

Children's Hospital Medical Center of Northern California d/b/a Children's Hospital Oakland and California Nurses Association. Case 32-CA-17432

September 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND KIRSANOW

On September 30, 2003, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief.¹ The General Counsel and the Charging Party each filed an answering brief. The Respondent filed a reply brief.

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

The judge found that the Respondent violated Section 8(a)(1) of the Act by filing a baseless and retaliatory Section 301 lawsuit against the Union. The Respondent excepts to this finding. For the reasons stated below, we find merit in these exceptions, and we shall dismiss the complaint.

I. FACTS

The relevant facts, which are set out more fully in the judge's decision, may be summarized as follows. The Respondent operates an acute-care hospital in Oakland, California. The Respondent's hospital workers are represented by six different unions. In the summer of 1998,² the Respondent was engaged in contract negotiations with one of them, ILWU, Local 6, AFL-CIO (Local 6), representing a unit of 17 X-ray technologists. Because the parties could not agree on a successor contract, Local 6 gave notice of its intent to engage in a primary strike on August 31.

That same month, the California Nurses Association (CNA or the Union), representing about 750 registered nurses employed at the hospital, issued "nurse alerts" encouraging the Respondent's nurses to strike in sympathy with Local 6 in the event of a primary strike. Having learned of the "nurse alerts," the Respondent advised CNA that in its view, CNA could not lawfully initiate, encourage, or sponsor a sympathy strike. The Respondent's position was based on the no-strike clause in the

parties' then-current collective-bargaining agreement, which stated:

There shall be no strikes, lockouts, or other stoppages, or interruptions of work, during the life of this agreement.

Nonetheless, on August 17, the Union sent the following notice to the Respondent concerning what the Union intended to do on August 31:

Pursuant to Section 8(g) of the National Labor Relations Act, as amended by the health care institution amendments of 1974, the California Nurses Association hereby gives notice of our intent to engage in a strike for a period of 24 hours in sympathy with the primary strike of ILWU, Local 6, AFL-CIO.³

The Respondent requested expedited arbitration of its challenge to the Union's right to call a sympathy strike. On August 24, the Union rejected that request, and further asserted that the no-strike clause in the parties' agreement did not prohibit the Union from engaging in sympathy strikes because, *inter alia*, (1) the Union had, in the past, issued multiple notices of intent to engage in a sympathy strike without the Respondent challenging its right to do so, and (2) the Union engaged in a 12-week sympathy strike in 1979.

In response to the Union's August 24 letter, the Respondent reviewed its files. It found therein no prior CNA-issued notices of intent to engage in a sympathy strike. As to the events of 1979, it found a 1979 letter from the Union stating that individual nurses had the right to honor another union's picket line "as a matter of personal conscience," but adding that "CNA will fully comply with the [collective-bargaining] agreement in so far as it prohibits strike action or work stoppages directed by CNA." By letter of August 25 (attaching a copy of the Union's 1979 letter), the Respondent reasserted its view that the no-strike clause prohibited the Union from engaging in a sympathy strike and asked the Union to furnish any documentation in its possession to the contrary. The Union never responded to this request. The primary strike was averted when Local 6 and the Respondent agreed to a contract on August 28. The Union then withdrew its sympathy-strike notice.

On September 2, 1998, the Respondent filed a grievance with the Union concerning its sympathy-strike ac-

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² All dates hereafter are in 1998, unless otherwise specified.

³ The Respondent alleged in its Sec. 301 suit (discussed below) that a strike by Local 6 X-ray technologists would have necessitated virtually no change in its operations, but that the Union's impending sympathy strike caused the Respondent to take expensive and extraordinary precautions because of the potential for large-scale disruption of its operations.

tivities. On September 21, the Respondent sought arbitration of its grievance. On December 10, 1998, the Union refused to go to arbitration, taking the position that the parties' collective-bargaining agreement did not permit the Respondent to initiate a grievance.

On February 9, 1999, the Respondent filed a "Complaint for a Permanent Injunction, Declaratory Relief, and Monetary Damages" under Section 301 of the Labor Management Relations Act in the United States District Court for the Northern District of California. This complaint alleged that the Union had violated the terms of the no-strike clause (set forth above) contained in the parties' then-current collective-bargaining agreement. The Respondent's complaint further alleged that such a broad no-strike clause prohibits sympathy strikes, and that the parties had taken no action in any way exempting sympathy strikes from that prohibition.

After the Section 301 lawsuit was filed, the Union changed its position and informed the Respondent that it would agree to arbitration if the Respondent would not use the proceeding as precedent for arguing that the contract allowed employer-initiated arbitration in the future. The Respondent refused, stating that it would not "arbitrate under an agreement that CNA is not obligated to do so."

On March 3, 2000, United States District Judge Vaughn R. Walker issued an Order granting the Union's motion for summary judgment and dismissing the Respondent's lawsuit in its entirety. *Children's Hospital Medical Center of Northern California v. California Nurses Assn.*, 283 F.3d 1188 (9th Cir. 2000). The court rejected the Respondent's argument, premised on a distinction between a union's waiver of employees' right to strike and a union's waiver of its own right to promote sympathy strikes, that the interpretation of the no-strike clause should be governed by ordinary contract-law principles, not by the "clear and unmistakable waiver" standard. Applying the latter standard, the court cited *Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524, 528 (7th Cir. 1990), for the proposition that a broad no-strike provision by itself is not sufficient to waive the right to engage in sympathy strikes if extrinsic evidence of the parties' intent does not demonstrate that the parties mutually agreed to include such rights within the breadth of the no-strike clause. The court defined the relevant inquiry at the summary judgment stage as whether a reasonable factfinder could conclude, based on extrinsic evidence of bargaining history and past practice, that in adopting the no-strike clause the parties intended to prohibit sympathy strikes. The court then described the relevant evidence as to bargaining history and past practice and found that no reasonable trier of fact could con-

clude that the no-strike clause represented a clear and unmistakable waiver of sympathy-strike rights. Accordingly, the court granted the Union's motion for summary judgment and denied the Respondent's cross-motion. The Ninth Circuit affirmed the District Court's decision. *Children's Hospital Medical Center of Northern California v. California Nurses Assn.*, supra.⁴

The General Counsel issued a complaint alleging that the Respondent's Section 301 lawsuit violated Section 8(a)(1) of the Act.

II. JUDGE'S DECISION

The judge noted the parties' agreement that the precedent applicable to this case is *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). He found that under *BE&K*, the Respondent's lawsuit was objectively baseless because no reasonable litigant could have realistically expected success on the merits. Specifically, in this regard, the judge found that it was not reasonable for the Respondent to believe that it could prevail on the legal issue, i.e., the standard to be applied to determine the effect of the no-strike clause, because doing so would have required the undoing of longstanding and well-established Board and court precedent. He further found that it was not reasonable for the Respondent to expect to succeed on the facts. The judge noted that the "clear and unmistakable waiver" standard would require a "mutual" agreement that the no-strike clause prohibited sympathy strikes. In light of the bargaining history and parties' past practice, the judge found that there was no such mutual agreement here and that no other conclusion could be drawn.

The judge found that the Respondent's lawsuit, in addition to being baseless, was also retaliatory. In this regard, he noted that, after the Union refused the Respondent's initial request to arbitrate the sympathy strike issue, the Respondent filed its suit without seeking court clarification of the contract's arbitration provisions. When, after the suit was filed, the Union changed its position and informed the Respondent that it would agree to arbitrate if the Respondent would not use the proceeding as precedent for Respondent-initiated arbitration in the future, the Respondent refused. The judge found that the condition proposed by the Union was reasonable under the circumstances, and that the Respondent's refusal was therefore "incongruous." Having found the lawsuit legally and factually baseless, and discerning no persuasive reason for the Respondent's refusal of the Union's arbi-

⁴ Judge Wacknov's decision includes extensive excerpts from the Ninth Circuit's decision.

tration offer, the judge found that the lawsuit was retaliation in violation of Section 8(a)(1), as alleged.

III. DISCUSSION

In our recent decision in *BE&K Construction Co.*, 351 NLRB 29 (2007), we held that a lawsuit that has a reasonable basis does not violate the Act, regardless of whether the lawsuit is ongoing or completed, and regardless of the motive for the lawsuit. Thus, if a lawsuit is reasonably based, the analysis ends there, and we will not further inquire into the plaintiff-respondent's motives for filing or maintaining it. We also stated in *BE&K* that in determining whether a lawsuit is reasonably based, we would look to whether a "reasonable litigant could realistically expect success on the merits." *Id.* at 29 (quoting *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, 60 (1993)). Taken out of context, that standard may be misunderstood to suggest that a lawsuit that entails some tacking into the wind of adverse precedent cannot be reasonably based. Such a view would be inconsistent with the constitutional underpinning of the Supreme Court's decision in *BE&K*, in which it recognized a First Amendment interest in lawsuits that "promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around." *BE&K*, supra at 532; see also *Bill Johnson's Restaurants*, supra at 747 (holding that the Board should "stay its hand" unless "the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous"). Mindful of these principles, and for the reasons that follow, we find that the Respondent's lawsuit was reasonably based.

One of the Respondent's principal contentions in its Section 301 action was that, in determining whether the no-strike clause prohibited sympathy strikes, ordinary contract-law principles should govern, not the "clear and unmistakable waiver" standard. The Respondent maintained that a union's waiver of its *own* right to promote sympathy strikes, as opposed to that of an *individual employee's* right to strike, need not be clear and unmistakable. In support, the Respondent cited *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and *Interstate Brands v. Bakery Drivers*, 167 F.3d 764 (2d Cir. 1999); and its reliance on those cases was at least colorable.

In *Wright*, the Court, applying the "clear and unmistakable waiver" standard, found that a collective-bargaining agreement's general arbitration clause did not waive an employee's right to a judicial forum for his claim under the ADA. In so finding, the Court distinguished *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), because "*Gilmer* involved an individual's waiver of his own rights, rather than a union's

waiver of the rights of represented employees and hence the 'clear and unmistakable' standard was not applicable." *Wright*, supra at 80–81. In *Interstate Brands*, the Second Circuit held that the rule of *Wright* that a contractual waiver of employees' statutory right to a judicial forum will be given effect only if it is "clear and unmistakable" does not apply where the right at issue belongs to the employer. In so holding, the circuit court reasoned as follows:

Wright's "clear and unmistakable" standard is based upon a concern about allowing a union to waive an individual employee's statutory rights—i.e., a concern about the waiver of one's rights by someone else. Where, however, one waives one's own rights, the "clear and unmistakable" standard is not required.

Interstate Brands, supra at 767. We think the Respondent could reasonably take the position, as it did, that under *Wright* and *Interstate Brands*, the Union's waiver of its own right to promote a sympathy strike need not be clear and unmistakable.

Although both the district court and the Ninth Circuit Court of Appeals rejected the Respondent's theory as inconsistent with relevant precedent, the court of appeals acknowledged that those precedents were not on all fours with the case before it, as they all involved union members who refused to cross another union's picket line even though their own union failed to call a sympathy strike. At issue in those cases was the effect of a no-strike clause on individual employees' right to engage in a sympathy strike; none of those cases involved the effect of a no-strike clause on a union's right to call a sympathy strike. Moreover, the Respondent's proffered distinction between the rights of unions and those of employees is not foreign to labor law. See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (finding that employer did not commit unfair labor practice by barring nonemployee union organizers from its property; by its plain terms, Act confers rights only on employees, not on unions or their nonemployee organizers).

More broadly, although the Board has adhered to the "clear and unmistakable waiver" analysis in interpreting disputed contractual language, some courts of appeals have rejected that standard in favor of a "contract coverage" analysis similar to that urged by the Respondent.⁵ Under a "contract coverage" analysis, it can be argued that the parties have already bargained about the issue of strikes, and thus the Board and courts should simply ascertain the results of that bargaining. Thus, waiver is

⁵ *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *Department of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992); *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993).

irrelevant, and the sole issue is what the clause *means*, to be determined (as the Respondent contends) by applying contract-law principles. See, e.g., *Department of the Navy*, supra at 57. Further, some members of the Board have voiced disagreement with the “clear and unmistakable waiver” standard and expressed support for the contract-coverage analysis. See, e.g., *Exxon Research & Engineering Co.*, 317 NLRB 675, 676–677 (1995) (Member Cohen, dissenting in part), enf. denied 89 F.3d 228 (5th Cir. 1996); *Dorsey Trailers, Inc.*, 327 NLRB 835, 836–837 (1999) (Member Hurtgen, dissenting in relevant part), enf. granted in part and denied in part 233 F.3d 831 (4th Cir. 2001); *California Offset Printers*, 349 NLRB 732, 737 (2007) (Member Schaumber, dissenting); *Provena St. Joseph Medical Center*, 350 NLRB 808, 816–819 (2007) (Chairman Battista, dissenting). Although the district court and the court of appeals here rejected the Respondent’s argument that the “clear and unmistakable waiver” analysis does not apply, that argument is consistent with the “contract coverage” analysis and was not unreasonable.

Neither was it unreasonable for the Respondent to contend that the no-strike clause at issue prohibited sympathy strikes even under a “clear and unmistakable waiver” standard. In so contending, the Respondent relied on *Indianapolis Power Co.*, 273 NLRB 1715 (1985). In that case, the Board held that if a collective-bargaining agreement contains a broad no-strike clause, the Board will read the clause plainly and literally as prohibiting all strikes, including sympathy strikes. If, however, the contract or extrinsic evidence demonstrated that the parties intended to exempt sympathy strikes, the Board would give the parties’ intent controlling weight. Applying this standard, the Board found that the no-strike clause at issue in that case waived unit employees’ sympathy-strike rights, and therefore the respondent did not violate the Act when it suspended and threatened to discharge a unit employee for refusing to cross a stranger picket line.

The court of appeals granted the union’s petition for review of the Board’s Order dismissing the *Indianapolis Power* complaint. *Electrical Workers Local 1395, v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1986). Noting the administrative law judge’s finding that the parties had merely agreed to disagree as to whether sympathy strikes were covered by the no-strike clause, the court remanded the case to the Board to determine whether the parties had intended the clause to cover sympathy strikes.

The Board, on remand, adhered to and clarified the rule announced in its previous decision, stating:

To summarize, we continue to believe that a broad no-strike clause should properly be read to encompass sympathy strikes unless the contract as a whole or ex-

trinsic evidence demonstrates that the parties intended otherwise. In deciding the issue whether sympathy strikes fall within a no-strike provision’s scope, the parties’ actual intent is to be given controlling weight and extrinsic evidence should be considered as an integral part of the analysis.

Indianapolis Power Co., 291 NLRB 1039, 1041 (1988). The Board found that, in light of the judge’s crediting of testimony that resulted in his finding that the parties’ bargaining history evidenced an agreement to disagree over the scope of the no-strike clause, there was no waiver of the right to honor stranger picket lines; accordingly, the suspension and threat to discharge were unlawful. The Seventh Circuit enforced the Board’s Order. *Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524 (7th Cir. 1990).

In sum, then, the Board employs a rebuttable presumption that a broad no-strike clause covers sympathy strikes. Importantly, at the time the Respondent brought its lawsuit, Ninth Circuit precedent was not settled concerning this presumption. See *Children’s Hospital Medical Center*, supra at 1195 (observing that in a prior case, the court had “explicitly declined to decide whether the presumption is proper under the NLRA”). Thus, the Respondent could reasonably argue for application of that presumption in its Section 301 action. In addition, at the time the Respondent filed its lawsuit, it could also reasonably believe, based on the information at its disposal, that the presumption was not rebutted here. As stated above, after receiving the Union’s August 24 letter setting forth the Union’s past-practice grounds for maintaining that the no-strike clause did not prohibit sympathy strikes, the Respondent searched its in-house files and found that they did not support the Union’s past-practice claims. The Respondent then wrote a letter to the Union reasserting its position that the parties’ no-strike clause prohibited sympathy strikes, and asking that the Union, if it had any documentation to the contrary, furnish that documentation to the Respondent. The Union, whose burden it would be (under Board law never expressly rejected by the Ninth Circuit) to rebut the presumption that sympathy strikes were contractually banned, did not respond to this request. In these circumstances, it was reasonable for the Respondent to rely on the information available to it concerning bargaining history and past practice with reference to the no-strike clause.⁶

⁶ Even assuming that the Respondent, in the course of litigation, obtained information tending to rebut the presumption of waiver, it could still reasonably continue to rely on its argument that the analysis should begin and end with the plain wording of the no-strike clause because a union’s waiver of its own right to promote sympathy strikes need not be clear and unmistakable.

In sum, we find, contrary to the judge, that the Respondent's lawsuit has not been shown to be baseless. Because a lawsuit that is reasonably based at the time of its filing and during its maintenance does not violate the Act regardless of the motive for bringing it, we shall dismiss the complaint without passing on the judge's finding that the Respondent's lawsuit was brought with a retaliatory motive.

ORDER

The complaint is dismissed.

Amy L. Berbower, Esq., for the General Counsel.

Chris Baker, Esq. and Bonnie Glatzer, Esq. (Thelen, Reid & Priest LLP), of San Francisco, California, for the Respondent.

M. Jane Lawhon, Esq. (Law Offices of James Eggleston), of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Oakland, California, on June 16, 2003. The charge in the captioned matter was filed by California Nurses Association (CNA or Union) on May 10, 1999. Thereafter, on February 25, 2003, the Regional Director for Region 32 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations by Children's Hospital Medical Center of Northern California d/b/a Children's Hospital Oakland (CHO or Respondent or Hospital) of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel, counsel for the Respondent, and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California nonprofit corporation with an office and place of business in Oakland, California, where it is engaged in the operation of an acute-care hospital. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$250,000, and annually purchases and receives goods and materials valued in excess of \$5000 which originate outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issue in this proceeding is whether the Respondent has violated Section 8(a)(1) of the Act by filing a complaint under Section 301 of the Labor Management Relations Act in the United States District Court for the Northern District of California alleging that the Union has violated the no-strike provisions of a collective-bargaining agreement between the parties.

B. Facts

1. Background

The Respondent's hospital workers are represented by six different unions. In the summer of 1998, the Respondent was engaged in contract negotiations with one of those unions, ILWU, Local 6, AFL-CIO (Local 6), representing a unit of 17 X-ray technologists. Because the Respondent and Local 6 were unable to reach agreement on a successor contract, Local 6 gave notice of its intent to engage in a primary strike on August 31, 1998. On August 17, 1998, the Union, representing approximately 750 registered nurses at the hospital, sent the following notice to the Respondent advising that it intended to engage in a sympathy strike on August 31, 1998, as follows:

Pursuant to Section 8(g) of the National Labor Relations Act, as amended by the health care institution amendments of 1974, the California Nurses Association hereby gives notice of our intent to engage in a strike for a period of 24 hours in sympathy with the primary strike of ILWU, Local 6, AFL-CIO.

The primary strike was averted when Local 6 and the Respondent reached a collective-bargaining agreement on August 28, 1998; thereupon the Union withdrew its notice to engage in a sympathy strike.

Respondent states in its United States District Court complaint, *infra*, that a strike by Local 6 X-ray technologists "would have necessitated virtually no change" in its operations, but preparations for the sympathy strike by the registered nurses caused the Respondent "to take expensive and extraordinary precautions" because of the potential large-scale disruption of its operations.¹

2. Court litigation

On February 9, 1999, the Respondent filed a "Complaint for a Permanent Injunction, Declaratory Relief, and Monetary Damages" under Section 301 of the Labor Management Relations Act in the United States District Court for the Northern District of California. The complaint alleges that the Union has violated the terms of the no-strike clause contained in the current collective bargaining between the parties. The no-strike clause is as follows:

G. NO STRIKES OR LOCKOUTS

¹ Clearly the Union's ability to combine its considerable support with the efforts of some 17 Local 6 members, whom the Respondent seems to admit had only minimal economic leverage, is a situation that the Respondent would very much like to neutralize.

There shall be no strikes, lockouts, or other stoppages, or interruptions of work, during the life of this agreement.

The complaint goes on to allege that such a broad no-strike clause prohibits sympathy strikes, and further, that “The parties have taken no action which in anyway [sic] rebuts the . . . presumption that the no-strike clause prohibits sympathy strikes.”

On March 3, 2000, United States District Judge Vaughn R. Walker issued an Order granting the Union’s motion for summary judgment and dismissed Respondent’s lawsuit in its entirety. *Children’s Hospital Medical Center of Northern California v. California Nurse’s Assn.*, 163 LRRM 2724 (N.D. Cal. 2000).

The court notes that the right to engage in a sympathy strike may be waived by the union representing employees in a collective-bargaining agreement only if the waiver of such a right is “clear and unmistakable.”² Further, contrary to the position of the Respondent, the court determines that it “will apply the clear and unmistakable standard to its interpretation of the no-strike provision at issue.”

Citing *Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524, 527 (7th Cir. 1990), the court states:

Thus, the inquiry at the summary judgment stage is whether a reasonable fact finder could conclude based on extrinsic evidence of bargaining history and past practice that in adopting the no-strike clause the parties intended to prohibit sympathy strikes.

Then, after noting that his findings are based on undisputed extrinsic evidence that is “compiled in the parties’ separate statements of material facts,” Judge Walker reviews both the bargaining history and the relevant evidence of past practice, and concludes as follows:

As with evidence of bargaining history, the past practice of threatened CNA sympathy strikes and hospital inaction leaves no room for the conclusion that such strikes fall within the scope of no-strike provision in the parties’ collective bargaining agreement. The parties have submitted additional evidence, none of which raises a genuine issue of material fact on this issue. The court has considered all the evidence, and need not parse it here. The court finds that there is no triable issue regarding whether the no-strike clause represents a “clear and unmistakable” waiver of sympathy strike rights. Upon consideration of extrinsic evidence, a reasonable trier of fact could only conclude that it does not.

The Respondent appealed this order to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit issued its decision on March 23, 2002 (283 F.3d 1188). The court noted that it reviews district courts’ summary judgment orders de novo, citing *Playboy Enterprises v. Welles*, 279 F.3d 796 (9th Cir. 2002). In *Playboy Enterprises*, the court states:

We review the district court’s grant of summary judgment de

² Citing, inter alia, *Electrical Workers Local 1395 v. NLRB*, 797 F.2d 1027, 1029 (D.C. Cir. 1986), and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *OCAW Local 1-547 v. NLRB*, 842 F.2d 1141 (9th Cir. 1988).

novo. Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. The court must not weigh the evidence or determine the truth of the matter but only determine where there is a genuine issue for trial. [Footnotes omitted.]

The court, citing the precedent underlying its “well established rule” that a contractual waiver of sympathy strike rights must be “clear and unmistakable,” then goes on to find the Respondent’s “unusual” argument to the contrary to be premised on “two fundamental errors:”

First, neither the language of the NLRA nor logic supports the distinction the hospital seeks to draw between the union’s right and those of its members.

The second flaw in the hospital’s argument is that *Wright* [v. *Universal Maritime Service Corp.*, 525 U.S. 70 (1998)] does not alter our analysis of waivers of strike rights. To the contrary, it supports CNA’s argument. . . . Thus, nothing in *Wright* requires us to depart from our precedent that a union’s waiver of the right to engage in a sympathy strike must be clear and unmistakable.

We therefore affirm our earlier holdings that the waiver of the right to engage in sympathy strikes must be clear and unmistakable. This holds true regardless of whether workers seek to exercise that right in the absence of any union action, or whether the union asserts the right to call a sympathy strike on behalf of those it represents. In both instances, if the union and the employer have negotiated a waiver of the members’ statutory right to strike, we must carefully examine the scope and circumstances of the particular waiver provision to determine whether the right to engage in sympathy strikes has been clearly and unmistakably waived.

The court reviews the long bargaining history between the parties and concludes that, “The history of bargaining between CNA and the hospital strongly militates against a conclusion that the union clearly and unmistakably negotiated a waiver of the employees’ right to engage in a sympathy strike.” And upon reviewing the past practice of the parties over many years the court concludes, “The parties’ past practice, like the bargaining history, militates strongly in favor of the conclusion that CNA did not clearly and unmistakably waive its sympathy strike rights.” The court then concludes as follows:

We reaffirm that for a union to waive the Section 7 right to engage in a sympathy strike, the waiver must be clear and unmistakable, so that the membership will be on notice that this important collective bargaining right is being bargained away. Because the facts in this record, viewed in the light most favorable to CHO, demonstrate that there was no clear and unmistakable waiver by CNA in this case, the district court was correct to grant summary judgment in favor of the union.

C. Analysis

1. The court proceedings

The complaint alleges that the lawsuit brought by the Respondent to enjoin the Union from calling or threatening to call a sympathy strike, and to impose monetary damages for such conduct, lacked a reasonable basis in law and fact; therefore, it restrained employees in their right to engage in activities protected by Section 7 of the Act.

The parties agree that the applicable law underlying this case is set forth in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983), and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), and that the issue before the Board is whether the Respondent's lawsuit lacked a reasonable basis in law and fact. Since *BE & K* the Board may no longer premise the finding of a violation of the Act exclusively on whether the outcome of such a lawsuit was adverse to the plaintiff; that is, whether the lawsuit was withdrawn or found by the court to lack merit. Thus, the fact that the Respondent did not prevail in its lawsuit is not determinative of whether the lawsuit was reasonably based. Rather, a lawsuit is "objectively baseless" if "no reasonable litigant could realistically expect success on the merits." *BE & K*, supra at 526; *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, 59-60 (1993). Such a test is designed to balance the rights of employees under the Act, and the rights of parties to have access to the courts for legitimate purposes.

The Respondent advances the argument that since the General Counsel had the authority to issue an immediate complaint, its failure to do so until after the conclusion of the court litigation warrants the inference that the General Counsel believed the lawsuit to be reasonably based.

The charge in this case was filed by the Union on May 10, 1999, alleging that:

In retaliation against Registered Nurses for their exercise of protected Section 7 rights, within the past six months, the Employer filed a civil action in federal court which lacks a reasonable basis in fact or law.

Even assuming *arguendo* that the General Counsel initially believed the lawsuit was reasonably based, customary regional office procedure would have required dismissal of the charge; and as the charge was not dismissed, the Respondent should have reasonably understood that the General Counsel intended to review the matter upon the conclusion of the court litigation. Further, in *Bill Johnson's* the Supreme Court stated, supra at 745, that ". . . if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts," the General Counsel should defer the unfair labor practice proceeding until the judicial action has been concluded. In its district court suit the Respondent contended that the no-strike clause, as interpreted and applied by the parties over many years, prohibited sympathy strikes. This factual contention, strongly in dispute, presented critical issues of material fact that would ultimately be resolved by the court. Accordingly, given the General Counsel's deferral of the matter, and the foregoing pronouncement of the Supreme Court, the Respondent's purported belief that

the General Counsel's inaction constituted something in the nature of a favorable advisory opinion regarding the merits of its lawsuit is clearly unfounded.

The Respondent also maintains that the district court found the lawsuit to be reasonably based. In a September 2, 1999 Order, issued without the benefit of oral argument, United States District Court Judge Vaughn R. Walker denied the Union's request for a stay of discovery in the court proceeding pending a Board determination of the instant charge. Judge Walker determined as follows:

In light of these allegations [i.e., the Respondent's allegations that the no-strike clause prohibited sympathy strikes], and the undisputed fact that CNA planned and threatened a sympathy strike, the court need not await the NLRB's guidance in order to determine that CHO has a reasonable basis for bringing the instant action. [Bracketed language added.]

Judge Walker's order, on a procedural matter, indicates that he was merely relying upon the Respondent's "allegations," at that early stage of the proceeding, and it is clear he was defining "reasonable basis" within that context. Until the court examined the Union's defense to the allegations there was no basis on which the court could evaluate the underlying issue in the instant proceeding, namely, whether a reasonable litigant could realistically expect success on the merits). To this latter question, Judge Walker's summary judgment order (*supra*), is quite relevant. I find this argument of the Respondent to be without merit.

On October 28, 1999, after the parties had engaged in substantial discovery over the meaning of the no-strike clause, the Union advised the court in a document entitled "Request for Status Conference to Modify Case Management Order," of "genuine issues of material fact which cannot be resolved without an evidentiary hearing before a finder of fact." The Respondent maintains that this language constitutes a tacit admission that its lawsuit had a "reasonable basis." The Respondent is apparently arguing that if there are genuine issues of material fact, then a lawsuit cannot be baseless. As noted above, the underlying issue in this proceeding is whether a reasonable litigant could realistically expect to prevail in its lawsuit, not whether some isolated facts may arguably be favorable to one side or the other. This argument of the Respondent is without merit.

The Respondent maintains that weight should be given to the fact that the Ninth Circuit held oral argument and issued a published opinion in this matter; therefore the lawsuit could not have been baseless because the court attached some significance to it. It would serve no purpose to speculate about the Ninth Circuit's rationale for holding oral argument and issuing a published decision. This argument is without merit.

The Respondent respectfully disagrees with the Ninth Circuit's determination of this matter, and makes the same arguments in this proceeding that it made before the District Court and the Ninth Circuit regarding the legal and factual merits of the controversy. It maintains that the Supreme Court's rationale in *Wright*, as extended by the Second Circuit in *Interstate Brands Corp. v. Bakery Drivers & Baking Goods Vending Machines*, 167 F.3d 764 (2d Cir. 1999), supports its argument that

union rights and employee rights are separate and distinct; that in unilaterally calling a sympathy strike, without first obtaining strike approval from the employees it represents, the Union was acting on its own behalf rather than as a representative of the employees; and that therefore, while the Union's waiver of employees' right to strike must be "clear and unmistakable," the Union's waiver of *its own* right to call a strike does not have to meet the "clear and unmistakable" test.³

The Respondent had several opportunities to convince the District Court and the Ninth Circuit of its position on this principle of law. Both courts thoroughly considered and dismissed the argument. Here, it is clear that the Respondent was not attempting to *apply* existing principles of labor law; rather it was attempting to *overturn* important, well-established, long-standing principles of labor law as developed and applied by the Board and courts. These principles have governed the affairs of unions and employers, including the Union and the Respondent, for many years. It could not be reasonably anticipated that such an important body of law would be summarily reversed. While the Respondent constructed an argument in support of its position, the Ninth Circuit found the Respondent's argument "unusual" and its reliance upon *Wright* as misplaced. Indeed, it found that *Wright*, the principal case relied upon by the Respondent, supports the Union's position rather than the Respondent's. Accordingly, I conclude that a reasonable litigant could not realistically expect to prevail on this principle of law.

The Respondent also argues that the District Court and Ninth Circuit were wrong in finding that the parties' bargaining history and past practice did not demonstrate a clear and unmistakable waiver of the right to engage in a sympathy strike. The Respondent also had several opportunities to present its evidence and arguments on this factual issue, and both courts, viewing the evidence in the light most favorable to the Respondent, granted the Union's motion for summary judgment and dismissed the lawsuit. The Respondent reargues the matter in its brief in this proceeding and maintains that the Ninth Circuit's opinion "failed to even discuss the extrinsic evidence supporting the Hospital's interpretation of the clause." The Respondent identifies the extrinsic evidence as follows:

The 1979 letter from CNA agreeing that it could not order a sympathy strike under the no-strike clause goes unmentioned in the Court's decision. Jt. Ex[h]. 17, Ex[h]. 6. The Ninth Circuit does not address an eye-witness's claim that no nurses crossed the picket line in 1979. Jt. Ex[h]. 6 at 842. The Court ignored the testimony of two percipient witnesses who stated that the 1987 no-strike proposal was presented as a clarifica-

³ Under the Respondent's theory, the nurses had a right to engage in a sympathy strike independently of the Union; thus the Union, but not the nurses, were subject to the no-strike clause vis-a-vis sympathy strikes. It would appear that argument is clearly inconsistent with the Respondent's prayer for an injunction, as follows:

2. An injunction permanently restraining CNA, its officers, agents, servants, representatives, *members and the employees it represents* from engaging in any future sympathy strikes, work stoppages, slowdowns or refusals to cross another union's picket lines; [Emphasis supplied.]

tion. Jt. Ex[h]. 6 at 833, 885–886, 908–909. And the Court's opinion essentially side-stepped the fact that both federal and state law in 1971 and 1997 (the time of the most recent negotiations between CNA and the Hospital) construed broad no-strike clauses to prohibit sympathy strikes.

First it should be noted that if the Respondent believed that the Ninth Circuit ignored, or neglected to address, or failed to mention, or sidestepped important extrinsic evidence, the Respondent could have pointed this out to the court in a motion for rehearing. What the court did find as credible evidence, however, shows that it either discredited or gave little significance to the evidence proffered by the Respondent, as follows:

Past Practice: In determining whether a waiver occurred, we look as well to "the interpretation of the contract by the parties, and the conduct of the parties bearing upon its meaning." [*Electrical Workers Local 387 v. Arizona Public Service*, 788 F.2d [1412], 1414 [(1986)]. Because these two factors are so closely related, we consider them together.

The parties' past practice, like the bargaining history, militates strongly in favor of the conclusion that CNA did not clearly and unmistakably waive its sympathy strike rights. To the contrary, the evidence regarding the steps that CAN took on several occasions to initiate sympathy strikes while the current no-strike clause was in effect, and CHO's consistent lack of response is wholly inconsistent with any determination that the parties mutually intended to waive the workers' right to engage in sympathy strikes.

For example, in 1979 SEIU Local 250, which represents many CHO employees, struck the Associated Hospitals. CNA leadership testified that because many of its own members failed "to perceive themselves as having a common cause with [the striking] workers," the union, after debating whether to call an official sympathy strike, decided against doing so.⁴ Nonetheless, some CAN-

⁴ The Ninth Circuit does not mention a April 12, 1979 letter from CNA Labor Representative Kenneth Absalom to the Respondent stating, inter alia, that the agreement does not prohibit registered nurses from honoring a lawful picket line of another union as a matter of personal conscience, and that "CNA will fully comply with the agreement in so far as it prohibits strike action or work stoppages directed by CNA; our membership will be so notified." The significance of this language was disputed by the parties in various depositions, and it may be reasonably presumed that the Ninth Circuit credited the statement of Absalom who, in a sworn declaration dated January 20, 2000, stated as follows:

Nor did CNA ever indicate to Associated Hospitals in the spring and summer of 1979 that the no-strike clause in its current collective bargaining agreement with Associated Hospitals prohibited sympathy strikes. When questioned in my deposition about the last paragraph in my April 12, 1979 letter to William Drum as the Administrator of CHO . . . I said that I did not have a specific recollection of what my reasoning was at the time I drafted that paragraph. I do know that I was not conceding in that last paragraph that the agreement prohibited CNA from striking in sympathy with Local 250 because I do distinctly recall that CNA did not have that understanding of the no-strike clause at that time. The problem with CNA's striking in sympathy with Local 250 in the spring of 1979 was not the no-strike clause in

represented nurses refused to cross the Local 250 picket line, thereby forcing CHO to close at least one unit of the hospital.⁵ Those sympathy strikers were not disciplined by CHO. Moreover, in 1983, Local 250 again engaged in a primary strike, and this time CNA issued a 10-day sympathy strike notice. Although the hospital now maintains that the understanding of the no-strike clause has always been that sympathy strikes by the employees acting on their own were permitted, but that the union was prohibited from calling such strikes, the record contains no communication to CNA that its proposed union-called sympathy strike would be illegal. In that case, as in this one, the primary strike was averted and the sympathy strike never occurred. Nonetheless, in 1983, CHO raised no legal objection to the proposed sympathy strike, nor did it seek clarification from the courts as to the scope of the no-strike clause. In 1996, SEIU Local 250 once again issued a ten-day strike notice, and CNA once again considered striking in sympathy. Although CNA posted a notice throughout the hospital that the nurses union would soon issue a ten-day strike notice in support of Local 250, no management official contacted CNA to assert that this was prohibited by the collective bargaining agreement.

The only reasonable inference from the bargaining history and past practice of the parties is that, at the very minimum, CNA did not clearly and unmistakably waive any sympathy strike rights. Drawing every possible inference in favor of the hospital, as we must, the most we could conclude would be that the parties agreed to disagree about the meaning of the clause. That, however, is insufficient to support a clear and unmistakable waiver. There was indisputably no "mutual intent" to include sympathy strikes within the scope of the general no-strike clause. *Indianapolis Power*, 797 F.2d at 1036 (noting that if "the parties had agreed to disagree over whether sympathy strikes were covered by the [no-strike] clause," then "a fortiori, no clean and unmistakable waiver of the right to honor picket lines" could be found.) Thus, the general waiver of the right to strike in the collective bargaining agreement does not include sympathy strikes. [Bracketed language in original.]

Regarding the Respondent's contention that the Ninth Circuit ignored the testimony of two percipient witnesses who stated that the 1987 no-strike "proposal" was presented as a clarification rather than as a proposal, the Ninth Circuit states, *inter alia*, under the heading of *Bargaining History*, that:

CHO now contends that its 1987 proposal was merely a "clarification" of the existing language, and that it supports the inference that sympathy strikes were always included in the scope of the general no-strike provision. The

the contract but the failure on the part of many CNA members to perceive themselves as having a common cause with other workers at the hospitals, which is a necessity before any union can call its members out on a sympathy strike.

⁵ This language shows that the court did not credit the Respondent's evidence that no nurses crossed the picket line in 1979.

history of the 1987 negotiations, however, supports the opposite conclusion: that *neither* side understood the general no-strike clause to include included [sic] a list of eleven numbered "language clarifications." The proposed sympathy strike language was not among them; instead, it was listed separately on the same document as a distinct "proposal." The hospital now contends the placement of the sympathy strike proposal on the document apart from the proposed "clarifications" was a typographical error.

Equally persuasive, toward the end of the contract negotiations, CHO offered to accept a CNA proposal for a tenure step change in exchange for CNA's accepting the new "no sympathy strike" clause. This bargaining posture indicates CHO's belief that to include sympathy strikes within the no-strike clause's reach would be an important change in the contract's terms, and not a mere "clarification" of the status quo. Otherwise, it would have been unlikely to offer such a concession in return for the new no-strike clause provision. See *Indianapolis Power*, 797 F.2d at 1036 fn. 10 (noting that a union's proposal to exclude sympathy strikes specifically from a general no-strike clause in two consecutive rounds of contract negotiations supported the inference that the union did not consider sympathy strikes to be permitted by the collective bargaining agreement in the first instance.).

Finally, given the thorough analysis and findings of the Ninth Circuit, the Respondent's contention that the Ninth Circuit "side-stepped" applicable law is patently erroneous.

2. Efforts to arbitrate the dispute

The Respondent maintains that its lawsuit was not retaliatory. In support of this argument the Respondent argues that it did not file the lawsuit until after it requested, and the Union refused, to arbitrate the issue under the arbitration provisions of the collective-bargaining agreement; this demonstrates its good faith in wanting to resolve the issue not before the courts but before an arbitrator. The initial problem with this argument is that after the Union refused to agree to arbitration, maintaining that the contract permitted only the Union to initiate grievances that could be subject to arbitration and that the Respondent had never before initiated an arbitration, the Respondent filed the lawsuit without attempting to seek court clarification of the arbitration provisions of the contract.

In its complaint the Respondent asserts that:

22. Because CNA has refused to arbitrate this matter, CHILDREN'S HOSPITAL is required to pursue the instant claims in federal court under Section 301, 29 U.S.C. § 185.

After the Respondent filed its lawsuit, the Union changed its position and advised the Respondent that it *would* agree to arbitrate the meaning of the no-strike issue on the condition that the Respondent would not use the arbitration proceeding as precedent for arguing that the contract permitted Respondent-initiated arbitration in the future. Thus, in an April 1, 1999 letter to the Respondent, prior to the time the Union was required to file its answer in district court, the Union states as follows:

After consideration of various approaches to resolution of this dispute and the expense of litigation, CNA is prepared to submit CHO's grievance at issue in this case to arbitration under the procedures of the collective bargaining agreement, on a non-precedential basis. This alternative resolution process will achieve your client's goal of submitting all issues to arbitration and preserve CNA's position that employer grievances are not substantively arbitrable under the contract.

As you know, CNA's responsive pleadings to the Complaint are due for filing tomorrow, April 2, 1999. If this proposal is acceptable, we are willing to prepare a stipulation for voluntary dismissal without prejudice under FRCP Rule 41 based on submission of the dispute to ADR [Alternative Dispute Resolution] procedures. If you and/or your client's representatives need more time to consider this proposal, we would request a brief extension of time to file responsive pleadings until you are able to formulate a position on our proposal.

The Respondent replied on April 15, 1999, as follows:

After considering CNA's April 1, 1999 offer to arbitrate this case, the Hospital has decided to reject that proposal. The Hospital is unwilling to arbitrate under an agreement that CNA is not obligated to do so.

The condition proposed by the Union seems quite reasonable under the circumstances: it would permit arbitration of the no-strike provision but would not change the *status quo*, that is, the parties' respective positions regarding the arbitration provision of the contract. Therefore the Respondent's refusal to arbitrate is incongruous. Consequently, from the foregoing, it appears that the Respondent, although initially professing a desire to arbitrate, was really not interested in resolving the issue through arbitration.

3. Conclusions

The stated purpose of Respondent's lawsuit was to preclude the Union from issuing 10-day notices of sympathy strikes, to preclude the Union and the employees it represents from engaging in sympathy strikes in the future, and to impose monetary damages on the Union for causing the Respondent to prepare for the announced sympathy strike; further, of course, the Respondent sought to change the provisions of the contract through court action rather than collective bargaining. Interference with such rights of employees under the Act is unlawful if undertaken for "retaliatory" purposes.

Lawsuits are disruptive, time consuming and very expensive, and it is reasonable to presume that one would not initiate a lawsuit without first critically evaluating the relative merits of the parties' positions. However, this presumption does not always hold true: lawsuits are filed and litigated for a myriad of reasons that may have nothing to do with the legal and factual merits of the controversy. Here, it seems necessary to discern the motive for the filing of the instant lawsuit by the process of elimination.

First, as noted above, it was not reasonable for the Respondent to believe that it could prevail on the legal issue, that is, the standard that should be used to determine the meaning of the no-strike clause; this would require the undoing of long-standing and well-established Board and court precedent, and, as the Ninth Circuit stated, the Respondent's argument was "unusual" and the principal case it cited favored the Union's position rather than the Respondents.

Nor was it reasonable for the Respondent to expect to succeed on the facts. The "clear and unmistakable" burden requires a "mutual" agreement that the no-strike clause prohibits sympathy strikes. Obviously there was no mutual agreement here; given the history of collective bargaining and the past practice of the parties no other conclusion may be drawn.

Finally, Respondent has advanced no persuasive reason for refusing to arbitrate the matter under the condition imposed by the Union, namely, that the arbitration be considered non-precedential in the sense that it would not give the Respondent the continuing right to file grievances and arbitrate other matters under the contract. Clearly arbitration would have been a much less costly and much more expedient way of resolving the dispute; indeed, it was the Respondent that initiated the possibility of arbitration, and it was alleged by the Respondent in its complaint that it was compelled to file the lawsuit because of the Union's refusal to arbitrate. Therefore, the Respondent's refusal to arbitrate is, I find, also indicative of a retaliatory motive.

Under these circumstances, and absent any other argument by the Respondent that would provide some lawful, non-retaliatory rationale for filing the lawsuit, I conclude there is none. Accordingly, I find that the baseless lawsuit was retaliatory in violation of Section 8(a)(1) of the Act, as alleged. See *Diamond Walnut Growers*, 312 NLRB 61, 69 (1993); *Phoenix Newspapers, Inc.*, 47, 49-50 (1989); *H. W. Barsz Co.*, 296 NLRB 1286, 1287 (1989).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) of the Act as set forth herein.

THE REMEDY

Having found that the Respondent's filing and pursuit of the lawsuit against the Union violated Section 8(a)(1) of the Act, I recommend that the Respondent be ordered to reimburse the Union for all legal and other expenses it incurred in defending against the Respondent's lawsuit, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

[Recommended Order omitted from publication.]