

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

# Advice Memorandum

DATE: September 21, 2001

TO : Celeste Mattina, Regional Director  
Karen P. Fernbach, Regional Attorney  
Elbert F. Tellem, Assistant to Regional Director  
Region 2

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

SUBJECT: Termon Construction, Inc.  
Case 2-CA-33876 512-5009-6700

This case was submitted for advice on whether the Employer unlawfully caused the arrest of two Union representatives who were exercising a contractual right of access to the Employer's project.

Local 78 (Union) is the Asbestos Workers local with jurisdiction over asbestos abatement involving non-active mechanical systems. In February 2001, the Employer and the Union signed a bargaining agreement covering the Employer's Harlem River House project where the Employer was to remove asbestos from a roof. The parties' bargaining agreement contained a provision which explicitly accorded Union representatives "the right to visit and go upon the Employer's jobs during working hours for the sole purpose of administering this Agreement ...."

In April and May, 2001, the Employer ceased paying Local 78 member employees for their work. The Union initially warned the Employer about its nonpayment and eventually told employees to cease work. On June 11, the Union learned that the Employer had returned to the project with other workers. The following day, two Union representatives entered the project and went up to the roof where they found seven employees who claimed to be working for the Employer. The Union representatives learned that these workers were members of sister Local 12A which has jurisdiction over asbestos abatement involving active mechanical systems.<sup>1</sup>

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<sup>1</sup> Since a roof is a non-active mechanical system, Local 78 asserts that the Employer's work on this project fell

The Employer appeared and demanded that the Union representatives leave the project. The representatives stated that the Employer had an agreement with the Union and the representatives had a right to be there. The Employer called the police who arrested the Union representatives against whom the Employer filed a criminal trespass complaint.

On July 25, the Criminal Court of New York dismissed the Employer's complaint upon a motion filed by Assistant District Attorney Sender. ADA Sender informed the Region that she had the Employer's charges dismissed because she thought the dispute was more a civil rather than a criminal matter, and also because she believed that the charges lacked prosecutorial merit.<sup>2</sup>

We conclude, in agreement with the Region, the Employer unlawfully caused the arrests of and filed the criminal complaint against the Union representatives in retaliation against their assertion of a contractual right.<sup>3</sup>

Under Bill Johnson's,<sup>4</sup> the Board cannot halt the prosecution of a lawsuit unless: (1) the lawsuit lacks a reasonable basis in fact or law; and (2) the plaintiff filed the suit with a retaliatory motive. In Alberici Construction,<sup>5</sup> the Board held that

if the plaintiff's lawsuit has been finally adjudicated and the plaintiff has not prevailed,

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within Local 78's jurisdiction rather than Local 12A's jurisdiction.

<sup>2</sup> ADA Sender stated that she spoke with Union counsel who demonstrated to her that the Union representatives had been within their rights to be on the Employer's premises due to the parties' bargaining agreement.

<sup>3</sup> The Region has already determined to issue complaint against the Employer's unlawful denial of access to the Union representatives.

<sup>4</sup> Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

<sup>5</sup> Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199 (1992), enf. den. on other grounds 15 F.3d 677 (7th Cir. 1994).

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.<sup>6</sup>

In Control Services,<sup>7</sup> the Board applied Alberici to a criminal proceeding. The Board there adopted the ALJ's conclusion that a state appellate court's final dismissal of criminal "offensive language" and "harassment" counts against a union representative established that the criminal prosecution was meritless.<sup>8</sup> In our case, the state criminal court's dismissal of the criminal trespass case similarly establishes that the Employer's criminal complaint was meritless.

We also conclude that the Employer caused the arrests and filed the meritless criminal trespass complaint in retaliation against the Union representative's protected attempt to assert their rights under the parties' bargaining agreement. The representatives clearly had a contractual right to be on the Employer's project investigating apparent contract violations.<sup>9</sup> The Employer knew that the representatives were exercising this right because the representatives expressly advised the Employer of that fact. The Employer thus caused their arrest in an attempt to thwart their contractual right and evade its own contractual responsibility.

Accordingly, we conclude that Section 8(a)(1) complaint should issue, absent settlement, alleging that the Employer

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<sup>6</sup> Id. at 1200, citing Summitville Tiles, 300 NLRB 64, 65 (1990).

<sup>7</sup> 315 NLRB 431, 455-56 (1994).

<sup>8</sup> The Board then proceeded to adopt the ALJ's conclusion that the employer unlawfully filed these charges in retaliation against the union representative's protected conduct of investigating alleged unlawful treatment of another employee.

<sup>9</sup> In fact, ADA Sender dismissed the criminal charges in large part because Union counsel demonstrated to her that the representatives had possessed a contractual right to be on the premises.

unlawfully caused the arrest and criminal prosecution of the Union organizers.<sup>10</sup>

B.J.K.

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<sup>10</sup> See New Jersey Bell Telephone Co., 308 NLRB 277, 281-82 (1992) (employer violated Section 8(a)(1) by causing the arrest of and by filing criminal trespass charges against an employee lawfully on its premises as a Weingarten representative); Springfield Hospital, 281 NLRB 643, 676 (1986), enf'd 899 F.2d 1305 (2d Cir. 1990) (where off-duty employees were lawfully on premises, employer unlawfully caused criminal citations and arrests for trespass; no subsequent criminal prosecutions occurred); Baptist Memorial Hospital, 229 NLRB 45, 46 (1977), enf'd in rel. part 583 F.2d 906 (6th Cir. 1978) (employer violated Section 8(a)(1) by causing the arrest and conviction of employee who violated employer's discriminatory no-solicitation policy). Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).