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

Advice Memorandum

DATE: June 3, 1996

TO : Martin M. Arlook, Regional Director
Region 10

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

SUBJECT: Coosa Electric Co. 512-5009-6700
Case 10-CA-29180

This Section 8(a)(1) case was submitted for advice as to whether the Employer's lawsuit, involving a prior Board charge filed by the Union, can be enjoined under Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).[1]

FACTS

The Employer, in an agreement apparently signed by its former owner/president, voluntarily recognized IBEW Local 136 (the Union) as the 9(a) representative of its employees based upon a card check on May 25, 1987. Subsequently the parties bargained and reached agreement, but the Employer refused to reduce the contract to writing. In its answer to the complaint issued by the Region (Case 10-CA-23116), the Employer admitted that the Union was the exclusive bargaining representative of a majority of its employees and that it had voluntarily recognized the Union. Prior to a hearing, the parties settled that case and the Employer signed a contract.

In May 1988, the Employer signed a Letter of Assent authorizing NECA to be its collective bargaining representative for current and subsequently approved agreements with the Union. The authorization would remain in effect until terminated by the employer with 150 days written notice to NECA and the Union. In December 1993, the Employer's new owner/president timely revoked that authorization and designated himself as agent for future bargaining with the Union. The 1991-1994 contract then in effect provided it would roll over from year to year unless

[1] The Union's request for Section 10(j) injunctive relief will be addressed in a separate memorandum.

terminated at least 90 days prior to the expiration date, and its terms would remain in effect until "a conclusion is reached in the matter of proposed changes." Neither party apparently gave such notice.

In May 1994, the Employer began bargaining for a new contract with the Union. When an agreement was not reached by the end of the month, the Employer took the position that it no longer had a duty to bargain, unilaterally laid off certain unit employees and hired non-Union replacements. In September 1994, the Union filed a charge (Case 10-CA-27902) regarding these changes and, in support of its 9(a) status, the Union presented the 1987 recognition agreement and the Employer's answer to the prior complaint. The Employer's owner disputed the validity of the recognition agreement, and its former president/owner could not recall, but would not deny, signing it. In April 1995, the Union withdrew the charge when the Employer sold its assets and ceased doing business.

In February 1996, the Employer's president/owner, as an individual, as president of the Employer, and on behalf of the Employer as an entity, filed a lawsuit in Alabama state court. The suit named two Union representatives who allegedly forged the recognition agreement, the Union and the International as defendants. The suit seeks punitive and compensatory damages arising from the Union's filing of the September 1994 NLRB charge, and alleges that the Union's maintenance of the charge based on the allegedly forged recognition agreement constituted interference with business and contractual relationships, defamation (i.e., a knowingly published false statement), abuse of process (with malice), actionable fraud, and conspiracy to commit these torts.

The Employer denies that the lawsuit has a retaliatory purpose and asserts that the suit has a reasonable basis in fact and law. The Employer argues that the Union and its agents acted in bad faith when they filed the September 1994 charge because they knew that it was based on a forged document. Even assuming lack of bad faith in the filing of the charge and assuming that the charge was not based solely on the voluntary recognition agreement, the Employer contends that the Union lost any protection against the

lawsuit under the Act when it presented a forged document as evidence in that proceeding.

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent settlement, alleging that the Employer's lawsuit was filed for a retaliatory motive and is baseless.[2]

The Supreme Court held in Bill Johnson's that the Board may not enjoin as an unfair labor practice the filing and prosecution of a nonpreempted state lawsuit unless the lawsuit lacks a reasonable basis in fact or law and was commenced with a retaliatory motive.[3]

In evaluating whether a lawsuit lacks a reasonable basis in fact, the Board must determine whether the suit raises "genuine issues of material fact" and, if so, the Board must stay its proceedings pending resolution of the lawsuit.[4] The Board may look beyond the pleadings in making such determinations,[5] but it should not resolve credibility issues or factual disputes.[6] The burden rests on the state court plaintiff "to present the Board with evidence that shows his lawsuit raises genuine issues of material fact," and that there is prima facie evidence of each cause of action alleged.[7] Evidence of retaliatory motive consists of

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[2] The lawsuit is therefore preempted once the complaint issues.

[3] 461 U.S. at 748-49.

[4] Id. at 745-46.

[5] Id. at 744-45.

[6] Id. at 746 n.12.

[7] Ibid.

such factors as the baselessness of the lawsuit[8] and a prayer for punitive damages.[9]

The analysis in Bill Johnson's does not apply, however, if a lawsuit is preempted by federal law or was filed with an objective that is illegal under federal law.[10] Under San Diego Bldg. Trades Council v. Garmon,[11] a lawsuit is preempted when the activities are "arguably subject" to the protections in Section 7 or "arguably prohibited" by Section 8. The only exceptions to this doctrine are where the activity is of mere peripheral concern to the Act, or where the conduct touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the states of the power to act."[12] An example of the latter is libel.[13]

Where the filing of an NLRB charge is the basis for the state court lawsuit, federal labor law superimposes the requirement of bad faith as an additional element of the state cause of action. See LP Enterprises, 314 NLRB 580 (1994). In order to satisfy this "bad faith" element, the party filing the charge must have acted maliciously, i.e. with knowledge that the charge allegations were false or with reckless disregard of the truth. Id. at 580, citing Linn v. Plant Guards, 383 U.S. at 64-65. Hence, to avoid a finding that its lawsuit is baseless because the 1994

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[8] Phoenix Newspapers, 294 NLRB 47, 49 (1989); Machinists Lodge 91 (United Technologies), 298 NLRB 225, 226 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991).

[9] LP Enterprises, 314 NLRB 580, 587 (1994); Phoenix Newspapers, 294 NLRB at 49-50; H.W. Barss, 296 NLRB 1286, 1287 (1989).

[10] Bill Johnson's, 461 U.S. at 737 n.5.

[11] 359 U.S. 236, 244-45 (1959).

[12] Id. at 243-44.

[13] See Linn v. Plant Guard Workers, 383 U.S. 53, 63-64 (1966).

charge was filed in good faith, the Employer must affirmatively show that the charge was filed with Linn malice for the defamation, abuse of process, interference with business and contractual relationships, fraud and conspiracy claims to have a reasonable basis under Bill Johnson's.

Initially, we note that the business interference, fraud and conspiracy claims in the lawsuit are not plead with Linn malice. Since those claims, like all of the Employer's causes of action, attack the filing of the September 1994 charge, there is no legal basis to find the "bad faith" required under LP Enterprises. However, even as to the defamation and abuse of process claims that were plead with Linn malice, the evidence presented by the Employer fails to raise a genuine issue of material fact as to bad faith by the Union in filing the 1994 charge. The Employer alleges bad faith solely because the Union knew at the time the charge was filed that its claim of 9(a) status was premised on a forged document. However, what the Union alleged on the face of the charge was factually true, i.e. that the Employer laid off unit employees who were Union members and obtained replacements outside the contract's exclusive hiring hall. Therefore, the charge itself could not have been maliciously "published." Further, it is clear that the Union's claim of 9(a) status was not premised solely upon the allegedly forged voluntary recognition agreement. Thus, in its answer to the complaint issued in Case 10-CA-23116, the Employer admitted that the Union was the exclusive bargaining representative of a majority of its employees and that it had voluntarily recognized the Union. Moreover, the Union's alternative theory of violation regarding the Employer's unilateral conduct cannot be characterized as so frivolous to be in bad faith. Thus, even if the parties had an 8(f) rather than a 9(a) relationship and the Employer timely revoked its Letter of Assent prior to expiration of the last contract, it apparently did not give the 90-day written notice required to forestall the 1991-1994 contract from rolling over for another year. Therefore, there was a colorable contractual basis for the Union's 8(a)(5) allegation. Finally, even if the question of whether the recognition agreement was forged is relevant to determining whether the 1994 charge was filed in bad faith, the Employer's only evidence in this regard is the statement of its prior owner/president that he did not recall signing

the voluntary recognition agreement eight years earlier. The Employer has not offered to prove, e.g. through handwriting analysis, that the former president did not sign the agreement, and essentially has failed to "present the Board with evidence that shows his lawsuit raises genuine issues of material fact." Bill Johnson's at 746 n.12.

Accordingly, since the Employer failed to show that the 1994 charge was filed with Linn malice, and all of its lawsuit allegations attack the Union's filing of that charge, the suit lacks a reasonable basis under Bill Johnson's. Additionally, since the Employer's baseless lawsuit and prayer for unspecified punitive damages "were unequivocally aimed directly at [the] protected concerted activity" of charge filing, the Employer's motive in filing the lawsuit was retaliatory. See Phoenix Newspapers, 294 NLRB at 50; LP Enterprises, 314 NLRB at 587.

Finally, we conclude that the Employer's claims are preempted once complaint issues. In Loehmann's Plaza,[14] the Board held that once a complaint issues alleging violations involving arguably protected activity, any court lawsuit concerning the question is preempted and the continued pursuit of such a lawsuit violates Section 8(a)(1). The Employer therefore has an affirmative duty to take action to stay the court proceedings within seven days following issuance of the Board complaint.[15]

B.J.K.

[14] 305 NLRB 663, 670 (1991).

[15] Id. at 671.