UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

ANHEUSER-BUSCH, LLC,	)	
	)	
Respondent, and	)	
	)	
MATTHEW C. BROWN, an individual,	)	Case 12-CA-094114
	)	
Charging Party, and	)	
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 947 AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, BREWERY, AND SOFT DRINK WORKERS CONFERENCE,	)	
	)	
Parties in Interest.	)	

RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO THE CROSS-EXCEPTIONS BY THE GENERAL COUNSEL AND CHARGING PARTY TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NLRA

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Respondent adopts the Preliminary Statement, Procedural Background, and Factual Background as set forth in its Memorandum in Support of Its Exceptions to the Decision of the Administrative Law Judge.

ARGUMENT

Awarding Attorneys' Fees and Costs for the Response to the Motion to Compel Arbitration Would Be Unprecedented and Unconstitutional

In Cross-Exception No. 2, Counsel for the General Counsel asserts that the Administrative Law Judge erred by failing to require Respondent to reimburse Charging Party for attorneys' fees and costs incurred in opposing Respondent's motion to compel arbitration in the Title VII litigation pending in federal district court.[1] This exception lacks any precedent in Board law and such relief is unconstitutional under Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983) and BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524-25 (2002), because, as discussed below, it impairs the fundamental right to petition the courts without falling into any of the exceptions carved out by Bill Johnson's.

At the hearing, Counsel for Charging Party asked the Judge for attorneys' fees and costs related to the motion to compel arbitration in federal court. See Tr. at 12:4-10. The Judge correctly indicated that any relief for fees would lie with the federal court. Id. at 12:11-18; 13:13-22. The Judge omitted such relief from his decision.

For the first time, the General Counsel now seeks reimbursement for Charging Party's fees and costs incurred in responding to the motion to compel arbitration in federal court. In support of its request, the General Counsel cites a string of retaliatory lawsuit cases under Bill Johnson's in which fees and costs from the underlying litigation were awarded. See Brief in

[1] Counsel for Charging Party filed a similar cross-exception, and both the General Counsel's exception and the Charging Party's exception will be addressed as one in this Response.

Support of Cross-Exceptions at 4 (citing Fed. Security, 359 NLRB No. 1 slip op. at 4-14 (2012); Operative Plasterers, Local 200 (Standard Drywall), 357 NLRB No. 160 slip op. at 3-4 (2011); Allied Trades Council (Duane Reade, Inc.), 342 NLRB 1010, 1015 (2004)). Each of these cases, however, is distinguishable from the present case because in each cited case, an exception to the Bill Johnson's rule preventing Board interference with litigation applied.

In Bill Johnson's and in a subsequent case, BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524-25 (2002), the U.S. Supreme Court held that the Board could only issue remedies for non-NLRB litigation if that litigation was both (1) meritless and (2) retaliatory. Bill Johnson's, 461 U.S. at 747 ("[R]etaliatory motive and lack of reasonable basis are both essential prerequisites" to issuing a remedy regarding litigation). There is, however, an exception to this rule set forth in footnote 5 of the Bill Johnson's opinion: the NLRB may also issue remedies for litigation that is either preempted by the NLRA or "has an objective that is illegal under federal law." Id. at 737 n.5.

The general rule in Bill Johnson's allowing sanctions for meritless, retaliatory litigation does not apply here because there is no evidence that Respondent's motion to compel arbitration was either meritless or retaliatory. Nor is this a case in which NLRA state-law preemption would apply, because Respondent is seeking to compel arbitration based on the Federal Arbitration Act in federal court. As a result, Federal Security, 359 NLRB No. 1 slip op. (2012), cited by General Counsel as grounds for allowing fees and costs, is inapposite, because the Board permitted an award of fees and costs in that case as the state-court litigation was preempted by the NLRA. 359 NLRB No. 1 at 5-7 (finding preemption because the employer's state-court malicious prosecution impaired access to the Board).

Thus, the only remaining Bill Johnson's exception is litigation in which the "objective is illegal under federal law." The phrase "objective that is illegal under federal law" must be narrowly interpreted to only include litigation intended to circumvent Board orders. The Board displayed such restraint in the other two cases cited by the General Counsel. See, e.g., Operative Plasterers, 357 NLRB at 10-11 (finding litigation to circumvent a Section 10(k) order has an unlawful objective); Allied Trade Council (Duane Reade, Inc.), 342 NLRB 1010, 1012-13 (2004) (finding that arbitration designed to circumvent a regional director's determination of an appropriate unit was unlawful). By contrast, in filing the motion to compel arbitration, Respondent has not tried to circumvent any Board order, and the motion therefore does not have an unlawful objective.

Counsel for the General Counsel seems to erroneously press the Board to adopt a broader reading of Bill Johnson's exception for litigation with an illegal objective, but Counsel for the General Counsel's interpretation would impermissibly conflict with Bill Johnson's holding. In Bill Johnson's, the Supreme Court decided whether the Board could remedy litigation "brought by an employer to retaliate against employees for exercising federally protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law." 461 U.S. at 733. The General Counsel issued a complaint alleging that an employer's lawsuit against an employee violated 8(a)(1) and 8(a)(4). Id. at 735. The ALJ and the Board agreed that the employer had violated 8(a)(1) and 8(a)(4). Id. at 735-37.

The Supreme Court held that though 8(a)(1) and 8(a)(4) are broad and are intended to protect Section 7 rights, and even though there was no doubt that a lawsuit could be used by an employer as a powerful instrument of coercion or retaliation, coercion and retaliation alone were insufficient to permit a remedy. Id. at 740-41. "The filing and prosecution of a well-founded

lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." Id. at 743. In other words, even though litigation activities can be undertaken with the express purpose of interfering with Section 7 rights and violate Section 8(a) of the Act, the Board is powerless to prohibit or sanction employers for engaging in such litigation activities except as allowed by Bill Johnson's exceptions.

If the phrase "objective that is illegal under federal law" is interpreted broadly to include any action that impairs rights under the NLRA, then the Bill Johnson's exception would swallow the Bill Johnson's rule. Bill Johnson's prohibits the Board from finding a violation of the Act even if an employer intended to infringe on Section 7 rights and violate 8(a). Id. at 743. Thus, Bill Johnson's exception for litigation with an "objective that is illegal under federal law" cannot be interpreted to allow the Board to award fees and costs for any litigation that may adversely affect Section 7 rights.

As a result, even assuming arguendo that Respondent's filing of the motion to compel arbitration violated Section 8(a)(5), a violation of Section 8(a)(5) alone cannot be construed to be an "objective that is illegal under federal law." Because the General Counsel has not shown that Respondent violated Bill Johnson's prohibition against meritless and retaliatory conduct, nor that the motion to compel arbitration is preempted or seeks an "objective that is illegal under federal law," it is unconstitutionally improper for the Board to interfere with the motion to compel arbitration in any way, including by awarding fees and costs.

The General Counsel cites an ALJ's decision in JP Morgan Chase & Co., JD(NY)-40-13, slip op. at 15:11-19, 16:16-19 (Aug. 21, 2013), in which the ALJ did award fees and costs related to a motion to compel arbitration. Exceptions to this opinion have been filed with the Board and

it is not binding precedent. It is also unpersuasive and should be rejected, because the ALJ in JP Morgan Chase & Co. misinterpreted Bill Johnson's in the same way urged by Counsel for the General Counsel.

The ALJ in JP Morgan Chase & Co. apparently believed that any litigation action violating NLRB case law regarding Section 8(a) satisfies the illegal objective exception in Bill Johnson's. See JP Morgan Case & Co. at 12-13 ("I conclude that Respondent's conduct has an unlawful objective since it is contrary to D.R. Horton as well as Lutheran Heritage."). The ALJ cited no Board precedent to reach that conclusion, instead setting forth a long list of cases in which under Bill Johnson's the Board did have authority to sanction litigation because it was either undertaken to circumvent prior direct Board orders to a Respondent, involved state-law litigation preempted by the NLRA, or involved 8(b) violations.[2] None of the cases cited by the ALJ support the proposition that filing a motion to compel arbitration in federal court, creating a disputed 8(a)(5) violation, is an "objective that is illegal under federal law" or falls within any other Bill Johnson's exceptions that would allow the Board to issue a remedy such as the one being requested here.

CONCLUSION

Because Respondent's motion to compel arbitration was not meritless and retaliatory, nor preempted by the NLRA or pursuing an "objective that is illegal under federal law," Bill Johnson's prohibits the Board from interfering with Respondent's motion to compel arbitration in federal court by awarding of fees and costs. The Judge correctly refused to provide fees and costs in this case. Accordingly, the cross-exceptions filed by Counsel for the General Counsel and Counsel for Charging Party seeking fees and costs should be denied.

[2] 8(b) cases are inapposite because they are not 8(a) cases. In Bill Johnson's, the Supreme Court provided an exception for 8(b) cases, allowing the Board to remedy certain 8(b) violations. *See* 461 U.S. at 737 n.5 (allowing the Board to issue a remedy against unions attempting to enforce unlawful fines).

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Dated: November 27, 2013

CERTIFICATE OF SERVICE

This is to certify that the following parties have been served this 27th day of November, 2013 by electronic mail (or e-filing):

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