International Union of Operating Engineers, Local 520, AFL–CIO (Alberici Construction Company, Ben Hur Construction Company, and McCarthy Brothers) *and* Thomas C. Glenn. Case 14–CB–7167

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On July 9, 1992, Administrative Law Judge Walter H. Maloney issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue presented in this case is whether the Respondent Union violated Section 8(b)(1)(A) of the Act by filing a state court lawsuit against a union member for slander and libel. The Union's lawsuit alleged that the union member made slanderous and libelous statements in charges filed against the Union with the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (the Board). The judge found that the Union's lawsuit had a reasonable basis in law and fact and that it was not filed for retaliatory reasons. Thus, the judge concluded that the Union did not violate the Act and recommended that the complaint be dismissed. We disagree for the following reasons.

Thomas Glenn, the Charging Party, and other members of the Union, individually filed multiple charges with the EEOC and the Illinois Department of Human Resources (IDHR) alleging that the Union was discriminating on the basis of race in the operation of its exclusive hiring hall. Glenn and the other members also wrote letters to the Union's International president requesting an investigation of their charges and filed a lawsuit in Federal court alleging discrimination. Each of the EEOC/IDHR charges were determined to have no merit and the Federal court suit was dismissed for lack of prosecution. Glenn subsequently filed a charge with the NLRB alleging that, through improper failures to make referrals from its hiring hall, the Union restrained and coerced Glenn and others in the exercise of their rights guaranteed by Section 7. The Regional Director dismissed Glenn's charge.

The Union then filed a civil lawsuit against Glenn, alleging that Glenn libeled and slandered the Union by making false statements in the charges he filed with the EEOC/IDHR and the NLRB. The Union's lawsuit sought a total of $200,000 in damages, including punitive damages. The state court granted Glenn's motion to dismiss the lawsuit on the ground that the statements he filed with the EEOC/IDHR and the Board were privileged. In reaching its decision, the state court relied on an Illinois state court case that held that statements made in EEOC charges are privileged. Applying the same rationale as that case, the state court extended the privilege to statements filed with the Board.

Glenn filed the present charge with the Board alleging that the Union's state lawsuit was filed to restrain and coerce employees in the exercise of their Section 7 rights.

The administrative law judge applied the principles set out in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), and found that the Union's lawsuit had a reasonable basis in law and fact, even though the Union was not successful and the lawsuit was dismissed. The judge found that a factual basis existed for the Union's lawsuit because it appeared that Glenn made unsubstantiated charges of discrimination and because Glenn admitted at the hearing that some of the statements he made in the charges were false. The judge also found that the lawsuit had a reasonable basis in law because the Union presented a set of precedents to the court that ''gave it a triable, if not winnable case on the law.''

The judge, though he did not feel it was necessary, proceeded to determine whether the Union filed its lawsuit with a retaliatory motive. The judge found that Glenn engaged in a campaign of filing false and frivolous charges that caused the Union to expend a substantial amount of money ($15,000) defending itself. The judge was not persuaded that punitive damages should be considered in determining whether the Union's motive was retaliatory.

Although the judge correctly enunciated the test set out in *Bill Johnson's Restaurants*, in finding that the Union's lawsuit had a reasonable basis in law and fact and was not filed for retaliatory purpose, we find that he erred in his application of the test to the facts of this case.

In *Bill Johnson's Restaurants*, the Supreme Court held that establishing a lack of reasonable basis in fact or law and a retaliatory motive are prerequisites to enjoining prosecution of a state court lawsuit. In addition, the Court held that if ''the state proceedings result in a judgment adverse to the plaintiff [respondent], the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief.'' 461 U.S. at 749.

In this case, the administrative law judge defined ''reasonable basis'' as having a ''triable claim, both on

the facts and on the law, at the time the suit was docketed in the clerk's office, and that the institution of the civil action was not an abuse of the civil court's processes undertaken for the purposes of harassment.'' The judge's definition of ''reasonable basis'' is contrary to Board precedent. The 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. *Summitville Tiles*, 300 NLRB 64, 65 (1990); *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991); and *Phoenix Newspapers*, 294 NLRB 47, 49 (1989).

Here, the Union's lawsuit is no longer pending, and the Union did not prevail. Thus, the merits of the suit have already been adjudicated against the Union, and we need only decide whether the lawsuit was filed against Glenn for a retaliatory reason.[1] On the basis of the facts before us, we find that the Union did file the lawsuit against Glenn with a retaliatory motive.

The Union asserts that it filed a civil lawsuit against Glenn because he allegedly made false statements that the Union discriminated against Glenn and other black members by refusing to refer them for employment based on their race. The Union's state court complaint specifically alleged that Glenn made false statements in charges filed with the EEOC/IDHR and the NLRB. Other members of the Union filed EEOC/IDHR charges alleging similar discriminatory referral practices. Glenn, however, was the only member to file a charge with the NLRB and Glenn was the only member against whom the Union filed a civil lawsuit. Thus, the evidence supports a finding that the Union singled out Glenn for punishment because Glenn filed a charge with the Board.

As further evidence of the lawsuit's retaliatory motive, we rely on the fact that the Union's lawsuit against Glenn sought punitive damages.[2] In fact, the Union sought a total of $200,000 in damages, even though the Union's complaint stated that it expended only approximately $15,000 in legal fees to defend the charges filed by Glenn.

Accordingly, we find that the Union filed its lawsuit against Glenn without a reasonable basis and for retaliatory reasons. Therefore, we find that the Respondent Union, by initiating and maintaining the meritless lawsuit against Glenn, violated Section 8(b)(1)(A) of the Act.

CONCLUSION OF LAW

By initiating and maintaining a civil action for libel and slander against Thomas C. Glenn in retaliation for his protected concerted activity, the Respondent, International Union of Operating Engineers, Local 520, AFL–CIO, violated Section 8(b)(1)(A) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent's filing and pursuit of the lawsuit against the Charging Party violated the Act, we shall order the Respondent to reimburse the Charging Party for all legal and other expenses he incurred in defending the Respondent's suit, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 12 fn. 10 (1991).

ORDER

The National Labor Relations Board orders that the Respondent, International Union of Operating Engineers, Local 520, AFL–CIO, Mitchell, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Initiating or maintaining a meritless lawsuit against employees in retaliation for their protected concerted activities.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse Thomas C. Glenn for all legal and other expenses incurred in the defense of the Respondent's state lawsuit (Case 89–L–220), in the manner set forth in the remedy section.

[1] Chairman Stephens and Member Oviatt acknowledge that the foregoing analysis conforms with Board precedent, and would apply that precedent in this case, in the absence of a Board majority to modify it. In addition, however, they expressly find that the Union's lawsuit lacked a reasonable basis in law and in fact because the Union was, or should have been, on notice of Illinois state court precedent holding that charges filed with EEOC are privileged from civil actions for libel and slander. Further, to the extent the Union's lawsuit related to Glenn's NLRB charges, Member Oviatt notes that those charges do not raise on their face a race discrimination claim, and therefore the Union had no basis for presuming that the NLRB charges were a continuation of Glenn's prior race discrimination charges which had been found to be without merit by the EEOC and the state agency.

[2] Member Oviatt finds it unnecessary to rely on the fact that the Respondent's lawsuit sought punitive damages as evidence of the lawsuit's retaliatory motive.

(b) Post at its office in Mitchell, Illinois, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Alberici Construction Company, Ben Hur Construction Company, and McCarthy Brothers, if willing, at all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT initiate or maintain a meritless lawsuit against employees in retaliation for their protected activities.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reimburse Thomas C. Glenn for all legal expenses incurred in the defense of our lawsuit (Case 89–L–220) plus interest.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 520, AFL–CIO

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Michael T. Jamison, Esq., for the General Counsel.
Harold Gruenberg, Esq., of St. Louis, Missouri, for the Respondent.
Thomas C. Glenn, of East St. Louis, Missouri, pro se.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me at St. Louis, Missouri, upon an unfair labor practice complaint,[1] amended at the hearing, which alleges that Respondent International Union of Operating Engineers, Local 250, AFL–CIO,[2] violated Section 8(b)(1)(A) of the Act. More particularly, the complaint alleges that the Respondent Union filed a libel and slander action against the Charging Party in a state court in order to harass him and to take reprisal against him for having filed an unfair labor practice charge against it. The Respondent admits that such an action was filed and that it was dismissed by a state court on a claim that the matters it alleged as libelous and slanderous were privileged, inasmuch as they were part of a case instituted by the Charging Party before a Federal agency. However, the Respondent claims that it had a reasonable basis in fact and in law for filing the civil action. Respondent also asserts that its motive for doing so was not to coerce the Charging Party in the exercise of Section 7 rights but to recoup damages it suffered in defending a long series of false and frivolous charges which the Charging Party had filed with both state and Federal agencies. Upon these contentions the issues herein were drawn.[3]

A. *The Unfair Labor Practices Alleged*

Respondent, an affiliate of the International Union of Operating Engineers, AFL–CIO, maintains an office at Mitchell, Illinois, just east of St. Louis. It represents unionized operating engineers in 16 counties in Southern Illinois and, for many years, has had a contract, covering both heavy construction and highway construction, with the Southern Illinois Contractors Association. These contracts have contained, inter alia, exclusive referral provisions covering applicants for employment members of the contractor's association.

Charging Party Thomas C. Glenn was a member of the Respondent Union from 1971 until late in 1990 and was a member at all times material to this proceeding. In the late

[1] The principal docket entries in this case are as follows:

Charge filed by Thomas C. Glenn, an individual, against Respondent International Union of Operating Engineers, Local 520, AFL–CIO (the Union) on July 17, 1989; complaint issued against the Union by the Regional Director for Region 14, on March 23, 1992; Respondent's answer filed on March 23, 1992; hearing held in St. Louis, Missouri, on May 12, 1992.

[2] Respondent admits, and I find, that Alberici Construction Company, Ben Hur Construction Co., and McCarthy Brothers, whose names were added to the complaint by an amendment at the hearing, each maintains a place of business in St. Louis, Missouri, and have had a collective-bargaining relationship with the Respondent which includes a provision for an exclusive hiring hall. Said employers are engaged in the building and construction industry in the metropolitan St. Louis, Missouri area and in fact do business both in Illinois and Missouri. The amended complaint further alleges that each of them performs services for customers outside the State of Missouri having an annual value which exceeds $50,000 and each purchases goods and materials directly from points and places located outside the State of Missouri valued in excess of $50,000 per year. Accordingly, these employers are engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Certain errors in the transcript have been noted and corrected.

1980s, he associated himself with several other black members of the Union in an informal organization calling itself United Black Craftsmen, the purpose of which was to secure additional referrals and employment for black members of the Union.

Over a period of years, Glenn and other members of the United Black Craftsmen have filed discrimination charges against the Union with the Illinois Human Relations Department, the U.S. Equal Employment Opportunities Commission (EEOC),[4] and the Board. They have also written letters to the president of the International and its director of Civil Rights and filed suit in the U.S. District Court for the Southern District of Illinois. In each instance they have complained about the conduct of the Respondent in assertedly failing to refer them because of race. They have yet to prevail in any forum.

On June 1, 1987, Glenn filed a charge with the Illinois Department of Human Rights and the EEOC against the Respondent herein, alleging that he had 17 years of operating experience and stating ''I was not referred to employment. I have called the Union hall on a daily basis but have not been referred for employment to any contractor.'' He claimed discrimination on the basis of race, stating that ''I have not been referred to work at Alton Lock and Dam 26,'' and stating further in his charge that other qualified minorities (black and female) have not been referred for work at the Lock and Dam 26 in proportion to their representation in the work force. On August 27, 1987, Glenn filed an additional charge with the same agencies, alleging that he had not been referred for steady employment following the filing of the EEOC charge. He claimed retaliation on the part of the Respondent. Other members of the United Black Craftsmen filed similar EEOC charges.

On September 29, 1988, the EEOC district director issued a determination accompanied by detailed findings of fact. He found that there was no merit to Glenn's charge. On September 11, 1989, he issued a subsequent determination dismissing the allegation of retaliatory conduct on the part of the Respondent. With this letter came a ''right to sue'' notice, authorizing Glenn to bring a civil action in a United States District Court under Title VII of the Civil Rights Act of 1964 if he was dissatisfied with the EEOC determination.[5] Following the issuance of this letter, a suit was instituted against the Respondent in the United States District Court for the Southern District of Illinois by Glenn, Peterson, and Miller based upon the matters alleged in the original EEOC charges. The suit was dismissed for want of prosecution because the plaintiffs did not achieve service of process upon the Respondent.

On December 14, 1988, Glenn filed a charge with the Board against the Respondent in which he alleged that ''the above-named labor organization by its officers, agents and representatives, since on or about June 4, 1988, has restrained and coerced employees of various employers in Southern Illinois in the exercise of rights guaranteed to them in Section 7 of the Act as amended by failing to properly refer Roy Miller, R. L. Paterson, and Thomas Glenn.'' The essence of the charge filed with the Board was a refusal on the part of the Respondent to refer named individuals therein on the basis of race. Two weeks later the charge was dismissed by the Regional Director and, contrary to the assumption of the Charging Party, this dismissal was not appealed to the Office of Appeals.

On March 3, 1989, the Respondent herein filed a civil action against[6] Glenn in a state court which is the gravamen of the complaint in this case. This action, filed by both the Respondent and its business agent, Daniel W. Ellis, alleged that Glenn was guilty of libel and slander by reason of the charges he had filed with both the EEOC and the Board. The complaint asked for both civil and exemplary or punitive damages for the Union and for Ellis.

On August 23, 1991, the circuit court, after entertaining briefs and argument, granted Glenn's motion and dismissed the complaint without going into the factual merits of the libel and slander allegations. The court relied upon an Illinois case, decided by the intermediate appellate court for the Second Illinois Appellate District, which held that charges filed before the EEOC enjoy an absolute privilege from civil actions for libel and slander.[7] The trial court in Glenn's case extended this holding to cover NLRB charges as well.

On July 17, 1989, while the state court libel action was still pending, Glenn filed the unfair labor practice charge in this case. It was held in abeyance by the Regional Director pending the outcome of the state court case. After the state court case was dismissed, the complaint herein was issued, alleging that the Respondent was harassing Glenn in the exercise of his Section 7 rights by filing a civil suit in retaliation for Glenn's action in filing the unfair labor practice charge in the earlier Board case.

B. *Analysis and Conclusions*

There is little disagreement over the essential operative facts of this case, since, for the most part, they consist of charges, pleadings, orders, and administrative actions which are matters of public record. The principal question before the Board is what construction should be placed upon these

[4] Apparently all charges filed before the Illinois commission and the EEOC were jointly filed and jointly processed.

[5] In dismissing the first charge, the EEOC Regional Director stated:

> The record shows Charging Party [Glenn] was referred for employment with the lock and dam on one occasion in 1986, seven occasions in 1987, and two occasions in 1988. Charging Party refused employment with lock and dam on all occasions except the two above referenced occasions in 1988. During this same period Charging Party was contacted for employment referral to other companies: 10 in 1986, 35 in 1987, and 8 in 1988.
>
> The evidence shows that Respondent has approximately 2,400 operating engineers members, of which 223, 285, and 172 were unemployed and available for work in 1986, 1987, and 1988, respectively. Therefore, the total number of black union operating engineers available for job referrals to the lock and dam were: 58 or 26.1% in 1986, 63 or 22.1% in 1987, and 44, or 25.6% in 1988. Respondent referred to the lock and dam construction 54 operating engineers in 1986, 10 or 18.5% were black; 84 operating engineers were employed in 1987, 38 or 45.2% were black; 30 operating engineers were employed in 1988, 7 or 23.3% were black. Thus, race was not a factor in Respondents's referral of Charging Party and other black operating engineers.

[6] Operating Engineers Local 520, and Daniel W. Ellis v. Thomas C. Glenn, Circuit Court for the Third Judicial District, Madison County, Illinois, Case 89-L-220.

[7] *Thomas v. Petrulis*, 125 Ill. App. 3rd 415, 465 N.E. 2d 1059 (1984).

documents. The General Counsel argues that the appropriate standard derived is whether the Respondent's lawsuit in the Circuit Court was without a reasonable basis or without merit and whether or not the Respondent filed the suit out of a retaliatory motive, citing the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). He further argues that the decision of the state court dismissing the civil action should foreclose the question of reasonable basis unless there is a cogent explanation for the contrary. In agreeing with these contentions, I am not required to accept automatically the findings of the state court in evaluating a reasonable basis claim in a Board case, since to do so would constitute a return to the *Powers* doctrine,[8] a rule enunciated in a case which was not only set aside in the Federal circuit in which the instant case arose[9] but was also repudiated by the Supreme Court in *Bill Johnson's.*

Reasonable basis for filing a lawsuit is not the equivalent of winning the suit. It means that the plantiff had a triable claim, both on the facts and on the law, at the time the suit was docketed in the clerk's office, and that the institution of the civil action was not an abuse of the civil court's processes undertaken for purposes of harassment. The order of the circuit judge in *Local 520 v. Glenn*, supra, dismissing allegations by the Respondent herein that it had been libeled and slandered by Glenn, never addressed the factual merits of those allegations. The decision turned on a question of privilege, a determination by that court that, even if Glenn had libeled and slandered the Respondent, the latter was not entitled to relief in Illinois for reasons of public policy more weighty than the need to redress citizens for injury to their reputations. Both the claim in that case and the record in this case reflect that, on several occasions before at least two public agencies and perhaps elsewhere, Glenn made unsubstantiated charges of racial discrimination against the Respondent herein. These charges were under oath and were found by public agencies on at least two occasions to be without merit. At least some of those allegations were also admitted by Glenn, in his testimony in this case, to have been false in fact. Such a record does not disclose an unreasonable case on its facts but outlines rather a substantial one which the circuit court, for reasons stated in its order, elected not to address.

As to whether the Respondent's civil action was unreasonable as a matter of law, the Respondent presented both to the circuit court and to the Board a set of precedents which gave it a triable if not a winnable case on the law. In arriving at the result announced in its order, the circuit court elected to follow a precedent from another Illinois appellate circuit and extended the precise holding of that precedent to cover Board cases as well as EEOC cases. In so doing, the circuit judge was far less certain of the legal merits of his ruling than is the General Counsel. As he stated in his opinion:

> The Court feels that it could bootstrap a decision supporting either side of this controversy to several of the decisions which have been submitted as precedent. The Court feels it must look to the reason for the privilege, which is to protect those who seek to address wrongs in appropriate forums. Admittedly, there are those who argue that frivolous, unnecessary, and slanderous claims should not be accorded that quasi-judicial privilege. The Court simply cannot come to that conclusion in this case from the facts that it has before it. Giving the very best interpretation to the Complaint as filed by the plaintiffs, the Court feels it must grant the Motion to Dismiss.

Such language from the trier of the law does not define an unreasonable legal claim on the part of the Respondent but a very real claim which, after careful analysis, simply failed to persuade the court. The fact that the Respondent did not elect to appeal the dismissal of its case does not in any way detract from the reasonableness of its claim but was simply a pragmatic determination not to throw good money after bad. Such is the fate of much litigation.

Having determined that the case filed by the Respondent against Glenn in the Third District Circuit Court of Madison County, Illinois, was reasonable both as to fact and law, it is appropriate but not necessary to address element of motivation which the General Counsel must establish as being retaliatory. Over a long period of time, both Glenn and others with whom he was closely allied had engaged in a campaign of filing false and frivolous charges against the Respondent, the net effect of which was to cost the Respondent and its membership a substantial amount of money. The allegation in its civil action was that the Respondent had, at the outset of that litigation, spent over $15,000 in legal fees and in salaries of its officers and employees in defending against Glenn's charges. While that figure was not formally established, either in that proceeding or in this one, it is clear that the expense of defending oneself against multiple charges, which could have serious repercussions, was substantial. The Respondent's current business agent, Daniel R. Gruber, without mentioning a precise figure, testified without contradiction to that effect. The fact that the Respondent also asked for exemplary or punitive damages in its civil action does not add an illegal motive to its reasonably grounded cause of action, since paying exemplary or punitive damages is a regular consequence of committing a willful tort, both under Illinois law and tort law generally. Adding such a commonplace demand to the ad damnum clause of a civil complaint does not transform a lawful response to a groundless campaign of harassment into a violation of the Act. A finding of privilege in a libel action should not serve to invoke the processes of this Agency, since Section 7 of the Act does not confer upon anyone a license to slander.

CONCLUSIONS OF LAW

1. Alberici Construction Company, Ben Hur Construction Company, and McCarthy Brothers are, and at all times material, have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent International Union of Operating Engineers, Local 520, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to sustain his burden of proof to establish that the Respondent violated Section 8(b)(1)(A) of the Act.

[Recommended Order for dismissal omitted from publication.]

[8] *Powers Systems*, 239 NLRB 445 (1978).

[9] *NLRB v. Powers Systems*, 601 F.2d 936 (7th Cir. 1979).