

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

Advice Memorandum

DATE: November 23, 2015

TO: Peter S. Ohr, Regional Director
Region 13

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

SUBJECT: Personnel Staffing Group, LLC (“MVP”) and/or *Bill Johnson’s Chron*
MVP Workforce, LLC (“MVP Workforce”) and/or 220-2550-4500
MVP and MVP Workforce as a single employer, 220-2550-8100
Cases 13-CA-149591, et al. 512-5009-0100

The Region submitted these cases for advice on whether the Employers violated Section 8(a)(1) by filing and maintaining a lawsuit and motion for temporary restraining order in Illinois state court against a workers’ rights organization and two of that organization’s officers. We conclude that the Employers’ claims of “intentional interference with business operations” and “intentional interference with prospective business advantage” are preempted and violate the Act, provided that (i) the Region issues complaint on allegations that the Employers refused to assign work to individuals because they engaged in protected concerted activity, (ii) that same protected concerted activity is also encompassed by the Employers’ “interference” claims, and (iii) the Employers fail to seek a stay of the “interference” claims within seven days. We further conclude that (with certain caveats explained below): the Employers’ trespass claim is not preempted, due in part to an unsettled question of state law involving the status of certain “public access areas”; the defamation claim is not preempted because the Employers have properly pled actual malice and damages; the fraud claim is not preempted because it does not sufficiently implicate Section 7 activity; and the motion for temporary restraining order is not preempted because it is narrowly tailored to the Employers’ non-preempted claims. Finally, we conclude that all of the claims in the lawsuit and the motion for temporary restraining order may be unlawful under a “baseless and retaliatory” theory, but that any such allegation should be held in abeyance pending further state court proceedings and/or further development of the underlying facts.

FACTS

Personnel Staffing Group, LLC and MVP Workforce, LLC (“the Employers”) are temporary labor service agencies (“temp agencies”) operating in the Chicago area.¹ The Employers supply third-party clients with workers who provide temporary clerical and industrial services. Chicago Workers’ Collaborative (“CWC”) is an Illinois non-profit organization that seeks to improve working conditions in the temporary staffing industry in the Chicago area.² CWC’s members include individuals, such as the four individual Charging Parties, who obtain work through various temp agencies around Chicago. CWC members are expected to attend meetings, participate in committees, attend protests and rallies, and fundraise for the organization. CWC provides members with legal services and other resources designed to help them organize and improve their terms and conditions of employment.

For many years, CWC has engaged in legal advocacy, public demonstrations, and organizing activities designed to combat wage theft, discrimination, and similar problems in the temporary staffing industry. For example, in 2007, the organization assisted in prosecuting and publicizing a wage-theft class action lawsuit against the Employers. CWC also seeks to assist workers by interacting with them in the waiting areas at temp agency offices. Illinois law designates those areas as “public access areas” that must have adequate seating and access to restrooms and water, and where all notices mandated by federal and state law must be displayed. In addition, CWC organizes rallies and forums to pressure temp agencies to improve working conditions, and representatives of the Employers have been present at such events. Moreover, since late 2012, CWC has had an ongoing dialogue with the Employers to address various concerns of workers, including individual grievances and allegations of discrimination.

On September 24, 2014, the Employers held a job fair at Personnel Staffing Group’s office, located in a strip mall in Cicero, Illinois. According to CWC and the individual Charging Parties, CWC’s (b) (6), (b) (7)(C) drove the four individual Charging Parties to the job fair but did not (b) (6), (b) (7)(C) stay. CWC’s (b) (6), (b) (7)(C) and three CWC (b) (6), (b) (7)(C) also attended the job fair. The individual Charging Parties claim that they approached the job fair table, which was set up on the sidewalk outside the office, and filled out applications. They deny blocking access to the table or interfering with others applying for work. They also deny speaking to other job applicants or distributing anything. The (b) (6), (b) (7)(C) stated that

¹ The Employers have stated that they do not contest their status as a single employer.

² No party asserts that CWC is a labor organization under Section 2(5) of the Act.

after dropping off the four individuals, (b) (6), (b) (7)(C) stopped by several different temp agencies' offices, including MVP Workforce's office, and told workers in the waiting areas about the job fair.

According to the Employers, all aspects of the job fair occurred on Personnel Staffing Group's private property. They claim that four unknown individuals employed by CWC blocked access to the event and told potential applicants that Personnel Staffing Group stole employees' wages, discriminated against employees, and refused to send injured employees to approved medical facilities. They also allege that CWC representatives blocked applicants from leaving the property in order to discourage them from working for the Employers; that CWC agents entered Personnel Staffing Group's office, harassed its employees, and interfered with its pool of workers; and that CWC sent individuals to apply for work who then refused work assignments.

On October 6, 2014, the Employers filed a lawsuit in the Circuit Court of Cook County, Illinois. The complaint names CWC, the (b) (6), (b) (7)(C) and the (b) (6), (b) (7)(C) as defendants and alleges that, since November 2013, "CWC's employees, agents, representatives, and/or others acting in concert with or on behalf of CWC" have engaged in various activities, including: "blocking the doors to [the Employers] offices"; "advising those seeking employment at the offices that [the Employers] are racist and are engaging in illegal activity and employment practices"; distributing "flyers falsely implying that [the Employers] steal the wages of their employees"; "taunt[ing] and disparag[ing] . . . employees . . . in an effort to discourage [them] from working for [the Employers]"; and "harass[ing] . . . job applicants and employees entering or leaving [the Employers] offices, forcing them to listen to CWC's defamatory remarks and intimidating them." The complaint also alleges that, at the September 24, 2014 job fair, "CWC's employees, agents, representatives, and/or others acting in concert with or on behalf of CWC . . . blocked access to the tables" and interfered with the event in various ways.

The lawsuit asserts five separate causes of action. The first two counts—"intentional interference with business operations" and "intentional interference with prospective business advantage"—are based on allegations that CWC and those acting in concert with it blocked access to the Employers' offices, harassed and intimidated applicants, taunted and disparaged employees, yelled "false and defamatory" remarks, and applied for jobs without the intention of accepting employment. Those actions allegedly disrupted the Employers' business by reducing the number of job applicants. The third count of the Employers' lawsuit is a claim of "trespass to land." It is based on allegations that CWC, and those acting in concert with it, entered the Employers' offices, blocked ingress and egress to and from the property, disrupted business operations, and ignored requests that they leave the premises and protest on public sidewalks. The fourth count claims defamation and is based on allegations that CWC and those acting in concert with it have publicly

accused the Employers of stealing wages, failing to pay their employees overtime, engaging in “slave labor,” being racist, and refusing to pay their injured employees’ medical expenses. The Employers assert that these statements were made in order to disrupt the Employers’ business and “with malicious intent . . . to destroy the temporary labor service industry, or at least, . . . were made with reckless indifference to their truth or falsity.” The complaint asserts that the statements have caused a decrease in the number of job applicants and have led employees to seek work from competitors. Finally, the lawsuit’s fifth count asserts a claim of fraud against CWC and the (b) (6), (b) (7)(C) based on the latter’s alleged conduct at MVP Workforce’s office on September 24. Specifically, the Employers allege that the (b) (6), (b) (7)(C) entered those premises, misrepresented that (b) (6), (b) (7)(C) had permission to speak with employees, and made false and defamatory statements to employees.

As relief, the lawsuit requests: entry of preliminary and permanent injunctions against the defendants prohibiting them from blocking ingress and egress from the Employers’ property and trespassing onto that property; actual, compensatory, and punitive damages; and other “equitable and just” relief. In its answer, CWC denied the lawsuit’s allegations. CWC admitted that it has protested and visited the Employers’ offices, but it denied trespassing, blocking ingress and egress, and making defamatory statements.

On October 7, 2014, the Employers filed a motion for temporary restraining order (“TRO”) in state court against CWC and the two named officers. The motion, which was based on the conduct set forth in the underlying lawsuit, requested that the defendants be temporarily enjoined from trespassing onto the Employers’ property and from blocking ingress and egress to and from their offices. On October 9, the state court granted the TRO, specifically restraining the defendants from “blocking ingress and egress to and from the premises of [the Employers] and/or entering the offices of [the Employers]” The TRO continues in effect by consent. CWC subsequently filed a motion to dismiss the Employers’ suit under Illinois’s anti-SLAPP Act, but the court denied that motion on January 16, 2015. The parties disagree over the basis of the court’s decision, which was not in writing. The Employers claim that the court determined that the lawsuit was not meritless, while the various Charging Parties contend that the court’s decision was based on the limited nature of the state’s anti-SLAPP law, which applies only to actions taken “solely” in response to protected activity.

On April 6, 2015, CWC and the other Charging Parties filed unfair labor practice charges in the instant cases. In addition to the allegations relating to the unlawfulness of the lawsuit and motion for TRO, the charges claim that the Employers violated the Act by refusing to assign work to individuals (including the four individual Charging Parties) who engaged in and/or supported protected concerted activity directed at the Employers.

ACTION

We conclude that: (1) the Employers' claims of "intentional interference with business operations" and "intentional interference with prospective business advantage" are preempted and violate the Act, provided that the Region issues complaint on allegations that the Employers refused to assign work to individuals due to protected concerted activity that is also alleged by the Employer to constitute a basis for its "interference" claims, and the Employers fail to seek a stay of the "interference" claims within seven days; (2) the Employers' trespass claim is not preempted, subject to the state court's disposition of an unsettled question of state law involving the status of certain "public access areas"; (3) the defamation claim is not currently preempted because the Employers have properly pled actual malice and damages; (4) the fraud claim is not preempted because it does not sufficiently implicate Section 7 activity; and (5) the motion for temporary restraining order is not preempted because it is narrowly tailored to the Employers' non-preempted claims. We also conclude that all of the claims in the lawsuit and motion for temporary restraining order may be unlawful under a "baseless and retaliatory" theory, but that any such allegation should be held in abeyance pending further state court proceedings and/or further development of the underlying facts.

Bill Johnson's Footnote 5 Doctrine

In footnote 5 of *Bill Johnson's Restaurants v. NLRB*, the Supreme Court made clear that the Board may enjoin suits that are preempted by the Board's jurisdiction.³

³ 461 U.S. 731, 737 n.5 (1983); *see also Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003) (stating that the Supreme Court's decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), "did not affect the footnote 5 exemption in *Bill Johnson's*"). The Court also affirmed the Board's ability to enjoin lawsuits with "an objective that is illegal under federal law." *Bill Johnson's*, 461 U.S. at 737 n.5. Here, we find that the Employers' lawsuit does not have such an objective. The suit is not "aimed at achieving a result that is incompatible with" a prior Board ruling. *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991) (finding that union's suit had illegal objective because it sought to enforce arbitral award that was in direct conflict with Board's unit clarification determination), *enforced*, 973 F.2d 230 (3d Cir. 1992). Nor is it otherwise "aimed at achieving a result incompatible with the objectives of the Act." *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 5 & n.11 (Aug. 14, 2015) (internal quotation marks omitted) (employer violated Act by filing motions to stay collective action lawsuit and compel individual arbitration; employer's motions sought construction of arbitration agreement that was plainly unlawful under Board law); *see also Manno Electric, Inc.*, 321 NLRB 278, 297 (1996), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997).

Thus, the Board has repeatedly held that a preempted lawsuit can be condemned as an unfair labor practice, without regard to its objective merits or the motive with which it was filed, if it is unlawful under traditional 8(a)(1) principles.⁴ That is, if a suit is found to be preempted, then it violates Section 8(a)(1) if it tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, regardless of the employer's motive.⁵

The principles set forth in *Brown v. Hotel Employees*⁶ and *San Diego Bldg. Trades Council v. Garmon*⁷ apply in determining whether a lawsuit is preempted. In *Brown*, the Supreme Court held that if conduct is *actually* protected by Section 7 of the Act, rather than merely *arguably* protected, state law that purports to regulate that activity is preempted as a matter of substantive right, without exception.⁸ In *Garmon*, the Court held that a presumption of preemption applies even when the activity that a state seeks to regulate is only arguably protected by Section 7 of the Act or prohibited by Section 8 of the Act.⁹ In such circumstances, the Board must exercise its "primary jurisdiction" and determine in the first instance whether the challenged conduct is protected or prohibited by the Act, thereby potentially divesting the states of all jurisdiction.¹⁰ The Court, however, recognized that not every state law cause of action involving *arguably* protected or prohibited activity is preempted. The two exceptions the Court noted involve activity that is "a merely peripheral concern" of the Act and activity that touches interests "so deeply rooted in local feeling and responsibility" that preemption cannot be inferred.¹¹

⁴ See, e.g., *Can-Am Plumbing*, 335 NLRB 1217, 1217 (2001), *enforcement denied on other grounds and remanded*, 321 F.3d 145 (D.C. Cir. 2003), *reaffirmed on remand*, 350 NLRB 947 (2007), *enforced*, 340 F. App'x 354 (9th Cir. 2009).

⁵ *Webco Industries*, 337 NLRB 361, 363 (2001) (citations omitted).

⁶ 468 U.S. 491 (1984).

⁷ 359 U.S. 236 (1959).

⁸ 468 U.S. at 502-03.

⁹ 359 U.S. at 245-46.

¹⁰ *Id.* at 245; see also *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-49 (1985); *Loehmann's Plaza*, 305 NLRB 663, 671 (1991), *supplemented by* 316 NLRB 109 (1995), *aff'd sub nom. UFCW Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996).

¹¹ *Garmon*, 359 U.S. at 243-44; see also *Webco Industries*, 337 NLRB at 362.

The Employers' Business Interference Claims

The first two counts of the Employers' lawsuit claim "intentional interference with business operations" and "intentional interference with prospective business advantage" based upon the alleged conduct of CWC and others acting in concert with it. Because those allegations rely in part upon claims of blocking access to and from the Employers' offices and various forms of harassment, which, if proven, may lie beyond the scope of the Act's protection, that conduct is *arguably* (not *actually*) protected.¹² Consequently, the framework for determining preemption set out by the Board in *Loehmann's Plaza* applies.¹³ There, the Board held that when the conduct that a state is attempting to regulate constitutes arguably protected activity, preemption occurs only upon Board involvement in the matter, and Board involvement occurs when the General Counsel issues a complaint regarding the same activity that is the subject of the state court lawsuit.¹⁴ At that point, the pending lawsuit is preempted, and the plaintiff must seek a stay of that lawsuit within seven days of the issuance of the unfair labor practice complaint pending Board disposition of the complaint.¹⁵

Here, no complaint has yet issued on any allegations that would bring the purportedly protected activity that is the subject of the Employers' state court lawsuit within the Board's primary jurisdiction. As such, there is presently no basis for finding the suit preempted. However, the Charging Parties have alleged in their charges that the Employers violated the Act by refusing to assign work to individuals

¹² See, e.g., *Milum Textile Services Co.*, 357 NLRB No. 169, slip op. at 4 (Dec. 30, 2011) ("[T]ortious interference claims arising out of a labor dispute are wholly preempted or, at least, preempted absent outrageous or violent conduct."); *In re Sewell*, 690 F.2d 403, 408 (4th Cir. 1982) (holding that the Act preempted state law tortious interference with contract claim where all of the defendant's conduct was subject to regulation by the Act); *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre*, 647 F.2d 372, 381-82 (3d Cir. 1981) ("[W]here parties to a labor dispute are charged with tortious interference with a collective bargaining agreement, at least in the absence of outrageous or violent conduct, state law causes of action are preempted.").

¹³ 305 NLRB at 671 & n.56.

¹⁴ *Id.* at 669-70.

¹⁵ *Id.* at 671.

(including the four individual Charging Parties) who engaged in and/or supported protected concerted activity directed at the Employers. The Region is investigating those allegations. Assuming that the Region finds merit to those allegations and issues complaint on that basis, the requirements for preemption would be met, provided that the Section 7 activity forming the basis of the refusal-to-assign-work allegation is also encompassed by the conduct upon which the Employers' "interference" claims are based.¹⁶ The Region should then follow the procedures set out in *Loehmann's Plaza*.¹⁷ If the Employers then fail to seek to stay the portions of their lawsuit relating to the claims of "intentional interference with business operations" and "intentional interference with prospective business advantage," the Region should issue complaint alleging that the Employers have also violated the Act by maintaining the preempted claims.¹⁸

¹⁶ For example, the prerequisites for preemption would be met if the Region determines that the Charging Parties were denied work because they made protected statements to other applicants *and* those same statements are encompassed by the allegations made in the Employers' "interference" claims (e.g., that those acting in concert with CWC harassed and intimidated applicants). By contrast, if the Region determines that the Charging Parties were denied work simply because of their general affiliation with CWC or because they engaged in activities not covered by the allegations made in counts one and two of the lawsuit, the requirements for preemption would not be met.

¹⁷ *See id.* at 670-71 & n.56. Consistent with OM 97-50, the Region should send the Employers a *Loehmann's* letter stating that a complaint has been issued and that the lawsuit is preempted. Because of policy considerations described in OM 97-50, the Region should not send a copy of that letter to the state court. *See* Memorandum OM 97-50, "Makro, Inc. and Renaissance Properties d/b/a Loehmann's Plaza 305 NLRB 663 (1991)," dated July 30, 1997.

¹⁸ In that event, the Region should also submit this case to the Injunction Litigation Branch with its recommendation on whether § 10(j) proceedings are warranted. We note that Board precedent supports acting against the Employers' "interference" claims, while deferring potential action against the other claims. *See Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 603 (1999) ("[T]he Board has enjoined an employer from prosecuting specific portions of a lawsuit found to be preempted by Federal labor law while deferring action on others that were not and as to which there existed genuine issues of fact and interpretations of state law to be resolved."), *enforced*, 236 F.3d 187 (4th Cir. 2000); *Manno Electric, Inc.*, 321 NLRB at 298 (finding some portions of lawsuit preempted but holding that determination of lawfulness of other portions must await results of state court adjudication). Proceeding in this manner would thus not run afoul of the Board's decision in *Jefferson Chemical Co.*, 200 NLRB 992, 992 n.3 (1972) (stating that "multiple litigation of issues which should

In that event, traditional 8(a)(1) principles would support finding counts one and two of the Employers' suit unlawful because they clearly tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, regardless of the Employers' motive in maintaining the suit. Indeed, the remedies sought by the Employers, including injunctive relief and damages, plainly tend to interfere with the four individual Charging Parties' Section 7 right to engage in protected concerted activity.¹⁹ For example, in *J.A. Croson Co.*, the Board found that an employer violated the Act by maintaining a preempted state court lawsuit against a competitor employer based on the latter's acceptance of job-targeting funds from a union.²⁰ In so finding, the Board rejected the employer's defense that the lawsuit did not violate the Act because it named as a defendant only the competitor employer, and not any person protected by Section 7.²¹ As the Board explained, if the employer's lawsuit prevailed, the result would have been to curtail the job-targeting program, which had resulted from the employees' exercise of their Section 7 rights.²² Here, the

have been presented in the initial proceeding constitutes a waste of resources and an abuse of our processes").

¹⁹ We conclude that complaint should not issue on CWC's allegation that the preempted lawsuit interferes with its Section 7 rights as an organization. We assume, arguendo, that the workers' organization could, in certain circumstances, invoke its own Section 7 rights. *See Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 29 (D.C. Cir. 2001) (affirming Section 7 rights of unions in certain circumstances). Here, however, CWC has made no allegations that would put its own activities within the Board's primary jurisdiction, as required under *Loehmann's Plaza*.

²⁰ 359 NLRB No. 2, slip op. at 8 (Sept. 28, 2012). Although this decision was decided by a panel that, under *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2578 (2014), was not properly constituted, it is the General Counsel's position that *J.A. Croson* was soundly reasoned, and the Region should therefore urge the current Board to adopt the *J.A. Croson* rationale as its own.

²¹ 359 NLRB No. 2, slip op. at 8.

²² *Id.*; see also *Diamond Walnut Growers*, 312 NLRB 61, 69 (1993) (finding that employer violated Section 8(a)(1) by bringing a baseless libel suit against union with retaliatory motive and rejecting employer's argument that it could not have violated Act because it sued only the union, not individual employees), *enforced*, 53 F.3d 1085 (9th Cir. 1995); *Dahl Fish Co.*, 279 NLRB 1084, 1110-11 (1986) (finding, pre-*BE & K Construction*, that employer violated Section 8(a)(1) by filing meritless suit against union in retaliation for the union's filing a Board charge; not finding union's activity protected from such retaliation would "abrogate the advantages of concerted activity

Employers' suit names only CWC, the (b) (6), (b) (7)(C), and the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) as defendants, and thus any relief could not directly restrain any other individuals, such as the four individual Charging Parties. Nonetheless, as in *J.A. Croson*, the practical effect of any such relief would be to interfere with the Section 7 rights of individual workers who have chosen to exercise their rights through and in conjunction with CWC.²³ This line of reasoning is particularly applicable in the instant case, as the lawsuit expressly alleges the conduct of "CWC's employees, agents, representatives, *and/or others acting in concert with or on behalf of CWC*" (emphasis added) as a basis for the requested remedies and would plainly operate to curtail protected activity.

Consequently, if the Region issues complaint on the refusal-to-assign-work allegations (or any other allegation that would place the protected concerted activity before the Board), and the Employers' "interference" claims encompass the same protected conduct, it should follow the procedure outlined in *Loehmann's Plaza*. Absent the Employers then taking affirmative action to stay their claims relating to "intentional interference with business operations" and "intentional interference with prospective business advantage," the Region should also issue complaint based on their unlawful maintenance of the preempted claims. However, if the Region decides not to issue complaint on the refusal to assign work allegations, or if there is no overlap between the protected activity underlying the complaint and the Employers' interference claims, these portions of the Employers' lawsuit will not be preempted.

The Employers' Trespass Claim

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, the Supreme Court observed that the Act does not preempt "state jurisdiction to enforce its laws prohibiting . . . [among other things] obstruction of access to property."²⁴ In addition, the Court, in discussing circumstances where trespass lawsuits may be preempted by the Act, stressed that, because certain trespasses upon employer

the Act was designed to protect" and discourage employees' Section 7 rights), *enforced mem.*, 813 F.2d 1254 (D.C. Cir. 1987).

²³ See also *Northeastern University*, 235 NLRB 858, 865 (1978) (finding that employer violated Act when it denied use of meeting space to workers' group and holding that it was irrelevant that group was not a labor organization under Section 2(5) because "as employees, members of [the group] ha[d] a protected right to act concertedly as individuals to improve their wages, hours, and working conditions"), *enforced in pertinent part*, 601 F.2d 1208 (1st Cir. 1979).

²⁴ 436 U.S. 180, 203-04 (1978).

property may be protected under Section 7, the Board must determine the legality of access in the first instance, so long as the party denied access files a charge based on an employer's demand to leave.²⁵ In that connection, the Court noted that preemption is justified "in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so."²⁶ Observing that the employer there "could not directly obtain a Board ruling on the question whether the [u]nion's trespass was federally protected" and that the union "could have presented the protection issue to the Board [but] ha[d] not done so," the Court found that the employer's state court lawsuit was not preempted.²⁷

Here, the Employers' trespass claim is based on allegations that CWC, and those acting in concert with it, entered the Employers' offices, blocked ingress and egress to and from the property, disrupted business operations, and ignored requests that they leave the premises and protest on public sidewalks. The Charging Parties deny the allegations and also assert that accessing the waiting areas at the Employers' offices in order to communicate with workers cannot constitute a trespass under Illinois law, citing a state statute designating such spaces as "public access areas."²⁸ The impact of that provision upon state trespass law appears to be a novel issue that has not been decided by any state court. In addition, as in *Sears*, and unlike in other cases where trespass suits have been found to be preempted,²⁹ the protected nature of the Charging Parties' access to the Employers' property has not been placed before the Board. Given these particular circumstances, which suggest minimal state

²⁵ *Id.* at 201-02.

²⁶ *Id.* at 201.

²⁷ *Id.* at 201-03.

²⁸ That provision reads:

Public Access Area. Each day and temporary labor service agency shall provide adequate seating in the public access area of the offices of the agency. The public access area shall be the location for the notices required by Section 45 of this Act and any other State or federally mandated posting. The public access area shall allow for access to restrooms and water.

820 Ill. Comp. Stat. Ann. 175/35.

²⁹ *See, e.g., Loehmann's Plaza*, 305 NLRB at 668 (finding employer violated Act by restricting union's access to property and subsequently finding maintenance of related lawsuit preempted).

interference with the Board’s jurisdiction, we conclude that the Employers’ trespass claim is not preempted. Accordingly, the Region should not allege that the trespass claim is preempted at this time; however, if the state court finds that presence in “public access areas” like the Employers’ waiting areas does not constitute trespass under state law, the Region should contact Advice.³⁰

The Employers’ Defamation Claim

The Supreme Court has held that libel or defamation claims exhibit an overriding state interest, provided that the statements at issue were made with actual malice and cause the plaintiff actual damages.³¹ In *Linn v. Plant Guard Workers Local 114*, the Court reasoned that defamation lawsuits were of peripheral concern to national labor policy because the malicious publication of defamatory statements “does not in and of itself constitute an unfair labor practice.”³² Further, while the Board might find that a party violated Section 8 by making the false statement in certain contexts, the Board has no remedies to compensate the defamed individual.³³ To avoid possible interference with national labor policy, however, the Court limited the availability of state remedies for libel in labor disputes to those instances in which the plaintiff pleads and proves that the defamatory statements were made with actual malice and caused actual injury.³⁴ A finding of actual malice requires that the party making a defamatory statement do so “with knowledge that it was false or with reckless disregard of whether it was false or not.”³⁵

Thus, the Board has held that *Linn* governs whether the Act preempts a defamation lawsuit in state court. To determine whether the filing and maintenance

³⁰ In those circumstances, the allegedly trespassory activity could constitute *actually* protected conduct. If so, the Employer’s claim would be preempted as a matter of substantive right under *Brown*.

³¹ See *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 61-65 (1966).

³² *Id.* at 62.

³³ *Id.* at 63-64.

³⁴ *Id.* at 55.

³⁵ *Chicago Dist. Council of Carpenters Pension Fund v. Reinke Insulation Co.*, 464 F.3d 651, 655 (7th Cir. 2006) (internal quotation marks omitted) (quoting *Old Dominion Branch, No. 496 Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974)).

of such a lawsuit constitutes an unfair labor practice because it is preempted, the Board examines whether the plaintiff pleads and proves actual malice and damages.³⁶ For instance, in *Beverly Health & Rehabilitation Services*, the Board dismissed aspects of the complaint that alleged that the employer had unlawfully maintained a preempted lawsuit, where it had satisfied the *Linn* framework by pleading actual malice and damages.³⁷

Here, the Employers' complaint properly pleads defamation under the standard set out in *Linn* and therefore is not preempted at this time. The claim of defamation is based upon allegations that CWC and those acting in concert with it publicly accused the Employers of, inter alia, stealing wages, engaging in racial discrimination, and refusing to pay their injured employees' medical expenses. While the Employers' claim that these statements were made in order to disrupt the Employers' business and "with malicious intent . . . to destroy the temporary labor service industry" is itself insufficient,³⁸ their additional assertion that the statements "were made with reckless indifference to their truth or falsity" tracks the requirement for "actual malice." In addition, the Employers have properly pled actual damages, as the complaint claims that the purportedly defamatory statements have caused the number of job applicants to decrease and have led employees to seek work from competitors. At the same time, however, to avoid preemption, the Employers must also ultimately prove actual malice and damages, and failure to do so could make issuance of complaint on that basis appropriate at some subsequent stage in the state court proceedings.³⁹ Accordingly, the Region should not presently issue complaint alleging that the defamation claim is preempted but should contact Advice if the Employers fail to prove actual malice and damages.

³⁶ See *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 963 (2000).

³⁷ *Id.* at 963. The Board also held the case in abeyance on the issue of whether the lawsuit was reasonably based under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

³⁸ See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989) (explaining that a defendant's "motive . . . [cannot] provide a sufficient basis for finding actual malice").

³⁹ See *Magic Laundry Services, Inc.*, Case 21-CA-103370, Advice Memorandum dated Mar. 21, 2014 (finding employer's defamation claim preempted based on court's dismissal for failure to provide evidence supporting finding of actual malice).

The Employers' Fraud Claim

The Employers' fraud allegations relate solely to actions purportedly engaged in by CWC's (b) (6), (b) (7)(C) i.e., (b) (6), (b) (7)(C) entrance onto the Employers' premises, misrepresentation that (b) (6), (b) (7)(C) had permission to speak with employees, and making of false and defamatory statements to employees. In certain circumstances, claims sounding in fraud or misrepresentation may be subject to the Board's primary jurisdiction over unfair labor practices and therefore preempted.⁴⁰ Here, however, the (b) (6), (b) (7)(C)'s conduct as a non-employee organizer does not sufficiently implicate the Act's protections.⁴¹ As a result, there is no conflict with the Board's jurisdiction, and the claim is not preempted.

The Employers' Motion for Temporary Restraining Order

The Employers' motion for TRO, which the court granted, requested that the defendants be temporarily enjoined from trespassing onto the Employers' property and from blocking ingress and egress to and from their offices. Thus, the motion was narrowly tailored and did not seek to enjoin even arguably protected activity.⁴² As such, the motion was an extension of the lawful portions of the Employer's suit and is not preempted.⁴³

⁴⁰ See *Lopresti v. Merson*, 2001 WL 1132051, at *10-11 (S.D.N.Y. 2001) (fraud claim preempted because it was "identical to a claim that the defendants did not bargain in good faith with respect to the effects of a plant closing agreement, which would be presented to the NLRB as a violation of [S]ection 8(a)(5)").

⁴¹ The employees with whom the (b) (6), (b) (7)(C) tried to communicate here were not "beyond the reach of reasonable . . . efforts to communicate with them." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533-34 (1992). As such, there is an insufficient basis for finding that derivative Section 7 rights justified the non-employee organizer's access to the premises.

⁴² Cf. *Milum Textile Services Co.*, 357 NLRB No. 169, slip op. at 2-3 (finding unlawful employer's pursuit of TRO, which would have enjoined union from "picketing and distributing leaflets" and from distributing "false materials").

⁴³ See *The Hennegan Co.*, Case 9-CA-45153, Advice Memorandum dated Nov. 20, 2009, at p.5 (TRO which was "an extension of [a] well-pled lawsuit" not preempted).

The Region Should Hold in Abeyance Any Allegation That the Employers' Suit Is Baseless and Retaliatory

In *Bill Johnson's*, the Supreme Court held that, except for the circumstances delineated in footnote 5 (described above), the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only when the lawsuit lacks a reasonable basis in law or fact and was commenced with a retaliatory motive.⁴⁴ Subsequently, in *BE & K Construction*, the Supreme Court rejected the Board's view that an unsuccessful retaliatory lawsuit could be prosecuted as an unfair labor practice even if the lawsuit was reasonably based.⁴⁵ On remand from the Supreme Court, the Board held that a reasonably based lawsuit does not violate the Act regardless of the motive for bringing it.⁴⁶ The Board stressed that in order to avoid chilling the fundamental First Amendment right to petition, it was necessary to construe the Act to prohibit only lawsuits that are both objectively and subjectively baseless.⁴⁷

Here, due to the general nature of the allegations made in the Employers' pleadings and the limited development of the underlying facts, particularly as relate to events other than those occurring on September 24, 2014, it is not presently possible to make a final determination on whether any aspects of the Employers' lawsuit run afoul of this standard. Consequently, any allegation that the Employers' lawsuit is baseless and retaliatory should be held in abeyance until further investigation or developments in the state court make full assessment possible.⁴⁸

⁴⁴ 461 U.S. at 748-49.

⁴⁵ 536 U.S. at 527-28, 532.

⁴⁶ *BE & K Construction Co.*, 351 NLRB 451, 451 (2007).

⁴⁷ *Id.* at 458.

⁴⁸ See *Elmhurst Dairy, Inc.*, Cases 29-CA-094925 and 29-CE-095112, Advice Memorandum dated June 4, 2013 (concluding that Region should hold in abeyance allegation that employer's lawsuit was baseless and retaliatory, until resolution of dispositive motions or completion of the lawsuit). This includes holding in abeyance any allegation by CWC that its own Section 7 rights as an organization were violated under a "baseless and retaliatory" theory. That theory, unlike the preemption theory, (see note 19 above), does not rely on the *Loehmann's* primary jurisdiction rationale and thus could be properly brought before the Board regardless of additional allegations regarding the underlying Section 7 activity. See *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d at 29.

In sum, the Region should determine whether to issue complaint on the Charging Parties' allegations that they were unlawfully refused work based on their protected concerted activity. If complaint issues on those allegations (or any other allegation that would place the protected concerted activity before the Board) and there is the requisite overlap with the Employers' "interference" claims, the Region should follow the procedure set out in *Loehmann's Plaza* and, if the Employers fail to seek to stay their claims of "intentional interference with business operations" and "intentional interference with prospective business advantage," also issue complaint alleging that the maintenance of those claims violates the Act. Although the remaining claims are not preempted and none of the claims seek an unlawful objective, the Region should hold any allegations that the suit is baseless and retaliatory in abeyance pending further state court proceedings and/or further development of the underlying facts.

/s/

B.J.K.

ADV.13-CA-149591.Response.MVP. (b) (6), (b) (7)(C)