

**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 REPLY BRIEF TO GENERAL COUNSEL’S
ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S DECISION**

On November 14, 2013, Counsel for the General Counsel filed an Answering Brief to the Respondent’s Exceptions. This Reply Brief addresses certain portions of that Answering Brief.

I. Counsel for the General Counsel’s Reliance On Election Cases Where Potential Eligible Voters Have Been Allowed To Cast Challenged Ballots Does Not Support An Argument That Brown Should Be An Employee or Member of the Bargaining Unit

On Pages 8 and 9 of Counsel for the General Counsel’s Answering Brief, she argues that Brown’s “continuing” employment status is supported by Board cases in which employees who had pending lawsuits and grievances challenging their discharges were allowed to cast ballots in representation elections under challenge. In addition to Advance Industrial Security, Inc., 217 NLRB 17 (1975), discussed by Respondent in footnote 8 of the Respondent’s Memorandum in Support of Its Exceptions to the Administrative Law Judge’s Decision, Counsel for the General Counsel relies on Grand Lodge International Association of Machinists, 159 NLRB 137, 143

(1996), Pacific Tile & Porcelain, 137 NLRB 1358 (1962) and Curtis Industries, Inc., 310 NLRB 1212 (1993).

A close examination of these cases reveals that they do not establish what Counsel for the General Counsel claims. In these representation cases, individuals were allowed to file **challenged** ballots. Their ballots only counted if they determined the outcome of the election, and after further investigation by the Regional Director.

In Pacific Tile, the Board directed the Regional Director to submit a supplemental report pertaining to the resolution of eight challenged ballots only if those ballots affected the outcome of the election. Significantly, the Board afforded the parties the opportunity to file exceptions to this supplemental report. This underscores that the Board had not reached a definitive conclusion pertaining to the eligibility of the employees to vote in Pacific Tile who had ancillary litigation. Id. at 1368.

Similarly, in Curtis Industries, the Board directed the Regional Director to evaluate the employees' eligibility to vote only if their votes affected the outcome of the election. Moreover, and most significantly, the Board directed that "If the Regional Director determines that the federal lawsuit will not be resolved with reasonable promptness, he should sustain the challenges to the ballots of the disputed individuals in the interest of prompt resolution of the question concerning representation." Id. at 1213. In essence, the Board in Curtis Industries empowered the Regional Director to effectively disenfranchise an individual by virtue of the fact that the person's right to reinstatement may not be resolved for a long period of time. Further, there was no direction to the Board to let the outcome of the ancillary proceedings determine the eligibility of these individuals to vote.

Counsel for the General Counsel ignores a case cited in footnote 9 on Page 13 and 14 of the Respondent's Memorandum in Support of Its Exceptions to the Administrative Law Judge's Decision. The case is New York Law Publishing Co., 336 NLRB No. 93 (2001). Further underscoring the uncertainty of challenged ballots, the Board in New York Law held that when challenged ballots are not determinative, the matter should be resolved through either bargaining or a timely invoked unit clarification proceeding. Id. at slip. op. at 1.

The representation cases that Counsel for the General Counsel relies on do not definitively hold that, even presuming the result of ancillary litigation results in reinstatement, a discharged individual is an employee under the Act or a member of a bargaining unit. The cases only address whether a discharged individual may vote subject to challenge. Further, the determination of whether an individual is able to vote under challenge lacks finality and does not support the Administrative Law Judge's Decision that the Charging Party is a member of the bargaining unit simply because he could be eligible for reinstatement under any law.

The cases do not hold that a discharged individual who is eligible to vote under challenge is the equivalent of or establishes employment status for purposes of filing an 8(a)(5) challenge.

Counsel for the General Counsel misinterprets the cases on which she relies. In an act of overreaching, she argues that "These cases stand for the proposition that if the outcome of the pending litigation or grievance is a finding that the employee was unlawfully discharged and reinstatement results from the finding, the employee will be found eligible to vote and the challenge to his or her ballot will therefore be overruled." (General Counsel's Brief at p. 9). The Board does not find that when there is a challenged ballot, the employee will automatically be eligible to vote and the challenge overruled. In fact, at least Curtis, Pacific Tile, and Advance

Industrial say exactly the opposite. There are a number of contingencies addressed in these cases that trump a definitive finding based on the results of the ancillary proceedings.

Counsel for the General Counsel attempts to “rewrite” Section 2(3) of the Act by arguing that the Employer’s violation of “another statute” would make the employee “eligible to vote as a bargaining unit employee.” (General Counsel’s Answering Brief at Page 9). The statute only refers to the NLRA. Moreover, the Board has never stated that if another statute is violated, an employee seeking to reestablish his/her employment status is a bargaining unit employee. There is so much uncertainty attached to challenged ballots that no such conclusion can be reached. It would be error for the Board to rely on these cases.

II. Counsel for the General Erroneously Supports the Judge’s Conclusion that Charging Party Is An Employee and Member of the Bargaining Unit Because He Was Seeking Reinstatement Under Title VII of the Civil Rights Act

On page 9 of his Decision, the Administrative Law Judge finds that the Charging Party is still an employee and member of the bargaining unit because his employment status is being pursued in the District Court. On page 8 of her Answering Brief, Counsel for the General Counsel argues that because “reinstatement is possible” under 42 U.S.C. Section 2000e-5(g)(1) Brown will be “eligible” for reinstatement if he prevails in his lawsuit.

Significantly like the Judge, Counsel for the General Counsel does not and cannot cite a single authority for the proposition that because reinstatement under a non-NLRA statute is a possibility, that employment as a bargaining unit member continues beyond termination. There is no question that the Charging Party was terminated and that his termination was upheld under the collective bargaining agreement. There is also no question that Charging Party is eligible for reinstatement under a federal employment discrimination statute. However, there is no authority supporting an argument that a terminated employee who **could** be eligible for reinstatement

under Title VII is a bargaining unit member while seeking to get his/her job back when no 8(a)(3) or 8(a)(4) unfair labor practice charge has been alleged.

For this reason this argument by counsel for the General Counsel does not support a denial of Respondent's Exceptions 1, 2, 3, 4, 7, 8 and 11.

III. Counsel For The General Counsel's Argument That The Administrative Law Judge Has Discretion To Control And Limit The Testimony At A Hearing Is General In Nature And Does Not Counter The Respondent's Argument That It Was Prejudiced By The Administrative Law Judge's Ruling.

It is well established that the Board will reverse a judge's rulings or order, excluding testimony, "when the party urging such measures demonstrates that the judge's ruling was not only erroneous, but also prejudicial to substantive rights." See, e.g., Glen Falls Bldg. & Constr. Trades Council, 325 NLRB 1084, 1086 (1998) (Board remanded case to ALJ where ALJ erroneously excluded testimony that prejudiced Respondent). The Judge's decision to preclude testimony from Mr. Nouse regarding the Union's understanding of who was and who was not in the bargaining unit and the testimony of Mr. Saggau as to why the Employer applied the DRP to the Charging Party was erroneous and prejudiced the substantive rights of the Employer.

The testimony of Mr. Nouse and Mr. Saggau was relevant to the issue of whether there was a "meeting of the minds" between the Union and the Employer as to the issue of whether terminated employees are members of the bargaining unit as described in the recognition clause of the collective bargaining agreement. See, e.g., Sunrise Nursing Home, Inc., 325 NLRB 380, 389 (1998) (Board upheld ALJ determination that employer violated Section 8(a)(5) where there was a "meeting of the minds" between employer and union regarding vacation policy and employer unilaterally changed the policy). The Employer was entitled to present evidence to demonstrate that there was a meeting of the minds between the Union and Employer on the issue of whether employees who were discharged and had the discharge arbitrated and upheld were

still members of the bargaining unit once the arbitrator's decision was issued. The Judge found this was the "bottom-line" question in the case and that Mr. Nouse's "opinion" would not have "meaning" and excluded the testimony on that basis. (Tr. 79-80). However, the Judge failed to recognize that the Union's opinion of whether such individuals are or should be in the bargaining unit does have meaning. In fact, it is critical to the analysis of whether there was a meeting of the minds between the parties on that issue. By curtailing this testimony the Judge prejudiced the substantial rights of the Employer to present evidence directly relevant to its case and probative of the "bottom-line" issue in question.

Mr. Nouse's testimony as to whether terminated employees are members of the bargaining unit is also directly relevant to the issue of whether the exclusion of such employees from the bargaining unit was a past practice to which the Union acquiesced, which could constitute a waiver of its right to bargain over this issue. See, e.g., Courier-Journal, 342 NLRB 1093, 1094 (2004) (Board found unilateral changes to health care premiums did not violate Section 8(a)(5) of the Act because changes were implemented pursuant to a well-established past-practice to which the Union acquiesced). Mr. Nouse was asked whether employees who are discharged and whose discharges are upheld at arbitration are, thereafter, members of the bargaining unit the Union represented. (Tr. 71-72). By precluding the Employer from continuing this line of questioning, the Judge prevented the Employer from possibly eliciting evidence of Union acquiescence in the treatment of such employees as being outside the bargaining unit. Such evidence is directly probative on the issue of whether the Union waived its right to bargain over application of the DRP to such employees, which was fundamental to the Employer's defense.

Contrary to the argument of counsel for the General Counsel on pages 11 and 12 of her Answering Brief, the Administrative Law Judge's decision to preclude the testimony of Mr. Nouse and Mr. Saggau on these issues was erroneous and prejudiced the substantive rights of the Respondent. Respondent's Exception 14 should be affirmed, and/or, in the alternative, the Board should remand this case to the Judge to allow the Employer to question Mr. Nouse and Mr. Saggau regarding these issues.

IV. Counsel for the General Counsel Misconstrues the "Illegal Objective" Exception In Bill Johnson's Restaurant, Inc.¹

On page 12 of her Answering Brief, Counsel for the General Counsel argues that Respondent's Exceptions 10 and 13 should be denied based on her misreading of the "illegal objective" exception in footnote 5 of Bill Johnson's. *Id.* at 737. She maintains that the Judge's order for the Respondent to withdraw its Motion to Compel in federal court is lawful under Bill Johnson's. Her theory is that a violation of any section of the Act, in this case, 8(a)(5), constitutes an illegal objective that permits the Judge's order and remedy involving a U.S.D.C. action.

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.

¹ Bill Johnson's Restaurant, Inc. v. NLRB, 461 U.S. 731 (1983)

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.

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. 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 Respondent's Motion to Compel arbitration in any way, and it was improper for the Administrative Law Judge to order Respondent to withdraw its Motion to Compel in federal court. Exceptions 10 and 13 should therefore be sustained.

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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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