

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

Advice Memorandum

DATE: November 25, 2003

TO : Gail Moran, Acting Regional Director
Region 13

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

SUBJECT: National Association of Letter Carriers
Case 13-CB-17418-1-P

This Bill Johnson's¹ case was submitted for advice as to whether the Union violated Section 8(b)(1)(a) and (b)(2) of the Act by filing a grievance seeking to overturn a contractually-correct job posting in order to retaliate against the Charging Party for her nonmembership in the Union. We conclude that the Region should issue complaint, absent settlement.

FACTS

The National Association of Letter Carriers (the Union) represents employees in the letter carrier craft at the U.S. Postal Service (USPS) facilities in Elgin, Illinois. The national agreement in effect between the Union and USPS provides, at Article 41, that "a vacant or newly established duty assignment not under consideration for reversion shall be posted within five working days of the day it becomes vacant or is established." However, the agreement goes on to state that "[T]he existing local method of posting and of installation-wide or sectional bidding shall remain in effect unless changes are negotiated locally."

Elgin Post Offices have used an expedited bidding and posting process for letter carrier routes since at least 1988. That has involved posting before a route is actually vacated, rather than waiting to post within five days after the route is vacated, as provided for in the National Agreement.²

¹ Bill Johnson's Restaurant v. NLRB, 461 U.S. 731 (1983).

² The Region has copies of postings confirming this practice.

Charging Party Masterson resigned her membership in the Union in April 2001, based on what she termed unsatisfactory answers regarding Union finances. USPS has asserted that, in late 2002, Union President Losurdo told Elgin Customer Service Manager Jelenik that, since so many employees had dropped out of the Union, "We are going after non-members."³ Following this, in December 2002, a "SCABS" notice was posted on the Union bulletin board in the workroom area that listed ten "scabs," including Masterson.

In January 2003, Union steward John Serrato began requesting Masterson's clock rings, overtime worked and medical forms/releases related to her light duty status. Serrato also asked USPS for Masterson's physician's contact information in an attempt to contact her doctor directly. Similar requests were not made for Union members also on light duty status at that time.

On January 21, 2003, Route 2365 serviced by the Elgin Post Offices was posted for bid pursuant to the expedited procedure, i.e. employee Turley had not yet vacated the route (in order to take a different route he had successfully bid) at the time it was posted. Masterson was the senior bidder and was awarded the route. Shortly after the announcement was made, postal clerk Kalisz overheard Union steward Serrato say "If I would've known Wanda [Masterson] was going to get the route, I would've bid it myself."

Union steward Kamradt notified Losurdo that Masterson was the successful bidder and Losurdo instructed Kamradt to file a grievance over the expedited manner in which the bid was posted. After an informal Step A discussion, the USPS grievance representative at the Elgin Main Office wrote a letter to the Union explaining that the route would not be re-bid because the expedited posting was a "locally negotiated past practice." Contrary to contractual protocol, the Union then submitted the grievance directly to Step B (which takes place at the regional level) without informing local management. This prevented local management from submitting any evidence to substantiate its claim that the expedited posting procedure was a locally negotiated agreement based on years of practice.⁴ One day

³ USPS declined to present Jelenik for an affidavit.

⁴ Unaware of the movement of the grievance to Step B, Elgin Postmaster Ryan instructed Jelenik to honor the bid to Masterson and to advise the Union that management would meet with the Union to hear any proposals for changes to

after receiving the grievance at Step B, the Step B Dispute Resolution Team issued a decision finding that management had "violate[d] Article 41 of the National Agreement and shall re-post Route 2365 for bid and place the current Route 2365 carrier [Masterson] back to their original assignment." Masterson was placed back on her old route, and a Union member was awarded Route 2365 after the re-bid.

One week after the Union filed its grievance regarding Masterson's successful bid, Union steward Kamradt's route was posted in an expedited manner, i.e., before Kamradt vacated it. The Union did not file a grievance over that posting.

ACTION

We conclude that the grievance was unlawful because it was objectively baseless and retaliated against Section 7 activity. We further conclude that, even if the grievance is determined to have been reasonably based, it was unlawful because it had the sole purpose of retaliating against Masterson because of her non-membership.

Absent the protections accorded by Bill Johnson's, the Union's conduct here clearly violated Section 8(b)(1)(a) and (2) in that the Union discriminated against Masterson, because of her non-membership in the Union, by filing a grievance to remove her from the route she had successfully bid. However, the Board has extended to grievances the principles of Bill Johnson's, which prohibits the enjoining of retaliatory lawsuits if they are reasonably based in fact and law.⁵

In BE & K, the Supreme Court reconsidered the circumstances under which the Board could find a concluded suit to be an unfair labor practice. Previously the Board had interpreted Bill Johnson's to permit the finding of an unfair labor practice where a litigation was unsuccessful and was filed with a retaliatory motive. The Supreme Court rejected that standard because the class of lawsuits

the current posting/bidding policy. The Union did not request such a meeting.

⁵ See, e.g., Longshoremen Local 7 (Georgia-Pacific), 291 NLRB 89 (1988), enfd. 892 F.2d 130 (D.C. Cir. 1989) (policy favoring private resolution of labor disputes parallels the First Amendment concerns emphasized by the Supreme Court in Bill Johnson's).

sanctioned would include a substantial portion of suits that involved genuine petitioning protected by the Constitution.⁶ The Court held that the Board can no longer rely on the fact that the lawsuit was ultimately unsuccessful, but must determine whether the lawsuit, regardless of its outcome on the merits, was reasonably based.⁷

The Court also considered the Board's standard of finding retaliatory motive in cases in which "the employer could show the suit was not objectively baseless."⁸ The Court viewed the Board as having adopted a standard in reasonably based suits of finding retaliatory motive if the lawsuit itself related to protected conduct that the petitioner believed was unprotected. The Court criticized that standard for finding retaliatory motive in non-meritorious but reasonably based cases, because Constitutional protection is warranted whenever a plaintiff's purpose is to stop conduct he reasonably believes is illegal.⁹ Similarly, the Court reasoned that inferring a retaliatory motive from general evidence of antiunion animus would condemn genuine petitioning in circumstances where the plaintiff seeks to stop specific conduct he reasonably believes is illegal.¹⁰ In dictum, however, the Court left open the possibility that the Board could consider an unsuccessful but reasonably based lawsuit to be an unfair labor practice if the suit would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity."¹¹

⁶ 122 S.Ct. at 2397, 2399, 2400, 2402 (the Board had held that even if a concluded suit had been reasonably based, once it was unsuccessful the Board could find an unfair labor practice if the suit was retaliatory).

⁷ Id. at 2399.

⁸ Id. at 2400.

⁹ Id. at 2400-2401.

¹⁰ Id. at 2401.

¹¹ Id. at 2402. This is only an issue with regard to reasonably based lawsuits. If a suit is baseless and directed at protected activity, it is retaliatory within the meaning of Bill Johnson's, without any need to show it would not have been filed "but for" a motive to impose litigation costs.

Here, although the Employer's Step B Dispute Resolution Team upheld the grievance and ordered a re-posting, we conclude that the grievance was objectively baseless within the meaning of Bill Johnson's. There is no dispute that, prior to this grievance, the parties had a local practice and agreement which permitted the posting of jobs in the expedited manner in which Route 2365 was posted. The national agreement clearly provides that local practices in existence prior to execution of the national agreement would remain in effect unless changes were negotiated locally. In order to obtain a successful grievance result, the Union manipulated the grievance procedure so as to insure that the Step B decision-makers did not have the pertinent facts regarding the locally established practice. The Union cannot contend that the grievance decision changed the local agreement because, subsequent to the resolution of the grievance, the parties continued to apply the prior posting practice. Under these circumstances, we conclude that, notwithstanding that the grievance was resolved in the Union's favor by the regional management team, it was objectively baseless.¹² Since the grievance was motivated by the Union's desire to retaliate against Masterson for her non-membership in the Union, it violated Section 8(a)(1).

Alternatively, even if the grievance is found to have been reasonably based, we conclude that it was unlawful under the heightened retaliatory motive test described in the BE & K majority opinion as potentially applicable to reasonably-based lawsuits. Thus, it is clear that the grievance was filed with the sole purpose of discriminating against Masterson for her non-membership in the Union. Not

¹² In Bill Johnson's, the Supreme Court stated in dicta that "if the employer's case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice." 461 U.S. at 747. However, the Supreme Court did not have before it a situation wherein a successful suit could nevertheless be determined to be objectively baseless from the outset. Moreover, in BE & K, the Court made clear that it did not intend, through the Bill Johnson's dicta, to suggest that the outcome of a suit was determinative as to its baselessness; rather, the Board must determine whether a completed lawsuit was reasonably based by conducting an analysis similar to that applied in ongoing suits.

only were there statements made to that effect, but the Union failed to file a grievance over similar Employer conduct when a Union member's job bid was at issue. Thus, the grievance would not have been filed but for Section 7 activity that was unrelated to the issues presented in the grievance. Moreover, the Union was not even seeking to obtain the outcome stated in the grievance, i.e., an interpretation of the contract that prohibited expedited posting, but was seeking only the removal of Masterson from the posted route.¹³ That is the only explanation for its failure to grieve the later expedited posting of Kamradt's route. In fact, the Union was not concerned at all with the merits of its claim, but only with punishing Masterson for her resignation from membership.

Accordingly, the Region should issue a complaint, absent settlement.

B.J.K.

¹³ See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49,60-61 (the subjective part of the sham antitrust litigation test is proven where a litigant has intended to interfere with the business relationships of a competitor through the use of the governmental process, as opposed to being concerned with the outcome of that process), which the Supreme Court in BE & K found to be relevant by analogy to the question of what constitutes "retaliatory motive" under Bill Johnson's.