New England Regional Council of Carpenters, a/w United Brotherhood of Carpenters and Joiners of America[1] ***and*** **Village Construction Company, Inc.** Case 1–CC–2712

September 29, 2007

DECISION AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On July 15, 2004, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a supporting brief, as well as a brief in response to the General Counsel's and the Charging Party's exceptions. The American Federation of Labor and Congress of Industrial Organizations and the AFL–CIO Building and Construction Trades Department filed a brief amici curiae.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to remand this case for further consideration in light of our decision in *BE & K Construction Co.*, 351 NLRB 450 (2007), on remand from 536 U.S. 516 (2002).

This case involves the question of whether the Respondent Union violated Section 8(b)(4)(ii)(B) of the Act by filing comments and an appeal with the Massachusetts Department of Environmental Protection (the DEP) as part of its effort to cause the Rockett family to cease doing business with C. White Marine, a nonunion pile driving company. In *BE & K Construction Co.*, supra, the Board held that the filing and maintenance of 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. While this case does not involve the filing and maintenance of a lawsuit, the question is whether the principles of the Board's decision in *BE & K* should be applied to the conduct at issue here—the filing of comments and appeal with the DEP.

Accordingly, the Board has decided to remand this case to the judge in order to allow him and the parties the opportunity to consider this matter in light of the Board's decision in *BE & K*, supra. The judge is directed to issue a supplemental decision addressing the question of whether the analysis we adopted in *BE & K* is applicable to the Union's filing of comments and an appeal with the DEP and, if so, whether the comments and appeal were reasonably based under the facts and circumstances of this case.

ORDER

This case is remanded for further proceedings consistent with this Decision.

William F. Grant, Esq. and *Elizabeth Tate, Esq.,* for the General Counsel.
Christopher N. Souris, Esq., for the Union.
Richard D. Wayne, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Boston, Massachusetts, on February 9, 10, and 11, and April 30, 2004.

The charge was filed on May 30, 2003, and the complaint was issued on December 30, 2003. Thereafter, an amended charge was filed on January 22, 2004, and those allegations were encompassed within an amendment to the complaint. In substance, the complaint, as amended, alleges.

1. That the Union has had a primary labor dispute with C. White Marine, Sullivan, and other carpenter contractors who do not have contracts with the Carpenters Union.

2. That at no time has the Respondent had a labor dispute with Pickering Wharf Realty Trust (Pickering or Village Construction).

3. That in furtherance of its dispute with primary employers, the Union on or about May 23, 2003, by its representative Steve Falvey, filed comments with the Massachusetts Department of Environmental Protection Waterways Regulation Program (the DEP), in opposition to the Pickering's application for a second license for the Pickering Wharf project which is the development and construction of commercial real estate complex in Salem, Massachusetts.

4. That in furtherance of its dispute with the primary employers, the Union, on or about January 7, 2003, filed an appeal with the DEP in opposition to the Pickering's application for a second license for the Pickering Wharf project.

5. That by the aforesaid actions, the Union threatened, restrained, or coerced Pickering and/or Village with an object of forcing or requiring the persons to cease doing business with C. White Marine and other persons.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] We have amended the caption to reflect the disaffiliation of the United Brotherhood of Carpenters and Joiners of America from the AFL–CIO effective March 29, 2001.

II. ALLEGED UNFAIR LABOR PRACTICES

The Derby and Congress Street Realty Trust, formerly known as the Pickering Wharf Realty Trust, is a real estate development company owned by the Rockett family. It has been engaged in the development of a commercial real estate venture in Salem, Massachusetts, at what is called the Pickering Wharf. This development includes the building of a hotel, commercial rental properties, a bank, and residences at a site abutting the waterfront. The two principles involved in this case are Michael and Hillary Rockett. The Rockett family owns the real property upon which the development is taking place. The project has or will receive tax incentives from the City of Salem. It is not, however, a public project governed by either the Federal Davis Bacon Act or by the State equivalent.

The Rocketts have acted as their own general contractor and to this end have a company called the Village Construction Company. For construction purposes, Village has subcontracted and continues to subcontract various parts of the construction to different subcontractors including companies who do work that normally would be defined within the Carpenter's craft. In building this development, the Rocketts have utilized both union and nonunion contractors. In this regard, neither the Trust nor Village Construction Company directly employs any part of the actual work force that is used for the construction other than a construction manager.

In order to build this project, the Rocketts needed to get a number of city and State permits. One of these was a permit from Massachusetts Department of Environmental Protection (the DEP), because the land, which is close to the harbor, is considered filled tidal land and falls within the jurisdiction of that agency.

Planning for the project began in or around 1998. On December 15, 2000, the DEP approved a license. The license approved the construction of a 5-story 99-room hotel (with a restaurant, pub, and retail space on the premises), plus a 1-story bank. As part of the approval, "waterfront and connecting walkways will be required pursuant to 310 CMR 9.52, to allow the public access to and along the shoreline . . . to provide continuous, uninterrupted public pedestrian access, along the South River." The DEP concluded that the construction project was for nonwater-dependent uses pursuant to the relevant State statute. The approval was for two buildings occupying a total of 16,585 square feet, which would contain substantial open spaces, parking spaces, walkways, and site roadways on the total site of approximately 40,822 square feet.

Nevertheless, construction did not go forward because a group of people filed an appeal from the DEP's approval. This group essentially was led by the owners of a competing hotel. Ultimately that appeal was withdrawn after the Rocketts filed an antitrust suit against the DEP appellants.

On December 20, 2002, the DEP approved a request to modify the original license approval. This involved the request, by the Rockets to modify the hotel by adding 5 feet (58 to 63 feet), and to allow for a total of 108 hotel rooms. (An increase of 9 rooms.) The DEP also approved a minor decrease in the building's footprint. No comments or appeal was made to this application and therefore approval was final.

Sometime in late 2002, the Rocketts decided to alter their plans for the hotel by converting the top two floors into residential condominiums. The intention was to reduce the hotel rooms from 99 to 84 and to have the remainder allocated to luxury apartments.

On March 6, 2003, the City of Salem amended its permit to accommodate the requested change. In substance, this also permitted the addition of 16 parking spaces, a new sidewalk to the rear of the hotel with a new exclusive residential entrance, a reduction in the hotel's footprint size, and a slight increase in the bank building from 2262 to 2306 square feet.

On March 13, 2003, the Rocketts filed an application to modify its license number 9331 with the DEP. Pursuant to the DEP's procedures, a legal notice was posted allowing public comments to be made by May 23, 2003. Under the DEP's rules, a comment can be filed by an adversely affected person or by a group of 10 or more citizens of Massachusetts. If comments are filed, the department is obligated by State law to review the application in relation to the comments and render a written determination.

Groundbreaking for the project was in April 2003. (A month after the application for the license modification was filed.) As part of the foundation, the Rocketts contracted with a company called C. White Marine to do pile driving work. This is work that is claimed by the Carpenters Union C. White Marine operates as a nonunion shop and the Union has had past disputes with this employer.

On Monday, May 12, 2003, the Union commenced picketing at the project. The picket signs identified Local 46 Carpenters and the signs identified C. White Marine as the person with whom the Union had a primary labor dispute. In addition, leaflets published by the Respondent were handed out to various people. One stated in pertinent part:

> The Rockett family has gotten a $2 million tax break to build a hotel at Pickering Wharf. At the same time, they keep demanding higher and higher rent from small business owners who are their tenants. And now they've taken all that money and hired an unscrupulous subcontract, C. White [M]arine, to work on the new hotel. C. White Marine is known to break the law, do unacceptable work and employ untrained workers at low wages.
>
> Salem needs a hotel, but not one that's built on the backs of workers, small business owners and other taxpayers. Come talk to the Carpenters demonstrating at Pickering Wharf. Help us change the direction of this project, which is so important to the future of Salem.

On May 13, 2003, Eric Rumpf, the construction manager, had a conversation with Respondent's agent, Steve Falvey, at the project. According to the credited testimony of Rumpf, he told Falvey that he thought the Union's protests were premature as there was more work to be awarded. Nevertheless, Falvey told Rumpf that the only way this action would go away, short of giving the job to EMR (a union contractor), was if Mike Rocket would commit that the job would be given to union contractors. When Rumpf replied that the job couldn't be given out without prices, Falvey said that he would be relentless about getting the job for his members.

On May 22, 2003, Falvey faxed a petition to the DEP with the names of 15 Salem residents. In pertinent part, this stated:

> We have significant concerns as to the intent of the applicant to provide public access to the waterfront. We believe the increased residential portion, which is sought, will impact the water dependent uses of this waterfront property in a negative way. This project will further restrict the remaining access to the harbor of small craft owners and recreational fishermen and we believe that granting this amendment will lead to further deterioration of this tidal area. We believe that allowing a permanent residential use within this development will change the approval concept in a way which requires more data before an amendment can be granted. It is our intention, as a group of ten or more citizens, who are members of the United Brotherhood of Carpenters . . . to provide information to the Waterways Regulation Program in advance of the Public Comments Deadline, which is Friday, May 23, 2003.

Since Falvey was not sure if this form of the petition was proper because unsigned, he drafted another substantially similar document containing the signatures of 11 employees or members of the Union. He sent this to the DEP on May 23, 2003.

A couple of things might be said about these two documents. There was testimony from one of the persons named in the May 22 petition to the effect that he never saw the document or that he was asked to approve it. Further, Falvey did not ask for or read the original approved applications, which described this project and which contained the mandated plans for walkways and waterfront access. Falvey simply had no basis for claiming that this application for a license amendment, would in any way impede or obstruct access to, or use of the waterfront. Moreover, his assertion that changing the use of the structure from a hotel to a hotel with some residences (which would mean a reduction in the number of users) could result in some kind of impediment to access, is patently ridiculous.

On May 30, 2003, a meeting was held in the office of Mayor Stanley Usovicz. At this meeting, Union Representative DiGiovanni stated that he didn't think that the Company was being fair to union contractors. To this, Hilary Rockett stated that it was hard for him to consider union contractors now that the comments had been filed with the DEP. The credible evidence is that at or near the conclusion of the meeting, the Union's representatives were asked why they were filing a frivolous appeal with the DEP and DiGiovanni said, "[B]usiness is business," and that "we'll do whatever we have to do to get the job."

On June 24, 2003, Rumpf spoke with Falvey at the construction site. According to the credited testimony of Rumpf, Falvey refused to withdraw the DEP comments and stated that when Sullivan Construction (a nonunion firm) started its work, there would be pickets at all of the gates.

Rumpf also testified that he had numerous conversations with Falvey during the summer of 2003, and that during one, in late August or early September, Falvey told him that he would not withdraw the DEP comments and said that although he didn't expect to get union contractors for the project, "there are other legal ways to get to you guys."

On December 17, 2003, the DEP made a written determination and approved the request for an amended license. In pertinent part, this stated:

> The proposed hotel and bank were authorized by License 9331, issued on May 10, 2003. The purpose of the amendment request was to seek authorization for the conversion of the top two floors of the hotel building to residential use, and to seek and extended license term. The Department previously approved . . . . A 5 foot increase in the height of the building, which enabled the addition of a sixth floor to the hotel and the reconfiguration of Facilities of Public Accommodation on the ground floor of the hotel building.
>
> The footprint of the hotel building is approximately 13,736 square feet and the covered drop-off area adds an additional footprint area of approximately 1,392 s.f. This is a minor reduction in area compared to that currently authorized. . . .
>
> The project will also advance important goals of the Salem Municipal Harbor Plan. . . . First, the project will improve pedestrian connections along Derby and Congress Streets by enhancing the landscape and accessibility of the city sidewalks adjacent to the project site. Second, the hotel use will help provide Salem with a vibrant waterfront.

The December 17, 2003 determination, which is 13 pages long and was faxed to Falvey at his request, sets forth the appeal procedure at page 12. Stating that an appellant has the right to an adjudicatory hearing, the request for an appeal must specifically request that an adjudicatory hearing is being requested. Additionally, the appellant must state clearly the facts that are the grounds for the request and must state why the decision is not consistent with applicable laws and regulations. The appeal has to be filed within 21 days of the DEP determination and ordinarily has to be accompanied by a filing fee unless waived or exempt.

On January 7, 2004, Falvey filed the following appeal:

> I hereby appeal the December 17, 2003 written determination to approve the above referenced application, which I believe violates 310 CMR 9.00 for the reasons that are contained in the comments that I submitted previously. I am faxing this appeal because I was only notified of the December 17, 2003 determination this afternoon and I understand that the time to appeal expires at 5:00 this afternoon. I reserve the right to supplement this appeal statement at a later date.

On January 26, 2004, Falvey sent a supplemental appeal statement to the DEP. In terms of any substantive objection to the license, this letter stated:

> On the subject of the appeal, I am just saying as I did in my May 23, 2003 comments that it seems to me that the application for the change in the license represents a very meaningful change in the nature of the project and that the change has potential environmental impacts that should be examined before the amendment is approved. Instead of just a hotel, with people visiting on a temporary basis, the two floors of permanent residential units are proposed. It seems really obvious to me that waterfront residential unit owners will be much more in-

> clined than temporary hotel guests to keep their own boats in the area. I am no expert on these maters but this increased congestion of the tidal area and waterway seems to me to raise public access issues that merit closer examination by the agency before acting on the application for the change.

With respect to Falvey's appeal, there are a number of noteworthy items. First, in neither his appeal nor his supplemental statement, did he comply with the requirement that he request an adjudicatory hearing. Second, as to the substance, other than the conclusory statements made by him in his comments regarding access to the water, the supplemental statement opines that the few permanent residents at the hotel, *might* have boats and *might* park their boats in the adjacent marina. This assertion is based on conjecture, which even if correct, would hardly impact on other boaters' access to the water. Thus, like the original comments, I consider the statements made in the appeal as conjecture at best and nonsense at worst. Indeed because the appeal does not ask for an adjudicatory hearing, I don't quite understand why the DEP, in accordance with its own rules, did not dismiss it forthwith.

Interestingly, the Charging Party did not respond to or submit any statements to the DEP regarding the appeal.

On February 13, 2004, after the initial hearing in this case concluded, Falvey sent a letter to Ben Lynch of the DEP stating in substance, that he was not seeking a trial. On February 18, 2004, the DEP issued a notice to parties indicating that it was referring the appeal to the Division of Administrative Law Appeals for further processing. On February 20, 2004, Falvey responded and reiterated that he was not asking for and did not want a trial before an administrative law judge. On February 23, 2004, the DEP, by Samuel J. Bennett, its senior counsel, sent a letter to Falvey informing him that in order to properly withdraw the appeal, he had to file a document with the docket clerk stating that on behalf of the 10 residents, he was withdrawing the appeal with prejudice. On February 23, Falvey did file such a withdrawal. And finally, on March 29, 2004, Benny Cashin, administrative magistrate, issued a "Final Decision-Order of Dismissal."

At the time of the resumed hearing, the DEP had not yet issued the amended license. But the license ultimately was issued on April 28, 2004.

III. ANALYSIS

The complaint alleges only that the Respondent violated Section 8(b)(4)(ii)(B) of the Act. It does not allege that the Respondent violated Section 8(b)(4)(i)(B) or (e) of the Act.

The pertinent statutory provision states that it shall be an unfair labor practice for a labor organization "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

Firstly, let me state at the outset that I am convinced, based on the evidence as a whole, and after considering the demeanor of the witnesses, that the Union, by Falvey, filed the comments and the appeal from the DEP determination to grant the license modification because he wanted to retaliate against Village for its failure to utilize or do business with union carpenter contractors or contractors who, in the opinion of the Union, would pay their workers wages and/or benefits acceptable to the Respondent.[1] I conclude that the filing of the comments and the subsequent appeal was done for *an* object of forcing or requiring Village to cease doing business with C. White Marine, Sullivan or any other persons with whom the Union had a primary labor dispute.

But that does not, by itself, end the story. The complaint alleges that the Union violated Section 8(b)(4)(ii)(B) of the Act. In order to make out such a violation, it is necessary for the General Counsel to prove that the Union engaged in acts which "restrained" or "coerced" an employer (in this case Village), *and* that it did so with an object of forcing or requiring that employer to cease doing business with other persons (in this case C. White Marine, Sullivan Construction, or other contractors who do not employ union labor or otherwise meet standards acceptable to the Union. If the General Counsel proves either without proving both, then there would be no violation of this section of the Act. Thus, if the General Counsels show that the Union had an object of forcing or requiring Village to cease doing business with C. White Marine, but did not show that the Union engaged in acts that are defined as "restraint" or "coercion," then no violation would have occurred. For example, even if a union has a secondary object, it does not violate Section 8(b)(4)(ii)(B) if it engages in truthful handbilling that does not affect deliveries, because that type of conduct, even if it might seem to be coercive by a layman, is not defined as restraint or coercion within the meaning of subsection (ii).[2]

By the same token, a union may engage in acts that are construed as restraint or coercion, but if an object of those acts is not to force or require one person to cease doing business with another, then no violation would exist. For example, if the employer "coerced" by a union's acts is an ally with the person

[1] It should be noted that such goals are perfectly legal and legitimate under the NLRA. A major issue that the Union expressed is their perception that many nonunion contractors list their employees as independent contractors and, among other things, seek to thereby avoid the payments required under the State's workers' compensation law.

[2] The second proviso to Sec. 8(b)(4)(B) states: "That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducting any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

with whom the Union has a dispute, there is no violation of this Section of the Act. *Marine Cooks & Stewards (Irwin-Lyons Lumber Co.),* 87 NLRB 54 (1949).

Therefore, in secondary boycott cases, it is necessary for the General Counsel to prove **(**1**)** that the Union engaged in coercive acts *and* (2**)** that such acts had a secondary object. As pointed out by the Supreme Court in *NLRB v. Servette, Inc*., 377 U.S. 46, (1964), it is not an unfair labor practice for a union to ask store managers of secondary employers not to handle goods distributed by struck employer. The Court held that the act of merely asking a store manager to perform the managerial function of deciding whom to do business with is not inducement within the meaning of Section 8(b)(4)(i) *or* restraint or coercion within the meaning of Section 8(b)(4)(ii). Thus, there is no violation even though the union in such a case has a secondary object.

Further, in *NLRB v. Fruit & Vegetable Packers Local 760, (Tree Fruits*), 377 U.S. 58 (1964), the Supreme Court held that secondary picketing of retail stores confined to persuading customers to cease buying the product of primary employer did not constitute "restraint or coercion" and did not fall within area of secondary consumer picketing condemned as an unfair labor practice, *even if the picketing was effective to reduce secondary employer's sales of primary employer's product leading or possibly leading to secondary employer dropping the item as a poor seller*. The Court stated:

> The Board's reading of the statute—that the legislative history and the phrase 'other than picketing' in the proviso reveal a congressional purpose to outlaw all picketing directed at customers at a secondary site—necessarily rested on the finding that Congress determined that such picketing always threatens, coerces or restrains the secondary employer. We therefore have a special responsibility to examine the legislative history for confirmation that Congress made that determination. Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing. . . . We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless "there is the clearest indication in the legislative history," ibid., that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.
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> We have examined the legislative history of the amendments to Section 8(b)(4), and conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an "isolated evil" believed to require proscription of peaceful consumer picketing at secondary sites was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute. This is not to say that this distinction was expressly alluded to in the debates. It is to say however, that the consumer picketing carried on in this case is not attended by the abuses at which the statute was directed.
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> The story of the 1959 amendments, which we have detailed at greater length in our opinion filed today in *NLRB v. Servette*, 377 U.S. 46 [(1964)], begins with the original Section 8(b)(4) of the National Labor Relations Act. Its prohibition, in pertinent part, was confined to the inducing or encouraging of "the employees of any employer to engage in, a strike or a concerted refusal to handle any goods of a primary employer." This proved to be inept language. Three major loopholes were revealed. Since only inducement of "employees" was proscribed, direct inducement of a supervisor or the secondary employer by threats of labor trouble was not prohibited. Since only a "strike or a concerted refusal" was prohibited, pressure upon a single employee was not forbidden. Finally, railroads, airlines and municipalities were not "employers" under the Act and therefore inducement or encouragement of their employees was not unlawful.

Just as both elements comprising coercive or restraining conduct *and* secondary objective are required to find a violation of this section of the Act it goes without saying that it would be an anomaly to find that a union engaged in a "coercive" act, *because* that act had a secondary object. So, as I stated at the outset of this part of the decision, my conclusion that the Union, by filing comments and an appeal with the DEP, was motivated by a desire to put pressure on Village to force it to cease doing business with employers with whom the Union has a dispute, does not answer the ultimate legal question in this case. And that question is, can these two acts by the Union, which essentially involve the invocation of a legal process authorized by the State of Massachusetts, be construed as "restraint" or "coercion" as those terms are defined by Section 8(b)(4)(ii) and not as defined in common usage.

The General Counsels contend that by filing the comments and taking an appeal within the DEP, the Respondent engaged in coercive conduct in the same way that an Employer may be

found to have violated Section 8(a)(1) of the Act when it files a lawsuit against employees or a union in retaliation for their union or conduct protected by Section 7 of the Act. For reasons, both factual and legal, I disagree with the conclusion that the conduct in this case can be construed as "restraining" or "coercive" as that term is used in Section 8(b)(4)(ii). Nor do I agree that the General Counsel can justify this charge by relying on the Supreme Court's decision in *BE & K Construction Co.*, 536 U.S. 516, 532 (2002).

There has arisen a body of law under the NLRA, by the Board and the courts dealing with the question of whether the Board has authority to order a Respondent to cease and desist from filing or prosecuting a lawsuit where an object is to retaliate against the other party for engaging in rights protected by the National Labor Relations Act (the Act).

The rationale for finding that a lawsuit can constitute restraint and/or coercion is based on the fact that when a lawsuit is filed it must be answered (preferably by a retained lawyer) and must be contested in a costly and time-consuming process that may ultimately cost a defendant his money, property or freedom. (Ultimately, even in a civil action between two nonstate parties, the physical power of the State's governmental agents can be brought in to compel the losing side to turn over assets to the other, or to compel that side, by means of injunctive relief, to modify his or her behavior. Failure to comply will subject a party to the contempt powers of a Court and can result in the loss of one's personal freedom.)

As pointed out by the Respondent, the actions of the Union in this case did not rise to the level of a lawsuit, inasmuch as the Union merely filed a comment with the DEP as to the appropriateness of that agency granting an amended license to build on a waterfront property in the State of Massachusetts. Thus, the comment process *by itself* is a mechanism whereby the State agency allows any person or persons to comment on a license for any reason, good, bad, or indifferent. I will assume that the DEP has people with expertise to evaluate a license application and related comments and are more capable than me, the General Counsel or the Board in construing and applying the applicable State law. And as shown in this case, inasmuch as the Union's comments were deemed to raise no issue, the DEP, on December 22, 2003, sent a notice that the amended license would be granted.[3] If there was no further action, the coercive potential of the State would not come into play and the project could go forward without fear of legal action. And at this point in time, there is no evidence that there was or even could have been any delay in the projects' construction as a result of the "comments."

If there was any action by the Union that could be construed as analogous to a lawsuit, it might be the appeal that Falvey filed on January 7, 2004. The analogy is perhaps apt because upon the filing of a proper appeal, a case is opened before a state administrative law judge who can hear evidence and make a decision on the license application that is appealable in the State courts. But in this case, Falvey filed an appeal, which did not comply with the requirements of State law and was, in any event, withdrawn on February 23, 2004. On March 29, 2004, Benny Cashin, administrative magistrate, issued a "Final Decision-Order of Dismissal."

Nevertheless, even assuming arguendo that the Union's actions with respect to the DEP can be viewed as analogous to a lawsuit, the next question is whether that would constitute restraint or coercion. Or if coercive in a layman's sense, still protected by the First Amendment.

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

With the passage of the 14th Amendment, the provisions of the First Amendment were applied to the states so that no State could make laws abridging the foregoing rights.

The right to free speech and the right of the people to petition the Government to redress grievances, while having separate applications, are obviously inextricably related to a common purpose. It would not make much sense to allow people to petition the Government if they could not assemble or otherwise communicate their grievances to each other before, during or after making their petitions known. The opposite side of the coin is equally true. The ability to peaceably assemble and exchange ideas would be of little use if people were unable to petition their governmental representatives for redress of their grievance.

And while the right of free speech has been recognized as going far beyond the right merely to exercise political speech, so too the right to petition the Government has come to mean far more than the right to file a petition with the appropriate state legislature. It encompasses the right to appeal to one's local, State, or Federal representatives, the right to file lawsuits in Federal and State courts, and the right to appeal to administrative agencies. (No doubt it also encompasses the right to appeal in other ways to agents of any governmental body.)[4]

Previous to the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Board took the position that an employer would commit an unfair labor practice if it filed a lawsuit against a union or employees, if that lawsuit was motivated by a desire to retaliate against employees for exercising their Section 7 rights. The Board had concluded in its *Bill Johnson's* decision that it could order the employer to halt the prosecution of an *ongoing* lawsuit where those conditions were met. The Supreme Court disagreed and held that under the petitioning clause of First Amendment, people (in-

[3] Presumably if the DEP had refused the license amendment, its people would have concluded that Falvey's comments had merit.

[4] Without necessarily agreeing with the author's conclusions, I refer the reader to "The Impact of BE&K on Employer Responses to Union Corporate Campaigns and Related Tactics" by Maurice Baskin and Herbert R. Northrop in the fall of 2003 issue of the Labor Lawyer. This article covers the historical background and an analysis to the Court's decision in *BE & K v. NLRB*, 536 U.S. 516 (2002). See also "After BE&K: The Difficult Question of Defining The First Amendment Right to Petition Courts," by Carol Rice Andrew, Houston Law Review, spring 2003.

cluding employers), had the right to file lawsuits and that the Board's authority to restrain such persons from filing lawsuits was more constrained than the Board had assumed. In *Bill Johnson's,* the Supreme Court held that as to an *ongoing* lawsuit, the Board can halt its prosecution if it found that the suit lacked a reasonable basis in fact and law and had been brought for a retaliatory motive.[5] The Court also held that with respect to an *unsuccessfully completed lawsuit*, the Board could find that the employer violated Section 8(a)(1) of the Act only if the suit was withdrawn or otherwise shown to be without merit *and* was filed with a retaliatory motive.

I note that under the Supreme Court's decision in *Bill Johnson's*, the legal conclusions can also be stated as follows. That with respect to an *ongoing* lawsuit, with the exception of those limited situations described in footnote 5, the Board may not enjoin a person from prosecuting a lawsuit if the suit has a reasonable basis in fact or law, even if it is filed with a retaliatory motive.[6] Also, the Board may not enjoin a lawsuit even one having no reasonable basis in fact or law, if it is filed without a retaliatory motive. Thus, with respect to an *ongoing* suit, the Court held that in the absence of a retaliatory motive a person is entitled, under the First Amendment, to "petition" the government even if he or she is ill informed, stupid, or just plain nuts.

As to concluded lawsuits, where the outcome was adverse to the plaintiff, the Court opined that the Board could not find a violation unless if was shown that the lawsuit lacked merit and was filed with a retaliatory motive. Thus, if filed with a retaliatory motive, the Board could not find a violation if the lawsuit has merit. Moreover, it could also not find a violation if the lawsuit lacked merit but was not motivated by retaliatory reasons.

At the time that the allegations of this complaint were being litigated before me, the "legal action" before the DEP was still pending. Thus, if this is considered to be analogous to a lawsuit, then it was *ongoing* at the time of this trial. And in this regard, the General Counsels asserted at the hearing that they were not contending that the DEP legal action did not have merit. As I read, the Supreme Court's opinion in *Bill Johnson's,* this by itself, would be grounds for dismissing this complaint. On the other hand, because Falvey withdrew the appeal, it might be said that this would meet the Court's definition of an unsuccessfully concluded and therefore not ongoing legal action.

It seems to me that the Supreme Court in *BE & K v. NLRB*, supra, did not expand the Board's authority, but instead further limited it insofar as lawsuits or other "petitions" protected by the First Amendment. Or put another way, it increased the scope of protected actions under the First Amendment.

The immediate question before the Supreme Court in *BE & K* was whether an unsuccessfully completed lawsuit could be the basis for the Board to find that the employer violated Section 8(a)(1) of the Act. In *BE & K* the employer responded to a union's campaign and lawsuits against it by filing a lawsuit of its own. Ultimately, all of the counts in its lawsuit were dismissed or withdrawn. After BE & K's suit was concluded, two of the union-defendants filed charges with the NLRB contending that by filing and maintaining its lawsuit, BE & K had violated Section 8(a)(1). The Board found that the employer had violated the Act and ordered it to reimburse the unions their attorney's fees.

The Supreme Court unanimously invalidated the National Labor Relations Board's standard for imposing unfair labor practice liability on employers who file lawsuits against unions. It concluded that even if a lawsuit was motivated by retaliatory reasons and even if it was ultimately unsuccessful, a lawsuit could *not* be grounds for an unfair labor practice if it had some reasonable basis. That is, the Court indicated that in order to have a reasonable basis the plaintiff, in such a lawsuit, need only show that he is trying to stop conduct he reasonably believes is illegal. The standard set out by the Court was that the plaintiff's belief be "genuine both objectively and subjectively." The only possible exception to this is a lawsuit that is shown to constitute "sham litigation," which the General Counsel wishes to define as a lawsuit motivated solely to impose costs on the defendant, regardless of the outcome of the suit.[7]

But what is a sham lawsuit? The Court concluded that merely because a lawsuit has a retaliatory motive does not mean it is sham litigation. Thus, the fact that the Union here may have initiated a legal type of proceedings before the DEP, for the purpose of retaliating against the Charging Party for not using union contractors, does not automatically mean that its legal action was a "sham." In fact, the General Counsels concedes that they do not know if Falvey's action had any merit in terms of the applicable Massachusetts law. If that is the case, then how can I conclude that this action was a sham, even if I suspect, without any relevant experience in environmental law, that Falvey had no factual or legal basis to base his appeal at the DEP.

But that is not the only reason that I conclude that the Union's actions did not constitute restraint or coercion as that term is used in Section 8(b)(4)(ii).

At the time that the Union, by Falvey, filed the comment before the DEP, the foundation of the project was being laid. The application for the license modification requested that the top

[5] I note that in fn. 5, the Court did allow for some exceptions where the Board could enjoin an ongoing lawsuit. For a discussion of fn. 5, which in my opinion, is not applicable to the present case, see my decision in *Regional Construction Corp*., 333 NLRB 313 (2001).

[6] One of the fn. 5 exceptions deals with the filing of a lawsuit by a union to compel an employer to comply with a hot cargo agreement outlawed by Sec. 8(e). *Elevator Constructors (Long Elevator*), 289 NLRB 1095 (1988). That type of case is distinguishable from the instant case because there the Union was seeking to "reenter" an illegal agreement, which by the terms of the Act, was "null and void" and violative of Sec. 8(e). There is no contention here that there exists any agreement between the Union and the Charging party that is unlawful under Sec. 8(e) of any other statute and whose enforcement, via arbitration or a lawsuit, would result in a violation of the Act.

[7] This concise description of the Court's decision may be a bit abrupt inasmuch as there were three separate opinions by the Court. Justice O'Connor wrote the opinion of the Court. Justice Breyer wrote a concurrence on behalf of himself and Justices Souter, Ginsberg, and Stevens. Justice Scalia wrote a concurrence on behalf of himself and Justice Thomas.

two floors of the building be converted from hotel rooms to condominiums. The construction was nowhere near the end stage at the time that the comments were filed and there is no evidence that it was anywhere near completion when the appeal was filed.

As noted above, had the Union not filed the appeal, the DEP's approval of the license modification would have been granted and the Employer could have, when it was time, finished construction of the building with the top floors designated to be condominiums. The filing of the comments did not and could not have caused any delay in relation to the stage that the construction was in at the time.

But even if the appeal had gone forward, it is unlikely that it could have affected the construction of the building. The Employer contends that the Union's appeal was frivolous and without any merit. If that is the case, it could have confidently gone forward with the construction and completed the building while waiting for the approval to eventually come. (As far as I know, there is no procedure to halt the construction while the approval is pending.) Even if there was any doubt as to the appeal's merit, the Employer could have gone ahead with the construction, designated the top two floors as large hotel suites and converted them to condominiums when the DEP's approval was ultimately granted. And if the license modification was not ultimately approved, then it would have turned out that the Union's appeal was not so frivolous and that it had merit after all.

Finally, I don't think that the filing of the DEP appeal can be construed as coercive under the terms of Section 8(b)(4)(ii) because (1) it was invalidly filed and (2) it was soon withdrawn. In my opinion, this whole matter is now moot and I do not think it wise to decide a case involving such unprecedented and difficult issues of law on the basis of this record.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.[9]

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] Even if a violation were to be found in this case, I would reject the remedy sought which requests that the Respondent reimburse the Charging Party for all reasonable costs, including attorneys fees associated with defending the DEP matter. In this regard, I note that for secondary boycotts, as opposed to other sections of the Act, Congress gave the Board the authority to issue injunctive relief only (cease-and-desist orders), while leaving collection of compensatory monetary damages to civil lawsuits under Sec. 303 of the Act.