

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

# Advice Memorandum

DATE: January 29, 2003

TO : Alan B. Reichard, Regional Director  
Veronica I. Clements, Regional Attorney  
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Region 32

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

SUBJECT: Children's Hospital of Oakland  
Case 32-CA-17432

The Region submitted this BE & K<sup>1</sup> case for advice as to whether the Employer's Section 301 lawsuit against the Union was baseless and retaliatory and, therefore, unlawful.

We conclude that the Employer's lawsuit was baseless because the legal issues were plainly foreclosed by extant precedent, and that the suit was retaliatory because it directly attacked employees' exercise of Section 7 rights.

### FACTS

California Nurses Association (the Union) has represented registered nurses working at Children's Hospital of Oakland (the Employer) since the early 1950's. Since 1971, the parties' collective bargaining agreements have contained no-strike clauses that stated:

"There shall be no strikes, lockouts, work stoppages, or interruptions of work during the life of this agreement."

The language of the no-strike clause has remained unchanged through at least ten subsequent renegotiations of the collective bargaining agreement.

In the summer of 1998,<sup>2</sup> ILWU, Local 6, which represents the Employer's approximately 17 x-ray technologists, was engaged in contract negotiations with the Employer. In August, Local 6 established a strike deadline of August 31.

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<sup>1</sup> BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 170 LRRM 2225 (2002).

<sup>2</sup> All dates are in 1998, unless noted otherwise.

On August 17, pursuant to section 8(g) of the Act, the Union gave the Employer written notice that, if Local 6 called a strike, the Union's approximately 650 RN's intended to conduct a 24-hour sympathy strike. The Employer responded to the Union's notice by canceling some types of surgeries, transferring patients with certain needs, and declining to accept some new patients.

After the Union served the Employer with its 8(g) notice that it intended to sympathy strike, the Employer asserted that the no-strike clause prohibited sympathy strikes. By letter dated August 20, the Employer asked the Union to agree to submit the issue to expedited arbitration, to conclude no later than August 26. By letter dated August 24, the Union refused the Employer's request for expedited arbitration. Also in that letter, the Union maintained that the no-strike clause did not include sympathy strikes, citing the parties' past practice as evidence that both sides had historically limited the scope of the no-strike clause to exclude sympathy strikes.

Shortly before the deadline, the Employer and Local 6 reached an agreement; the Union cancelled its sympathy strike approximately 72 hours before its scheduled start.

After the strike was averted, the Employer again asked the Union to submit the dispute over the scope of the no-strike clause to arbitration. The Union resisted the Employer's efforts, asserting that the Employer had no right to access the grievance procedure to arbitrate the scope of the no-strike clause. The Employer agreed that the subject was not arbitrable and advised the Union of its intent to file suit.

The Employer filed suit under Section 301 of the Labor Management Relations Act,<sup>3</sup> seeking a declaration that the no-strike clause bars sympathy strikes and a permanent injunction prohibiting the Union from engaging in sympathy strikes. The Employer also sought monetary damages for losses resulting from the Employer's precautionary measures taken in anticipation of a sympathy strike. After discovery, the parties filed cross-motions for summary judgment.<sup>4</sup>

The district court reviewed the applicable case law, the parties' arguments, and the extrinsic evidence of the

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<sup>3</sup> 29 U.S.C. § 185.

<sup>4</sup> The Union did not move to dismiss the case under Fed.R.Civ.Pro. 12(b)(6).

parties' bargaining history and past practice and determined that no reasonable trier of fact could find in favor of the Employer. The district court granted the Union's motion and dismissed the Employer's lawsuit.<sup>5</sup> Specifically, the district court found that the language of the no-strike clause had been unchanged for nearly thirty years, though the Employer attempted in 1987 to change the language to explicitly include sympathy strikes.<sup>6</sup> The district court also found that the Union had called for sympathy strikes on at least three separate occasions and actually conducted a sympathy strike on at least one of those occasions.<sup>7</sup> The Employer never raised any legal objection to the Union's calls for sympathy strikes, and no employee was disciplined for sympathy striking.<sup>8</sup> Thus, the district court found that the parties' bargaining history and past practice clearly established that both sides had historically excluded sympathy strikes from the no-strike clause.

The Employer appealed the district court's decision to the Ninth Circuit. The Ninth Circuit, in reviewing the district court's grant of summary judgment *de novo*, examined the applicable law, the parties' bargaining history, and the parties' past practice. Applying its "clear and unmistakable" standard to determine whether the parties intended the general language to apply to sympathy strikes, the Ninth Circuit affirmed the district court's action granting the Union's motion for summary judgment, and dismissed the Employer's lawsuit.<sup>9</sup> The Ninth Circuit specifically rejected the Employer's arguments against application of the "clear and unmistakable" standard as fundamentally flawed, and unsupported by "the language of the [Act], precedent, [or] logic[.]"<sup>10</sup> In affirming the

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<sup>5</sup> Children's Hospital Medical Center of Northern California, 163 LRRM 2724 (N.D. Cal. 2000).

<sup>6</sup> Id. at 2727. The district court rejected the Employer's unsupported argument that it did not attempt to expand the scope of the no-strike clause but rather sought to "clarify" it. Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Children's Hospital Medical Center of Northern California v. California Nurses Association, 283 F.3d 1188, 1197 (9<sup>th</sup> Cir. 2002).

<sup>10</sup> Id. at 1192 - 1194.

district court, the Ninth Circuit held that the Employer's unsuccessful attempt to change the language of the no-strike clause, and the Union's prior calls for sympathy strikes and the Employer's consistent lack of response, established that the no-strike clause did not prohibit sympathy strikes.<sup>11</sup>

### **ACTION**

We conclude that the Employer's lawsuit violated Section 8(a)(1). The claim raised by the Employer was plainly foreclosed under extant law and, therefore, the lawsuit was baseless. The lawsuit was also retaliatory as it attacked employees' exercise of their Section 7 right to sympathy strike. The Region should issue complaint, absent settlement.

In BE & K, the United States Supreme Court reconsidered the circumstances under which the Board could find a concluded lawsuit to be an unfair labor practice.<sup>12</sup> Previously, in Bill Johnson's,<sup>13</sup> the Supreme Court held that in concluded suits, if the litigation resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit, the Board could find a violation if the suit was filed with a retaliatory motive.<sup>14</sup> Thus, even if a concluded suit had been reasonably based, the Board could find an unfair labor practice if the suit was unsuccessful and retaliatory.

In BE & K, the Court rejected the Bill Johnson's standard for adjudicating unsuccessful but reasonably based lawsuits.<sup>15</sup> The Court reasoned that the standard was overly broad because the class of lawsuits punished included a substantial portion of suits that involved genuine petitioning protected by the Constitution.<sup>16</sup> The Court thus indicated that the Board could no longer rely on the fact that the lawsuit was ultimately meritless but must determine whether the lawsuit, regardless of the outcome, was reasonably based.<sup>17</sup>

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<sup>11</sup> Id. at 1197.

<sup>12</sup> 122 S.Ct. at 2397.

<sup>13</sup> 461 U.S. 731 (1983).

<sup>14</sup> Id. at 747, 749.

<sup>15</sup> BE & K, 122 S. Ct. at 2397, 2400, 2402.

<sup>16</sup> Id. at 2399.

As the Court in BE & K did not re-articulate the standard for determining whether a lawsuit is baseless, the standard set forth in Bill Johnson's remains authoritative. Under Bill Johnson's, the Board may go behind the bare pleadings to determine whether a lawsuit is baseless because it presents unsupportable facts or unsupportable inferences from facts, and to determine whether the suit presents "plainly foreclosed" or "frivolous" legal issues.<sup>18</sup> In doing this, the Board may draw guidance from a summary judgment decision and reject plainly unsupportable inferences from the undisputed facts and/or patently erroneous legal arguments.<sup>19</sup>

### **The Employer's Lawsuit Was Baseless**

The district court entered summary judgment for the Union and dismissed the Employer's lawsuit because, drawing every inference in favor of the Employer, it concluded that no reasonable trier of fact could possibly return a verdict in favor of the Employer.<sup>20</sup> The Court of Appeals for the Ninth Circuit affirmed the district court's order under the same standard, for the same reasons.<sup>21</sup>

In concluding that the Employer had not demonstrated that the Union waived employees' right to engage in sympathy strikes, the Ninth Circuit reiterated its longstanding precedent applying a "clear and unmistakable" standard to that kind of waiver.<sup>22</sup> The Ninth Circuit has

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<sup>17</sup> Id. at 2399-2402.

<sup>18</sup> 461 U.S. at 746. The Board's inquiries are subject to certain constraints. For example, the Board cannot make credibility determination or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge. Nor may the Board determine "genuine state-law legal questions. Id. at 744-46.

<sup>19</sup> Id. at 746 n. 11.

<sup>20</sup> Children's Hospital v. CNA, above, 163 LRRM at 2727.

<sup>21</sup> Children's Hospital v. CNA, above, 283 F.3d at 1197.

<sup>22</sup> Id. at 1192; International Brotherhood of Electrical Workers, Local 387, AFL-CIO v. NLRB (Arizona Public Serv.), 788 F.2d 1412, 1414 (9<sup>th</sup> Cir. 1986); Oil, Chemical and Atomic Workers International Union, Local 1-547 v. NLRB (Chevron), 842 F.2d 1141 1143 (9<sup>th</sup> Cir. 1988); NLRB v.

consistently applied that standard in every sympathy strike case it has decided.<sup>23</sup>

To determine whether a union has clearly and unmistakably waived employees' right to sympathy strike, the Board and the Ninth Circuit look to the language of the collective bargaining agreement and, if necessary, the relevant extrinsic evidence to determine whether the parties intended that a "no-strike" clause would include sympathy strikes.<sup>24</sup> Where the contractual language does not explicitly address sympathy strikes, it is always necessary to consider extrinsic evidence.<sup>25</sup>

The evidence regarding the parties' bargaining history and past practice is undisputed. As noted above, the language of the no-strike clause had been unchanged for

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Southern California Edison, 646 F.2d 1352, 1363 (9<sup>th</sup> Cir. 1981).

<sup>23</sup> Children's Hospital, above, 283 F.3d at 1192; Chevron, above, 842 F.2d at 1143; Arizona Public Serv., above, 788 F.2d at 1414; So. Cal. Edison, above, 646 F.2d at 1364. Despite the Ninth Circuit's "well-established rule," the Employer "construct[ed] the unusual argument" that the Union acted on its own behalf in calling the sympathy strike in August 1998 and, therefore, the clear and unmistakable waiver standard ought not apply. Rather, the Employer argued that, because the issue involved the Union's "right to strike," the Ninth Circuit should apply general contract principles to determine whether the Union waived its "right." The Ninth Circuit found the Employer's argument to be fundamentally flawed, noting that "neither the language of the NLRA, precedent, nor logic supports the distinction [the Employer] seeks to draw between the union's rights and the rights of its members." 283 F.3d at 1193. See also, Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) (plain language of Section 7 confers rights only on employees, not unions) (emphasis in original); Retail Clerks Union v. NLRB, 370 F.2d 205, 208 (9<sup>th</sup> Cir. 1966) (purpose of Section 7 is to protect workers, not labor unions).

<sup>24</sup> Children's Hospital, 283 F.3d at 1194; Food & Commercial Workers Local 1439 (Rosauer's Supermarkets), 293 NLRB 26, 27 (1989); Arizona Public Serv., above, 788 F.2d at 1414 (citing Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 279 (1956)). See also Chevron, above, 842 F.2d at 1143.

<sup>25</sup> Rosauer's Supermarkets, above, 293 NLRB at 27; Arizona Public Serv., above, 788 F.2d at 1414; Chevron, above, 842 F.2d at 1143.

nearly thirty years, despite the Employer's efforts to change that language to explicitly include sympathy strikes. Additionally, the Union made several calls for sympathy strikes, without objection by the Employer. The parties' bargaining history and past practice regarding sympathy strikes led the Ninth Circuit to conclude that "[t]he only reasonable inference . . . is that, at a minimum, [the Union] did not clearly and unmistakably waive any sympathy strike rights."<sup>26</sup> Indeed, drawing every inference in favor of the Employer, the Ninth Circuit concluded that it was "indisputabl[e]" that the parties did not mutually agree to include sympathy strikes within the scope of the no-strike clause; at most, the parties agreed to disagree on the scope of the no-strike clause.<sup>27</sup> Thus, the Employer had no reasonable basis to believe that the Union's initiation of a sympathy strike was unlawful and, therefore, the suit was not reasonably based.<sup>28</sup>

### **The Employer's Lawsuit Was Retaliatory**

The Supreme Court's decision in BE & K does not affect the retaliatory motive analysis here because this lawsuit, unlike the suit in BE & K, is baseless. Thus, while the Supreme Court in BE & K rejected the Board's standard of finding a lawsuit retaliatory solely because it is brought with a motive to "interfere with the exercise of protected [NLRA Sec. 7] rights,"<sup>29</sup> the Court's holding is limited to reasonably based lawsuits. With regard to reasonably based lawsuits, that standard would condemn genuine petitioning where a suit was directed at conduct that a plaintiff reasonably believed was unprotected.<sup>30</sup> Here, the fact that this baseless lawsuit was directed at the employees' efforts to engage in a sympathy strike in support of other Hospital employees is sufficient to establish retaliatory

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<sup>26</sup> Id. at 1197.

<sup>27</sup> Id.

<sup>28</sup> We reject the Employer's assertions that the Ninth Circuit's decisions to hear oral argument and publish an opinion, and the six-month interval between the Ninth Circuit's receipt of briefs and the issuance of its decision, "prove" that the Employer's suit was reasonably based. There is no basis to presume these actions were related to the merits of the suit, and the plain language of the Ninth Circuit's decision establishes that the Employer's suit was baseless.

<sup>29</sup> BE & K, 122 S. Ct. at 2400.

<sup>30</sup> Id., 122 S.Ct. at 2400 - 2401.

motive. In addition, it would appear that the Employer filed this lawsuit because of its inability to secure a broader no-strike clause in bargaining, and in order to give it leverage in future bargaining.

In sum, the Region should issue complaint, consistent with the above analysis, alleging that the Employer's lawsuit violated Section 8(a)(1).

B.J.K.