JD(ATL)—40--03
Grand Rapids, MI and Kalamazoo, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

ALLIED MECHANICAL SERVICES, INC.

and **CASE 7—CA—41687**

PLUMBERS AND PIPE FITTERS LOCAL 357, UNITED ASSOCIATION OF JOURNEYMEN, OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

and **CASE 7—CA—41783**

LOCAL 7, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO

and **CASE 7—CA—41993**

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

Thomas Doerr, Esq.,
for the General Counsel.
Tinamarie Pappas, Esq.,
for the Charging Party Local Unions.
Nicholas Femia, Esq., for the
Charging Party International Union.
David M. Buday and ***Nathan D. Plantinga, Esqs.***, for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

JANE VANDEVENTER, Administrative Law Judge. I issued a recommended Decision in this matter on February 27, 2001, finding that Respondent had violated Section 8(a)(1) of the Act by filing a Federal District Court lawsuit against Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Local 357), Local 7, Sheet Metal Workers International Association, AFL-CIO (Local 7), and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the UA).[1] Several parties filed exceptions to my decision with the National Labor Relations Board (the Board).

On September 26, 2002, the Board remanded the case to me for reconsideration in light of the Supreme Court's Decision in ***B. E. & K. Construction Co. v. NLRB***, ___ U. S. ___, 122 S. Ct. 2390 (2002), which issued on June 24, 2002. An Order issued on October 8, 2003, which afforded the parties an opportunity to file briefs and arguments on the issues raised by the remand. All parties filed briefs, which I have read.

A. <u>SUMMARY OF FINDINGS OF FACT</u>

The facts are set forth in detail in the recommended Decision referenced above. This summary is intended only to place the legal analysis in context, and does not change the findings of fact set forth in the recommended Decision herein. While Respondent employs members of both the plumbing and pipefitting trade and the sheet metal trade, in recent years it has had a collective bargaining agreement only with the sheet metal union (Local 7), and not with the plumbers' union (Local 357). In 1991, pursuant to an informal settlement agreement with the Board, Respondent recognized Local 337 of the UA (Local 337), the predecessor union to Local 357.[2]

Since 1991, Respondent and Local 357[3] have been involved in several strikes and numerous unfair labor practice charges. Those charges which were pursued by the Board resulted in additional settlement agreements as well as three unfair labor practice trials in 1994, 1997, and 1999. The first of these (***Allied I***) was decided by the Board on December 18, 1995,[4] and was later enforced by the Sixth Circuit Court of Appeals.[5] In that case, the Board found Respondent had discriminated against nine employees in violation of Section 8(a)(3) by failing and refusing to reinstate them in June 1994 when work became available after the end of two strikes.

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1 JD(ATL)—9—01.

2 On March 1, 1998, Local 337 was consolidated by the UA with Local 513 of the UA, and the resulting consolidated local union was designated as Local 357.

3 Hereinafter, "Local 357" means the UA Local which represented the plumbing and pipefitting trade employees, whether it was actually Local 337 or the merged local 357 at the time.

4 320 NLRB 32 (1995).

5 ***Allied Mechanical Services, Inc. v. NLRB***, 113 F.3d 623 (6th Cir. 1997).

Subsequently, the second of these litigated cases (***Allied II***) was decided on February 9, 1998, by Administrative Law Judge (ALJ) Richard H. Beddow, Jr., and affirmed in substantial part by the Board on January 5, 2001. The Board found, inter alia, that Respondent had discharged six employees because they had engaged in a strike, had failed and refused to reinstate employees after the end of a strike, had made unilateral changes in terms and conditions of employment without affording Local 337 notice or an opportunity to bargain over those changes, had refused timely to furnish Local 337 with information it needed for bargaining, had bypassed Local 337 and dealt directly with employees, and by its overall conduct had failed to bargain in good faith.[6] The Board issued a broad cease and desist order as part of its decision, based on the ALJ's findings that Respondent "has shown a proclivity to violate the Act and has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for employees statutory rights." Some of Respondent's conduct found to be in violation of the Act was its demand that striking employees return to work immediately on pain of being discharged, and its discharge of them when they did not return immediately.

An additional two unfair labor practice charges (***Allied III***) filed by Local 357 were tried in 1999 before ALJ David L. Evans. In his decision issued on February 8, 2000, Judge Evans found that Respondent had violated Section 8(a)(3) of the Act by failing and refusing to reinstate ten strikers, and by refusing to consider for employment or hire eight job applicants because of their union membership, activities or desires.[7] Judge Evans dismissed certain 8(a)(5) allegations in the same proceeding. He recommended that a broad Order be issued "because the Respondent has demonstrated a proclivity for violating the Act" and because the serious nature of the violations found "demonstrate a general disregard for employees' fundamental rights." Respondent's exceptions to this decision are currently pending before the Board.

On August 4, 1998, Respondent filed a Section 301 and 303 lawsuit in Federal District Court against Local 7, Local 357, Local 337, the UA, and Sheet Metal Workers International Association, the international union with which Local 7 is affiliated (SMWIA). The issue involved in the lawsuit was the denial by Local 7 of "job targeting funds" to Respondent in its bids on three different construction projects during the period February through April 1998, a Red Cross building in Kalamazoo, the Kalamazoo Chamber of Commerce and the YMCA Sherman Lake project. In its general allegations, Respondent alleged that Local 337 "has filed numerous unfair labor practice charges and engaged in mini-strikes and other activities in an attempt to disrupt and damage the business operations of [Respondent]." Respondent further alleged that Local 337, Local 357 and/or the UA had "threatened, coerced and/or otherwise restrained" Local 7 and/or SMWIA from providing job targeting funds to Respondent on the three jobs mentioned above, and that this was done because Respondent was not signatory to a collective bargaining agreement with Local 337 or Local 357. Respondent alleged that by these actions all the named unions "collectively and/or individually, acted to coerce, threaten and/or otherwise restrain [Respondent] from doing business with" the builders of the three named job projects.

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[6] 332 NLRB No. 171 (2001).

[7] JD-14-00.

Respondent alleged four separate counts in its lawsuit. The first count alleged the UA, Local 357, and/or Local 337 violated Section 8(b)(4)(i) and (ii) of the Labor Management Relations Act by threatening or coercing Local 7 to withhold job targeting funds from Respondent. The second count alleged the same three unions violated Section 8(b)(4)(ii) by restraining potential customers at the three named job projects from doing business with Respondent. The third count alleged Local 7 and/or SMWIA had violated and breached the collective bargaining agreement with Respondent by withholding the job targeting funds. The allegation was essentially based on the "most favored nations" clause of the collective bargaining agreement. The complaint recounted the facts that Respondent had filed a grievance under the collective bargaining agreement regarding the Red Cross job, which grievance had been denied at the highest step of the grievance procedure. Respondent further alleged that it did not file grievances with respect to the other two jobs in question, as that would have been futile in light of the decision on the first grievance. The fourth count alleged that the UA, Local 337 and/or Local 357 had violated Section 8(b)(4)(i) by threatening, coercing or otherwise restraining Respondent's employees by prohibiting Local 7 and SMWIA from providing Respondent with job targeting funds.

On March 30, 1999, federal district court dismissed the lawsuit pursuant the Unions' Motions for Summary Judgment. The claims against SMWIA were dismissed on the ground that it was not signatory to any collective bargaining agreement with Respondent. With respect to the allegations against Local 7, the court found that Respondent was bound by the result of the "final and binding" grievance procedure with regard to the Red Cross project, and had not exhausted its remedies (by filing grievances) with respect to the other two job projects. As to the secondary boycott allegations against the unions, the judge found that all the conduct complained of was primary in nature.

While an appeal was pending, the UA was dismissed from the lawsuit on August 5, 1999, by stipulation of the parties. On June 26, 2000, the Sixth Circuit panel upheld the decision below, essentially for the reasons relied upon by the district court.

At the trial of the instant matter, there was uncontradicted testimony relating to statements made by Respondent's part-owner, J. Huizinga, in the spring of 2000, to the effect that Respondent intended to "get even" with Local 357. There was also testimony by Daniel Huizinga, treasurer and part-owner of Respondent, concerning the filing of the lawsuit. D. Huizinga testified that Respondent had a "strong belief that the UA was interfering and colluding with the Sheet Metal to deny us target funds…that the Sheet Metal people were being influenced by the Piping Union." Despite allegations to this effect in the pleadings filed in Respondent's lawsuit, he testified that he had no knowledge of what officials of Local 357 had said to Local 7 officials. He also testified he did not understand the concept of "solidarity" among unions. D. Huizinga admitted that he had no knowledge of any actual actions or conversations between Local 337/357 and Local 7. He further admitted that he had no knowledge whatever of any involvement the UA had in the situation. Despite Respondent's admitted lack of knowledge of local 337/357's and the UA's actions, Respondent filed its lawsuit against these unions.

Respondent took the position that the most favored nations clause of its collective bargaining agreement with Local 7 was violated by Local 7's denial of job targeting funds to

Respondent. D. Huizinga testified that Respondent filed a grievance under the collective bargaining agreement with respect to this contention, and related the fate of the grievance. After deadlocking at the second step, it was referred to the third and final step, where Respondent's grievance was denied. D. Huizinga testified that he was well aware of the "final and binding" nature of the grievance and arbitration procedure in the collective bargaining agreement. Despite the denial of its grievance at this final and binding step of the grievance procedure, Respondent filed its lawsuit against Local 7 and its international affiliate.

B. Discussion and Analysis

1. The applicable law

In ***Bill Johnson's Restaurants v. NLRB***, 461 U.S. 731 (1983), the Supreme Court set forth a framework for decisions involving lawsuits alleged to be violations of Section 8(a)(1) of the Act. The court held that two elements must be proven in order to show that a particular lawsuit violates the Act. The lawsuit must be shown to be without merit, i.e., to lack a reasonable basis, and the respondent must be shown to have filed the lawsuit in retaliation for protected concerted activities of the employees or unions being sued. The Board has stated that this case means 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." ***Teamsters Local 520 (Alberici Construction),*** 309 NLRB 1199, 1200 (1992), enf. denied on other grounds, 15 F.3d 677 (7th Cir. 1994).

2. The Supreme Court's Decision in *BE & K Construction Company v. NLRB*

In ***BE & K***, the Supreme Court held that, in applying the ***Bill Johnson's*** test to the particular concluded lawsuit, the Board had unduly restricted the respondent's right to file lawsuits. The Board, noting that the lawsuit in ***BE & K*** had been dismissed on a motion for summary judgment, found that the suit was unsuccessful, and therefore, lacked a reasonable basis. The second prong of the test, that of retaliatory motive, was found to have been met largely based upon an inference from the fact that the Respondent had filed the unsuccessful lawsuit, and that it had some animosity toward the unions. The Court found this approach overbroad, and reasoned that it would prohibit many genuine lawsuits.

Regarding the first prong of the test, the Court[8] held that the lack of success, without more, is not sufficient to show the "lack of a reasonable basis" for the lawsuit. The Court found that the lawsuit was reasonably based, albeit unsuccessful. An enunciation of a standard for determining whether a suit is "reasonably based" appears to be contained in the Court's language to the effect that the lawsuit must be the product of a "subjectively genuine" belief and must be "objectively reasonable." In a concurring opinion of four additional justices, Justice Breyer wrote that the Court's decision applied to the case before it, where the Board had rested its finding of retaliatory motive almost exclusively upon the

[8] Justice O'Connor, writing for the Court, joined by two other justices.

simple fact that the employer filed a reasonably based, but unsuccessful lawsuit and the employer did not like the unions. The concurring opinion states clearly that its reasoning in ***BE & K*** does not reach cases where the "evidence of 'retaliation' or antiunion motive might be stronger or different," nor does it reach cases where the lawsuit was brought as "part of a broader course of conduct aimed at harming the unions and interfering with employees exercise of their rights under Section 7 of the NLRA."[9]

3. Positions of the Parties on the Remand

The General Counsel takes the position that the evidence supports a conclusion that the suit is baseless, and therefore is unaffected by the Supreme Court's Decision in ***BE & K***. The General Counsel further argues that even if there were to be some reasonable basis discerned for Respondent's lawsuit, that the evidence of retaliatory motive is more extensive in the instant case that the evidence in ***BE & K***, and therefore falls into a different category of cases, those alluded to by Justice Stevens in his concurrence. The General Counsel argues further that the record evidence of Respondent's failure to make even a minimal pre-complaint investigation of the facts is an additional factor which should be taken into account in analyzing the first prong of the standard.

The Charging Parties both take positions similar to that of the General Counsel. The UA adds that as to it, Respondent named the UA in its lawsuit, while pleading no facts relating to it, beyond the bare fact that it is the international union with which Local 357 is affiliated. Respondent admitted to no knowledge of any involvement of the UA in the events which were alleged in its lawsuit. The UA argues further that the law is well settled that such affiliation, standing alone, does not implicate the UA in actions undertaken by its affiliated local unions.

Respondent posits that the evidence supports a conclusion that Respondent held a "genuine belief" in its lawsuit, and that this forms a reasonable basis for the lawsuit. Respondent argues that the lawsuit should be found not to be a violation of Section 8(a)(1) of the Act, in light of ***BE & K***.

4. Analysis of Reasonableness of Respondent's lawsuit

In this case, as in ***BE & K***, there is a concluded lawsuit which was dismissed upon a motion for summary judgment. The Supreme Court's decision therefore requires a more detailed analysis of the first prong of the test enunciated in Bill Johnson's, whether the lawsuit was reasonably based. The standard is an objective one, whether a reasonable litigant could realistically expect success on the merits of the claims.[10]

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9 122 S. Ct. at 2403.

10 Respondent appears to urge that a sincere belief held by it, without more, is sufficient to support its claim that the filing of its lawsuit against the unions met the test for reasonableness. Respondent mistakes the test. The Court's opinion specifically refers to the "objectively reasonable" component of the standard. If Respondent's purely subjective formulation of the standard were applied, the result would be absurd. Under its formulation, any sincerely held belief, no matter how unreasonable, or even idiotic, the belief was, would render a lawsuit "reasonable."

Respondent's lawsuit had two claims, one sounding in contract, and one based on secondary boycott allegations. Both claims were dismissed by the District Court on motions for summary judgment. At this stage, the court was obliged to assume that all Respondent's pleading could be proven by evidence.[11] This is a standard which gives Respondent the benefit of the doubt, but Respondent's lawsuit could not withstand even this test.

As to the contract claims, the District Court noted that Respondent had no contract with three of the four unions, the two international unions, and the Plumbers local union (Local 337/357), and therefore could have no contract claim against them. As to those three unions, therefore, there is no basis whatsoever for Respondent's contract claims, and any analysis must find that these claims, as to those three unions, were without ***any*** basis, and certainly without any reasonable basis. As to Local 7, the District Court found that one of Respondent's contract claims had been resolved by final and binding arbitration, and that the others were barred by its failure to exhaust its arbitration remedy. Respondent filed its contract claims against Local 7, although it knew full well that it was impossible to pursue them, given the clear facts that they had already been resolved in final and binding arbitration, in which it had participated. Respondent has advanced no reason, nor did it plead any reason in its lawsuit, for the District Court to vacate or ignore the arbitration decision. No "reasonable litigant" could have any expectation of success on the merits in such a situation. I conclude, therefore, that Respondent had no reasonable basis for its lawsuit sounding in contract.

As to its claims based on secondary boycott allegations, Respondent filed claims of collusion between the Unions with no factual basis whatsoever. Respondent's witness, D. Huizinga, admitted that he had ***no*** knowledge of facts which would support Respondent's claims, nor had he made any inquiry into those facts, normally a duty of any party filing a lawsuit. Respondent thereby demonstrated that it had a complete disregard for whether its pleadings were true or not true.[12] The secondary boycott claims were dismissed by the District Court, as all the events concerned a primary dispute, that of Respondent with the two unions that represented its ***own*** employees. No other employer was involved, only Respondent. Respondent argues that secondary boycott claims are difficult, and therefore, apparently, that they should always be deemed to have sufficient basis to pass the test of "reasonableness." I find this argument unpersuasive and disingenuous.

No "reasonable litigant" could realistically expect success on the merits of this lawsuit, filed as it was with no facts ascertained, contract claims clearly precluded by the final and binding arbitration, the obvious primary nature of the disputes, and no evidence whatsoever to connect the two international unions with the events complained of.

As was noted by the Court in ***BE & K***, the first amendment's protection of the right to file lawsuits is not without limits. Where a litigant has demonstrated a reckless readiness to

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11 Respondent could not have proven the statements pleaded, as shown by D. Huizinga's testimony that Respondent knew of no facts to support its claims of "collusion" among the Unions.

12 Respondent argues that this factor should not be accorded any weight, since the Unions did not seek Rule 11 sanctions against it in the District Court lawsuit. There may be many reasons for a party to refrain from seeking such sanctions. I decline to be foreclosed from considering any relevant factor in this analysis.

use litigation to harry and harm an opponent, to drain its resources, regardless of the fatuousness or frivolity of the claims in litigation, the scope of the protection may have been exceeded.

5. <u>Respondent's motive in filing the lawsuit</u>

It is unnecessary to repeat the analysis of motive contained in my earlier decision, but a summary of the facts relied upon as evidence of retaliatory motive follows. Respondent's retaliatory motive was shown by Respondent's repeated unfair labor practices over a course of several years, as found by the Board, the Sixth Circuit, and several administrative law judges, conduct which included acts undertaken against individual employees, not just the unions, the timing of Respondent's lawsuit, Respondent's avowed purpose to "get even" with the unions, the iteration of employees' and the unions' protected activity in its lawsuit's pleadings, and the complete lack of a reasonable basis for the lawsuit.

Thus, I find that the Respondent's lawsuit lacked a reasonable basis, that the unions' conduct which 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. I find that the General Counsel has shown the requisite elements and that Respondent, by filing and maintaining its lawsuit against the Charging Party unions, violated Section 8(a)(1) of the Act.

Even assuming, for argument's sake, that Respondent's claims in its lawsuit met some extremely lenient test for reasonableness, the evidence of retaliatory motive in this case is far different and far stronger than that in ***BE & K.*** By virtue of its many unfair labor practices found by the Board, the Sixth Circuit, and several administrative law judges, it could fairly be said to be the type of case referred to in Justice Breyer's concurrence, its lawsuit but a part of a "broader course of conduct" against the employees and their unions.

In view of the foregoing analysis, it is unnecessary to repeat the discussion of the remedy included in my earlier recommended decision. My findings and conclusions as to remedies remain the same. However, I have attached a revised Notice to Employees, the language of which conforms to the Board's decision in ***Ishikawa Gasket America, Inc.***, 337 NLRB No. 29 (2001).

In view of the foregoing analysis, my recommended Conclusions of Law, Remedy, and Order remain the same as set forth in my earlier decision.

Dated, Washington D.C.

Jane Vandeventer
Administrative Law Judge

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT file and prosecute lawsuits with causes of action that are without legal merit and that are motivated by an intention to retaliate against activity protected by Section 7 of the Act against the Unions (Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local 7, Sheet Metal Workers International Association, AFL-CIO, Sheet Metal Workers International Association, and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO).

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them 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.

ALLIED MECHANICAL SERVICES, INC.
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the Nation Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue - Room 300, Detroit, MI 48226-2569
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244