

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

Advice Memorandum

DATE: April 20, 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

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This Bill Johnson's case was submitted for advice regarding whether the Employer violated Section 8(a)(1) by filing and maintaining a state court lawsuit against the Union, a Union official, and Union members for picketing the Employer's facility.

FACTS

Overnight Transportation Company ("Employer") is a trucking transport company. Teamsters Local 375 ("Union") is the certified representative of the Employer's truck drivers.

From October 25, 1999¹ to the present, the Union has been engaged in a strike against the Employer. From October 25 to the present, the Union has picketed the Employer's Tonawanda, New York facility ("Tonawanda Terminal"). The picket line has been manned by Union officers, retired Union members, and Union members employed by other trucking firms. None of the Employer's drivers have picketed the Tonawanda Terminal.

Beginning with the first day of the strike, October 25, to the present, Union members and officials have picketed the sole entrance to the Tonawanda Terminal.² It

¹ All dates refer to 1999 unless otherwise noted.

² The remainder of the Tonawanda Terminal is surrounded by a fence.

is undisputed that the picketing has blocked ingress and egress to the Tonawanda Terminal. Picketing typically begins about 7:00 a.m., preventing trucks and persons from entering or leaving the Tonawanda Terminal. Trucks and employees of the Employer and its customers are blocked by the picketers. The Employer calls the police on a regular basis in order to allow trucks to enter and leave the Tonawanda Terminal, which they then do in convoy. The picketers delay trucks' ingress to and egress from the Tonawanda Terminal from 45 minutes to 1 hour 35 minutes. Typically, the last trucks leave the Tonawanda Terminal at 9:00 a.m., at which time the picketing ceases.

It is also undisputed that the Union picketers have also impeded traffic on a public street in the vicinity of the Tonawanda Terminal, further blocking access to the Tonawanda Terminal.

Union Business Agent Frank Felicetta ("Felicetta") has been present at the picketing nearly every day since the strike began. Felicetta admits that the picketers block the Employer's entrance and exit on a regular basis. On November 8, Felicetta was observed by a security guard threatening the driver of a truck owned by a customer of the Employer, who was attempting to leave the Tonawanda Facility after picking up a load at the facility. Felicetta allegedly threatened to drag the driver out of his truck and beat him. Felicetta does not deny the allegation.³ Felicetta admits that on November 23, he repeatedly readjusted the spot mirror of a truck when it attempted to drive out of the facility, preventing it from leaving. The truck had been unable to leave the Tonawanda Terminal with the daily police guarded convoy due to mechanical problems. The police were called back. Felicetta told the police he had readjusted the truck's mirror in retaliation for that driver's having endangered picketers when it entered the Tonawanda Terminal that morning.

On November 12, the Employer filed a charge against the Union alleging violation of Section 8(b)(1)(A) for

³ Instead, Felicetta wanted to know why, if he had made such a statement, it was not on videotape.

threatening the Employer's customers and by picketing in a manner that blocked the Employer's entrance and exit.⁴ The Region determined that complaint should issue. Prior to issuance of complaint, the Region approved a bilateral informal settlement agreement on January 12, 2000.

The Employer also filed a charge alleging that the Union engaged in unlawful secondary activity by blocking the Employer's entrance.⁵ The Region found no merit to this claim and it was withdrawn.

On December 6, the Employer filed a six-count state court lawsuit against the Union, Felicetta (as an individual and a Union official), eleven other individuals,⁶ and John Does, who are alleged to be Union members, officers or agents (collectively the "Defendants"). The lawsuit alleges that the Defendants' intentional picketing of the Tonawanda Terminal has blocked and delayed the Employer's trucks, its employees, and customers from entering and exiting the Tonawanda Terminal; blocked traffic on a public street leading to and from the Tonawanda Terminal; this conduct was condoned, authorized or ratified by the Union; that Felicetta directed, supervised and participated in the picketing each day; and that this conduct interfered with the Employer's business and caused it to incur money damages.

The Employer alleges four counts against all Defendants based on the Defendants' blockage of the Tonawanda Terminal entrance: injury to property, private nuisance, interference with business relations, and false imprisonment. The Employer alleges one count against all Defendants, public nuisance, due to the blockage of the public street leading to the Tonawanda Terminal. Finally, the Employer alleges one count against only the Union and Felicetta (as a Union official), negligence, for failure to

⁴ Case 3-CB-7599.

⁵ Case 3-CC-1476.

⁶ These individuals were identified personally by the Employer, or were named based on a motor vehicle search of automobiles parked outside the Tonawanda Terminal near the Union picketers.

take reasonable measures to prevent interference with the Employer's business operations.

The Union's answer (on its own behalf and that of its named Union members and officials) is that the picketers at all times engaged in peaceful picketing.

The charges against Defendant Matulis were withdrawn by the Employer. Matulis is a Union member who works at the Tonawanda Terminal. He was working during the picketing, but parks his car outside the facility.

There is uncontradicted evidence that Defendant Fill is not a Union member, and was in a hospital during the time period alleged in the lawsuit. Thus, Fill could not have been present as a picketer. The Employer refuses to withdraw its allegations against Fill until he identifies through discovery who was driving his car to the Tonawanda Terminal.⁷ Since Fill is not a Union member, the Union is not defending him. At present, there is a question about whether Fill has been served.

On December 14, the Union filed the instant charge against the Employer alleging violation of Section 8(a)(1) by filing and maintaining a state lawsuit to restrain lawful picketing.

ACTION

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.⁸ [FOIA Exemptions 2 and 5

⁷ Fill's son is a Union member.

⁸ [FOIA Exemptions 2 and 5

.] Absent withdrawal, the Region should dismiss the charges against the Employer relating to the remaining Defendants, as the Employer's allegations are not in retaliation for engaging in protected conduct.

A. Bill Johnson's Standard

In Bill Johnson's,⁹ the Supreme Court held that the Board may enjoin as an unfair labor practice the filing and maintenance of a pending lawsuit that lacks a reasonable basis in fact or law and was commenced for a retaliatory motive.¹⁰ According to the Court, a lawsuit lacks a reasonable basis where the lawsuit plaintiff asserts "plainly unsupported inferences from the undisputed facts" or makes "patently erroneous submissions with respect to mixed questions of fact and law," or where the legal issue is plainly foreclosed as a matter of law.¹¹ The Board may also enjoin lawsuits that have an illegal objective or which are preempted by the Act.¹²

1. The Conduct Alleged is Not Protected and is Not Preempted

In Tube Craft,¹³ the Board held that "peaceful picketing does not include the right to block access to the employer's premises." Consequently, a union's physical obstruction of an employer's entrance violates Section 8(b)(1)(A)¹⁴ and is unprotected.¹⁵ Since obstructing access

⁹ Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

¹⁰ Id. at 738.

¹¹ Id. at 746, n.11 and 747.

¹² Id. at 737-38 n.5.

¹³ Tube Craft, Inc., 287 NLRB 491, 492 (1987).

¹⁴ Id. at 493; see also Big Horn Coal Co., 309 NLRB 255, 259 (1992) (citing Iron Workers Local 455 (Stokvis Multi-ton), 243 NLRB 340, 348 (1979)).

to an employer's facility is unprotected and could be enjoined under state law, a state court may award compensatory and punitive damages against a union for engaging in such conduct without preemption under the Act.¹⁶

Here, the Employer has alleged and there is sufficient evidence, that the Union picketers blocked access to the Tonawanda Terminal by routinely blocking the entrance to the Tonawanda Terminal and by occasionally blocking the public street leading to the entrance to the Tonawanda Terminal. Applying Tube Craft, such conduct is not protected, and the Employer may legitimately seek money damages in state court for damages it sustained due to this unprotected conduct.

2. The Employer's Allegations against Fill and Matulis Lack a Reasonable Basis in Fact and are Retaliatory

The Employer's allegations against Defendants Matulis and Fill lacked a reasonable basis in fact. Matulis, an employee at the Tonawanda Terminal who was working when the picketing took place, was not involved in picketing or picketing misconduct. For this reason, the Employer withdrew its complaint against Matulis, and thus it is meritless.¹⁷ Likewise, Fill was not involved in picketing or picketing misconduct because he was hospitalized during the alleged picketing, and remains so today. Consequently, applying Bill Johnson's, these allegations against him are baseless.

Under Board law, "if an employer disciplines an employee who is engaging in protected activity, it must have an honest belief that the employee engaged in [] misconduct of a serious nature. If the employer establishes such a defense, the General Counsel has the burden of showing that the employee did not engage in the

¹⁵ UAW v. Russell, 356 U.S. 634, 640 (1958).

¹⁶ Id. at 640-41.

¹⁷ There is a rebuttable presumption that a withdrawn complaint lacks merit. Vanguard Tours, Inc., 300 NLRB 250, 255 (1990), enf'd denied in pertinent part, 981 F.2d 62 (2d Cir. 1992).

misconduct."¹⁸ Further, "an honest belief in misconduct requires some specificity in the record linking particular employees to particular misconduct". Thus, in Beaird Industries, the employer violated Section 8(a)(3) by discharging, without an investigation, an employee who was near the site where several unidentified individuals had engaged in violence. The Board stated that the employer lacked any "probative evidence that [the discharged employee] caused that damage".¹⁹ Here, as in Beaird Industries, the Employer lacked any probative evidence that Defendants Matulis and Fill were engaged in unprotected activity. They were named in the complaint simply because their cars were parked outside the Tonawanda Terminal when the picketing took place. This is insufficient evidence of misconduct. Consequently, the Employer was not privileged to file a lawsuit against Matulis and Fill seeking money damages for their participation in the alleged picketing misconduct.

The lawsuit allegations against Matulis and Fill are also retaliatory. The two were named as defendants, causing them to defend themselves in an action seeking money damages from them, solely because of their association with the Union²⁰ and the proximity of their car to the Union picketing. Further, the Employer is maintaining its allegations against Fill in order to coerce him to identify who was driving his car when the picketing took place, and in retaliation for his not having identified that individual -- even though the Employer could learn the identities of the picketers from Fill and others through normal discovery processes without Fill being a named defendant.²¹ The charges against Matulis and Fill are also retaliatory because the Employer seeks

¹⁸ Beaird Industries, Inc., 311 NLRB 768, 770 (1993)

¹⁹ Id.

²⁰ Matulis is a Union member, and Fill's son is a Union member.

²¹ For example, the Employer could question Fill as a non-party deponent. See Fed. R. Civ. P. 26.

punitive damages²² and because the allegations are unfounded.²³

In light of the fact that the Employer is unwilling to dismiss the allegations against Fill, instead insisting upon propounding discovery against him in order to compel him to identify the person driving his car to the site of the Union picketing, and in light of the fact that Fill must defend himself because he is not a Union member entitled to Union litigation defense, we conclude that Complaint should issue immediately against the Employer with respect to its baseless, retaliatory allegations against Defendants Fill and Matulis. [FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5

²² H.W. Barss Co., 296 NLRB 1286, 1287 (1989) (employer's excessive monetary damage request warranted inference of retaliation); Phoenix Newspapers, Inc., 294 NLRB 47, 48-50 (1989) (\$10 million punitive damage request warranted conclusion that lawsuit retaliatory).

²³ Bill Johnson's, 461 U.S. at 749 (Board warranted in inferring retaliation where lawsuit unmeritorious); Diamond Walnut Growers, Inc., 312 NLRB 61, 69 (1993) (baseless lawsuit allegations were evidence of retaliation), enf'd, 53 F.3d 1085 (9th Cir. 1995).

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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.²⁵ [*FOIA Exemptions 2 and 5*

.] Absent withdrawal, the Employer should dismiss the charges against the Employer relating to the remaining Defendants, as the Employer's allegations are not in retaliation for engaging in protected conduct.

B.J.K.

²⁴ [*FOIA Exemptions 2 and 5*

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²⁵ [*FOIA Exemptions 2 and 5*

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