

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

DATE: March 10, 2014

TO: Dennis P. Walsh, Regional Director
Region 4

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

SUBJECT: IBEW Local 269 (Kiss Electric, LLC)
Case 04-CC-115998

560-2575-6701

This case was submitted for advice as to whether to issue complaint alleging that the Union violated Section 8(b)(4) of the Act by threatening to cause a developer's proposed project to be reviewed by a municipality, leading to the delay or cancellation of the proposed project, with the object of coercing the developer to cease doing business with a nonunion contractor. We conclude that it would not effectuate the purposes and policies underlying the Act to issue complaint in the instant case.

FACTS

New Century Property Group, LLC (New Century) is currently developing the site of a former supermarket and adjacent property in Falls Township, Pennsylvania. When completed, the site will be occupied by another retail establishment, as well as other small business tenants. New Century hired McCormick Management Services, LLC (McCormick), a nonunion entity, to be the general contractor for the project. McCormick retained Charging Party Kiss Electric, LLC (Kiss Electric), also a nonunion entity, to do the electrical work on the project.

On September 11, 2013,¹ New Century and McCormick filed applications for the building permits required for the project with Falls Township. Later that day, at approximately 3:00 p.m., a Field Representative/Organizer for IBEW, Local 269 (the Union), telephoned the owner of New Century. The Union representative complained about McCormick and about New Century's decision to use McCormick. According to the owner, the Union representative said that, if New Century didn't use a union contractor, the Union had the political pull in the Township to make the project go through land development review, and that it would take two years. The owner also

¹ All dates hereafter are in 2013, unless otherwise noted.

claims that the Union representative said that New Century would never get the job done, and that New Century was really going to have problems if they used McCormick. The Union representative denies making any of these statements.

The next day, September 12, New Century received a letter by mail from Falls Township giving notice that the project would have to go through land development review. The Region's investigation indicates that the land development review of the project was required under Falls Township's zoning and land use ordinances, and that the Union was not involved in the instigation of the land development review or in Falls Township's consideration of the requested building permits.

In October, Falls Township issued the building permits for the part of the project that was within the footprint of the former supermarket at the site.² The rest of the Project remained in land development review until mid-November, at which time Falls Township allowed the remainder of the project to go forward, subject to certain modifications agreed to by New Century.

On October 30, Kiss Electric, the electrical contractor working on the project, filed the charge in the instant case, alleging that the Union violated Section 8(b)(4) of the Act by threatening, coercing, and restraining New Century.

ACTION

We conclude that it would not effectuate the purposes and policies underlying the Act to issue complaint in the instant case.

Section 8(b)(4)(ii)(B) of the Act makes it unlawful for a labor organization or its agents to threaten, coerce, or restrain any person, where an object is to force that person to cease doing business with another person. In the instant case, the Charging Party alleges that the Union unlawfully threatened to instigate land development review of the New Century project in order to force neutral employer New Century to cease using McCormick as its general contractor.³ That threat is alleged to be

² Also in October, McCormick had a conversation with a union contractor who unsuccessfully bid on the electrical work subcontract on the New Century project. McCormick claims that the union contractor told him that he had been instructed by the Union representative to deliver to McCormick the message that the Union would get the building permits released if the work were given to the union contractor. Both the Union representative and the union contractor deny that they made any such statements.

³ The Charging Party also alleges that the Union violated Section 8(b)(4) by the October statements McCormick attributes to the union contractor, which assertedly

coercive, as it explicitly threatened significant delays in the project or its cancellation altogether, and secondary, as it expressly requested that New Century cease doing business with McCormick.

As the alleged threatening 8(b)(4) conduct consisted of a threat to appeal to Falls Township to instigate land development review, however, it raises the issue of whether the Union's conduct is protected by the petitioning clause of the First Amendment,⁴ and is therefore outside the ambit of 8(b)(4). Although an attempt by the Union to instigate local land development review would clearly not have been a lawsuit, per se, it would have similarly invoked a formal mechanism or proceeding leading to state action in the consideration of whether or not to issue the requested building permits. Thus, while not a lawsuit in the strict sense, the land development review process implicates similar concerns about government petitioning. Significantly, the Board has not limited the application of *Bill Johnson's Restaurants* and *BE & K* solely to situations involving lawsuits, but has also applied the same principles to similar conduct, such as grievance filing or the resort to arbitration, including where such conduct is alleged to violate Section 8(b)(4).⁵ Therefore, we conclude that the same principles should apply in this case.⁶

indicated that the Union would get the building permits released if the work were given to the union contractor. As these statements have been denied, and there is no other non-hearsay evidence of the Union making such a claim, we agree with the Region that this allegation should be dismissed, absent withdrawal.

⁴ See generally *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

⁵ See, e.g., *Food & Commercial Workers Local 367 (Quality Foods)*, 333 NLRB 771 (2001); *SEIU Local 32B-32J (Nevins Realty Corp.)*, 313 NLRB 392 (1993) (demand for arbitration); *Emery Air Freight*, 278 NLRB 1303 (1986) (grievance filing), remanded in rel. part 820 F.2d 448 (D.C. Cir. 1987).

⁶ We recognize that the Board has left open the question of whether its *BE & K* decision directly applies to lobbying activity. See *New England Regional Council of Carpenters (Village Construction Co.)*, 351 NLRB 606, 606 (2007). We have long taken the position, however, that the same analysis should apply to such government petitioning as it does to lawsuits. See, *New England Regional Council of Carpenters*, Case 1-CC-2712, advice memorandum dated December 8, 2003, at 6-8. Indeed, the Board applied a similar analysis to lobbying activity in *Petrochem Insulation*, 330 NLRB 47, 49-50 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001). While the Board emphasized in that case that governmental lobbying by a union is protected by the First Amendment, and that the right to petition a legislative body falls squarely under the "umbrella of 'political expression,'" it also explicitly raised the possibility

However, the Union never took any action to carry out its alleged threat. Thus, the Union was not involved in the instigation of the land development review or in Falls Township's consideration of the requested building permits in any way. In this regard, the Board has long distinguished threats of lawsuits from the actual filing of lawsuits,⁷ and has expressly found that such threats may be found unlawful where they are not "incidental" to a filed lawsuit or some other similar conduct.⁸ The Board has made clear that a threat to sue, in the absence of the filing of a lawsuit, is not incidental to a lawsuit, and therefore the threat by itself may be found to be an unfair labor practice.⁹ Therefore, a complaint could issue alleging that the Union's threat was unlawful.

that such conduct could be found coercive and violative of Section 8(b)(4) if it was meritless and had a secondary objective. The Board found it unnecessary to decide that issue in *Petrochem*, however, as it found no factual support for the contention that the union's actions at issue in that case were meritless. *Id.*, at 50 ("Because there is no support for the Respondent's contention that the Unions filed their petitions and objections without regard to their merits, we find that the Unions' conduct did not violate Section 8(b)(4)(B)").

⁷ See, e.g., *Clyde Taylor Co.*, 127 NLRB 103, 108 (1960) ("we do not mean to deny the existence of the normal right of all persons to resort to the civil courts to obtain an adjudication of their claims. We interdict here only the making of a threat . . ."); *Carborundum Materials Corp.*, 286 NLRB 1321, 1321-22 (1987) (finding unlawful a threat to sue an employee); *Consolidated Edison*, 286 NLRB 1031, 1032-33 (1987) (same, noting that "the issue of the legality of a threat to file a lawsuit [is] different from those involved in the actual filing of a lawsuit").

⁸ See, e.g., *Postal Service*, 350 NLRB 125, 125 n.1 (2007) ("whatever constitutional concerns might exist with respect to the filing of a lawsuit, they are not implicated when only a threat to file a lawsuit is in issue"); *DHL Express, Inc.*, 355 NLRB 680, 680 n.3 (2010) (a threat to sue was not incidental to a lawsuit where no lawsuit was filed); *Networks Dynamics Cabling*, 351 NLRB 1423, 1427 n. 14 (2007) (a threat to prosecute was not incidental to a prosecution where no criminal charges were filed).

⁹ We note that, while the Board has not definitively held that the principles of *BE & K Construction Co.*, 351 NLRB 451 (2007), are to be applied even when a threat to file a lawsuit is incidental to a lawsuit, it has repeatedly assumed, arguendo, that threats incidental to a lawsuit are protected from unfair labor practice liability. See *Postal Service*, 350 NLRB at 125; *DHL Express, Inc.*, 355 NLRB at 680 n.3; *Networks Dynamics Cabling*, 351 NLRB at 427 n. 14.

In the circumstances of the instant case, however, we conclude that it would not effectuate the purposes and policies underlying the Act to issue complaint. In particular, we note that land development review of the New Century project was required under Falls Township's zoning and land use ordinances regardless of any action by the Union, and that the Union was not involved in the instigation of the land development review or in Falls Township's consideration of the requested building permits in any way. Indeed, the letter informing New Century of the land development review, received by New Century by mail on September 12, may well have already been sent by Falls Township when the owner and the Union representative spoke on September 11, at approximately 3:00 p.m. In any case, the alleged threat was limited to the Union's instigation of a process that was already required by Falls Township itself, along with predictions of the possible consequences of that process. In these circumstances, we conclude that it would not effectuate the purposes and policies underlying the Act to issue complaint.

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal.

/s/
B.J.K.