BE & K Construction Company *and* Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO and Local 302, International Brotherhood of Electrical Workers, AFL–CIO and District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL–CIO and Contra Costa County Building And Construction Trades Council, AFL–CIO and Northern California District Council of Laborers, Laborers International Union of North America, AFL–CIO and Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO and Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL–CIO and Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL–CIO and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 32–CA–9474, 32–CA–9475, and 32–CA–12531–1–8

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On October 18, 1995, the General Counsel of the National Labor Relations Board issued a consolidated complaint alleging that the Respondent had violated Section 8(a)(1) of the Act. The Respondent filed an answer admitting in part and denying in part the complaint allegations and raising certain affirmative defenses.

On March 13, 1996, the General Counsel filed a Motion for Summary Judgment and memorandum in support, with exhibits attached. The General Counsel submits that the Respondent's answer raises no material issues of fact requiring a hearing. On March 18, 1996, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted.[1] The Respondent filed an opposition to the motion and a cross-motion for summary judgment in its favor. The General Counsel filed a reply brief, the Charging Parties filed briefs in support of the General Counsel and in opposition to the Respondent, and the Respondent filed an answering brief.

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

Ruling on Motions for Summary Judgment

The principal issue in this case is whether the Respondent violated Section 8(a)(1) by filing and maintaining a civil lawsuit against the Charging Party Unions in Federal district court. The General Counsel and the Unions contend that the Respondent's suit lacked merit because, except for certain claims that the court dismissed with prejudice at the Respondent's request, the court granted the Unions' Motions for Summary Judgment in their favor. The General Counsel and the Unions further argue that the Respondent sued the Unions in retaliation for their having engaged in activities protected by Section 7 of the Act. Because the suit lacked merit and was filed for retaliatory purposes, the General Counsel and the Unions urge that, under *Bill Johnson's Restaurants v. NLRB*,[2] the Board should find that it was unlawfully filed and maintained, and should require the Respondent to reimburse the Unions for attorneys' fees incurred as a result of the suit. The General Counsel and the Unions also dispute the Respondent's contention that certain allegations of the complaint are untimely.

The Respondent contends that its suit was lawful because, in its view, (1) the Unions' actions that were the subject of the suit were not protected by Section 7; (2) it prevailed in certain respects in the district court litigation; (3) the suit had a reasonable basis in fact and law; and (4) the suit was not filed with retaliatory intent. The Respondent also argues that some of the allegations of the complaint are time barred by Section 10(b). Finally, the Respondent contends that even if it violated the Act, the Board should not require it to pay the Unions' attorneys' fees.

On the basis of the record presented, we find that there is no genuine issue as to any material fact and that the General Counsel is entitled to judgment as a matter of law. Thus, for the reasons discussed below, we agree with the General Counsel and the Unions that the Respondent's suit was unmeritorious and that it was filed in retaliation against the Unions' protected activities. We also reject the Respondent's contention that some of the complaint allegations are time barred. We therefore find that the Respondent's suit violated Section 8(a)(1) as alleged. We also find it appropriate to order the Respondent to make the Unions whole by reimbursing them for the attorneys' fees they incurred in defending against the suit. In sum, we shall grant the General Counsel's Motion for Summary Judgment and deny the Respondent's motion.

On the entire record, the Board makes the following

[1] On March 21, 1996, the Board issued an amended order.

[2] 461 U.S. 731 (1983).

FINDINGS OF FACT

For the purposes of deciding the issues raised in the Motions for Summary Judgment, the factual record in this case comprises the admitted allegations of the complaint, other admissions made by the parties, and the facts actually found by the courts.[3] We make this statement because the Respondent asserts that a number of the allegations contained in its various claims were accepted as true by the courts and must be treated as facts by the Board. With that assertion we emphatically disagree.

There is no dispute that the Unions did, in fact, engage in some of the conduct—filing a state court lawsuit, instituting grievance and arbitration proceedings, and engaging in certain lobbying activities—that the Respondent argued was unlawful. The courts found those actions not to be unlawful, *even if*, as the Respondent contends, they were undertaken with a secondary objective. Other actions alleged to be unlawful were the subject of claims that the Respondent withdrew with prejudice; the court made no factual determinations regarding them. The Respondent nevertheless argues that the record in the court proceedings establishes that all of its factual allegations are true, including its allegations of an unlawful secondary objective.

There is no merit to that contention. The courts, in granting the Unions' Motions for Partial Summary Judgment, were required to view the record in the light most favorable to the Respondent as the nonmoving party.[4] In finding that the Unions were entitled to judgment as a matter of law, the courts had to *assume* the facts were as the Respondent alleged, not to *find* them so. It is plain from their decisions that the courts considered the Respondent's allegations and found that those allegations, *even if* true, would not support a conclusion that the Unions had acted unlawfully. The courts did not find, as facts, either that the Unions engaged in the conduct that was the subject of the withdrawn claims or that they acted from an unlawful secondary motive.[5]

I. JURISDICTION

The Respondent, BE & K Construction Company, is a Delaware corporation with headquarters in Birmingham, Alabama. It is engaged in industrial general contracting throughout the United States. During the fiscal years immediately preceding the filing of each of the charges and preceding the date of the complaint, the Respondent annually provided services valued in excess of $50,000 to customers located outside the State of Alabama. The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that each of the Unions is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

USS-POSCO Industries (UPI) is a partnership formed by USX Corporation and Pohang Iron and Steel Company to modernize and operate a steel facility in Pittsburg, California. UPI awarded a construction contract to modernize that facility to the Respondent, which is a nonunion contractor. The Respondent formed a joint venture with Eichleay Constructors, Inc. (ECI) to perform the contract.

After the contract was awarded, the Unions allegedly began a campaign against the Respondent. According to the Respondent, that campaign was aimed at forcing UPI to enter into an unlawful prehire agreement in violation of Section 8(e), forcing UPI to cease doing business with the Respondent, and ultimately eliminating nonunion employers from the construction market in Contra Costa County and elsewhere in California.

On September 21, 1987, the Respondent and UPI filed suit under Section 303 of the Act in the U.S. District Court for the Northern District of California.[6] The complaint alleged that the Unions:

- Advocated the adoption and enforcement of a toxic waste ordinance in Contra Costa County, which would impede the progress of the modernization project, without any genuine belief that the project would harm the environment;
- Picketed and handbilled at the plaintiffs' premises without disclosing their identities or the true nature of their dispute with the plaintiffs, and induced and encouraged employees of the Respondent's subcontractors to engage in a strike at the project;

[3] We shall also consider the affidavits and declarations attached to the parties' briefs. It is well settled that, in ruling on a Motion for Summary Judgment, we are required to construe the facts in the light most favorable to the nonmoving party. Therefore, when ruling on the General Counsel's motion, we shall assume the facts as represented by the Respondent are true unless they have been determined to be otherwise by the courts. In ruling on the Respondent's motion, we shall give like treatment to the facts as represented by the General Counsel and the Unions.

[4] 10 Wright & Miller, *Federal Practice and Procedure*, Civil 2d, Sec. 2716.

[5] The court of appeals did state that "the unions encouraged work stoppages by unionized employees because of well-founded safety concerns[,]" and "[t]hat these activities were not undertaken to unionize this particular employer but in order to eliminate non-union shops altogether by making an example of BE & K does not matter." *USS-POSCO Industries* and *BE & K Construction Co. v. Contra Costa County Building Trades Council,* AFL–CIO, et al. 31 F.3d 800, 809 (9th Cir. 1994). Although those statements might appear to be factual findings, we doubt the court meant them as such. Elsewhere, the court referred to the Unions' alleged conduct, and it did not indicate any basis for doing otherwise in the case of the quoted material. We think the court of appeals engaged in inartful drafting rather than fact-finding in the quoted passages.

[6] *USS-POSCO Industries* and *BE & K Construction Co. v. Contra Costa County Building Trades Council,* AFL–CIO, et al., No. C–87–4829 DLJ.

- Filed, in bad faith, a lawsuit in California state court (the Pile Drivers suit) alleging, among other things, violations of California's Health and Safety Code; and
- Initiated collective bargaining grievance proceedings against ECI under authority of collective-bargaining agreements that did not apply to ECI.

The complaint alleged that the Unions' conduct violated Section 8(b)(4)(ii)(A) and (B).

The Unions filed motions to dismiss or for summary judgment on three of the plaintiffs' four claims. The Unions argued that lobbying for the toxic waste ordinance and filing the Pile Drivers suit were protected by the First Amendment. They also argued that because the grievance and arbitration process is the preferred method of resolving labor disputes, resort to those proceedings should not be found unlawful.

On July 29, 1988, the court granted the Unions' motions in part and dismissed the allegations relating to lobbying and grievance filing. The court found that advocacy of the toxic waste ordinance and lobbying for its enforcement against the plaintiffs were protected by the First Amendment and did not constitute unfair labor practices.[7] Concerning the Unions' grievance filing, the court noted that the grievances against ECI had been successful and that there was no contention that the provisions of the collective-bargaining agreement that the Unions sought to enforce were illegal. The court found it proper to allow further time for discovery on the claim relating to the Pile Drivers suit and denied without prejudice the Unions' motion to dismiss that claim.

On October 3, 1988, the plaintiffs filed an amended complaint for damages and injunctive relief. The amended complaint again alleged that the Unions' conduct violated Section 8(b)(4)(ii)(A) and (B). It also added the allegation that the Unions' conduct violated Sections 1 and 2 of the Sherman Act, and demanded treble damages and injunctive relief.

The Unions moved for partial summary judgment, for dismissal of the amended complaint, and for sanctions. On May 1, 1989, the court granted the Unions' motion for partial summary judgment with regard to the plaintiffs' claim based on the Pile Drivers suit.[8] The court first noted that the plaintiffs had improperly sued even the Unions that were not parties to the Pile Drivers suit, and dismissed the suit against those Unions.[9] As to the remaining Unions, the court found, on the basis of discovery that had taken place since it issued the previous order, that the plaintiffs had failed to prove that the Pile Drivers suit lacked a reasonable basis in law. Although the Unions had not prevailed on the merits (the state court denied their motion for a temporary restraining order and for a preliminary injunction), the court noted that after the Pile Drivers suit was filed, the Federal Occupational Safety and Health Administration had investigated the jobsite and found a number of safety and health violations. As it found no genuine issue of material fact on the issue of health and safety problems on the jobsite at the time the Unions filed their suit, the court found that the plaintiffs had offered no evidence to support a finding that the Unions' suit lacked a reasonable basis in fact and law. The court therefore dismissed the plaintiffs' claim regarding the filing of the Pile Drivers suit.[10]

Turning to the amended complaint, the court held that the plaintiffs were within their rights in filing an amended complaint, but not in restating claims on which summary judgment had already been granted. The court therefore granted the Unions' motion to strike or dismiss the amended complaint, but allowed the plaintiffs to file a revised amended complaint.

On May 22, 1989, the plaintiffs filed a second amended complaint, including allegations of all the dismissed claims, and adding a claim under the Clayton Act.[11] The plaintiffs stated that they were realleging the previously dismissed claims solely in order to preserve their right to appeal under their understanding of controlling Ninth Circuit precedent. In support of the complaint, the plaintiffs alleged a number of actions on the part of the Unions that they had not alleged in the original complaint. Those actions included

- Automatic petitioning of governmental entities for delay and harassment purposes, regardless of the merits of the petitions;
- Interfering with UPI's attempts to obtain necessary building permits;

[7] 692 F. Supp. 1166. The court relied on the *Noerr-Pennington* doctrine, which holds that petitioning the government does not violate the Sherman Antitrust Act, 15 U.S.C. 1 et seq., unless the petitioning is a sham—i.e., in reality an attempt to interfere directly with competitors' business relationships and not a genuine effort to influence legislation and law enforcement practices. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *Mine Workers v. Pennington*, 381 U.S. 657 (1965). The court noted that *Noerr-Pennington* had been adapted to the labor law context in *Bill Johnson's*, in which the Supreme Court held that filing a well-founded state court lawsuit does not constitute an unfair labor practice. 692 F.Supp. at 1169. It also observed that the "sham" exception includes instituting baseless, repetitive claims in an effort to bar competitors from meaningful access to courts and administrative agencies. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). As there was no allegation that the Unions' activities were other than a genuine effort to influence legislation and law enforcement practices, or that the plaintiffs were denied meaningful access to present their own views before the Contra Costa County Board, the court found that they did not come within the sham exception to *Noerr-Pennington*. 692 F. Supp. at 1170.

[8] 721 F.Supp. 239.

[9] Id. at 241.

[10] Id. at 241–242.

[11] 15 U.S.C. 15 and 26.

- Instigating violent civil disorders at the UPI construction site;
- Filing and prosecuting a series of overlapping, repetitive, and sham lawsuits against the plaintiffs and others, without any reasonable expectation of success on the merits, simply to harass the defendants and to defeat the project through delay and inflation of costs;
- Making known to all interested parties that the Unions intended to file such suits and protests, but that they would withdraw and refrain from filing such actions if UPI and the Respondent would agree to use only union labor.

The Unions moved to strike or dismiss the second amended complaint and for sanctions. On August 24, 1989, the court granted the motion to strike with regard to the previously dismissed claims. It also rejected the plaintiffs' explanation for repleading the dismissed claims, and granted the Unions' motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure. On November 21, 1989, the court issued an order striking specific portions of the second amended complaint. In addition to the claims concerning lobbying for the toxic waste ordinance, filing the Pile Drivers suit, and grievance filing against ECI, the stricken paragraphs included those related to automatic petitioning of governmental entities, automatic protests of permits, and interference with UPI's efforts to obtain building permits.

On March 23, 1990, UPI moved for voluntary dismissal, with prejudice, of all its claims against the Unions. On March 27, 1990, the court granted the motion.

On June 8, 1990, the district court granted the Unions' motion to limit discovery concerning the Respondent's antitrust claim.[12] The court found that the statutory labor exemption to the antitrust laws, which does not apply to concerted action or agreements between unions and "non-labor parties," would exempt the Unions' conduct from antitrust liability unless the Respondent could show *both* a combination with nonlabor groups *and* an illegitimate purpose in that combination. Accordingly, the court limited discovery to the issue of whether the Unions combined with contractors, manufacturers, of other commercial entities involved in the same market for construction services as the Respondents, and whether any such combinations were for purposes other than organizing the Respondent's employees and maintaining area standards.

On July 25, 1991, the Unions moved for summary judgment on the Respondent's antitrust claim. The court granted the motion on September 5, 1991, noting that the Respondent had stated its nonopposition to the motion in light of the court's previous rulings.

[12] 134 LRRM 2590, modified 136 LRRM 2647 (July 26, 1990).

In early 1992, the parties to the district court action entered into a stipulation that the Respondent's remaining claims for relief under Section 303 should be dismissed with prejudice. As part of the stipulation, the Respondent agreed to waive its right to appeal any matters contained in the claims that were not the subject of the court's previous orders.

On February 13, 1992, the court issued an order for the issuance of final judgment, noting that it had previously granted partial summary judgment in favor of the Unions on four of the Respondent's claims and that it had dismissed the other two claims with prejudice pursuant to the Respondent's motion for a voluntary dismissal with prejudice. The court thus ordered that final judgment should issue in favor of the Unions and against the Respondent, and that the Unions should recover their costs of the lawsuit.

The Respondent appealed to the United States Court of Appeals for the Ninth Circuit. On July 26, 1994, the court of appeals affirmed the district court's decision granting summary judgment in favor of the Unions on the Respondent's antitrust claim.[13] The court of appeals held, however, that the district court had erred in finding that to overcome the statutory labor exemption to the antitrust laws, the Respondent had to prove *both* that the Unions had combined with nonlabor groups *and* that the combination had an illegitimate purpose. The court of appeals therefore held that the lower court had erred in limiting discovery to the former element, because the Respondent could have established an antitrust violation by proving that the Unions' actions had an illegitimate purpose, even if they were not taken in concert with nonlabor groups. The court found a strong presumption that some of the allegedly unlawful actions—e.g., picketing and handbilling for organizing purposes, encouraging work stoppages over safety issues—were protected from antitrust liability. "More troublesome" were the allegations that the Unions automatically protested permits sought by the Respondent, lobbied for the passage of the toxic waste ordinance and for its enforcement against the Respondent, and brought frivolous lawsuits. The court found that such conduct is not per se exempt from the antitrust laws even if engaged in in pursuit of traditional union interests.

The court held, however, that the district court's error was harmless, because the Unions' actions were protected from antitrust liability under the First Amendment under the *Noerr-Pennington* doctrine. The court found that the Unions' conduct did not lose its protection under the "sham" exception to *Noerr-Pennington.* To come within the "sham" exception, the court held, the Unions'

[13] 31 F.3d 800. Although the Respondent's original and amended notices of appeal indicated that other issues were being appealed, the court stated that the Respondent was actually appealing only the dismissal of its antitrust claims and the district court's imposition of sanctions. 31 F. 3d 801

conduct must have been both objectively baseless, in the sense that no reasonable litigant could realistically expect to prevail on the merits, and intended to interfere directly with the Respondent's business relationships.[14] Because the Respondent alleged that the Unions had brought a whole series of legal actions without regard for the merits, the court found, the inquiry must be whether the actions were filed not out of a genuine interest in redressing grievances, but essentially for purposes of harassment; thus, the Respondent's allegations, if proved, would overcome the Unions' *Noerr-Pennington* defense. The court found that the Unions' conduct had not lost its protection, however, because more than half of the actions filed by the Unions had proved successful. The court was unable to reconcile that relatively high "batting average" with the Respondent's contention that the actions were filed without regard to the merits.

The court of appeals also reversed the district court's award of Rule 11 sanctions. It held that although the plaintiffs were wrong in believing that they were required to replead the dismissed claims in order to preserve those issues for appeal, their basis for that belief was not frivolous.

B. Discussion

The complaint alleges that the Respondent violated Section 8(a)(1) by bringing a meritless suit against the Unions to enjoin them from engaging in protected concerted activity and to recover damages from them. Thus, our disposition of this case turns on the application of principles set forth in *Bill Johnson's Restaurants*.

In *Bill Johnson's*, the Supreme Court held that the Board may not enjoin the prosecution of a pending state court suit alleged to have been filed with a retaliatory motive unless the suit lacks a reasonable basis in fact and law.[15] While acknowledging the Board's strong interest in preventing interference with protected Section 7 rights, the Court said that this interest must be balanced against two countervailing interests: the First Amendment right of access to the courts and the States' interest in protecting the health and welfare of their citizens. Thus, if the state court suit has a reasonable basis, the Board may not issue an order directing that the suit be withdrawn, but rather must stay its hand and await the results of the state court adjudication with respect to the merits of the suit.[16]

On an entirely different footing, however, are suits that have been litigated to completion, for at that point the plaintiff has had his day in court and the state's interest in providing a forum for its citizens has been vindicated.[17] If the suit has resulted in judgment in favor of the plaintiff (the Respondent in the unfair labor practice case), then the unfair labor practice complaint must be dismissed, "for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice."[18] However, the Court said, if judgment has gone against the plaintiff, or the suit has been withdrawn or has been otherwise shown to be without merit, then the unfair labor practice proceeding may go forward. If the Board finds that the suit was filed with retaliatory intent, it may find a violation and order appropriate relief.[19] Moreover, the suit's having been found unmeritorious is a factor that the Board may take into account in determining whether it was filed in retaliation for the exercise of Section 7 rights.[20]

Notwithstanding the distinction clearly drawn by the Court between the standard that must be met to enjoin the prosecution of a pending lawsuit, and the standard that must be met to find an unfair labor practice once the lawsuit has been finally adjudicated, the Respondent argues that its suit cannot be deemed to lack merit if there was a reasonable basis for pursuing it. In support of this proposition, the Respondent cites the Supreme Court's holding in *Professional Real Estate Investors* that a suit cannot be deprived of antitrust immunity as a sham unless it is "objectively baseless."[21] We reject this contention. In *Bill Johnson's*, as we have stated, the Supreme Court held that the Board may not enjoin the prosecution of an allegedly retaliatory state court lawsuit unless the suit lacks a "reasonable basis." But once the suit has been adjudicated and the employer has lost, the Court continued, the Board may proceed to determine whether the suit was brought with retaliatory motive and thus violated the Act. The Board has interpreted that holding as meaning that, even if an employer had a "reasonable basis" for bringing the suit, the suit may still be found unlawful if the employer withdraws the suit or loses on the merits and the Board finds that it brought the suit out of a desire to retaliate against protected activity.[22] That principle squarely applies here.

The contention that *Professional Real Estate Investors* requires a different result has already been specifically rejected by the Ninth Circuit Court of Appeals. In *Diamond Walnut Growers v. NLRB*,[23] the court reaffirmed

[14] See *California Motor Transport*, supra, and *Professional Real Estate Investors v. Columbia Pictures Industries,* 508 U.S. 49 (1993).

[15] 461 U.S. at 743. Exceptions to that principle, not relevant to this proceeding, are suits that are claimed to be beyond the jurisdiction of state courts because of federal preemption and suits that have objectives that are illegal under Federal law. Id. at 737–738 fn. 5.

[16] Id. at 749.

[17] Id. at 747.

[18] Id.

[19] Id. at 747, 749.

[20] Id. at 747.

[21] *Professional Real Estate Investors v. Columbia Pictures Industries*, supra at 60.

[22] See, e.g., *Machinists Local 91 (United Technologies)*, 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991), cert. denied 502 U.S. 1091 (1992); *Operating Engineers Local 520 (Alberici Construction)*, 309 NLRB 1199, 1200 (1992), enf. denied on other grounds 15 F.3d 677 (7th Cir. 1994); *Summitville Tiles,* 300 NLRB 64, 65 fn. 6 (1990); *Vanguard Tours*, 300 NLRB 250, 255 (1990), enf. denied in relevant part 981 F.2d 62 (2d Cir. 1992).

[23] 53 F.3d 1085 (9th Cir. 1995).

the distinction between pending suits, which can be enjoined only on a showing that they lack a reasonable basis, and suits that have been adjudicated adversely to the employer, which may be found unlawful if filed with retaliatory intent. The court held that *Professional Real Estate Investors* and similar cases did not alter the Supreme Court's approach to allegedly retaliatory lawsuits under Section 8(a)(1) as announced in *Bill Johnson's*. We agree with the court, and we reject the Respondent's suggestion that we revisit this settled area of the law.

Applying these principles to the circumstances of this case,[24] we note that the General Counsel issued the complaint in this case after the Respondent's suit had been adjudicated and its appeals had run their course. The issue here, therefore, is not whether the Respondent's suit lacked a reasonable basis, but whether it lacked merit (and, if it lacked merit, whether it was filed with a motive to retaliate against the Unions for engaging in protected conduct).

1. Did the Respondent's district court suit lack merit?

In deciding whether the suit lacked merit, we address first the question of the deference to be accorded in this proceeding to the federal courts' rulings on the merits of Respondent's suit.

The Supreme Court in *Bill Johnson's* treated the state court's final disposition of the state court suit as determinative on the question of whether the suit was meritorious. Thus, the Court explained, if the employer prevails in the state court suit and obtains judgment against the employees, he should also prevail before the Board and the complaint should be dismissed, "for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice."[25] By the same token, however,

> [I]f judgment goes against the employer in the state court . . . 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 . . . 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 filed in retaliation for the exercise of the employees' Sec. 7 rights.[26]

In this case, as we have noted, the Respondent sued in federal rather than state court, and its claims alleged violations of federal law rather than of state law. However, we see no reason not to regard the rulings of the federal courts here as equally determinative on the question of whether the Respondent's federal court lawsuit lacked merit for purposes of a *Bill Johnson's* analysis.

As antitrust law is primarily the concern of the federal courts and not of the Board, we do not hesitate to defer to the courts' determinations with regard to the merits of the antitrust claims in the Respondent's suit. We acknowledge that the Section 303 claims stand on somewhat different footing, inasmuch as they involve an issue over which the Board and the courts have concurrent jurisdiction: whether the Unions engaged in conduct which violates Section 8(b)(4) of the Act.[27] However, because the Respondent here elected to pursue its 8(b)(4) claims against the Unions in the form of a Section 303 suit in federal court rather than as an unfair labor practice charge before the Board, we think it appropriate to look to the federal courts' disposition of those claims as well as the antitrust claims as the test of whether the claims were meritorious.

a. *The adjudicated claims*. As we have discussed, the district court granted the Unions' motions for partial summary judgment and dismissed the Respondent's Section 303 claims based on the Unions' lobbying for passage and enforcement of the toxic waste ordinance, their prosecution of the Pile Drivers suit, and their institution of grievance and arbitration proceedings against ECI.[28] The court also granted partial summary judgment in favor of the Unions and dismissed the Respondent's antitrust claim, and the court of appeals affirmed, albeit on a different theory. Thus, with respect to those portions of the Respondent's suit that were actually adjudicated, the court rendered judgment for the Unions and against the Respondent. Accordingly, those portions of the Respondent's suit were unmeritorious within the meaning of *Bill Johnson's*.

The Respondent contends, however, that its suit must be found meritorious. It argues that it actually prevailed, at least in part, because the court of appeals reversed the district court concerning both the standard to be applied

[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. See, e.g., *Grinnell Fire Protection Systems Co*., 328 NLRB No. 76 (1999); *BASF Wyandotte Corp*., 278 NLRB 173, 181 fn. 26 (1986). 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.

[25] 461 U.S. at 747.

[26] Id. (emphasis added).

[27] Sec. 303 provides that

> (a) It shall be unlawful, for the purpose of this section only . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the . . . Act.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

[28] As noted above, the district court also struck a number of portions of the second amended complaint that were related to the claims as to which it granted partial summary judgment. We consider those stricken portions of the complaint to have been adjudicated as well as the claims themselves.

in determining whether the Unions' actions lost their protection under the antitrust laws and the matter of sanctions. The Respondent also urges that its suit cannot be found to be without merit because it was not objectively baseless in the sense that no reasonable litigant could realistically expect to succeed on the merits.

We reject the Respondent's contentions as lacking in merit. The first, that the court of appeals' decision vindicated important aspects of the Respondent's claims, is bereft of either logical or factual support. All of the Respondent's claims that were litigated were dismissed; judgment was entered against the Respondent and in favor of the Unions; and the Unions were awarded costs as the prevailing parties.[29] That the court of appeals agreed with the Respondent concerning certain aspects of antitrust law is beside the point, as is its holding that the Unions might have been guilty of antitrust violations had they, in fact, engaged in a pattern of suit-filing without regard to the merits. The point is that the Respondent alleged that the Unions had violated the antitrust laws by engaging in such a pattern of conduct, and the court found that they had not. That it reached that conclusion on a different theory from that of the district court is irrelevant.

The Respondent also argues that it prevailed in part because the court of appeals' ruling will dissuade the Unions from engaging in unlawful conduct in the future. That argument, however, is both speculative and irrelevant to the issue of which party prevailed in the district court action. To "prevail" in litigation, a party must do more than obtain a ruling from the court as to what the law is. The party must also persuade the court that the law, as applied to the facts in the case, compels judgment in its favor on at least some point.[30] In that respect, the Respondent failed at every turn.

Equally unavailing is the Respondent's contention that it "prevailed" in part because the court of appeals reversed the district court's award of sanctions. The court in no sense endorsed the *merits* of the Respondent's suit. Indeed, its ruling in this regard concerned only the *consequences* to the Respondent of pursuing an *unmeritorious* suit. The court simply found that, having *lost* on the merits regarding certain of its claims, the Respondent did not act frivolously by repleading those claims in the belief that it had to do so in order to preserve those issues for appeal. In no way can this ruling on a *procedural* issue be read as supporting the Respondent's present contention that its suit had *substantive* merit.

b. *The voluntarily dismissed claims*. Not all the Respondent's claims were submitted to the courts for a decision on the merits. Some, alleging (inter alia) unlawful picketing, encouraging employees to engage in secondary strikes, and violence, were voluntarily withdrawn and dismissed with prejudice.

In *Bill Johnson's*, the Supreme Court indicated that the withdrawal of a claim could be regarded as equivalent to an showing that it lacks merit:

> If judgment goes against the employer in the 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 . . . unfair labor practice case.[31]

Further, under Rule 41 of the Federal Rules of Civil Procedure, dismissal of a complaint with prejudice at the plaintiff's request acts as a complete adjudication. Unless otherwise provided for by the court, such a dismissal is subject to the rules of res judicata and is binding on the parties and their privies.[32] Accordingly we find that these claims that the Respondent voluntarily withdrew with prejudice were, for *Bill Johnson's* purposes, unmeritorious.[33]

2. Was the Unions' conduct protected by Section 7?

Although the courts dismissed most of the Respondent's claims against the Unions, the fact that those claims were dismissed does not in and of itself mean that the Unions' actions were necessarily protected by Section 7. Some kinds of lawful concerted conduct do not enjoy the protection of the Act.[34] Before we can determine whether the Respondent's suit violated the Act, then, we must determine whether the Unions' actions were affirmatively protected by Section 7.

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[29] Rule 54(d), Fed. R. Civ. P., provides for the award of costs to the prevailing party in a civil action.

[30] See *City of Chanute, Kansas v. Williams Natural Gas Co.*, 31 F.3d 1041, 1048–1049 (10th Cir. 1994), cert. denied 513 U.S. 1191 (1995) (cities were not "substantially prevailing parties" for purposes of Clayton Act, despite district court's having originally granted preliminary injunction against pipeline and cities' having later entered into stipulation agreement with pipelines granting certain rights to cities, where cities' antitrust damage claims were fully adjudicated on the merits and rejected).

[31] 461 U.S. at 747 (emphasis added).

[32] Wright and Miller, *Federal Practice and Procedure, Civil 2d*, Secs. 2364, 2367, 2373.

[33] In *Vanguard Tours*, 300 NLRB at 255, the Board declined to read the Supreme Court's statement in *Bill Johnson's* as suggesting that the withdrawal of a lawsuit is in all circumstances equivalent to a showing of lack of merit. The Board found, under the circumstances presented in *Vanguard Tours*, that the employer's withdrawal of its suit was presumptively an admission that the suit lacked merit, and that the employer had failed to rebut the presumption. In *Vanguard Tours*, however, unlike this case, there was no indication that the employer had withdrawn its suit with prejudice. We find the employer's voluntary withdrawal of its claim with prejudice to be an admission that the claims lacked merit.

[34] E.g., *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 464 (1953) (disloyally disparaging employer's product).

Can union conduct ever be protected?

The Respondent contends that the conduct in question was unprotected because it was engaged in *by the Unions*, rather than by employees. The Respondent's premise is that only employees—not unions—have Section 7 rights, and thus that its suit could not violate Section 8(a)(1) because it was not in retaliation against *employee* protected activity. The Respondent relies on *Lechmere, Inc. v. NLRB*,[35] in which the Supreme Court stated that "the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers."[36] The Respondent also reasons that, because the Unions did not represent *its* employees, their actions were unprotected. We find no merit to either contention.

To begin with, we do not read the Supreme Court's language quoted above in as sweeping a fashion as the Respondent urges. *Lechmere* was concerned with one narrow aspect of union activity—the attempt by union organizers who were not employees of the respondent employer to engage in organizing activity on that employer's private property. The Court reaffirmed its earlier holding in *NLRB v. Babcock & Wilcox Co.*,[37] which distinguished between the Section 7 right of employees of the employer to engage in self-organizational activity on the employer's property and the (much more restricted) right of nonemployee organizers, to whom the Court held that Section 7 applies "only derivatively," to engage in trespassory activities on the same property.[38] The Court noted its holding in *Babcock* that an employer may have to allow nonemployee organizers on its property *if the union has no reasonable alternative means of reaching the employees with its message*.[39] The Court also did not question the exception to the general rule set forth in *Babcock & Wilcox* that an employer may not *discriminate* against unions in denying access to its property.[40] In our view, the Court's reaffirmance in *Lechmere* of the right of nonemployee union organizers to gain access to an employer's property if no reasonable alternative means of reaching the employees exist, together with its failure to question the proposition that employers may not discriminatorily deny unions access to their property, negate any suggestion that the Court intended to hold that union conduct is never protected by the Act.

Our confidence in this reading of *Lechmere* is bolstered by the language and purpose of the Act itself. Section 1 sets forth the Act's *raison d'etre*:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

To those ends, Section 7 provides that

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

The Act thus unequivocally assures employees of the right to join unions and to engage in "other concerted activities" for "other mutual aid or protection." It would be a curious and myopic reading of these core provisions of the Act to hold that, although employees are free to join unions and to work through unions for purposes of "other mutual aid or protection," the conduct of the unions they form and join for those purposes is not protected by the Act. Under that reasoning, conduct that is protected when engaged in by two or more employees together would lose its protection if engaged in by the employees' union on their behalf. We decline the Respondent's invitation to read the Act in such a perverse way.

The Respondent's contention is also contrary to Board and court precedent. In *Diamond Walnut Growers*,[41] both the Board and the court of appeals found that the employer violated Section 8(a)(1) by bringing a meritless libel suit against the union with retaliatory motive. The employer argued that it could not have violated Section 8(a)(1) because it sued only the union, not individual employees. Both the Board and the court squarely rejected that argument. The Board affirmed the decision of the administrative law judge, who held that "for the Board to find an unfair labor practice pursuant to a *Bill Johnson's Restaurants* analysis, it is not necessary for the plaintiff/respondent to sue employees in state court nor to sue a union and employees. *It is sufficient to sue a union only as in this case.*"[42]

Likewise, in *Dahl Fish Co.*,[43] the Board adopted the administrative law judge's finding that the employer violated Section 8(a)(1) by filing suit against the union in retaliation for the union's filing a Board charge. The judge specifically found the acts of the union and its

[35] 502 U.S. 527 (1992).
[36] Id. at 532 (emphasis in original).
[37] 351 U.S. 105 (1956).
[38] 502 U.S. at 533.
[39] 502 U.S. at 533–534, citing *Babcock*, 351 U.S. at 112.
[40] 351 U.S. at 112.
[41] 312 NLRB 61 (1993), enfd. 53 F.3d 1085 (9th Cir. 1995).
[42] 312 NLRB at 69 (emphasis added).
[43] 279 NLRB 1084, 1110–1111 (1986), enfd. mem. 813 F.2d 1254 (D.C. Cir. 1987).

agents protected in those circumstances. A contrary holding, she reasoned,

> would abrogate the advantages of concerted activity the Act was designed to protect by imposing on the employees the burden of filing charges to gain such protection. The employees would then be subjected to the dangers of lawsuits with their attendant costs, which could convince them to forgo their Section 7 rights to file charges. Thus, I find that the Union is protected by Section 8(a)(1) in these circumstances. To hold otherwise would destroy the equilibrium the Act was designed to establish, and would divest the employees of the advantages gained by their decision to organize and to be represented by the single voice of the Union.[44]

The identical reasoning applies here.[45]

The Respondent argues, however, that *Diamond Walnut* is distinguishable because there the union represented the employees of the employer who filed the suit, and because those employees were engaged in a strike. The Respondent notes that the court of appeals found that the suit drained the union's resources and inevitably interfered with the employees' exercise of their Section 7 right to strike. Because *its* employees were not represented by the Unions and did not engage in a strike or other protected activity, the Respondent contends that its suit did not interfere with *their* exercise of Section 7 rights, and therefore was not unlawful.

We disagree. Although the employers in *Diamond Walnut* and *Dahl Fish* sued the unions that represented their employees and that were helping those employees to exercise their Section 7 rights, those are not the only circumstances in which an employer's suit against a union may interfere with the exercise of employees' rights. In the first place, employees of employers other than the Respondent have Section 7 rights, and some of them form or join unions in order to advance those rights. Even if those individuals' interests are not congruent with, or are even antithetical to, the interests of the Respondent's employees, their concerted pursuit of those interests, through unions or otherwise, is protected by Section 7 except under circumstances not shown to exist here. And the Respondent cannot lawfully interfere with those employees' exercise of their Section 7 rights merely because it does not employ them. It is well established that an employer violates the Act by interfering with the exercise of Section 7 rights of employees of other employers, or by causing other employers to discriminate against their employees because of their union or other protected concerted activities.[46] Thus, assuming that the actions of the Unions on behalf of the employees they represented were otherwise protected, they did not lose their protected character vis-à-vis the Respondent merely because the employees represented by the Unions were not the Respondent's employees. As the Supreme Court noted in *Eastex, Inc. v. NLRB*,[47] the employees whose concerted activities may be protected under Section 7 are defined by Section 2(3) to include *any* employees, not just those of any particular employer.[48]

For all the foregoing reasons, we find that the Respondent's suit is not immune from Section 8(a)(1) liability merely because it was filed against the Unions, rather than against employees, or because the Unions did not represent the Respondent's employees.

Was the Unions' Actual Conduct Protected

The Respondent also contends that, whether or not union activity in the abstract *can be* protected by Section 7, the Unions' conduct here was *not* protected. The Respondent relies in part on a complaint (later settled) against Cement Masons Local 825, alleging violence and rioting that assertedly was part of the conduct alleged to be unlawful in the Respondent's suit.[49] It also cites a General Counsel's advice memorandum which analyzed assertedly indistinguishable conduct in a different case by another union and found it unprotected.[50]

a. *The adjudicated claims*. We consider first the conduct that was the subject of the Respondent's claims that were dismissed on the merits by the district court--i.e., the Unions' legislative lobbying, suit filing, and instituting grievance and arbitration proceedings. We note initially that each of those courses of action concerned conditions of employment, and thus normally would be protected by Section 7 if engaged in by employees.[51] Because concerted activity is not unprotected simply be-

[44] 279 NLRB at 1111.

[45] See also *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1377 (7th Cir. 1997).

[46] See, e.g., *Dews Construction Corp*., 231 NLRB 182 fn. 4 (1977), enfd. mem. 578 F.2d 1374 (3d Cir. 1978); *International Shipping Assn*., 297 NLRB 1059 (1990).

[47] 437 U.S. 556 (1978).

[48] Id. at 564. See also *O'Neil's Markets v. NLRB*, 95 F.3d 733 (1996), in which the court of appeals, citing *Eastex*, agreed with the Board that union area standards handbilling is protected by Sec. 7. See *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978).

[49] Case 32-CB-2787.

[50] *Tame T.I.C.*, Cases 27–CC–826 et al.

We reject at the outset the Respondent's contention that either the issuance of a complaint against Cement Masons Local 825 or the advice memorandum in *Tame T.I.C.* compels a finding that any of the Unions' alleged conduct was unprotected. Neither action by the General Counsel constituted a decision on the merits.

[51] In *Eastex*, the Supreme Court held that Sec. 7 protects employees who seek to improve working conditions by resorting to administrative and judicial fora, and who appeal to legislators to protect their interests as employees. 437 U.S. at 566. See also, e.g., *Summitville Tiles*, 300 NLRB at 65 (suits filed by employees found protected); *Altex Ready Mixed Concrete*, 223 NLRB 696, 700 (1976), enfd. 542 F.2d 295 (5th Cir. 1976) (union filing suit against employer for contract violation, protected); *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1384–1385 (9th Cir. 1976) (lobbying U.S. senators and congressmen concerning immigration laws, protected) (*Wray Electric Contracting*, 210 NLRB 757, 762 (filing OSHA complaint found protected); *Miami Systems Corp.*, 320 NLRB 71, 77 (1995), revd. in part on other grounds 111 F.3d 1284 (6th Cir. 1997) (pursuing grievance to arbitration, protected).

cause it is engaged in by unions, we find that those actions on the part of the Unions were presumptively protected.

The Respondent argues that the Unions' conduct was unprotected because it was engaged in with an unlawful secondary objective. The Respondent brought the identical claims to the district court, however, and lost. The court rejected the Respondent's contention that each of those actions violated Section 8(b)(4) and dismissed its claims based on those contentions. The Respondent did not appeal the dismissals. As we have observed, it is possible for conduct to be lawful but not protected by Section 7. But the Respondent argued to the court that the Unions' conduct was unlawful *for the same reason* it now argues that that conduct was unprotected—i.e., because it allegedly had an unlawful secondary object. Having litigated this very issue unsuccessfully before the courts, and having failed to file a charge with the Board, the Respondent will not now be heard to argue that the Unions' conduct was unprotected.

We note in particular that the district court held that the Unions' filing and processing of meritorious grievances to enforce lawful contract provisions could not violate Section 8(b)(4).[52] The court cited *Truck Drivers Union Local 705 v. NLRB*,[53] in which the D.C. Circuit, in reaching that result, disagreed with the Board. The Board had held that, assuming that *Bill Johnson's* applies to grievance processing, even the processing of a meritorious grievance could violate Section 8(b)(4) if done with a secondary objective.[54] The Board has since indicated, however, in agreement with the D.C. Circuit, that the processing of a meritorious grievance does not violate Section 8(b)(4) unless the grievance seeks to enforce an unlawful contract clause, and has endorsed the court's distinction between illegal objective and retaliatory motive.[55]

Because it failed to convince the court that the Unions' lobbying, suit filing, or grievance processing violated either Section 8(b)(4) or the antitrust laws, and has suggested no other reason why that otherwise protected conduct should be found to have lost its protected character, we find that the Respondent has failed to rebut the presumption that the Unions' conduct was protected.[56]

b. *The voluntarily dismissed claims*. The Respondent also contends that the Unions engaged, in unprotected acts of picketing, handbilling, violence, and other conduct that was not addressed on the merits by the court, but was the subject of claims that were voluntarily dismissed with prejudice at the Respondent's request. Thus, the court made no findings as to whether the Unions engaged in the conduct alleged and, if so, whether the conduct was lawful.

We find it unnecessary to decide whether those alleged actions, if engaged in, were protected. We have already found that the Unions' lobbying, grievance filing and processing, and lawsuit filing were protected activities. If, then, the Respondent filed its suit in an attempt to retaliate against the Unions for engaging in those protected actions, and the suit was unmeritorious, the suit was unlawful, regardless of whether it was also targeted at activities that were not protected. Accordingly, in our view, whether the conduct alleged in the voluntarily dismissed claims was or was not protected by Section 7 is irrelevant.

3. Was the Respondent's lawsuit unlawfully motivated

For the reasons discussed above, we have found that the Respondent's suit lacked merit and that the Unions' conduct that was the target of the suit was protected by Section 7. In order to find that the Respondent violated Section 8(a)(1), however, we must find that it either filed or maintained its suit against the Unions in retaliation against protected conduct. We find, on the basis of the following evidence, that the Respondent's suit had a retaliatory motive.

First, the Respondent's suit was, by its terms, directed at protected conduct. The complaint allegations in that action expressly listed lobbying, suit filing, and grievance filing as purportedly unlawful. As we have found, each of those forms of conduct was protected. Since 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*

[52] It also held that the Unions' lobbying activities did not run afoul of Sec. 8(b)(4). Its decision was cited with evident approval in *Brown & Root v. Louisiana State*, 10 F.3d 316 (1994), in which the Fifth Circuit clearly indicated that to find governmental lobbying to constitute "coercion" within the meaning of Sec. 8(b)(4)(B) would pose potentially serious First Amendment problems.

[53] 820 F.2d 448 (1987).

[54] *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303, 1304 (1986). The Board held that the union's grievance in that case had an unlawful secondary objective and therefore came within the exception mentioned in fn. 5 of *Bill Johnson's* for suits filed with an unlawful objective.

[55] See *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990), citing the D.C. Circuit's decision in *Truck Drivers Union Local 705*, supra*; Teamsters Local 776 (Rite Aid)*, 305 NLRB 832 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

[56] Contrary to the General Counsel and the Unions, we find that the Respondent is not barred by Sec. 10(b) of the Act from contending that the Unions' conduct was unprotected. Sec. 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge[.]" That provision has been interpreted by the Board also to preclude raising, as a defense to a complaint allegation, conduct as to which Sec. 10(b) would bar a complaint if it were alleged as an unfair labor practice. See, e.g., *Sewell-Allen Big Star*, 294 NLRB 312, 313 (1989), enfd. mem. 943 F.2d 52 (6th Cir. 1991), cert. denied 504 U.S. 909 (1992). We find that principle inapplicable in the kind of *Bill Johnson's* setting presented here, where the General Counsel, in establishing a violation of Sec. 8(a)(1), must show that the Unions' allegedly secondary activity, which occurred outside the 10(b) period, was protected. Because of this required showing, the Respondent cannot be precluded from asserting facts otherwise barred by Sec. 10(b) in countering the General Counsel's case.

Johnson's.[57] Indeed, the Respondent as much as admits a retaliatory motive. In its answering brief, the Respondent states that it "filed its litigation in order to stop certain Union conduct which it believed to be unprotected by the Act, and that after the suit, the activity stopped." Clearer evidence of retaliatory motive could hardly be found.[58]

Moreover, in alleging that the Piledrivers suit was unlawful, the Respondent charged not only the Unions that were parties to that suit but also some that were not. The district court sensibly ruled that "[t]he non-party defendants cannot be held liable for a[n] action based on the filing of a lawsuit to which they were not parties," and dismissed the suit against the nonparty unions. This pursuit of an action against several unions that were not even parties to the Piledrivers litigation indicates that the Respondent was interested only in harassing the Unions, not in obtaining justice, and is additional evidence that it filed and maintained its suit with a retaliatory motive.

The reception the Respondent's suit received at the hands of the federal courts is still further evidence of retaliatory motive. The Supreme Court in *Bill Johnson's* held that, when an employer's suit is found unmeritorious, "the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' Section 7 rights."[59] We do so here and find that the utter absence of merit to the Respondent's Section 303 claims that were dismissed on motions for summary judgement indicates a retaliatory motive on the part of the Respondent which brought them.

4. Are portions of the complaint barred by Section 10(b)

The charges filed by all the Unions except Steamfitters Local 342 and IBEW Local 302 were filed on May 20, 1992, more than 4 years after the Respondent initiated its civil suit. The Respondent contends that the complaint allegations based on the 1992 charges were untimely filed under Section 10(b).

We find no merit in that contention. The Board has held that the General Counsel may add allegations to the complaint outside the 6-month 10(b) period if they are closely related to the allegations of a timely filed charge and are based on conduct that occurred during the 10(b) period.[60] Allegations are "closely related" if (1) they arise from the same factual situation as those of the timely filed charge, (2) they involve the same legal theory, and usually the same section of the Act, and (3) the respondent would raise the same or similar defenses to both allegations.[61]

The Respondent concedes that the charges filed in 1988 by Steamfitters Local 342 and IBEW Local 302 were timely filed. And we find that the allegations of the 1992 charges are closely related to the earlier charges. Thus, both sets of charges arise from the same factual situation (the Respondent's lawsuit against *all* the Unions), involve the same legal theory (a violation of Section 8(a)(1) under *Bill Johnson's*), and have elicited identical defenses from the Respondent. As the 1992 charges were based on conduct that took place during the 10(b) period, we find that the allegations based on those charges are not time-barred.[62]

CONCLUSIONS OF LAW

For all the reasons discussed above, we find that the Respondent's lawsuit against the Unions lacked merit, that the Unions' conduct that was the target of the suit was protected by Section 7, and that the Respondent filed and maintained its suit out of a desire to retaliate against the unions for engaging in protected concerted activity. We therefore find that the suit violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to reimburse the Unions for all legal and other expenses, including attorneys' fees, incurred in defending against the Respondent's lawsuit, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835–836 and fn. 10 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

Concerning the award of attorneys' fees, we note that the Board has consistently found it appropriate to order employers to reimburse both employees and unions for legal expenses, including attorneys' fees, incurred in defending unlawful suits by employers.[63] Indeed, the

[57] *H.W. Barss Co*., 296 NLRB 1286, 1287 (1989); *Phoenix Newspapers*, 294 NLRB 47, 50 (1989).

[58] In his affidavit, the Respondent's counsel avers that the Respondent filed its suit against the Unions to preserve its business from what it reasonably believed to be unlawful activities by the Unions. The courts, however, found that most of the Unions' activities were not unlawful and dismissed with prejudice the claims concerning the remaining activities. The Respondent's mistaken belief that the Unions' actions were unlawful, even assuming that it had a reasonable basis and was held in good faith, is not a defense to a finding that its suit was unlawful if, as we find, the suit lacked merit and was filed with a retaliatory motive. See *Phoenix Newspapers*, 294 NLRB at 49–50.

[59] 461 U.S. at 747.

[60] *Redd-I, Inc*., 290 NLRB 1115, 1116 (1988).

[61] Id. at 1118.

[62] We therefore need not address the Unions' contention that the allegations based on the 1992 charges are not barred by Sec. 10(b) because the Unions were not aware that the Respondent's suit lacked merit until the district court dismissed it.

[63] See, e.g., *Diamond Walnut Growers*, 312 NLRB at 71; *Geske & Sons, Inc*., 317 NLRB 28, 30, 58–59 (1995), enfd. 103 F.3d 1366, 1378–1379 (7th Cir. 1997); *Phoenix Newspapers*, 294 NLRB at 51; *H.W. Barss Co*., 296 NLRB at 1288; *Summitville Tiles*, 300 NLRB at 67.

Supreme Court in *Bill Johnson's* expressly stated: "If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses."[64]

The Respondent contends, however, that an award of attorneys' fees to the Unions is foreclosed in this case. It argues that the Court in *Bill Johnson's* authorized such awards only for employees, not for unions. It also contends that attorneys' fees may be awarded in Board cases only to discourage frivolous litigation, and that its suit, even if unmeritorious, was not frivolous.[65] We find neither argument persuasive.

Although the Respondent correctly points out that the Supreme Court in *Bill Johnson's* expressly endorsed awards of attorneys' fees only to employees, we believe that the reason was that the Court was addressing only the case before it, in which the employer had sued employees, not a union. We find nothing in the Court's opinion to suggest that its reasoning was meant to apply only to suits against employees and, like the Seventh Circuit, we decline to draw by negative implication the inference urged by the Respondent.[66] Rather, we agree with the Seventh Circuit's observations in the course of affirming an award of legal expenses:

> The injured party, the Union that plays a necessary part in the organizational activities of the employees, is compensated for expenses that it would not have incurred in the absence of the baseless state law suit. An adequate deterrent to unlawful attempts by employers to hinder organizational attempts by unions is provided. A baseless and retaliatory lawsuit against a union can be a powerful weapon in the hands of an unprincipled employer. Such an employer need not win its lawsuit against a union to thwart the Union's attempts to organize workers; rather, the employer need only impose substantial costs and delays upon the Union. The Board's remedies in the face of such a potential abuse must include an economic disincentive for engaging in such conduct.[67]

The Respondent's argument that it is inappropriate to award attorneys' fees unless a party has engaged in frivolous litigation is also wide of the mark. We do not award attorneys' fees in *Bill Johnson's* cases because employers' suits are *frivolous*. We award them because the suits are *unlawful*; they themselves constitute the unfair labor practices for which a remedy must be provided.[68] As the court of appeals correctly observed in *Geske & Sons*, the Unions would not have incurred those attorneys' fees except for the Respondent's meritless lawsuit, and it is both appropriate and necessary to order that they be made whole and to provide an economic disincentive for engaging in similar unlawful conduct.

ORDER

The National Labor Relations Board orders that the Respondent, BE & K Construction Company, Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing and prosecuting lawsuits with causes of action against the Unions that are without legal merit and that are motivated to retaliate against activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, 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 the Unions for all legal and other expenses incurred in the defense of the Respondent's lawsuit in the manner set forth in the Remedy section of this decision.

(b) Within 14 days after service by the Region, post at its facilities in Birmingham, Alabama, and Contra Costa County, California, copies of the attached notice marked "Appendix."[69] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 21, 1987.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

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[64] 461 U.S. at 747.

[65] The Respondent relies on the Sixth Circuit's decision in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237 (1995), in which the court of appeals relied on both of those theories in denying enforcement to pertinent provisions of the Board's order. With all due respect to the court, we disagree with its decision for the reasons discussed in text below.

[66] *Geske & Sons, Inc. v. NLRB*, 103 F. 3d at 1378.

[67] Id. at 1379.

[68] See *Service Employees Local 32B-32J v. NLRB*, 68 F.3d 490, 496 (D.C. Cir. 1995) (enforcing Board's award of attorneys' fees against union that violated Sec. 8(b)(4)(B) by unlawfully demanding arbitration). *Lang Towing, Inc.*, 201 NLRB 629 (1973), and *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), enfd. as modified sub nom. *Electrical, Radio & Machine Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), cert. denied 417 U.S. 921 (1974), cited by the Respondent, are inapposite to this case. Neither of those decisions involved lawsuits that themselves violated the Act.

[69] 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."

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Respondent's cross-motion for summary judgment is denied.

APPENDIX

NOTICE TO EMPLOYEES
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.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT file and prosecute lawsuits with causes of action against the Unions that are without legal merit and that are motivated to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse the Unions for all legal and other expenses incurred in the defense of our lawsuit, with interest.

BE & K CONSTRUCTION COMPANY