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

Advice Memorandum

DATE: May 31, 2007

TO : Frederick Calatrello, Regional Director
Region 8

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

SUBJECT: National Paper & Packaging Co.
Cases 8-CA-36800; 36937

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This 8(a)(1) case was submitted for advice on whether National Paper and Packaging Co. (National Paper or the Employer) violated the Act by (1) offering and providing its own attorney to represent non-supervisory employee witnesses during an on-going Board investigation; and/or (2) maintaining a lawsuit in state court that seeks to enforce a non-compete clause against an employee it allegedly terminated for his protected concerted activity.

We conclude that the Employer violated Section 8(a)(1) of the Act by offering and providing its own attorney to represent non-supervisory employee witnesses during an on-going Board investigation. Further, we conclude that the Employer's attempt to enforce the non-compete clause against an employee it terminated for protected concerted activity is preempted by the Board's primary jurisdiction, and [*FOIA Exemptions* 2 and 5

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I. The Employer Violated Section 8(a)(1) by Offering and Providing its Own Attorney to Represent Non-Supervisory Employee Witnesses during the Board Investigation

During the investigation of Charging Party Sollisch's unlawful discharge allegation, the Region issued investigative subpoenas to two non-supervisory employees of the Employer, Jacquelyn Fiocca (Fiocca) and Gary Testen (Testen). After being subpoenaed, Fiocca informed the Employer's CEO that a Board agent had contacted her and the CEO requested that she email him an account of her conversation with the Board agent. Subsequently, a Human Resources (HR) representative of the Employer approached Fiocca and told Fiocca to testify truthfully and there would be no adverse consequences for doing so. When Fiocca

asked if she should appear before the Board agent alone or if she should get an attorney, the HR representative responded that she would have the Employer's attorneys contact Fiocca. Within two days, Employer attorney Sheila Greenbaum called Fiocca and stated that she was representing the Employer, and that the Employer had agreed to provide Greenbaum's firm to represent Fiocca. Greenbaum then explained that Fiocca's other choices were to testify without representation or hire her own attorney. Finally, Greenbaum said that if Fiocca wished to be represented by the Employer's attorney, there was the potential for a conflict of interest and, if that occurred, the firm would withdraw from representing Fiocca. Fiocca accepted Greenbaum's offer to represent her.

The Region then subpoenaed Testen. He immediately contacted Fiocca, who told him that the Employer was providing her with free representation. Testen contacted the same HR representative, stating that he also wanted representation. The HR representative told Testen that she would contact the Employer's law firm. [*FOIA Exemption* 7(D) ,] Testen could not recall whether Greenbaum contacted him or if he first called her, but as in the conversation with Fiocca, Greenbaum presented Testen with an offer of free legal representation and then mentioned the other alternatives of no representation or hiring his own attorney. Greenbaum also explained that in the event that a conflict of interest arose, her firm would have to withdraw its representation. Testen accepted Greenbaum's offer to represent him in the Board investigation.

We conclude that this conduct violated Section 8(a)(1). In S.E. Nichols, Inc., the Board affirmed the ALJ's decision that the employer violated Section 8(a)(1) by offering its own attorney to represent non-supervisory employees during interviews with a Board agent.[1] The Board was investigating multiple charges filed against the employer resulting from its activities during a divisive union organizing campaign. During the Board investigation, upper management told the employees that Board agents would visit the store and might interview them and that "if [an employee] needed any protection [S.E. Nichols] would get

[1] 284 NLRB 556, 582 (1987), enfd. in rel. part 862 F.2d 952 (2nd Cir. 1988). See also, KFMB Stations, 349 NLRB No. 38, slip op. at 1, 15 (2007), where the Board recently applied S.E. Nichols in finding that an employer's offer to provide company counsel to non-supervisory employees during a Board investigation violated Section 8(a)(1).

its lawyer to sit in on the meeting."[2] In finding an 8(a)(1) violation, the ALJ concluded that:

> An employee who accepts an employer's suggestion that he be accompanied by counsel would reasonably also accept the offered services of the [employer's] attorney because securing independent counsel would entail expense and, probably, inconvenience. The [Employer] is thus temptingly proposing a serious conflict of interests. There is no apparent way that an attorney could properly advise and represent both employees and the employer who has been accused of violating their rights […] The most fearless employee would find it difficult to provide the Board information against the employer when he is accompanied and being "advised" by the employer's counsel.[3]

Here, as in S.E. Nichols, the Employer's attorney contacted Fiocca and offered her free legal services during the investigation. We are aware that Fiocca initiated the dialogue regarding representation by asking an HR representative what she recommended, and Testen may have initiated the contact with Greenbaum. However, it is irrelevant that the employees may have initiated the dialogue, since the offer itself was what was found unlawful in S.E. Nichols. Moreover, although Greenbaum also told both Fiocca and Testen that they had the right to seek their own representation or appear before the Board without representation, the Employer's offer of free legal representation inappropriately constituted a serious conflict of interest, thus interfering with the employees' Section 7 rights and with the Board's investigatory processes.

The Employer argues that the Fifth Circuit's decision in Florida Steel Corp. v. NLRB[4] requires a different result. There, the court denied enforcement of the Board's Section 8(a)(1) order, where the employer had distributed a letter to all employees advising them of their right to counsel during interviews with Board agents, because the letter merely offered employees the assistance of the company in securing legal counsel and did not "require or compel" the employees to consult with the employer about obtaining

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[2] 284 NLRB at 580.

[3] 284 NLRB at 581, 582.

[4] 587 F.2d 735 (5th Cir. 1979).

counsel.[5] However, even if the Board were to accept the Fifth Circuit's rationale in Florida Steel, that case is distinguishable because (1) the statement offering assistance was made in a generalized letter rather than in a face-to-face conversation; and (2) there was no offer of free representation but only a statement of the employees' general right to representation and assistance in finding legal counsel.[6]

II. The Employer's Attempt to Enforce a Non-Compete Clause Against an Employee it Unlawfully Terminated is Preempted and [*FOIA Exemptions* 2 and 5 .]

In May 2006,[7] the Employer unilaterally instituted a new "fuel surcharge" policy, which added a charge to all customer deliveries to off-set the rising price of gasoline. Under the new policy, if the customer refused to pay this surcharge, the amount would be deducted from the salesperson's commission. On July 14, Sollisch and other salespersons met with management to discuss their dissatisfaction with the fuel surcharge policy and the negative affect it would have on their commissions. After the meeting, Sollisch repeatedly emailed his supervisors to advise them of his dissatisfaction with the surcharge, as well as the negative responses he was receiving from his customers. On August 7, the Employer terminated Sollisch, citing "irreconcilable differences," poor work performance, and his alleged yelling at the July 14th meeting.

The Region has found merit to the allegation that the Employer unlawfully terminated Sollisch for protected concerted activity. The Region rejected the Employer's Wright Line[8] defense that Sollisch would have been terminated regardless of his complaints during the July 14th meeting and his emails, because (1) employees Fiocca and Testen, who were present at the July 14th meeting, corroborated Sollisch's statement that he did not raise his voice during the meeting and never used the language attributed to him by the Employer; and (2) Sollisch had a

[5] 587 F.2d at 750.

[6] See, NLRB v. S.E. Nichols, 862 F.2d at 959 (distinguishing Florida Steel).

[7] All dates are in 2006, unless otherwise noted.

[8] Wright Line, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989.

long history of satisfactory and above-average performance evaluations prior to his termination.

In late October, Sollisch was hired as a sales representative by another company in the Cleveland area. On November 3, the Employer's attorney sent letters to Sollisch and his new employer, which alleged that Sollisch was in violation of a non-compete clause in his employment agreement and demanded that he cease and desist from working for the new employer. Also on November 3, Sollisch filed a complaint in the Court of Common Pleas, Cuyahoga County, Ohio, against the Employer for unpaid compensation. The Employer then filed a counterclaim seeking a preliminary and permanent injunction that would prevent Sollisch from engaging in a competing business. The counterclaim sought to enforce the non-compete clause, and contained three additional claims based on allegations that Sollisch had divulged trade secrets and refused to return customer lists and confidential documents. On May 29, 2007, the Region received notice of the state court's decision denying an injunction that would have prohibited Sollisch from working for a competing business. The court's ruling was based on its determination that the time restriction in the non-compete clause, and the blanket prohibition on working in the paper and packaging industry, were unreasonable.

In Liberty Mutual,[9] the Board held that if an employer's unlawful action places a discriminatee in the position of having to seek work in violation of a non-compete clause, "it would be entirely unfair to allow [the employer] to assert the agreement against the charging party."[10] Liberty Mutual involved an insurance salesman bound to an employment agreement which included a non-compete clause. After the salesman was terminated, he went into business selling insurance, which was in contravention of the covenant not to compete. The employer brought a state lawsuit in order to enjoin him from violating the non-compete agreement. The Board held that the employer had unlawfully terminated him for protected activity and, moreover, that the unlawful termination precluded the employer from enforcing the non-compete agreement. The Board reasoned that permitting the lawsuit to go forward would severely chill employee protected activity because engaging in such activity could result in being prohibited from working altogether in one's vocation.[11]

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[9] 235 NLRB 1387 (1978).

[10] 235 NLRB at 1388.

[11] Id.

Applying Liberty Mutual, the Employer's efforts to enforce the non-compete clause against an employee it unlawfully terminated were unlawful. Since a lawsuit is involved, however, it is necessary to determine whether Bill Johnson's Restaurants, Inc. v. NLRB[12] precludes us from enjoining the suit.[13]

In Bill Johnson's the Supreme Court held that, although an employer's lawsuit filed in retaliation for the exercise of Section 7 rights violates the Act, First Amendment considerations insulate the filing and prosecution of a reasonably based lawsuit from being enjoined as an unfair labor practice. In BE&K Construction v. NLRB,[14] the Supreme Court subsequently clarified Bill Johnson's by rejecting the standard that unsuccessful retaliatory lawsuits could be prosecuted as unfair labor practices even if reasonably based.[15] In dictum, the Court left open the possibility that an unsuccessful but reasonably based lawsuit might be considered an unfair labor practice if it would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome."[16]

In footnote 5 of Bill Johnson's, the court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law" or that are preempted by the Board's jurisdiction.[17] In determining whether a lawsuit is preempted by the NLRA, the Board and courts apply the test articulated in San Diego Building Trades v. Garmon,[18] i.e., "when an activity is arguably subject to Section 7 or Section 8 of the Act, the States, as well as, the federal courts must defer to the exclusive competence of the [Board] if the danger of state interference with national policy is to be averted."[19]

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[12] 461 U.S. 731 (1983).

[13] Liberty Mutual was decided before Bill Johnson's Restaurants.

[14] 536 U.S. 516 (2002).

[15] Id. at 527-28, 532.

[16] Id. at 536-37.

[17] 461 U.S. at 737 n.5.

[18] 359 U.S. 236 (1959).

[19] Id. at 245.

Here, although the lawsuit was unsuccessful, it was not baseless under state law and there is no evidence that it was filed solely with a motive of imposing costs of litigation on Sollisch. However, further proceedings would be preempted under Garmon. The Region has determined that the Employer unlawfully terminated Sollisch for his involvement in protected concerted activity, which is an issue that lies within the primary jurisdiction of the Board. If the Board decides that Sollisch was discharged in violation of the Act, the Employer's enforcement of the non-compete clause would interfere with the Board's ability to remedy that violation. Thus, the Board has primary jurisdiction to decide the legality of the discharge under the principle set forth in Liberty Mutual and should find that the Employer cannot enjoin Sollisch from working in his new job if he was unlawfully terminated.[20] In these circumstances, further proceedings (including an appeal) on the counterclaim would be preempted pending the Board's adjudication of this issue.

Accordingly, the Region should, absent settlement, issue a Section 8(a)(1) complaint regarding the Employer's offer of free representation to employee witnesses.[21] With regard to the lawsuit, which the Court of Common Pleas has dismissed in relevant part, the Region should dismiss the Section 8(a)(1) allegation regarding prosecution of a preempted, retaliatory lawsuit if the Employer does not appeal the court's decision. [*FOIA Exemptions* 2 and 5

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[20] The Employer's counterclaim is preempted only if it takes further action to enforce the non-compete clause against Sollisch's efforts to work after the unlawful termination. The Employer's allegations regarding (1) misappropriation of trade secrets, (2) conversion, and (3) violation of the Ohio Uniform Trade Secrets Act, which were found by the court to have merit, are not preempted claims.

[21] The Region should also issue a Section 8(a)(1) complaint allegation regarding the letters that the Employer wrote to both Sollisch and his new employer in retaliation for Sollisch's protected concerted activity. These letters do not in any way implicate Bill Johnson's.

[22] [*FOIA Exemptions* 2 and 5 .]