

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

# Advice Memorandum

DATE: May 15, 2009

TO : Robert W. Chester, Regional Director  
Region 6

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

SUBJECT: Fairmont General Hospital  
Case 6-CA-36374

This case was submitted for advice on whether the Employer's federal court lawsuit is unlawful under Bill Johnson's.<sup>1</sup> We agree with the Region that the charge should be dismissed, absent withdrawal, because the Employer's lawsuit cannot be considered "objectively baseless" and thus unlawful under Bill Johnson's, as more recently construed by the Board in BE & K.<sup>2</sup>

### **FACTS**

The UFCW Local 550 (Union) represents a unit of nonprofessional employees of the Employer and has a current collective bargaining agreement, effective from July 1, 2006 through June 30, 2009.

In January 2007, the Region issued a finding in a UC case that the position of Clinical Data Coordinator or "coder" should be included in the existing bargaining unit. The Employer responded by eliminating the position from the unit and creating a new, nonunit position with similar duties. The Union filed a Section 8(a)(3) charge alleging that the Employer eliminated and reclassified the position for unlawful reasons, the Region issued complaint, and the parties entered into a non-Board settlement.

Under that settlement agreement, the Employer agreed to place three existing coders into the bargaining unit by September 1, 2008. If the existing coders left before that

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<sup>1</sup> Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

<sup>2</sup> BE & K Construction Co., 351 NLRB 451, 451 (2007).

date, and if the Employer was unable to replace them within three weeks of their departure, the Union agreed that it would not object to the Employer outsourcing the coding work. The settlement agreement provided that the Employer's obligation to make good faith efforts to hire individuals in the unit as coders continued even if the Employer outsourced the work. The settlement agreement is silent as to whether it is subject to grievance-arbitration and whether it is incorporated into the collective bargaining agreement.

The existing coders all resigned before September 1 - two in March and one in July 2008. The Employer announced in early August that it was having trouble finding replacements and was considering outsourcing. The Union responded on August 3 by filing a grievance, arguing that the Employer was violating the collective bargaining agreement's subcontracting provision.

In late August 2008, the Union filed a charge (6-CA-36184), alleging that the Employer had failed to use good faith efforts to recruit coders, as required by the terms of the settlement agreement.

Meanwhile, the Employer was still unsuccessful in its efforts to fill the coder position. In October 2008, the Employer informed the Union that it intended to contract with Precyse Solutions, one of the approved contractors named in the settlement agreement. Pursuant to the Employer's obligation to continue its recruiting efforts, the Employer negotiated a contract that allowed it to cancel the contract on 30 days' notice.

In October 2008, the Union filed a second grievance alleging that the Employer's outsourcing of the work violated the agreement's subcontracting provision.

After investigating Case 6-CA-36184, the Region dismissed the charge, finding that the Employer had used good faith efforts to recruit coders even though it had been unsuccessful. The Region concluded that the Employer was therefore permitted to outsource the coding work under the settlement agreement. The Office of Appeals upheld that dismissal on January 9, 2009.

The Union, however, refused to withdraw the pending grievances and continues to assert that hiring coders violates the agreement's subcontracting provision.

On January 20, 2009, the Employer filed a Section 301 suit in the U.S. District Court for the Northern District of West Virginia. The Employer's amended complaint seeks a declaratory judgment that the Union has breached the settlement agreement and that the Employer is therefore excused from further performance of its obligations under that agreement.

On March 4, 2009, the Union filed this charge, alleging that the Employer's lawsuit is not reasonably based and was filed for retaliatory reasons.

#### **ACTION**

We conclude that the charge should be dismissed, absent withdrawal, because the Employer's lawsuit cannot be considered "objectively baseless" and thus unlawful under Bill Johnson's, as recently construed by the Board in BE & K.

Under Bill Johnson's, the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only when the lawsuit: 1) lacks a reasonable basis in law or fact; and 2) was commenced with a retaliatory motive.<sup>3</sup> In BE & K, the Board clarified that there are no circumstances in which a reasonably based lawsuit could be an unfair labor practice, regardless of the motive for initiating the lawsuit.<sup>4</sup> A lawsuit cannot be deemed objectively baseless unless its factual or legal claims are such that "no reasonable litigant could realistically expect success on the merits."<sup>5</sup>

Here, we agree with the Region that the Employer's lawsuit is reasonably based under the Board's test. An

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<sup>3</sup> Bill Johnson's, 461 U.S. at 748-49.

<sup>4</sup> BE & K Construction Co., 351 NLRB at 451.

<sup>5</sup> Id., at 457.

employer may bring a Section 301 lawsuit in district court for breach of a contract with a labor organization. The Employer's Section 301 lawsuit here alleges that the Union breached the settlement agreement's provision prohibiting the Union from objecting to the Employer outsourcing the coding work where the Employer used good faith efforts to replace the coders and where the Employer was unable to replace the coders for three weeks after their departure. The Region, affirmed by the Office of Appeals, has determined that the Employer used good faith efforts to recruit coders and, therefore, that the Employer had the right to subcontract the work.

Given this finding, the Employer has a reasonably based argument that the Union's continued objection to the subcontracting of the coder work, in the form of maintaining the grievances, violates the terms of the settlement agreement. The Employer's lawsuit aims to prevent the Union from pursuing only these two specific grievances, not to inhibit the Union's general right to file grievances. Further, the settlement agreement does not require the Employer to submit disputes to the grievance arbitration procedure.

Accordingly, the Employer's lawsuit is reasonably based and, absent withdrawal, the charge should be dismissed.

B.J.K.