy in that they cumulatively owned "at least 200 of 277 voting shares, held a sufficient majority to elect or impeach officers, Board members, elect committee persons, and to rescind working rules and even amend or change the constitution."[9]

In contrast, the Board in Upper Great Lakes Pilots, Inc., found that the employee-shareholders did not have an "effective voice" in the formulation and determination of corporate policy because they did not, collectively, own a majority of the corporation's stock.[10] There, the employer was a corporation and its pilots owned all of the corporate stock. Of the 54 outstanding shares of voting stock, 29 or 54% were owned by corporate officers and directors. The Board held:

> The Respondent's directors and officers during the relevant time period together owned more than half of the voting stock. The rest of the pilots, even acting in concert, could not outvote the officers and directors. On the basis of stock ownership, then, the minority shareholders lacked an effective voice in the formulation and determination of corporate policy.

311 NLRB 131, 132.

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[8] 338 NLRB 444 (2002).

[9] Id. at 450.

[10] 311 NLRB 131 (1993).

Here, the Non-Founders comprise a minority of the shareholders (18 out of 48), and own a minority of shares (840 of 2,270 shares, or 37%). As minority shareholders, the Non-Founders do not quantitatively possess the shares necessary to control the Board of Directors, influence corporate policy, or modify work rules or compensation, and accordingly, do not have an "effective voice" in the formulation and creation of corporate policy. In addition to being minority shareholders, the Non-Founders only have an indirect affect on NJAA policy due to the Shareholders' Agreement's voting structure. For example, a 66% shareholder vote (Founders and Non-Founders) is needed to remove a Board member, and an 80% shareholder vote is needed to change corporate policy. Further, even if an action passes shareholder vote, the Founders can veto any such action by simple majority vote. Accordingly, we conclude that the Non-Founders do not have an effective voice in formulating NJAA's policy and thus are not precluded from the Act's protection on that basis.[11]

II. NJAA's Counterclaims are not Baseless Under BE & K

In BE & K Construction Co., a majority of the Board held that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or completed, and regardless of the motive for the lawsuit.[12] The Board concluded that the Bill Johnson's principles regarding right of access to courts are equally applicable to both completed and ongoing lawsuits.[13] It stated that in either case, declaring a lawsuit to be an unfair labor practice has a chilling effect on the right to petition. Accordingly, it found that, just as with an ongoing lawsuit, a completed suit that was reasonably based cannot constitute an unfair labor practice.[14] In determining whether a lawsuit is reasonably based, the Board explicitly adopted the standard set forth by the Supreme Court in the antitrust context, i.e., a lawsuit lacks a reasonable basis, or is objectively

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[11] We do not reach the issue of whether the Non-Founders are statutory employees as they may be independent contractors.

[12] 351 NLRB No. 29 (2007).

[13] Id., slip op. at 7.

[14] Id.

baseless, if "no reasonable litigant could realistically expect success on the merits."[15]

We conclude that NJAA's counterclaims are not baseless because they are neither baseless in fact nor baseless in law, i.e., not plainly foreclosed under the parties' dispute resolution procedure.

Four of the five counterclaims were made against all of the Non-Founders and, in sum, alleged that the Non-Founders breached their fiduciary duty to NJAA and breached the Shareholders' Agreement by filing the Demand and other litigation thereby causing NJAA to incur attorneys' fees and costs to contest this "onslaught of litigation." The Founders requested compensatory and punitive damages, attorneys' fees and costs, and sanctions. One counterclaim was against Non-Founder, [*FOIA Exemptions 6 and 7(C)* .] NJAA sought reimbursement for costs it incurred in [*FOIA Exemptions 6 and 7(C)*
.]
The Founders alleged that [*FOIA Exemptions 6 and 7(C)*] breached his professional duties under the Shareholders' Agreement.

First, we note that all these claims are cognizable under the parties' dispute resolution procedure which states that any "controversy or claim out of or arising out of or relating to" the Shareholder's Agreement is subject to a mandatory three-step procedure. All the NJAA's counterclaims were filed in direct response to the Non-Founder's Demand which itself had been filed pursuant to the Shareholders' Agreement's dispute resolution procedure. The claim against [*FOIA Exemptions 6 and 7(C*)] also arose out of or was related to the Shareholders' Agreement because it is based on NJAA's defense of [*FOIA Exemptions 6 and 7(C)*] as a shareholder-employee.

Second, none of the counterclaims is baseless in fact. The claims variously attack Non-Founder conduct allegedly inconsistent with the Shareholders' Agreement, the Non-Founders' filing of charges for untoward purposes, and the filing of frivolous and vexatious litigation. Since these claims rely on the Non-Founders' Demand, they are all well based in fact. [*FOIA Exemptions 6 and 7(C)*

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[15] Id. (quoting Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60 (1993)).

Finally, we cannot conclude that any of these allegations are baseless in law since they all reasonably allege violations of the Shareholders' Agreement. Each of NJAA's counterclaims allege the Non-Founders breached their fiduciary duty and certain provisions *under* the Shareholders' Agreement. The claim against [*FOIA Exemptions 6 and 7(C)*] is not plainly foreclosed given the NJAA's defense of his alleged misconduct as a shareholder-employee. Based on the foregoing, a reasonable litigant could realistically expect success on the merits of these counterclaims and accordingly, NJAA's filing and maintenance of the counterclaims was not unlawful under BE & K.

III. NJAA's Threats to File a Counterclaim and for Sanctions were "Incidental" to the Pending Litigation

The Board has historically distinguished the filing of a lawsuit from a threat to file a lawsuit and has rejected employers' attempts to extend the protections of BE & K to situations involving threats to sue.[16] The Board recently concluded that "whatever constitutional concerns might exist with respect to the filing of a lawsuit, they are not implicated when only a threat to file a lawsuit is in issue."[17]

In United States Postal Service, the Board found that an employer's threat to file a lawsuit against an employee because he had filed an unfair labor practice charge violated Section 8(a)(1) where the threat stood alone and apart from any subsequent lawsuit. The supervisor involved in the underlying unfair labor practice threatened to file a lawsuit against the charging party employee, after the supervisor received a copy of the charge, saying that he was going to be sorry for filing the charge and had better get an attorney. However, no legal counsel was obtained and no lawsuit was ever filed. The employer argued that the finding of a Section 8(a)(1) violation would chill the right to petition the courts and that because BE & K concerned a lawsuit, the principles should be extended to threats to sue because "threats of litigation, incidental to the normal process of litigation" would not constitute an unfair labor practice.[18]

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[16] Carborundum Resistant Materials Corp., 286 NLRB 1321, 1323, n.8 (1987).

[17] United States Postal Service, 350 NLRB No. 12, slip op. 2, n.1 (2007).

[18] Id. slip op. at 1.

The Board assumed, arguendo, that the principles of BE & K may apply "where a threat to file a lawsuit is 'incidental' to a lawsuit."[19] The Board noted Venetian Casino Resort, LLC v. NLRB, 484 F.3d 601, 612 (D.C. Cir. 2007), where the employer was found to have violated 8(a)(1) when it interfered with a protected union demonstration by broadcasting over loudspeakers that the demonstrators were committing criminal trespass. The employer in Venetian argued that its broadcast of the trespass message "[was] incidental and inextricably intertwined" to a lawsuit it had filed, and therefore, was protected by the First Amendment and immunized from liability under the Supreme Court's Noerr-Pennington doctrine.[20]

In Venetian the court of appeals assumed the applicability of the Noerr-Pennington doctrine in the labor law context and found that although the employer had filed a lawsuit against the union, the broadcast was in no way "incidental" to that lawsuit and thus, could be alleged to constitute an unfair labor practice. In United States Postal Service, the Board reached the same result reasoning that because "no actual lawsuit was filed, the threat was not 'incidental' and, thus, the Respondent's threat to sue [the charging party] for filing an unfair labor practice charge violated Section 8(a)(1) of the Act" and consequently, the threat was not entitled to immunity.[21]

We conclude that the Noerr-Pennington doctrine, which admittedly arose in the context of antitrust litigation, arguably can be applied here in the labor law context regarding threats to sue. Thus, the Supreme Court in BE & K specifically relied upon antitrust law in determining that an ultimately unsuccessful lawsuit is shielded by the First Amendment and cannot be subject to attack under the NLRA unless the lawsuit is baseless.[22] The Court relied on

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[19] Id.

[20] Id. at slip op. at 2, citing Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-38 (1961) and United Mine Workers of America v. Pennington, 381 U.S. 657, 669-670 (1965), both of which are discussed in BE & K.

[21] Id.

[22] BE & K Construction Company v. NLRB, 536 U.S. 516, 524 (2002).

its sham antitrust litigation test set forth in Professional Real Estate Investors,[23] i.e., an antitrust case holding that a lawsuit lacks a reasonable basis if "no reasonable litigant could realistically expect success on the merits."[24] The Court's conclusion in Professional Real Estate Investors that a lawsuit must be objectively baseless to be deprived of immunity from antitrust liability was directly derived from the "sham" litigation exception it had previously articulated in Noerr-Pennington.[25] In dicta, the Court noted that Noerr-Pennington, an antitrust doctrine, has been invoked in other contexts, such as labor law where the Court had held that an "improperly motivated" lawsuit may not be enjoined under the Act as an unfair labor practice unless such litigation is "baseless."[26] Thus, the Court and the Board have already applied antitrust law in a labor law context to determine whether a lawsuit itself is protected by the First Amendment and may not be attacked under the Act. Accordingly, the Noerr-Pennington doctrine may be used to determine whether a *threat* of a lawsuit is protected by the First Amendment and thus shielded from NLRA liability.

We conclude that NJAA's threat of a counterclaim against [*FOIA Exemptions 6 and 7(C)*] and for sanctions against the Non-Founders, their attorney, and the attorney's law firm, are all "incidental" to the pending litigation – the Demand – and thus do not violate Section 8(a)(1).

By its May 31 letter, the Founders' attorney threatened to include [*FOIA Exemptions 6 and 7(C)*] as the subject of one of its counterclaims. A week later, the Founders, in fact, filed a counterclaim against [*FOIA Exemptions 6 and 7(C)*] which was contained in its answer to the Non-Founders' Demand. As such, the counterclaim against [*FOIA Exemptions 6 and 7(C)*] was clearly incidental to the Demand.

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[23] Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. at 61.

[24] As earlier noted, the Board on remand explicitly adopted the standard set forth by the Supreme Court in Professional Real Estate Investors, to determine whether a lawsuit is reasonably based. BE & K, 351 NLRB No. 29, slip op. at 7.

[25] Professional Real Estate Investors, 508 U.S. 49, 60 (1993

[26] Id. at 58 citing Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743,44 (1983).

The Founders' threat of sanctions is also arguably incidental to the pending litigation. By its June 30 letter, the Founders' attorney threatened to seek sanctions against the Non-Founders, their attorney, and his law firm unless the Non-Founders withdrew its litigation, including its Demand, within twenty-eight days. Although no application for sanctions has been filed to date, the Founders had requested "sanctions and other relief" against the Non-Founders in one of its counterclaims. The Founders' June 30 threat of sanctions is arguably incidental to its previous request for sanctions as it relates to and arises from the Demand, and therefore, the protections of BE & K would apply, and the threat does not violate Section 8(a)(1).

In sum, we conclude that the Non-Founders' shareholder status does not exclude them from the Act's protection; however, we reach no conclusion as to whether the Non-Founders are statutory employees as they may be independent contractors. Assuming the Non-Founders are statutory employees, the charges should be dismissed, absent withdrawal, because the Employer's counterclaims were reasonably based under BE & K, and its threats to file a counterclaim and for sanctions were incidental to the pending litigation, and therefore did not violate Section 8(a)(1).

B.J.K.