

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

MILUM TEXTILE SERVICES COMPANY,

Respondent,

And

UNITE HERE!

Charging Party.

Case Numbers:

28-CA-20898

28-CA-20896

28-CA-20973

28-CA-21050

28-CA-21203

**RESPONDENT'S REPLY TO THE CROSS-EXCEPTIONS
FILED BY THE UNION**

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Milum Textile Services Company**

I. The ALJ Erred in Her Determination that Milum Violated Section 8(a)(1) of the Act on 26 April 2006 by Pursuing Preliminary Injunctive Relief in the Federal Lawsuit.

The Respondent excepts to the ALJ's finding that Milum violated Section 8(a)(1) of the Act on April 26, 2006 by filing a motion for a temporary restraining order ["TRO"] in the federal lawsuit. In its opposition, the Union's sole argument is that the motion for temporary restraining order is baseless because the sole purpose of the lawsuit was to stop the rally.

A. The Facts

Prior to filing the lawsuit, Milum had sought assistance from the NLRB – and that assistance was not forthcoming.¹ [ALJD at 5] After that unsuccessful process, Milum believed that the recourse to restrain this behavior was through the courts. [Tr 2173] As Craig Milum testified, he filed the federal lawsuit against the Union on 26 April 2006 because the union was engaging in activities that were inappropriate, illegal, libelous, hurtful, and interfering with Milum's customer relations.² On the same day that the federal lawsuit was filed, Milum filed a separate document entitled, "Motion for Temporary Restraining Order". [GC 10] The Motion for Temporary Restraining Order specifically set forth the acts that Milum sought to have restrained:

1. Picketing and distributing leaflets to the customers of Fox Restaurants and any other customers of Plaintiff.
2. Distributing false materials to Plaintiff's customers [GC 11 at 1]

And, in the Memorandum of Points and Authorities attached to the Motion for Temporary Restraining Order, Milum clearly alleged that the union's objectionable behavior commenced on or about 10 March 2006 and was continuing:

¹ The Union argues at page 3 that although the union started making the challenged statements on 10 March, Milum did not file the lawsuit until the day before the rally. The implication is that Milum did nothing because it was only concerned about the rally. As the record shows, this is not the case as Milum was pursuing possible remedies via the NLRB throughout this period.

² There were five separate allegations set forth in the federal complaint: (1) illegal secondary boycott, (2) intentional interference with economic relations, (3) intentional interference with prospective economic advantage, (4) libel, and (5) common law fraud – four (4) of which are state claims. [GC 8]

On or about 10 March 2006, and continuing thereafter, Unite Here...commenced a course of conduct specifically designed to cause Milum's customers to cease doing business with Milum...As set forth in the press release, Unite intends to contact not only Milum's customers, but the customers of Milum's customers. [GC 10 at 2]

A hearing was held on the Motion for Temporary Restraining Order, and the federal judge denied the motion for temporary restraining order. [GC 12] It cannot be overemphasized that the Judge ruled exclusively on the motion for temporary restraining order and did not make any determination regarding any of the allegations set forth in the complaint. [GC 12] Milum ultimately and voluntarily withdrew the lawsuit on 26 May 2006. Craig Milum testified that he withdrew the lawsuit for several reasons: his conversations with attorneys who had experience dealing with the Union, his belief that the Union typically tried to move everything to the NLRB, his belief that if he started in state court there was a better chance of keeping the case in the court system, and because of the cost of prosecuting a lawsuit. [Tr 2174–2176] In the letter that Craig Milum sent to his customers in November 2006 he sets forth in detail information about the lawsuit that had recently been decided in California involving a similar UNITE HERE! corporate campaign. [GC 69 (Attachment)] The jury in that case awarded the plaintiff \$17,000,000.00 in damages:

Not long ago, Unite Here conducted a corporate smear campaign against a linen company in California and extended it to the customers of the company and to their customers, one of which operated a group of hospitals. Unite Here sent out postcards to thousands of woman who might be choosing a hospital in which to give birth to their babies, and therefore were potential "customers" of the hospital. The postcard stated that the linens supplied by the particular linen company they used were not safe: **"the laundry service utilized by [the hospital], does not ensure that "clean" linens are free of blood, feces, and harmful pathogens"**. [Copy of postcard attached hereto] Thus, as set forth on the postcard, if you have your baby at this hospital, "You may be bringing home more than your baby...." The hospital had no alternative but to sue Unite Here for libel, trade libel, wrongful interference with prospective economic relations, and unfair competition. The jury in this California case recently awarded the hospital \$17,000,000.00 against Unite Here. [Emphasis added]

[A copy of the actual postcard that UNITE HERE! used is attached to GC 69]

This is the same type of language that the Union used in the letter that it sent to Milum's customers on 10 March 2006 – and which was attached to the Complaint filed by Milum in federal court. [GC 8]

B. The Unfavorable Ruling on the TRO Does Not Render the TRO Baseless

In *BE & K Construction Co.*, 351 NLRB No. 29 slip op. at 6, the Board held that the maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit. The test is whether a reasonable litigant could realistically expect success on the merits. Even if we assume, *arguendo*, that a “motion” for a TRO can be segregated from the remainder of the lawsuit and deemed to be a violation of the Act in and of itself, the fact remains that in order to violate Section 8(a)(1) the request for the TRO and the underlying claim must be baseless. Milum's Motion for a TRO was clearly not baseless. The facts in *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 P.3d 1230 (9th Cir. 1997), are virtually identical to this case, and show that a denial of a TRO does not render the “lawsuit” baseless, and that the underlying claim is not baseless. In *San Antonio* the hospital **filed an unfair labor practice** against the union regarding the banner that the union was displaying at its operation which stated, “This medical facility is full of rats.” The Union **did not have any relationship with the hospital** which it was targeting. The Board refused to go to complaint. The Hospital then filed **a lawsuit** in federal court including various state tort claims and a **federal claim for an unlawful secondary boycott**. The hospital also filed a **motion for temporary restraining order** which the court **denied**. The Court then conducted an evidentiary hearing on the hospital's request for a **preliminary injunction** (separate request) during which

evidence (New York Times standard) was presented. **At the conclusion of the evidentiary hearing**, the Court ruled that the hospital had met the requirements for a **preliminary injunction** set forth in the NLA, and enjoined the union from using the banner that they were then using. The fact that the hospital attempted to obtain relief from the NLRB and was denied such relief did not make its claim baseless. Nor was the hospital's claim rendered baseless because the Court denied its request for a TRO. As set forth in *San Antonio*, the hospital did not submit its proof of actual malice **until the time of the evidentiary hearing** on its request for **preliminary injunction**. In this case, Milum's Motion for a TRO was denied, and Milum did not request preliminary injunctive relief. The fact that Milum did not request preliminary injunctive relief upon which an evidentiary hearing would have been conducted, does not render its TRO request baseless. In *San Antonio* the hospital's complaint set forth six damage claims: libel, trade libel, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, interference with contractual rights, and secondary boycott under section 303 of the LMA – virtually identical to Milum's causes of actions. The Court in *San Antonio* held that the injunction could be predicated on the hospital's defamation claims, and that libel actions under state law are pre-empted by the federal labor laws **unless the defamatory statements are published with knowledge of their falsity or reckless disregard for the truth pursuant to *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)**. The Court went on to state that the union's right to use inflammatory rhetoric during a labor dispute **is not unbridled** under the NLA, and "Where, as here, a union's fraudulent language is **directed at any entity with which no labor dispute exists**, the NLA does not prevent a district court from exercising jurisdiction to issue an injunction prohibiting the fraudulent activity." *San Antonio* at 1235. The Court further stated, "Fraud and violence are as

unlawful and as reprehensible in a labor controversy as elsewhere.” *San Antonio* at 1235. Thus, Milum’s request for a TRO and the underlying claims for illegal secondary boycott and interference with economic relationships was clearly not baseless.

Therefore, a reasonably based lawsuit is protected by the First Amendment even if it is retaliatory and unsuccessful, and an “unsuccessful” lawsuit would include a lawsuit that was “lost or withdrawn”.³ The only issue is whether petitioner’s evidence raised factual issues that were genuine and material. Further, the role of the ALJ is to determine whether petitioner’s evidence raised factual issues that were genuine and material. *Bill Johnson’s Restaurants v. National Labor Relations Board*, 536 U.S. 516; 122 S. Ct. 2390; 153 L. Ed. 2d 499 (2002). In *Bill Johnson’s Restaurants* the court specifically pointed out that it was not within the province of the ALJ, based upon his own evaluation of the evidence, to determine that the libel and business interference counts in the lawsuit were in fact without merit. And, the Board may not decide that a suit is baseless by making credibility determinations, as the ALJ had done, when genuine issues of material fact or law exist.

II. Conclusion

Based upon the foregoing and the evidence in the record, the finding of the ALJ’s with respect to the filing of the Motion for Temporary Restraining Order should be overturned.

Dated this 22nd day of January 2008.

s/ Laurie A. Laws
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³ The Court discussed its dicta in the *Bill Johnson* case and used the phrase “lost **or withdrawn**” when describing unsuccessful lawsuits.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **RESPONDENT'S REPLY TO THE CROSS-EXCEPTIONS FILED BY THE UNION** was E-filed and served on this 22nd day of January 2008 as follows:

One copy via U.S. Mail to:

Cornele A. Overstreet
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One copy to the following via e-mail pursuant to agreement:

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s/ Laurie A. Laws
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