

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

# Advice Memorandum

DATE: June 30, 2003

TO : Peter B. Hoffman, Regional Director  
Jonathan B. Kreisberg, Regional Attorney  
John S. Cotter, Assistant to the Regional Director  
Region 34

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

SUBJECT: Sheet Metal Division of Capitol District  
Sheet Metal, Roofing & Air Conditioning  
Contractors Association, Inc.  
Cases 34-CA-9760, 34-CA-9793

Sheet Metal Contractors Association	512-5009-6700
of Northern New Jersey	512-5009-6733
Cases 34-CA-9761, 34-CA-9794	512-5009-6767

Associated Sheet Metal & Roofing  
Contractors of Connecticut  
Cases 34-CA-9762, 34-CA-9795

These Section 8(a)(1) cases were resubmitted for advice as to whether an ultimately unsuccessful lawsuit against Sheet Metal Workers Local 38 (the Union) and the Sheet Metal & Roofing Employers Association of Southeastern New York (SENY) was baseless and retaliatory, consistent with the holding of the Supreme Court in BE & K.<sup>1</sup>

We conclude that the lawsuit's state antitrust claims and request for an injunction were baseless and retaliatory. However, the NLRA and federal antitrust claims were reasonably based. As to the reasonably based aspects of the suit, we conclude that there is insufficient evidence to assert that the suit would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome." Therefore, we cannot argue that the reasonably based claims constituted an unfair labor practice and, absent settlement, the Region should issue a Section 8(a)(1) complaint alleging only that the request for injunctive relief and the state antitrust claims were baseless and retaliatory.

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<sup>1</sup> BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 170 LRRM 2225 (2002).

FACTS

The Union represents sheet metal workers in various counties in Connecticut and New York. SENY is a multi-employer bargaining agent representing union sheet metal contractors within the Union's jurisdiction. A July 1998 collective-bargaining agreement between the Union and SENY contained the following clause (the Provision):

To protect and preserve for the Building Trades employees covered by this Agreement all work they have performed and all work covered by the Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of work; it is agreed that all work requiring sketching and fabrication shall be performed by employees hereunder, either in the shop or on the job site within the geographical jurisdiction of [the Union].

On June 30, 1998, the Charged Parties<sup>2</sup> filed a lawsuit against the Union and SENY (referred to collectively as "the Defendants") in federal district court. The suit alleged that the Provision violated both the Sherman Act<sup>3</sup> and antitrust laws of Connecticut,<sup>4</sup> New Jersey<sup>5</sup> and New York (Donnelly Act),<sup>6</sup> as well as Sections 8(b)(4)(B) and 8(e) of the Act. Although the Provision had never been enforced against them, the Charged Parties (collectively, the "Outside Contractors" or "Plaintiffs") apparently filed the lawsuit because the Union had not assured them of future non-enforcement. The complaint included a prospective damages estimate of \$50 million and sought treble damages for the alleged antitrust violations, damages under the

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<sup>2</sup> Sheet Metal Division of Capitol District Sheet Metal, Roofing & Air Conditioning Contractors Association, Inc.; Sheet Metal Contractors Association of Northern New Jersey; and Associated Sheet Metal & Roofing Contractors of Connecticut (multi-employer bargaining agents that represent union sheet metal contractors outside of the Union's jurisdiction in New York, New Jersey and Connecticut).

<sup>3</sup> 15 U.S.C. § 1 et seq.

<sup>4</sup> Conn. Gen. Stat. § 35-26 et seq.

<sup>5</sup> N.J. Stat. Ann. § 56:9-1.

<sup>6</sup> N.Y. Gen. Bus. Law § 340.

Act, injunctive relief, a declaratory judgment, and costs and attorneys' fees.

On July 10, 1998, SENY filed a charge against the Union alleging that the Provision violated Section 8(e).<sup>7</sup> On September 3, 1998, the Regional Director declined to issue a complaint, having determined that the Provision constituted a valid work preservation clause under National Woodwork.<sup>8</sup>

On March 24, 1999, the district court ruled that the Provision violated Section 8(e) and Sections 1 and 2 of the Sherman Act and issued a declaratory judgment that the Provision was void and unenforceable.<sup>9</sup> The court awarded attorneys' fees of \$56,298.75 under Section 26 of the Clayton Act,<sup>10</sup> finding that the plaintiffs substantially prevailed in obtaining injunctive relief for threatened antitrust violations.<sup>11</sup>

The Union and SENY appealed. On March 21, 2000, the U.S. Court of Appeals for the Second Circuit reversed and remanded "[b]ecause too many of the facts in this case

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<sup>7</sup> Case 34-CE-8.

<sup>8</sup> National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612 (1967).

<sup>9</sup> Sheet Metal Div. of Capitol Dist. v. Local 38, 45 F.Supp.2d 195, 209, 210-211 (N.D.N.Y. 1999). Given the procedural and evidentiary complexity of this lawsuit, we only summarize here the facts concerning each of the claims made by the Plaintiffs, and will occasionally mention one or more additional specific details in the "Action" section where relevant to explaining a particular Advice finding.

<sup>10</sup> 15 U.S.C. § 12 et seq.

<sup>11</sup> Sheet Metal Div. Of Cap. Distr. v. Local 38, 63 F.Supp.2d 211, 213-214 (N.D.N.Y. 1999). The court, however, declined to award attorneys' fees under Section 15 of the Clayton Act, which requires a showing of injury, because the Outside Contractors "ha[d] not demonstrated any injury to their business or property by reason of anything forbidden in the antitrust laws," had "essentially admit[ted] that they suffered no injury...in their memorandum of law," and "did not successfully obtain an award of damages." Id. at 212-213.

remain unresolved, and because the district court made several errors of law...."<sup>12</sup>

On remand, the district court partially granted the Union's and SENY's motion for summary judgment, denied the Outside Contractors' request for injunctive relief, and found the state law antitrust claims were preempted by the NLRA.<sup>13</sup> The district court found that the Plaintiffs were not entitled to injunctive relief because they had not availed themselves of other potential remedies before filing the lawsuit as required by Section 8 of the Norris-LaGuardia Act.<sup>14</sup>

The district court denied the Defendants' motion for summary judgment as to the NLRA and federal antitrust (Sherman Act) claims. Regarding the 8(e) claim, the court found that there were numerous questions of fact regarding the purpose and scope of the disputed clause that were "integral to the determination of whether the clause is a valid work preservation clause."<sup>15</sup> The court concluded that:

Without resolving these factual questions, the Court cannot conclude, as a matter of law, [whether] the purpose of the disputed clause was to preserve work traditionally performed by Local 38 members or that the clause was directed at work over which the contracting employees had control. Thus, there are questions of fact preventing a determination of whether the clause

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<sup>12</sup> Sheet Metal Div. v. Local 38, 208 F.3d 18, 20 (2d Cir. 2000).

<sup>13</sup> Decision & Order dated March 5, 2001, at 6, 18.

<sup>14</sup> Section 8 states that federal injunctive relief should not extend to any complainant who "has failed to comply with any obligation imposed by law . . . or who has failed to make every reasonable effort to settle such dispute." 29 U.S.C. § 108.

<sup>15</sup> In this regard, the district court noted specific "potentially conflicting" evidence regarding: (1) Defendants' rationale for including the Provision in the contract; (2) whether SMACNA and SENY contractors intended to leave or have left Local 38's jurisdiction as a result of Local 38's wage rates, as claimed by the Defendants; and (3) Defendants' intent to enforce the clause against the Outside Contractors. Decision & Order dated March 5, 2001, at 9-10.

is a valid work preservation clause that does not violate Section 8(e) of the NLRA at this juncture.<sup>16</sup>

The federal antitrust claims were ruled inappropriate for summary judgment because they raised questions analogous to those under the NLRA regarding whether the Provision is a valid work preservation clause and therefore is exempt from antitrust scrutiny. The court next considered the elements of an offense under either Sections 1 or 2 of the Sherman Act. It concluded that the case presented various questions of material fact (regarding such things as the existence of market power and whether the Provision was in fact intended to preserve unit work) that a "reasonable fact finder" might resolve in the Plaintiffs' favor.<sup>17</sup>

The district court held a four-day bench trial in April 2001. At the close of the Outside Contractors' proof, the court partially granted the Union's and SENY's motion for judgment on partial findings, and dismissed the Sherman and Donnelly Act claims.<sup>18</sup> Following the entire trial, the court ruled that the Provision was lawful under Section 8(e) because it "targets work traditionally performed by [Union] workers and does not bind non-signatories...."<sup>19</sup>

On July 20, 2001, the Union filed charges against each of the Outside Contractors alleging that the lawsuit violated Section 8(a)(1) because it was meritless and retaliated against Section 7 protected activity.<sup>20</sup> On August 7, 2001, SENY filed similar charges against each of the Outside Contractors.<sup>21</sup> The Outside Contractors contend that the lawsuit had a reasonable basis, as shown by the fact that they originally prevailed in district court, and that the district court's ultimate ruling was in fact a

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<sup>16</sup> Id. at 10.

<sup>17</sup> Id. at 11-17.

<sup>18</sup> Decision & Order dated May 23, 2001, at 3. It is unclear why the claim involving the Donnelly Act, which is New York's antitrust statute, was not dismissed earlier with the other state antitrust claims.

<sup>19</sup> Id. at 24.

<sup>20</sup> Cases 34-CA-9760, 34-CA-9761, and 34-CA-9762.

<sup>21</sup> Cases 34-CA-9793, 34-CA-9794, and 34-CA-9795.

victory because the court found that the Provision did not apply to them.<sup>22</sup>

In our initial Advice Memorandum, we concluded that the lawsuit was meritless because all of its claims were either summarily dismissed or ultimately decided against the Plaintiffs at trial. We further concluded that the lawsuit was retaliatory because it: (1) was motivated by, and directly aimed at, protected activity, i.e., a lawfully negotiated work preservation clause; (2) sought excessive damages; and (3) was meritless. The Region resubmitted the case for advice in light of the Supreme Court's decision in BE & K.

#### ACTION

We conclude that portions of the Outside Contractors' lawsuit, i.e., the request for injunctive relief and the state antitrust claims, were baseless and retaliatory. However, we conclude that the NLRA and federal antitrust claims were reasonably based, and that there is insufficient evidence to assert that they would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome." Therefore, we cannot argue that those claims constituted an unfair labor practice and, absent settlement, the Region should issue a Section 8(a)(1) complaint alleging only that the request for injunctive relief and the state antitrust claims were baseless and retaliatory.

In BE & K, the Supreme Court reconsidered the circumstances under which the Board could find a concluded suit to be an unfair labor practice.<sup>23</sup> Previously, in Bill Johnson's Restaurants v. NLRB,<sup>24</sup> the Court held that in order for the Board to halt the prosecution of an *ongoing* lawsuit, it had to find that the suit lacked a reasonable basis in fact or law and was brought for a retaliatory motive. At the same time, however, it said that a *completed* lawsuit could be enjoined as an unfair labor practice under a lesser, alternative standard. A completed

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<sup>22</sup> Specifically, they contend that they achieved their sole objective in filing the lawsuit, which was to ensure that their members would be able to continue to do business in Local 38's geographical jurisdiction. (The district court's final decision made clear that the Provision *could* not be enforced against the Outside Contractors).

<sup>23</sup> 122 S.Ct. at 2397.

<sup>24</sup> 461 U.S. 731, 742-43 (1983).

lawsuit could constitute an unfair labor practice if the litigation was unsuccessful (resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit) and was filed with a retaliatory motive.<sup>25</sup> The Court in BE & K reconsidered and rejected that alternative standard because the class of lawsuits sanctioned would include a substantial portion of suits that involved "genuine petitioning" protected by the Constitution.<sup>26</sup> The Court thus indicated that the Board could no longer rely on the fact that the lawsuit was ultimately unsuccessful, but must determine whether the lawsuit, regardless of its outcome on the merits, was reasonably based.<sup>27</sup> The Court in BE & K explained that this Constitutional protection is warranted in any case in which a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal.<sup>28</sup> In such cases, petitioning "is genuine both objectively and subjectively."<sup>29</sup>

The Court left open the question of whether, and under what circumstances, a lawsuit that was reasonably based as an objective matter might be considered an unfair labor practice. As to that question, a majority of the Court, in *dictum*, indicated that there could be no violation for a reasonably based lawsuit unless one could find that the suit would not have been filed "but for" a motive to impose litigation costs on the defendant, regardless of the outcome of the case, in retaliation for protected activity.<sup>30</sup>

As the Court in BE & K did not re-articulate the standard for determining whether a lawsuit is baseless, the standard set forth in Bill Johnson's remains authoritative. The Court in Bill Johnson's explained that while "genuine disputes about material historical facts should be left for the state court, plainly unsupported inferences from the

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<sup>25</sup> Id. at 747, 749.

<sup>26</sup> 122 S.Ct. at 2399.

<sup>27</sup> Id. at 2399-2402.

<sup>28</sup> Id. at 2401 (emphasis in original).

<sup>29</sup> Id.

<sup>30</sup> Id. at 2402. Two of those Justices opined that the decision in BE & K implies that the Court, in an appropriate case, will rule that the Board can never find a reasonably based lawsuit to be unlawful. Id. at 2402-2403 (Scalia, concurring).

undisputed facts and patently erroneous submissions with respect to mixed questions of fact and law may be rejected."<sup>31</sup> Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."<sup>32</sup> Thus, a lawsuit can be deemed baseless only if it presents unsupportable facts or unsupportable inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

#### 1. Reasonable basis analysis

As a preliminary matter, we conclude that it is appropriate to separately analyze each of the claims in determining whether the suit is baseless. Support for this conclusion is found in the Board's supplemental decision in Bill Johnson's, where the Board stated:

[W]e find it necessary to analyze the two claims contained in that suit separately. This approach is suggested in the Supreme Court's opinion, when, after noting that the state court had denied the defendant's motion for summary judgment on the libel claim, the Court indicated with respect to the business interference claims that "if [they] have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that [the Respondent] acted unlawfully by prosecuting these meritorious claims." 461 U.S. at 750 fn. 15. The libel claim was still pending in state court when the Court issued its opinion, thus indicating that the Board might arrive at a different conclusion with respect to its reasonable basis and ultimately its merits.<sup>33</sup>

##### A. Claim for injunctive relief was baseless

We agree with the Region that the Outside Contractors' request for an injunction was baseless. Section 8 of the Norris-LaGuardia Act states that federal injunctive relief should not extend to any complainant who "has failed to comply with any obligation imposed by law . . . or who has

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<sup>31</sup> Bill Johnson's, 461 U.S. at 746, n.11.

<sup>32</sup> Id.

<sup>33</sup> 290 NLRB 29, 31, n.10 (1988).

failed to make every reasonable effort to settle such dispute."<sup>34</sup> The district court dismissed the claim for injunctive relief on a motion for summary judgement, finding that the Plaintiffs were not entitled to such relief because there were "potential remedies of which Plaintiffs did not avail themselves."<sup>35</sup> As noted by the Court, the Plaintiffs brought the suit without having attempting to settle the matter or filing charges with the Board.<sup>36</sup> Accordingly, we find that the Outside Contractors' request for injunctive relief was baseless.

B. State antitrust claims were baseless

We agree with the Region that the state antitrust claims were baseless. As the district court found, the state antitrust claims were clearly preempted based on 25-year-old Supreme Court precedent. In Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100,<sup>37</sup> the Supreme Court, while evaluating the legality of a "hot cargo" clause, held that the NLRA preempted state but not federal antitrust claims. The Court noted that it has repeatedly held that "federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA," and stated that the use of state antitrust law to regulate union activities in aid of organization must also be preempted because "it creates a substantial risk of conflict with policies central to federal labor law."<sup>38</sup>

In this case, the district court summarily dismissed the Outside Contractors' state antitrust claims, stating:

This case, like Connell, involves a question of whether a contractual provision, defined as a

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<sup>34</sup> 29 U.S.C. §108.

<sup>35</sup> Decision & Order dated March 5, 2001, at 6, citing, *inter alia*, Eastern Air Lines, Inc. v. Intl. Assoc. of Machinists and Aerospace Workers AFL-CIO, 923 F.2d 26 (2d Cir. 1991) (failing to make every effort to settle under Section 8 of the Norris-LaGuardia Act forfeits claim to federal injunctive relief); and Andino v. City of New York, 1986 WL 14713, p. 4 (E.D.N.Y. Dec. 12, 1986) (plaintiffs had failed to file ULP charge with the NLRB).

<sup>36</sup> Id. The Section 8(e) charge was filed after the suit had been initiated.

<sup>37</sup> 421 U.S. 616, 635-36 (1975).

<sup>38</sup> Id. at 635-636.

"hot cargo" clause or "organizational weapon," falls within the construction industry proviso to Section 8(e) of the NLRA. Accordingly, for the reasons enunciated by the Supreme Court, Plaintiffs' state law antitrust claims are pre-empted.

The Board need not look beyond the pleadings, make credibility determinations or usurp the role of a fact-finder or jury to determine that the state antitrust claims were not reasonably based. Thus, because preemption is so clear, this aspect of the lawsuit was baseless.

C. NLRA claim was reasonably based

The district court initially found merit to the Outside Contractors' Section 8(e) claim and granted their motion for a declaratory judgment that the Provision was void and unenforceable. On appeal, the Second Circuit reversed and remanded, finding, *inter alia*, that the record was not fully developed on: (1) the history and purpose of the Provision; (2) whether Local 38 intended to enforce the Provision against the Outside Contractors; and (3) the NLRB's determination that the Provision is similar to the clause the Supreme Court approved in National Woodwork. On remand, the district court denied the Defendants' motion for summary judgment on this claim because there were "questions of fact regarding the purpose and scope of the Provision" integral to the determination of whether the clause is a valid work preservation clause. Only after trial, and having weighed conflicting evidence, did the district court ultimately conclude that the Provision did not violate Section 8(e), but rather was a work preservation clause that did not bind non-signatories.

We conclude that the NLRA claim was reasonably based because the Plaintiffs provided evidence supporting its claim that had to be considered in light of conflicting evidence before the court could determine that the claim had no merit.

D. Federal antitrust claims were reasonably based

As set forth above, the federal antitrust claims were ruled inappropriate for summary judgment because they raised questions analogous to those under the NLRA, and because factual questions remained regarding whether the Provision is a valid work preservation clause or is exempt from antitrust scrutiny. In denying summary judgment, the court concluded that the case presented various questions of material fact (regarding such things as the existence of market power and whether the Provision was in fact intended

to preserve unit work) that a "reasonable fact finder" might resolve in the Plaintiffs' favor.<sup>39</sup> Upon Defendants' motion and after hearing the Outside Contractors' evidence in the bench trial, the district court dismissed the Sherman Act claims.

As noted by both the Second Circuit and the trial court,<sup>40</sup> the Sherman Act claims were intertwined with the NLRA claim which, as discussed above, was reasonably based. Also, the Sherman Act claims were sufficient to survive the Defendants' motion for summary judgment. Accordingly, it is clear that these claims, although ultimately unsuccessful, were reasonably based.

## 2. Retaliatory motive analysis

We conclude that the baseless portions of the lawsuit were retaliatory because they were motivated by, and directly aimed at, protected activity. As the district court ultimately found and as the Region had earlier determined in dismissing the 8(e) charge, the Provision was a lawful collectively-bargained work preservation clause, which constitutes Section 7 protected activity. The Region should also allege that certain claims in the lawsuit were *baseless* as additional evidence of retaliatory motive.<sup>41</sup> The Region should not, however, rely on the Outside Contractors' request for damages as additional evidence of retaliatory motive in this case. The Plaintiffs acknowledged in the complaint's request for injunctive relief that if a restraining order were granted, the Plaintiffs would suffer no damages. Indeed, the Plaintiffs' requests for damages and treble damages were dropped after the parties entered into a stipulation in which Local 38 agreed to refrain from enforcing the clause pending the determination on Plaintiffs' motions for injunctive relief and/or a declaratory judgment.

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<sup>39</sup> Id. at 11-17.

<sup>40</sup> 208 F.3d at 26; Decision and Order dated March 7, 2001 at 11-12.

<sup>41</sup> Despite using the word "meritless" rather than "baseless" at p. 10 in the Advice Memorandum in Hannah & Sons Construction Co., Inc., 4-CA-28916, dated December 10, 2002, we believe that a merely meritless but not baseless claim should not be relied on as evidence of retaliatory motive. BE & K fundamentally proscribes any penalization of reasonably based petitions to government of redress of grievances.

We finally conclude that the reasonably based portions of the lawsuit do not constitute an unfair labor practice, because it cannot be found that those claims would not have been filed but for a motive to impose costs on the defendant, regardless of the outcome of the suit, in retaliation for protected activity. Although there is some evidence of retaliatory motive regarding these claims (attacking Section 7 activity), this is clearly insufficient under BE & K. Moreover, there is evidence showing that the Outside Contractors were motivated, at least in part, to make sure that the Provision was not applied to them. This was in essence the relief requested. [FOIA Exemption 5

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Accordingly, absent settlement, the Region should issue a Section 8(a)(1) complaint alleging that the Outside Contractors' state antitrust claims and claim for injunctive relief were baseless and retaliatory.

B.J.K.