

Giant Food Stores, Inc. and Easton Development Company and United Food and Commercial Workers, Local 1357. Case 4-CA-15117

April 30, 1990

ORDER DENYING MOTIONS

**BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY**

On June 15, 1989, the Board issued its Decision and Order in this case¹ in which it, inter alia, dismissed the complaint allegation that the Respondents' maintenance of a civil lawsuit in state court violated Section 8(a)(1) of the National Labor Relations Act, but retained jurisdiction over that allegation "for the purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that the state court proceedings have been completed."²

On August 8, 1989, the General Counsel of the National Labor Relations Board and the Charging Party filed separate motions for reconsideration contending that the Board erred in its application of the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), to this case. The Respondents thereafter filed an opposition to the motions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motions for Reconsideration

In the underlying complaint, the General Counsel alleged that the Respondents violated Section 8(a)(1) by maintaining, after June 10, 1985, a civil lawsuit in the Pennsylvania state courts against the Charging Party seeking to enjoin trespassory picketing at the Respondents' shopping center. Applying the Court's decision in *Bill Johnson's Restaurants*, the administrative law judge concluded that the maintenance of the Respondents' lawsuit after June 10, 1985, was not "baseless." Accordingly, the judge dismissed this complaint allegation but retained jurisdiction over the allegation pending completion of the state court proceedings.

The General Counsel did not except to this conclusion or any other portion of the judge's decision, which had dismissed the complaint in its entirety. Inter alia, the Charging Party filed exceptions on the *Bill Johnson's Restaurants* issue contending that the judge erred by not finding that the maintenance of the lawsuit after June 21, 1985, rendered "that suit 'baseless' per the decision of the

United States Supreme Court in [*Bill Johnson's Restaurants*]." In its brief in support of its exceptions, the Charging Party asserted that by June 21, 1985, 15 or 16 stores had opened in the shopping center and that the Respondents' maintenance of the lawsuit beyond that date "was thus 'baseless' in state law per the rationale of [*Bill Johnson's Restaurants*]."

In its earlier decision, the Board found that the Respondents' maintenance of the state court lawsuit after the Union filed an unfair labor practice charge on June 10, 1985, did not lack a "reasonable basis" and the Board set out at length its reasons for so concluding. Finding that the lawsuit did not lack a reasonable basis, and in accord with the analytical framework set out by the Supreme Court in *Bill Johnson's Restaurants*, 461 U.S. at 747, the Board dismissed the complaint allegation regarding the maintenance of the state court lawsuit, but retained jurisdiction over that allegation for further consideration on a party's notification of a "final, binding determination or resolution of the merits by the Commonwealth of Pennsylvania." *Giant Food Store*, supra at 334.

In their motions for reconsideration, both the General Counsel and the Charging Party now contend that the analytical framework of the Supreme Court's decision in *Bill Johnson's Restaurants*, applied by the Board in its earlier decision,³ does not apply to this case because the state court lawsuit that forms the basis of the alleged violation was preempted by the Act. As support for their claim that the Board erred in its analytical approach to this case, they cite footnote 5 of *Bill Johnson's Restaurants*, 461 U.S. at 737-738, which had not been previously cited to or addressed by the Board. They further assert that the maintenance of a retaliatory lawsuit in state court is an unfair labor practice whenever that state court lawsuit is preempted by the National Labor Relations Act.

Section 102.46(b)(2) of the Board's Rules and Regulations provides (in pertinent part):

Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.

We find that the contentions raised by the General Counsel and the Charging Party in their motions for reconsideration, with their reliance on footnote 5 of *Bill Johnson's Restaurants* as being dispositive of their positions, have been waived inasmuch as they were not previously presented to the Board

¹ 295 NLRB 330 (1989) Member Devaney did not participate in that decision.

² Id. at 334.

³ This framework was essentially also that used by the judge in his underlying decision.

by way of timely exceptions to the judge's decision or otherwise.

Accordingly, the General Counsel's and the Charging Party's motions for reconsideration are denied as raising matters in an untimely fashion.⁴

⁴ In such circumstances, we make no determination on the legal sufficiency of the General Counsel's and Charging Party's arguments.

CHAIRMAN STEPHENS, dissenting.

I do not agree that the General Counsel and the Charging Party waived the argument made in their motions for reconsideration, and I therefore believe that the panel should address the argument on its merits.