

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

# Advice Memorandum

DATE: May 9, 2000

TO : Sandra Dunbar, Regional Director  
Region 3

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

SUBJECT: Overnite Transportation Company  
Case 3-CA-22273

506-2017-1700  
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524-0183-6789

This Bill Johnson's case was resubmitted for advice regarding whether the Employer violated Section 8(a)(1) by filing and maintaining a state court lawsuit against the individually named defendants.

## FACTS

### A. Background

In our prior Advice Memorandum, dated April 20, 2000,<sup>1</sup> we concluded that complaint should issue against the Employer for violating Section 8(a)(1) by filing and maintaining a baseless, retaliatory lawsuit against named defendants Fill and Matulis as it is undisputed that these defendants were not present during, and did not participate in, the alleged picketing misconduct.<sup>2</sup> We also concluded that the Region should hold in abeyance the allegation that the Employer violated Section 8(a)(1) by filing a baseless, retaliatory lawsuit against the John Doe defendants, pending a final court determination that any such individuals later named by the Employer did not engage in

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<sup>1</sup> Overnite Transportation Company, 3-CA-22273 (April 20, 2000).

<sup>2</sup> The alleged picketing misconduct consisted of intentional and repeated picketing which blocked ingress and egress to the Employer's facility (the Tonawanda Terminal), and on occasion blocked traffic on a street adjoining the entrance to the Tonawanda Terminal, which also had the effect of blocking ingress and egress to the Tonawanda Terminal. We concluded that these acts, which are not disputed, are not protected by Section 7 of the Act. Consequently, the Employer's lawsuit alleging these acts is not retaliatory in the meaning of the Act.

picketing misconduct. Finally, we concluded that the Region should dismiss the Section 8(a)(1) charges against the Employer relating to its lawsuit against the remaining named defendants, as there was no evidence rebutting the Employer's allegation that these defendants were engaged in the alleged picketing misconduct.

**B. Supplemental Findings of Fact**

In a supplemental submission dated May 2, 2000, the Region determined that its investigations revealed no evidence that any individual named defendant (other than Union official Felicetta) had picketed the Tonawanda Terminal or had engaged in picketing misconduct. Rather, the Employer's sole basis for identifying these individuals and naming them as defendants was that vehicles registered in their names were parked near the Tonawanda Terminal when picketing took place.

**ACTION**

For the reasons stated in our first Advice Memorandum, the Region should: (1) issue an 8(a)(1) complaint against the Employer for filing a baseless, retaliatory lawsuit against defendants Fill and Matulis;<sup>3</sup> (2) hold in abeyance the allegation that the Employer violated Section 8(a)(1) by filing a baseless, retaliatory lawsuit against the John Doe defendants; and (3) dismiss the allegations against the Employer for filing a baseless, retaliatory lawsuit against the Union and Union official Felicetta.

However, with respect to the allegation that the Employer violated Section 8(a)(1) by filing a baseless, retaliatory lawsuit against the individual named defendants (other than Felicetta, Fill and Matulis), we now conclude that these allegations should be held in abeyance pending final court determination regarding whether these defendants engaged in picketing misconduct.

In Tube Craft,<sup>4</sup> the Board noted that peaceful picketing does not encompass the right to block access to an

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<sup>3</sup> [*FOIA Exemptions 2 and 5*

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<sup>4</sup> 287 NLRB 491, 492 (1987).

employer's premises. This is precisely the type of conduct, which the Employer alleges took place. However, in light of the Region's supplemental findings of fact, it is apparent that there is a factual dispute regarding whether the named defendants (other than Felicetta, Fill and Matulis) engaged in picketing misconduct, or were even personally present during the picketing. Consequently, Bill Johnson's requires that the allegations against the Employer relating to its lawsuit against these defendants should be held in abeyance pending final court determination of merits of the lawsuit.

### **CONCLUSION**

For the foregoing reasons, we conclude that, absent settlement, the Region should issue complaint alleging that the Employer violated Section 8(a)(1) for filing and maintaining a baseless retaliatory lawsuit against Defendants Fill and Matulis. The Region should hold in abeyance the allegation that the Employer violated Section 8(a)(1) by filing a baseless, retaliatory lawsuit the John Doe defendants, and the named individual defendants (other than Felicetta, Fill and Matulis), pending final court determination whether these individuals engaged in picketing misconduct. Absent withdrawal, the Region should dismiss the charges relating to the Union and Felicetta, as the Employer's allegations are not in retaliation for engaging in protected conduct.

B.J.K.