

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

Advice Memorandum

DATE: June 8, 2000

TO : F. Rozier Sharp, Regional Director
Region 17

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

SUBJECT: Old Dominion Brush Co.
Case 17-CA-20510

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This Bill Johnson's¹ case was submitted for advice on whether the Employer violated Section 8(a)(1) by filing a criminal trespass complaint against an employee for requesting permission to engage in ambulatory picketing on the Employer's private property.

The Employer operates a manufacturing and distribution business in a single building located on open property. The property is freely entered by a driveway entrance and not posted against trespassing. On January 10, 2000, two striking employees of Overnite Transportation (Overnite) were following an Overnite truck to engage in ambulatory picketing. The Overnite truck entered the Employer's driveway and parked at its loading dock. The striking employees followed and parked their vehicle in the Employer's parking lot. One striker posted himself as a picket in the Employer's driveway entrance; the other striker, [FOIA Exemptions 6 and 7(C)], entered the Employer's business.

Once inside the Employer's office, striker [FOIA Exemptions 6 and 7(C)] began explaining to the Employer's Manager that he was an Overnite striker and that an Overnite truck had just entered the property. The Manager quickly cut off [FOIA Exemptions 6 and 7(C)] explanation, pointed toward the door, and said "on the street." [FOIA Exemptions 6 and 7(C)] immediately left, returned his parked vehicle to the street, and joined the other striker in picketing the driveway entrance.

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

Around 20 minutes later, city police officers arrived, entered the Employer's office, and then exited and approached the picketers. One officer told [FOIA Exemptions 6 and 7(C)] that he had been trespassing and the Employer didn't want him there. [FOIA Exemptions 6 and 7(C)] explained his striker status and offered a document outlining his right to picket. The officer stated that [FOIA Exemptions 6 and 7(C)] had been there before and the Employer had told him not to return. [FOIA Exemptions 6 and 7(C)] protested that he had never before been to the Employer's premises. The officer handcuffed and arrested [FOIA Exemptions 6 and 7(C)] and transported him to the police station. [FOIA Exemptions 6 and 7(C)] was fingerprinted and issued a criminal complaint, citing him for violating Kansas City municipal ordinance 50-102. The complaint was signed by the Employer's Manager who stated therein that [FOIA Exemptions 6 and 7(C)] had:

Knowingly entered unlawfully upon real property possessed by [Manager], notice against trespass upon said real estate having been fully given by actual communication to the defendant.

The Manager avers that on several occasions during the preceding few months, sometimes 3 to 4 times per week, Overnight picketers had come to the Employer's facility when Overnight trucks were present. These picketers had entered the Employer's office to explain their strike, to offer literature, and to request permission to picket on the property. The Manager avers that he told picketers that he had no interest in the strike, didn't want them coming into the office or on the property, and to picket in the street. According to the Manager, picketers were generally cooperative, although some had tried to continue the dialogue even after being directed to the street.

The Manager avers that on January 10, he explained to the police that he had previously and repeatedly told picketers not to come into his office. The Manager expressly admits, however, that he did not recognize [FOIA Exemptions 6 and 7(C)] as a picketer who had previously visited his office.

The Kansas City Municipal Ordinance provides as follows:

Section 50-102. "Trespass generally"

(a) A person commits a violation of this section if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure or upon real property.

(b) A person does not commit a violation of this section by entering or remaining upon real property unless the real property is fenced or otherwise enclosed in a manner designed to exclude intruders or as to which notice against trespass is given by:

- (1) Actual communication to the actor; or
- (2) Posting in a manner reasonably likely to come to the attention of intruders.

In City of Kansas City v. Piguierre, 625 S.W.2d 938 (Mo. Ct of Appeals, 1981), a similar municipal ordinance defined a person engaged in trespass as one who "enters upon or in such land . . . after such entry upon or in same has been forbidden by a personal communication of the owner or person authorized by the owner to make such communication. . ." The Court noted that the "gist of both the ordinance and the statute is the willful entry or continued presence upon property which the person had been forbidden by personal communication." (Citation omitted). The Court rejected the proffered defense that a violation of such ordinance required additional proof of damage or breach of the peace.

In State of Missouri vi Burkemper, 882 S.W.2d 193 (Mo. Ct. of Appeals, 1994), defendants were charged with violation of a statute similarly defining a person as engaging in trespass "if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure or upon real property." Defendants argued that they had not received notice of their trespass in a manner reasonably likely to come to the attention of intruders. The Court rejected that defense noting that "signs stating that trespassers will be prosecuted were posted at each of the entrances to the parking lot and another sign containing an ordinance was posted on the doorway to the building. In addition, the defendants were personally notified that they were trespassing . . . "

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer unlawfully caused the criminal prosecution of the Charging Party.

Under the Supreme Court's analysis in Bill Johnson's, the Board cannot halt the prosecution of a lawsuit unless:
(1) the lawsuit lacks a reasonable basis in fact or law; and
(2) the plaintiff filed the suit to retaliate against

protected activity.² The Board has extended this rule to include the filing of a criminal complaint.³

Applying Bill Johnson's here, we note first that the criminal complaint filed by the Employer is clearly baseless. A violation of this trespass provision requires either previous actual communication of trespass, or a posting of the property in a manner reasonably likely to come to the attention of trespassers. The Employer has admitted that [FOIA Exemptions 6 and 7(C)] had not previously been at his establishment, and thus had not been previously advised against trespass. And the Employer's property is neither enclosed nor posted against trespass. We note second that the criminal complaint also is retaliatory against [FOIA Exemptions 6 and 7(C)] Section 7 right to engage in ambulatory picketing.

[FOIA Exemptions 2 and 5

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B.J.K.

² Bill Johnson's Restaurants, Inc., 461 U.S. at 748-749.

³ Johnson & Hardin Co., 305 NLRB 690, 691 (1991), enf. denied in part on other grounds 49 F.3d 237 (6th Cir. 1995).

⁴ [FOIA Exemptions 2 and 5 .]