

**American Pacific Concrete Pipe Company, Inc and
Donald Roland Case 31-CA-13776**

February 21, 1989

DECISION AND ORDER

**BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND CRACRAFT**

On January 31, 1985, Administrative Law Judge Richard J. Boyce issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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 affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint, which alleged that the Respondent's state court lawsuit against Charging Party Donald Roland violated Section 8(a)(4) and (1) of the Act. We reverse.

On July 23, 1982, the Board issued a decision¹ in Case 31-CA-10098 finding, *inter alia*, that the Respondent violated Section 8(a)(3) and (1) of the Act by its April 1980 refusal to recall employee Donald Roland, and ordering the Respondent to offer Roland reinstatement and make him whole for his economic losses. The Court of Appeals for the Ninth Circuit enforced the Board's Order on April 28, 1983.²

On September 23, 1983, the General Counsel issued a backpay specification alleging, *inter alia*, that Roland was entitled to backpay totaling \$46,620³ plus interest. On November 23, 1983, at a meeting between representatives of the Respondent and General Truck Drivers, Warehousemen and Helpers Union Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Charging Party in Case 31-CA-10098), Roland agreed, *inter alia*, to waive his make-whole claim against the Respondent in exchange for a payment of \$20,000. The General Counsel did not participate in reaching this settlement agreement between Charging Party Roland and the Respondent.

Despite Roland's private agreement, the General Counsel continued to pursue Roland's backpay

claim.⁴ On December 13, 1983, the first day of the backpay hearing, the Respondent's counsel, Carlos Bea, approached Roland prior to the start of the hearing and told Roland that the Respondent was going to sue him. On December 18 Roland was served with a civil complaint against him, which the Respondent had filed in the East District Superior Court of Los Angeles County, California, on December 12. The civil complaint alleged that Roland "instructed an attorney for the National Labor Relations Board to pursue his back-pay specification" at the backpay hearing and thereby breached the November 23 agreement, and that Roland fraudulently induced the Respondent to pay him \$20,000 by knowingly misrepresenting that "he would fully and finally release" the Respondent from any backpay claims. The civil complaint, which is based on state contract law, seeks "compensatory damages of \$20,000 plus attorney fees, litigation expenses for the backpay proceeding, and \$100,000 in 'exemplary and punitive damages'" for each of the two causes of action.

The judge analyzed this situation under the U.S. Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). He found that, even though the General Counsel's continued pursuit of Roland's backpay claim "triggered" the Respondent's suit, the "real motivating element" for the suit was the Respondent's perception that Roland breached the settlement agreement. The judge further found it was unnecessary to decide whether the Respondent's suit was preempted by Federal law, as contended by the General Counsel, because in his view a finding of preemption would have no bearing on the issue of motive. Having concluded that there was no retaliatory motive, the judge then determined that it was unnecessary to decide whether the Respondent's suit lacked a reasonable basis in fact or law.

We find that the judge erred in several respects. First, he failed to address the threshold question of whether the Board's jurisdiction preempts the Respondent's suit. Second, he erroneously applied *Bill Johnson's Restaurants*, *supra*, to the instant situation. Finally, he erroneously found that a retaliatory motive for the Respondent's suit was not established by the record evidence.

For the reasons below, we conclude that the Board's jurisdiction to decide backpay claims preempts the Respondent's suit pertaining to the same subject matter. In *San Diego Building Trades Coun-*

¹ 262 NLRB 1223

² Enfd. mem. 709 F.2d 1514

³ The General Counsel subsequently amended Roland's backpay claim to \$41,602.

⁴ The General Counsel took the position that the \$20,000 paid to Roland pursuant to his private settlement with the Respondent did not bar his backpay claim, but was an offset to the claim.

cil v Garmon, 359 U S 236, 244-245 (1959), the Court held that

[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted

The Board's regulation of Section 8 prohibited conduct and Section 7 protected activity is not limited to the finding of a violation Pursuant to Section 10(c) of the Act, the Board has the authority to determine and to administer appropriate remedies for unfair labor practices and "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act" See *NLRB v Meat Cutters Local 347*, 417 U S 1, 8 (1974), *Kansas Refined Helium Co v NLRB*, 683 F2d 1296, 1301 (10th Cir 1982) "Affirmative action" necessarily includes the institution of compliance proceedings to determine the make-whole remedy for the employee who was the target of the employer's unfair labor practices Thus, applying the *Garmon* analysis, the Board has exclusive jurisdiction to determine the impact of the private settlement of Roland's backpay claim in the backpay proceedings The Respondent's suit, in which the legal effect of Roland's private agreement would be a central issue, seeks to adjudicate many of the same issues involved in the backpay controversy⁵ Therefore, the Respondent's suit is preempted by Federal law See generally *Operating Engineers Local 926 v Jones*, 460 U S 669, 682 (1983) (preemption of state tort suit involving issues that are crucial elements of violation in unfair labor practice proceedings), *Wisconsin Department of Industry v Gould Inc*, 475 U S 282, 285 (1986) (preemption of state law that operates as supplement to Board remedies for unfair labor practices)

Having concluded that the Respondent's suit is preempted by Federal law, it is apparent that *Bill Johnson's Restaurants*, supra, is inapplicable to the instant case There the Court at footnote 5 clearly stated

It should be kept in mind that what is involved here is an employer's lawsuit that the

federal law would not bar except for its allegedly retaliatory motivation We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law Petitioner concedes that the Board may enjoin these latter types of suits Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state court injunction "where [the Board's] federal power preempts the field" *NLRB v Nash-Finch Co*, 404 U S 138, 144 (1971)

The implication is that the Board, in determining whether the filing of preempted state court suits is violative of the Act, may hold that an employer who sues an employee for a retaliatory motive is guilty of a violation of the Act

Contrary to the judge, on careful review of the record, we find that the Respondent had a retaliatory motive in maintaining its state suit against Roland The record indicates that the Respondent would not have filed the suit but for the General Counsel's continued pursuit of Roland's backpay claim The Respondent waited until the day before the backpay hearing to file a lawsuit On the day of the hearing, just before the backpay hearing commenced, the Respondent surprised Roland with the news that the Respondent was suing him The suit was directed only at Roland, although Roland was not the charging party in Case 31-CA-10098 The Union, which was the charging party in Case 31-CA-10098, was not sued by the Respondent even though it was the union that had signed the November 23 agreement Roland, however, was a chief witness in the backpay hearing By its suit, the Respondent not only seeks a return of the \$20,000 and the costs of litigation, but also prays for an additional \$100,000 in punitive damages against Roland for each cause of action Punitive damages may indicate a retaliatory motive See *Buffalo Newspaper Guild Local 26 (Buffalo Courier)*, 266 NLRB 813, 819 fn 15 (1983) All these circumstances thus reveal that the Respondent filed the lawsuit with an intent to retaliate against Roland for testifying or participating in the backpay proceedings

We conclude that the Respondent, by filing the lawsuit, violated Section 8(a)(4) and (1) of the Act

⁵ On July 29 1988 the Board ruled that it would honor the private agreement and dismissed the backpay specification pertaining to Roland 290 NLRB 623 There is no conflict between the Board's decision to honor the settlement agreement and our finding here that the Respondent violated Sec 8(a)(4) of the Act by filing the lawsuit in retaliation against Roland's continued participation in the backpay proceeding The policy—embodied in Sec 8(a)(4)—of protecting access to Board process applies whether the party whose access is the subject of retaliation ultimately obtains relief from the Board

CONCLUSION OF LAW

By filing a complaint against Donald Roland in the East District Superior Court of Los Angeles County, California, seeking money damages, including litigation costs and punitive damages, alleging that Roland was responsible for the decision by the General Counsel for the National Labor Relations Board to pursue backpay due Roland because of the Respondent's unfair labor practices against Roland, the Respondent has violated Section 8(a)(4) and (1) of the Act

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act

In order to dissipate the effect of the Respondent's unfair labor practices, we shall order the Respondent to cease and desist from prosecuting its complaint against Donald Roland, and we shall require the Respondent to withdraw the complaint that it filed against Roland. In addition, in order to place Roland in the position he would have been absent the Respondent's 8(a)(4) and (1) violations, we shall order the Respondent to make Roland whole for all legal and other expenses he incurred in defending the Respondent's lawsuit. See *Laborers Northern California Council (Baker Co)*, 275 NLRB 278 (1985)

ORDER

The National Labor Relations Board orders that the Respondent, American Pacific Concrete Pipe Company, Inc., Upland, California, its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Prosecuting its lawsuit styled as *American Pacific Concrete Pipe Company Inc a California corporation v Donald E Roland*, Does 1 through 10, No EAC45731 (E D Super Ct of Los Angeles County, Cal), which the Respondent has filed and maintained against Roland in order to retaliate against Roland for testifying and participating in proceedings before the National Labor Relations Board

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

2 Take the following affirmative action necessary to effectuate the policies of the Act

(a) Withdraw its lawsuit, named above, and reimburse Donald Roland for all legal and other expenses he has incurred in defending the lawsuit

(b) Post at its facility copies of the attached notice marked "Appendix"⁶ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply

⁶ If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

Section 7 of the Act gives employees these rights

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities

WE WILL NOT prosecute a lawsuit, styled as *American Pacific Concrete Pipe Company Inc a California corporation v Donald E Roland*, Does 1 through 10, No EAC45731 (E D Super Ct of Los Angeles County, Cal), which we have filed and maintained against Roland in order to retaliate against Roland for testifying and participating in proceedings before the National Labor Relations Board

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act

WE WILL withdraw our lawsuit, named above, and we will reimburse Donald Roland for all legal and other expenses he has incurred in the defense of our lawsuit

AMERICAN PACIFIC CONCRETE PIPE
COMPANY, INC

Raymond J Magana and Gerald V Selvo Esqs, for the
General Counsel
Robert W Richardson Esq (Carlos Bea A Law Corp), of
San Francisco California for the Respondent

DECISION

STATEMENT OF THE CASE

RICHARD J BOYCE Administrative Law Judge This matter was tried in Los Angeles California December 11 1984 The charge was filed by Donald Roland, on his own behalf, December 27, 1983 The complaint issued June 19 1984, and alleges that American Pacific Concrete Pipe Company Inc (Respondent) violated Section 8(a)(1) and (4) of the National Labor Relations Act (Act) in December 1983 by institut[ing] a state court lawsuit against Roland because Roland participated in the Board's backpay proceedings in Case 31-CA-10098¹

I JURISDICTION

Respondent is a California corporation engaged in the manufacture of concrete pipe in the community of Upland It concededly satisfies the Board's jurisdictional standards and so is an employer engaged in and affecting commerce within the meaning Section 2(2), (6), and (7) of the Act

II THE ALLEGED MISCONDUCT

A Facts

On July 23 1982 in Case 31-CA-10098 the Board issued a decision in which it concluded among other things that Respondent had violated Section 8(a)(3) and (1) of the Act by its April 1980 refusal to recall certain employees² Roland was one of those employees As a remedy for that violation the Board ordered Respondent to offer reinstatement to the affected employees and make them whole for their economic losses³ The Board's Order was enforced by the Ninth Circuit Court of Appeals in April 1983⁴

¹ The pertinent provisions of the Act state Sec 8 (a)—It shall be an unfair labor practice for an employer—(1) to interfere with restrain or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act] (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act Sec 7 guarantees employees the right to self organization to form join or assist labor organizations and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

² *American Pacific Concrete Pipe Co* 262 NLRB 1223 1227

³ *Id* at 1228

⁴ *American Pacific Concrete Pipe Co v NLRB* 709 F 2d 1514

On September 23 1983 the General Counsel issued a backpay specification in that case alleging that Roland and three others were entitled to stated sums of backpay The sum claimed for Roland was \$46 620 02 plus interest

On November 23 1983—some 3 weeks before the opening of a hearing on the backpay specification—a letter of argument, so called was entered into by Respondent Roland and the Charging Party⁵ in Case 31-CA-10098 It provided in relevant part

Since the parties desire to settle the make whole portion in Case 31-CA-10098

It is therefore agreed that

The parties agree Roland shall be paid Twenty Thousand Dollars (20 000 00) as full compensation for all alleged injuries as the result of [Respondent's] actions which gave rise to the Order in NLRB Case 31-CA-10098 as liquidated damages for such alleged injuries

It is further agreed that

The make whole portion in Case 31-CA-10098 is settled and withdrawn

And

That Roland and the Union expressly releases [sic] and discharges [sic] [Respondent] from all claims and causes of action that Roland and the Union ever had now have or may have in the future known or unknown, or that any person claiming through them may have or claim to have against [Respondent] created by or arising out of the occurrence giving rise to NLRB Order in Case 31-CA-10098

It is Roland[s] and the Union's intention that this release be binding on Roland[s] and the Union's legal representatives [and] assigns

Also on November 23 in keeping with the letter of agreement Respondent paid Roland \$20 000

On December 12 1983—the day before the start of the backpay hearing having learned that the General Counsel intended to press for Roland's entitlement as alleged in the specification despite the letter of agreement—Respondent filed a complaint against Roland in the Superior Court of Los Angeles County East District⁶ It alleges two causes of action

(a) That Roland breached the letter of agreement by instructing the NLRB to continue to seek recovery pursuant to the specification

(b) That Roland fraudulently induced Respondent to pay him the \$20 000 by knowingly misrepresenting that he would release it from further claims

The complaint claims, with regard to each alleged cause of action that Respondent is entitled to compensatory damages of \$20 000, and 'exemplary and punitive damages of \$100,000

⁵ General Teamsters Sales Drivers Food Processors Warehousemen and Helpers Local 871 International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America

⁶ Cause No 45731

The complaint was served on Roland December 18. The suit is still pending so far as the record shows. There is no evidence and thus no reason to suppose that the other backpay claimants have been sued in connection with their involvement in the Board's backpay processes.

The backpay hearing, as indicated, began December 13, and the General Counsel did proceed on Roland's behalf in disregard of the letter of agreement.⁷ Roland testified in that hearing, conceding that he understood the letter of agreement to be a release of any claims that [he] might have against [Respondent] arising out of backpay dispute and that he at no time attempted to rescind that transaction. There is no evidence that he ever sought to defer the General Counsel from continuing to espouse his cause because of the letter of agreement.

Roland has not returned the \$20,000 to Respondent.

B Conclusion

In *Bill Johnson's Restaurants v NLRB*⁸ the Supreme Court addressed the legality under the Act of a state court lawsuit in which an employer was seeking compensatory and punitive damages from certain of its employees, together with injunctive relief because of their picketing and handbiling activities. The Board had concluded that the suit violated Section 8(a)(1) and (4),⁹ and the Court of Appeals for the Ninth District agreed.¹⁰

The Supreme Court, however, remanded the matter for further consideration.¹¹ So doing, it stated¹²

[W]e hold that it is an enjoined unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by 7 of the [Act]

[T]he prosecution of an improperly motivated suit lacking a reasonable basis constitutes a violation of the Act.

Retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease and desist order against a state suit.

As concerns motive in the present case it is plain that had Roland not entered into the letter of agreement, which inarguably was meant to put the matter of his backpay to rest once and for all, Respondent would not have sued him in response to the General Counsel's ongoing prosecution of his alleged backpay entitlement. Otherwise, the others for whom backpay is being sought presumably would have been sued as well. So although the General Counsel's continued pursuit of Roland's backpay claim in disregard of the letter of agreement doubtless triggered the state action, the real motivating element—the sine qua non—was Respondent's perception that Roland had breached that agreement. And a persuasive case has not been made, extracting from *Allbritton Communications*¹³ that that perception was

So unreasonable as to warrant the inference that the suit had an ulterior motivation such as to discourage employees from filing legitimate claims or to penalize them for doing so.

Or, to borrow from *Retail Clerks Union Local 770 (Hughes Markets)*,¹⁴ Respondent's suit was in vindication of

a colorable contract right and was not the kind of tactic calculated to restrain employees in the exercise of rights guaranteed by the Act.

It is concluded in short that a showing has not been made that Respondent's state court suit was filed with the requisite retaliatory motive and thus, without getting into the question whether that suit lacks a reasonable basis as contemplated by the Supreme Court in *Bill Johnson's Restaurants*, that Respondent did not violate the Act as alleged.¹⁵

CONCLUSIONS OF LAW

By bringing suit against Roland in state court on December 12, 1983, Respondent did not violate the Act as alleged.

[Recommended Order for dismissal omitted from publication.]

⁷ The backpay hearing before Administrative Law Judge Clifford H. Anderson finally closed October 10, 1984, after 8 days in session. Judge Anderson's decision is yet to issue.

⁸ 461 U.S. 731 (1983).

⁹ *Bill Johnson's Restaurants*, 249 NLRB 155 (1980).

¹⁰ *Bill Johnson's Restaurants v NLRB*, 660 F.2d 1335 (9th Cir. 1981).

¹¹ 461 U.S. at 748-749.

¹² 461 U.S. at 744, 748-749.

¹³ 217 NLRB 201, 208 (1984).

¹⁴ 218 NLRB 680, 683 (1975).

¹⁵ That Respondent's suit perhaps is subject to dismissal by the state court on presumption grounds has no bearing on the issue of motive. Cf. *Clyde Taylor Co.*, 127 NLRB 103, 110 (1960).