

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 28

Milum Textile Services Co.

and

28-CA-20898 et al

UNITE HERE

UNITE HERE'S MEMORANDUM OPPOSING  
MILUM TEXTILE'S EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S DECISION

UNITE HERE relies primarily on, and incorporates by reference, Counsel for General Counsel's brief in opposition to Milum Textile's exceptions to Administrative Law Judge Lana Parke's decision. This memorandum is limited to opposing Milum Textile's exceptions concerning the *Bill Johnson's*<sup>1</sup> allegation.

Judge Parke found that Milum Textile violated §8(a)(1) by relying on preempted theories in a motion for a TRO against UNITE HERE.<sup>2</sup> Milum Textile excepted, arguing essentially that the TRO was only one part of the lawsuit, and that §8(a)(1) is not violated unless the lawsuit

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

<sup>2</sup> Decision, 16.

as a whole is unlawful.<sup>3</sup> The Board, however, need not reach this issue. As asserted in UNITE HERE's brief in support of its exceptions, the lawsuit as a whole was unlawful.

The basic facts have been set forth in detail in the parties' briefs supporting their respective exceptions, and in Judge Parke's decision.<sup>4</sup> In short, on April 26, 2006, Milum Textile filed a federal court lawsuit alleging that UNITE HERE made various unlawful statements. Milum Textile also sought a TRO to enjoin UNITE HERE's April 27 rally, at which UNITE HERE intended to publicize the disputed statements. Milum Textile lost the TRO, and then did nothing to prosecute its lawsuit, until May 26—when it voluntarily dismissed the case.

Relying on *Bill Johnson's* and *BE&K*,<sup>5</sup> Judge Parke found that Milum Textile violated §8(a)(1) by asserting two preempted theories to support its TRO request: (1) secondary boycott and (2) interference with economic relationships. According to Judge Parke, in all other respects, Milum Textile's lawsuit was lawful.<sup>6</sup>

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<sup>3</sup> Milum Textile's Brief in Support of Respondent's Exceptions to Administrative Law Judge's Decision, 22-26.

<sup>4</sup> Decision, 5-6; UNITE HERE's Brief in Support of Exceptions to Administrative Law Judge's Decision, 6-8.

<sup>5</sup> *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

<sup>6</sup> Decision, 16.

As UNITE HERE argued in its own exceptions brief, the lawsuit as a whole had only one purpose: To enjoin the April 27 rally.<sup>7</sup> UNITE HERE started making the challenged statements on March 10, seven weeks before the rally. Yet Milum Textile did not file the lawsuit until the day before the rally. Milum Textile’s lawyer admitted at the TRO hearing that his client filed the lawsuit to stop the rally.<sup>8</sup> Craig Milum admitted that the loss of the TRO proceeding was “part of” his reasons for withdrawing the lawsuit.<sup>9</sup> Milum Textile’s other proffered reasons for filing the lawsuit were pretextual. Milum Textile’s inaction, after losing the TRO, showed its disinterest in the lawsuit apart from the TRO.

Under *Bill Johnson’s* and *BE&K*, Milum Textile violated §8(a)(1) because its entire lawsuit was baseless and retaliatory. The lawsuit was baseless because (1) Milum Textile’s secondary boycott claims were preempted;<sup>10</sup> and (2) Milum Textile could produce no evidence of actual malice or of actual damages necessary to enjoin allegedly defamatory

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<sup>7</sup> UNITE HERE’s Brief, 22-24.

<sup>8</sup> GCX12, p.3.

<sup>9</sup> Hearing Transcript, 4/11, 2246-2247.

<sup>10</sup> UNITE HERE’s Brief, 31-32.

speech.<sup>11</sup> The lawsuit was retaliatory because (1) Milum Textile abused process by attempting to delay the April 27 rally, without regard to its claims' legal merits;<sup>12</sup> (2) Milum Textile abused process by filing the lawsuit as part of a course of conduct—which included attempts to persuade the Board's Regional Director and the police to take action against UNITE HERE and the employees—in which Milum Textile solicited government action against UNITE HERE's protected activity;<sup>13</sup> (3) the lawsuit was part of Milum Textile's extensive course of conduct which Judge Parke found or should have found to be unlawful;<sup>14</sup> and (4) the lawsuit was directed against UNITE HERE's protected criticisms of Milum Textile employees' working conditions.<sup>15</sup>

UNITE HERE agrees with Milum Textile's assertion that Judge Parke improperly parsed out segments of the lawsuit and declared unlawful only these segments. The entire lawsuit was unlawful, not just a couple of its component parts. Milum Textile filed the lawsuit solely to stop the April 27 rally. Milum Textile had no reasonable expectation of prevailing on the merits, and filed the lawsuit to retaliate

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<sup>11</sup> *Id.*, 24-29, 31.

<sup>12</sup> *Id.*, 33-36.

<sup>13</sup> *Id.*, 36-37.

<sup>14</sup> *Id.*, 37-39.

<sup>15</sup> *Id.*, 39.

against UNITE HERE. Milum Textile therefore violated §8(a)(1). For the above reasons, and for the reasons set forth by Counsel for General Counsel, UNITE HERE requests that the Milum Textile's exceptions be overruled.

Respectfully submitted,



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Dated: January 7, 2008.

## Certificate of Service

I hereby certify that counsel for General Counsel and for Milum Textile have consented to service by electronic mail, and that I have served them this day by electronic mail.



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Ira Jay Katz

Dated: January 7, 2008.