

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

Advice Memorandum

DATE: November 20, 2009

TO : Gary E. Muffley, Regional Director
Region 9

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

SUBJECT: The Hennegan Company
Case 9-CA-45153

This case was submitted for advice as to whether the Employer's state court lawsuit and a resulting temporary restraining order is preempted.¹ We conclude that neither the lawsuit nor the TRO are preempted because the Employer pled both malice and actual damages as elements of the causes of action, trade libel and tortious interference with a business relationship.

FACTS

The Hennegan Company, a commercial print company located in Florence, Kentucky, prints commercial catalogs, brochures, annual reports, inserts and specialty products. In 2006, the Employer was purchased by Consolidated Graphics, which operates print shops throughout the United States and Europe. The Employer and Charging Party Graphic Communications Conference of the International Brotherhood of Teamsters, Local 508-M of District Council 3 have been parties to successive collective bargaining agreements in four separate bargaining units at the Florence, Kentucky facility. After unsuccessful negotiations for a successor contract in the litho bargaining unit, the Employer implemented terms and conditions of employment on July 6, 2009.²

On August 17, the Union sent a letter to 5 to 10 of the Employer's primary customers. In essence, the letter

¹ The Region has determined that the lawsuit does not lack a reasonable basis in fact or law and has not submitted that issue to Advice.

² All dates are in 2009 unless specified otherwise.

argues that the Employer's bargaining demands for staffing reductions could lead to a negative impact on employee safety and product quality. Specifically, the letter states, in pertinent part, that,

- "the company has carried out a relentless assault on the safety and rights of the workers who print your products."
- "In bargaining ... the company has demanded eliminating the staffing provision from the contract." And,
- "The employees at the plant have told [the Union] that they believe that staffing reductions may lead to serious injuries as employees working large printing presses are stretched thin and could result in a lower quality of work."

On August 28, the Employer demanded that the Union retract the letter. The Union did not comply and on September 3, Hennegan filed a lawsuit in Kentucky's Boone County Circuit Court against the Union and the individual Union officials who signed the letter. The lawsuit seeks compensatory and punitive damages for trade libel and tortious interference with business relations or contracts. Under Kentucky law, both causes of action require a plaintiff to establish that the defendant acted with malice.

The Employer also sought a temporary restraining order, which the Boone County Circuit Court granted on September 3. The court concluded that "it [appears] ... that Defendants are committing the unlawful acts," and thus entered a TRO enjoining the Union from:

"Contacting Plaintiff's current and prospective customers in order to interfere with Plaintiff's business and contractual relationships with said customers;

Publishing information regarding Plaintiff's record of safety, concern for its employees and adherence to state and Federal laws that Defendants know or should know to be false."

The Union unsuccessfully attempted to remove the case to federal court under Section 301. The United States District Court for the Eastern District of Kentucky concluded that the Employer's state claims were not preempted by the Act because the state court would not be required to interpret the terms of the parties' collective-bargaining agreement in order to resolve the causes of action.

On September 23, the Union sent a second letter to customers, informing them of Hennegan's lawsuit. The Union stated therein that it may be necessary to "involve" the customer in the lawsuit in order for the Union to defend itself. It maintained that such involvement may include subpoenaing business documents and requiring customer officials to be deposed, respond to interrogatories, and testify at trial. On September 30, the Employer filed a motion for contempt of the TRO, arguing that the Union's second letter to customers violates the terms of the injunction. The motion is pending.

ACTION

We conclude that the state court lawsuit is not preempted because in both causes of action, the Employer has pled and will be required to establish malice and actual damages.

A lawsuit is preempted where the activities are "arguably subject" to the protections of Section 7 or "arguably prohibited" by Section 8.³ An exception to this principle arises when 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."⁴

The Supreme Court has held that libel or defamation claims exhibit an overriding state interest, provided that

³ San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959).

⁴ Id. at 243-44.

the statements at issue were made with malice and caused the plaintiff damages.⁵ In Linn, the Court reasoned that defamation lawsuits were of peripheral concern to national labor policy, because the malicious publication of defamatory statements that might injure a person's reputation "does not in and of itself constitute an unfair labor practice."⁶ Further, while the Board might find that a party violated Section 8 by making the false statement in certain contexts, the Board has no remedies to compensate the defamed individual.⁷ To avoid possible interference with national labor policy, however, the Court limited the availability of state remedies for libel or defamation in labor disputes to those instances in which the plaintiff pleads and proves that the defamatory statements were made with malice and caused injury.⁸

The Board has held that Linn governs whether a defamation lawsuit is preempted. That is, to determine whether the filing and maintenance of a lawsuit constitutes an unfair labor practice because it is preempted, the Board examines whether the plaintiff pleads and proves malice and actual damages.⁹ In Beverly Health & Rehabilitation Services, the Board dismissed aspects of the complaint that alleged that the Employer had unlawfully maintained a preempted lawsuit, where it had satisfied the Linn framework by pleading malice and damages.¹⁰

In the instant case, the lawsuit's causes of action turn on trade libel and intentional interference with a business relationship. As to the trade libel claim, Hennegan's state court complaint alleges that the Union acted with malice when sending the letters to its

⁵ See Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 61-65 (1966).

⁶ Id. at 62.

⁷ Id. at 63-64.

⁸ Id. at 55.

⁹ See Beverly Health and Rehabilitation, 331 NLRB 960, 963 (2000).

¹⁰ Id. at 963.

customers, thus pleading a required element of the tort.¹¹ Hennegan further pled actual damages, in an amount to be proven at trial. As to the Employer's other state law claim of tortious interference, a malice element must also be proven.¹² Thus, this claim, like the trade libel claim which relies on the same conduct and statements, is well-pled under Linn and Beverly and is not preempted by the Act. Since the TRO is an extension of this well-pled lawsuit, it also is not preempted.¹³

Since the lawsuit was properly pled and the conduct alleged by the Employer is not protected as pled, we find that the lawsuit is not preempted and the charge should be dismissed, absent withdrawal.

B.J.K.

¹¹ Under Kentucky law, a plaintiff must prove, among other things, that the defendant "knows that the statement is false or acts in reckless disregard of its truth or falsity." Keith v. Laurel County Fiscal Court, 254 S.W.3d 842, 845 n.4 (Ky. App. 2008) (adopting and quoting Restatement of Torts (Second) § 623A).

¹² See, e.g., National Collegiate Athletic Association v. Hornung, 754 S.W.2d 855, 859 (Ky. 1988) ("[I]t is clear that to prevail a party seeking recovery must show malice or some significantly wrongful conduct.").

¹³ Further, the TRO comports with the framework articulated in Linn and Beverly. Although it granted relatively broad injunctive relief, because the court concluded that the Union apparently engaged in the unlawful conduct as alleged, the court necessarily found reasonable cause to believe that the Union acted with malice, as pled.