

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

Advice Memorandum

DATE: December 27, 2000

TO : Peter W. Hirsch, Regional Director
Region 4

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

SUBJECT: Hannah & Sons Construction Co., Inc.
Case 4-CA-28916

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) when it filed and maintained a lawsuit against the Charging Party Union because the Union refused to sign a collective-bargaining agreement with the Employer and thereby prevented the Employer from obtaining a construction subcontract.

FACTS

In November of 1998, Hannah & Sons Construction Company (the "Employer") was offered a subcontract with a general contractor, Buckley, Inc., doing work for the Delaware Port Authority. The subcontract was for pile-driving work as part of a rehabilitation project for the Walt Whitman Bridge in the Philadelphia, Pennsylvania area.

Buckley, a member of the Contractors Association of Eastern Pennsylvania (the "Council"), was and is a party to a collective-bargaining agreement with the Metropolitan Regional Council of Philadelphia & Vicinity of the United Brotherhood of Carpenters & Joiners of America (the "Union"). The agreement covers all heavy and highway construction work, and includes a subcontracting clause which states that signatory employers will not subcontract job-site work to any contractor not bound by the terms of the Agreement. The Employer was not a party to the Agreement.

On November 12, 1998, the Employer approached Michael Dooley, Union Business Agent, and asked to become a party to the Agreement. By letter on that same date, the Employer formally requested a copy of the Agreement for execution. The Union did not provide it.

By letter dated June 15, 1999, the Employer again requested a copy of the Agreement for execution from the

Union. The letter accused Dooley of having indicated a willingness to sign an agreement and then refusing to do so without providing any reasonable explanation. The Employer also stated in the letter that it was committed to the employment of union workers; that it had distinguished itself as a quality contractor employing union workers; and that it had distinguished itself as a specialty contractor in the area of excavation, grading, demolition, pile-driving, and bridge and site work in the Greater Philadelphia Metropolitan Area. Additionally, the Employer indicated that it wished to resolve this matter without disrupting the goodwill it had built with organized labor throughout its twenty years of operation.

By letter dated June 21, 1999, Edward Coryell ("Coryell"), the Union's Business Manager, acknowledged receipt of the Employer's request to execute an agreement with the Union. Coryell informed the Employer that the Union had conducted an investigation which failed to uncover a single union project handled by the Employer, or a single hour of fringe benefit contributions made by the Employer, during the twenty-year period the Employer had asserted it was working as a union contractor. Coryell asked for a list of all projects that the Employer had completed over the past twenty years, and all collective-bargaining agreements to which the Employer had been a signatory (with a list of the applicable crafts and trades for each contract and the fringe benefit payments contributed under each contract). The Union asserts that it refused to enter a collective-bargaining agreement with the Employer because the Employer failed to provide the Union with the requested information. The Employer has presented no evidence that would contravene that assertion or indicate that the Union had some other purpose.

The Employer was unable to obtain the subcontract because of the Union's refusal to execute an agreement. On January 6, 2000,¹ the Employer filed a Complaint against the Union, Coryell and Dooley in the Court of Common Pleas of Philadelphia County.² The Complaint alleged, inter alia, that the Union's refusal to sign an agreement with the Employer, knowing that the agreement was essential to the Employer's ability to fulfill its contractual obligations, was tantamount to intentional interference with its

¹ All dates hereafter are in 2000 unless otherwise noted.

² The Employer had filed a Praecipe of a Writ of Summons in September 1999, in order to comply with the statute of limitations, but did not set forth its causes of action until the January 6, 2000 complaint.

contractual relationship with the Delaware Port Authority. The Complaint included four counts of intentional interference with contractual relationships, one count of common law antitrust under Pennsylvania law, and one count of civil conspiracy.

On January 24, the Union removed the lawsuit to Federal District Court. On February 2, the Union filed charges with the Region, alleging that the Employer violated Section 8(a)(1) of the Act by instituting the lawsuit against the Union. On February 17, the Region deferred action on the charge pending the outcome of the lawsuit.

On motion by the Employer, the District Court remanded the case to the State Court on April 26. On May 9, the Union filed preliminary objections to the complaint based upon an argument of preemption. On August 8, the Common Pleas Court of Philadelphia agreed with the Union and dismissed the lawsuit. The Court found that the four counts of intentional interference with contractual relationships involved a single determinative issue: whether the Union and the employees it represented had a right to refuse to work for or to enter into a contract with the Employer. The Court further concluded that the National Labor Relations Board should resolve that issue, and it dismissed the four counts with prejudice. As to the other counts of common law antitrust and conspiracy, the Court found that, although they involved claims that may exist under state law, they were so intertwined with the Union's rights under federal law that the Court would "defer to the Federal Courts for resolution unless it is deemed otherwise" and dismissed the counts without prejudice. The Employer failed to appeal the Court's decision.

ACTION

We conclude that, consistent with Bill Johnson's,³ complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by filing and maintaining the lawsuit against the Union.

In Bill Johnson's, the Supreme Court held that the Board may enjoin as an unfair labor practice the filing and prosecution of a state court lawsuit when the lawsuit lacks

³ Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

a reasonable basis in fact or law, and was commenced in retaliation for the exercise of Section 7 rights.⁴

Here, the first prong of this two-part test is governed by the Board's decision in Alberici Construction,⁵ where it was noted that "[t]he Board has consistently interpreted Bill Johnson's to hold that if the plaintiff's lawsuit has been finally adjudicated and the plaintiff has not prevailed, its lawsuit is deemed meritless..." Thus, the Court of Common Pleas of Philadelphia dismissed four counts of the Employer lawsuit with prejudice. Furthermore, the Court declared that the other counts alleged were intertwined with the dismissed counts such that it was appropriate to dismiss those counts as well, albeit without prejudice. Since the Employer failed to prevail during the adjudication process on any of the counts raised, the lawsuit is now considered to have been meritless.

As to retaliatory motive, the Board generally has found that when a lawsuit is directed at Section 7 activity, the lawsuit necessarily is unlawfully "retaliatory."⁶ In the instant case, the lawsuit alleged that the Union, by refusing to sign an agreement with the Employer, interfered with the Employer's ability to obtain a subcontract since the Union's Agreement with the general contractor required the Employer to be a party to the Agreement. However, this type of subcontracting clause is permitted in the construction industry "in order to protect continuity of work and benefits for the employees."⁷ The Union refused to enter the agreement with the Employer only after the Employer made assertions that the Union could not substantiate and the Employer refused to provide

⁴ Id. at 748-49; Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 136 (1995); Machinists Lodge 91 (United Technologies), 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991), cert. denied 502 U.S. 1091 (1992).

⁵ Alberici Construction, 309 NLRB 1199, 1200 (1992) (citations omitted), enf. denied on other grounds 15 F.3d 677 (7th Cir. 1994). See also Bill Johnson's, 461 U.S. at 747.

⁶ Phoenix Newspapers, 294 NLRB 47, 49 (1989); H. W. Barss Co., 296 NLRB 1286, 1287 (1989).

⁷ Donald Schriver, Inc. v. NLRB, 635 F.2d 859, 876 (D.C. Cir. 1980), enfg. 239 NLRB 264, cert. denied 451 U.S. 976 (1981).

information requested by the Union in an attempt to substantiate the assertions.⁸ Under these circumstances, the Union reasonably questioned the Employer's integrity and willingness to comply with the requirements of the collective-bargaining agreement. Thus, by refusing to enter into a contract with the Employer, the Union was attempting to protect the jobs and benefits of its members and therefore the conduct was protected activity under the "mutual aid and protection clause" of Section 7 of the Act.⁹ The Employer's lawsuit clearly was directed at this protected activity.

Accordingly, absent settlement, the Region should issue complaint alleging that the Employer violated Section 8(a)(1) of the Act by maintaining a meritless lawsuit in retaliation for the Union's engaging in Section 7 activity.

B.J.K.

⁸ Had the Union refused to enter a collective-bargaining agreement with the Employer for discriminatory or arbitrary reasons, that conduct arguably would have violated Section 8(b)(4), insofar as it would have the object of forcing a cessation of business between the general contractor and the Employer. Cf. Limbach, 305 NLRB 312 (1991), affirmed in relevant part 989 F.2d 515 (D.C.Cir. 1993), enfd. 53 F3d 1085 (9th Cir. 1995) (union's disclaimer of representation after Section 8(f) contract expired violated Section 8(b)(4) where its purpose was to force the employer to cease doing business as a double-breasted operation). Thus, the construction industry proviso privileges secondary agreements, such as that at issue here, in order to preserve job site peace and to protect continuity of work and benefits of construction industry employees. A union purpose not in keeping with the policies supporting the proviso arguably would take the union's conduct outside the scope of the proviso and consequently make it unlawful under Section 8(b)(4).

⁹ Cf. Manno Electric, 321 NLRB 278, 298 (1996) and Associated Builders & Contractors, 331 NLRB No. 5, fn. 1 (May 16, 2000) (job-targeting programs designed to protect the employees' jobs and wage scales was protected activity under the "mutual aid and protection" clause).