

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

DATE: May 13, 2016

TO: David E. Leach, Regional Director
Region 22

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

SUBJECT: George Harms Construction Co. and
its wholly-owned subsidiary
G.R. Robert Construction Co., Inc.
Cases 22-CA-158906, 158928

Bill Johnson's Chron
512-5009-6700
524-3350-8500

The Region submitted this case for advice as to whether the lawsuits the Employer filed in New Jersey state court against two former employees that advance claims of employee piracy and breach of the duty of loyalty violate Section 8(a)(1) of the Act because they are baseless and retaliatory under the principles of *Bill Johnson's Restaurants*.¹ We conclude that the Employer's claims are both baseless and retaliatory and that the Region should therefore issue complaint, absent settlement, alleging that the Employer's state lawsuits violate Section 8(a)(1). We also conclude that the lawsuits will be preempted under the principles of *San Diego Bldg. Trades Council v. Garmon*² after the Region issues complaint alleging that the lawsuits violate Section 8(a)(1) because they are baseless and retaliatory. Thus, the Employer must hold its state proceedings in abeyance while the Board is permitted in the first instance to decide whether the relevant employee conduct constituted protected activity. If the Employer fails to hold its state proceedings in abeyance after the Region issues complaint, the Region should amend the complaint to also allege that the Employer's continued prosecution of the preempted state lawsuits violates Section 8(a)(1).

FACTS

George Harms Construction Co. and its wholly-owned subsidiary, G. R. Roberts Construction Co. ("the Employer"), are engaged in heavy construction and road

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

² 359 U.S. 236, 243-45 (1959).

building from their principle place of business in Howell, New Jersey.³ Charging Parties A and B worked as (b) (6), (b) (7)(C) for the Employer until they voluntarily terminated their employment to become members of Operating Engineers Local 825 (“Local 825”).⁴ Although the Employer’s construction workers are represented by Steelworkers Local 15024, it was a “running joke.”⁵ Employees had no idea whether they had a shop steward and, to their knowledge, had never had a Steelworkers representative file a grievance on their behalf or otherwise represent them.

A. Charging Party A Stops Working for the Employer, Becomes a Member of Local 825, and is Contacted by Former Coworkers About (b) (6), (b) (7) New Job.

Charging Party A worked for the Employer from (b) (6), (b) (7)(C), 2006 to (b) (6), (b) (7)(C), 2015 – approximately (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) years. At the time (b) (6), (b) (7)(C) began, (b) (6), (b) (7)(C) was already a skilled operator with a (b) (6), (b) (7)(C) to (b) (6), (b) (7)(C) and, consequently, never participated in the Employer’s apprenticeship program. During the course of (b) (6), (b) (7)(C) employment, Charging Party A did not receive any specialized training from the Employer, but it did pay for (b) (6), (b) (7)(C) to (b) (6), (b) (7)(C).⁶ In (b) (6), (b) (7)(C) 2014, (b) (6), (b) (7)(C) began thinking about changing jobs in part because (b) (6), (b) (7)(C) was dissatisfied with (b) (6), (b) (7)(C) working conditions, and in part because “there wasn’t any work on the books” because the Employer kept losing bids. Charging Party A testified that while at the Employer, (b) (6), (b) (7)(C) worked eight to twelve hour days for six days a week, never received breaks, and always “show[ed] up” when the Employer called (b) (6), (b) (7)(C) in the middle of the night. (b) (6), (b) (7)(C) also stated that (b) (6), (b) (7)(C) was getting “screwed” on (b) (6), (b) (7)(C) pay and that despite (b) (6), (b) (7)(C) efforts, the supervisors yelled, screamed, and made negative remarks to (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) coworkers.

³ George Harms Construction Co. is the parent company of G. R. Roberts Construction Co., which provides the on-site workforce for all George Harms’ construction projects. For ease of reference, we refer to the two entities as “the Employer.”

⁴ As (b) (6), (b) (7)(C) the responsibilities of the Charging Parties included (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C), and (b) (6), (b) (7)(C) such as (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C).

⁵ The Employer’s Owner testified that the company also had a collective-bargaining agreement with Laborers Locals 472 and 172, but neither of the Charging Parties referenced the Laborers in their testimony.

⁶ Charging Party A testified that the cost of this license was \$100.

On (b) (6), (b) (7)(C), 2015,⁷ the Employer laid off Charging Party A. Shortly thereafter, a friend who was a member of Local 825 contacted (b) (6), (b) (7) to say that Local 825 was looking for experienced (b) (6), (b) (7)(C). This person gave Charging Party A the phone number of one of Local 825's organizers. Charging Party A contacted the organizer and, on (b) (6), (b) (7)(C), took a basic skills test administered by Local 825 on which (b) (6), (b) (7) performed very well. As a result, on (b) (6), (b) (7)(C), (b) (6), (b) (7) became a Local 825 member, was placed on its out-of-work list, and dispatched to a job that same day. Later in the month, when an Employer supervisor contacted (b) (6), (b) (7) to offer recall from layoff, Charging Party A replied that (b) (6), (b) (7) had joined Local 825 and would not be returning. About ten minutes later, (b) (6), (b) (7) received a call from another supervisor who told (b) (6), (b) (7)(C) was making a mistake and warned, "[d]on't talk to any of my guys."

After advising the Employer that (b) (6), (b) (7) would not be returning, Charging Party A began receiving calls from (b) (6), (b) (7) former coworkers. (b) (6), (b) (7) coworkers inquired about (b) (6), (b) (7) current working conditions and said that they also were interested in joining Local 825. Charging Party A told them which employers (b) (6), (b) (7) was working with, that things were going well, and that the money was great because (b) (6), (b) (7) was not "getting screwed" on (b) (6), (b) (7) pay. One former coworker also asked about benefits and they compared the Employer's benefits with those (b) (6), (b) (7) was receiving as a Local 825 member, including health and pension benefits. When asked, Charging Party A told (b) (6), (b) (7) former coworkers that (b) (6), (b) (7) could not do anything to help them become Local 825 members beyond giving them the contact information of the organizer (b) (6), (b) (7) had called. In mid-(b) (6), (b) (7)(C), Charging Party A received a call from the (b) (6), (b) (7)(C) who warned (b) (6), (b) (7) not to burn bridges or talk to any of (b) (6), (b) (7) employees.

B. Charging Party B Stops Working for the Employer, Becomes a Member of Local 825, and is Contacted by Former Coworkers about (b) (6), (b) (7) New Job.

Charging Party B worked for the Employer from (b) (6), (b) (7)(C), 2013 to (b) (6), (b) (7)(C), 2015 – approximately (b) (6), (b) (7) and (b) (6), (b) (7)(C) years. Like Charging Party A, he was already a skilled operator with a (b) (6), (b) (7)(C) when (b) (6), (b) (7) began (b) (6), (b) (7) employment and neither participated in the Employer's apprenticeship program nor received any specialized training from the Employer.⁸ During (b) (6), (b) (7) tenure with the Employer, Charging

⁷ Hereinafter, all dates are in 2015 unless otherwise indicated.

⁸ The Employer's Owner testified, however, that when Charging Party B began working for the company (b) (6), (b) (7) could only operate a (b) (6), (b) (7)(C) (i.e., a (b) (6), (b) (7)(C) (b) (6), (b) (7)(C)), but that during the course of (b) (6), (b) (7) employment (b) (6), (b) (7) learned how to use the (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) (b) (6), (b) (7)(C), and (b) (6), (b) (7)(C).

Party B was very unhappy and knew every morning that it was going to be another “crappy” day. According to Charging Party B, the Employer subjected (b) (6), (b) (7) to heavy supervision, sometimes required (b) (6), (b) (7) to work seven days a week, and did not give (b) (6), (b) (7) any break or lunch periods. (b) (6), (b) (7) stated that “the work would just never stop” and “no one was happy with management.” Moreover, (b) (6), (b) (7) was in a dead-end position operating a (b) (6), (b) (7)(C) and unable to improve (b) (6), (b) (7) skills because (b) (6), (b) (7) was never given the opportunity to operate anything else.

In (b) (6), (b) (7)(C) Charging Party B noticed that the Employer’s work had begun to dry up because contractors with agreements with Local 825 were outbidding the Employer for jobs. Although (b) (6), (b) (7) had been given Local 825’s contact information over two months before, Charging Party B testified that (b) (6), (b) (7) had been too “scared” to contact it because (b) (6), (b) (7) and (b) (6), (b) (7) corkers “ha[d] been brainwashed to believe that [the Employer] is the best Company” and “[e]veryone knew that [the Employer] was anti-Local 825.”⁹ During the first week of (b) (6), (b) (7)(C), however, (b) (6), (b) (7) contacted Local 825’s organizer, who then scheduled a basic skills test for (b) (6), (b) (7) on (b) (6), (b) (7)(C). Based on Charging Party B’s excellent scores on the skills test, Local 825 offered (b) (6), (b) (7) membership and placed (b) (6), (b) (7) on its out-of-work list. (b) (6), (b) (7) then called (b) (6), (b) (7) former supervisor to say that (b) (6), (b) (7) was resigning. Several days later, the (b) (6), (b) (7)(C) called (b) (6), (b) (7) to ask why (b) (6), (b) (7) had left and where he had gone. After Charging Party B explained that (b) (6), (b) (7) had joined Local 825, the (b) (6), (b) (7)(C) remarked that “Local 825 just took a trophy deer off my property.” (b) (6), (b) (7) subsequently contacted Charging Party B on several occasions asking to see (b) (6), (b) (7) paystub, but Charging Party B repeatedly refused.

Immediately after leaving the Employer in mid-(b) (6), (b) (7)(C) Charging Party B began receiving phone calls from former coworkers asking about (b) (6), (b) (7) working conditions as a Local 825 member.¹⁰ (b) (6), (b) (7) advised them that it was “a completely different life” and that (b) (6), (b) (7) wished that (b) (6), (b) (7) had made the move sooner. In response to (b) (6), (b) (7) coworkers’ inquiries, Charging Party B advised them that although (b) (6), (b) (7) saw no difference in (b) (6), (b) (7) paycheck, it did not matter because (b) (6), (b) (7) was treated so much better than (b) (6), (b) (7) had been treated by the Employer. When (b) (6), (b) (7) former coworkers asked how they too could join Local 825, Charging Party B told them about the testing process and explained that the only thing (b) (6), (b) (7) could do to help was to give them the contact information of the organizer (b) (6), (b) (7) had called.

⁹ According to Charging Party B, the employees knew that the Employer would retaliate if it caught them talking to a member of Local 825.

¹⁰ Charging Party B estimates that (b) (6), (b) (7) was ultimately contacted by approximately 10 of (b) (6), (b) (7) former coworkers.

C. Several Employees of the Employer Begin to Contact Local 825 to Ask About Becoming Members.

In late (b) (6), (b) (7)(C) and early (b) (6), (b) (7)(C), the Local 825 organizer who Charging Parties A and B had contacted, and one of (b) (6), (b) (7)(C) colleagues, began receiving calls and emails from the Employer's employees – approximately 22 in total – inquiring as to whether they could become members. (b) (6), (b) (7)(C) explained that an individual could become a Local 825 member either by enrolling in its apprenticeship program or by achieving a high score on its basic skills test. (b) (6), (b) (7)(C) further explained that once an individual becomes a Local 825 member, that person signs the out-of-work list and is then dispatched as work becomes available. According to the organizer, the employees told (b) (6), (b) (7)(C) that they felt bullied and intimidated by the (b) (6), (b) (7)(C), as well as its (b) (6), (b) (7)(C), and asked that their conversations remain confidential. Ultimately, about 13 former employees of the Employer became Local 825 members.

D. The Employer Files State Court Lawsuits Against the Charging Parties.

On (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) the Employer filed identical lawsuits against Charging Parties A and B, respectively, in the Superior Court of New Jersey. In the factual allegations of each Complaint, the Employer asserts that during the course of their employment, the Charging Parties became privy to its confidential and proprietary business information including, but not limited to, business practices, jobsites, and information about employee salaries and benefits that could provide an advantage to its competitors. The Employer further asserts that following their voluntary resignations, the Charging Parties began working with direct competitors and thereafter used the information obtained during their employment to induce its employees to leave their employment for the purpose of causing it harm. In addition, the Employer maintains that in the course of “pirating” its employees, the Charging Parties knowingly made false statements about its business practices, its ability to procure sufficient work to sustain employees, and its financial condition with malicious intent and for the sole purpose of causing it harm by wrongly inducing key employees to leave their employment to work for a competitor.

Based on these factual allegations, the substantive portion of each Complaint includes two counts. Count One, a claim of employee piracy, alleges that the Employer expends considerable time and expense training its key employees so that they can obtain the licenses necessary to operate heavy construction machinery. This count further alleges that the Charging Parties pirated these key employees with the specific intention of causing the Employer harm by “forcing [it] to incur the substantial monetary cost for training replacement personnel, by impeding [its] ability to compete for new construction contracts, and by hindering [its] ability to complete existing projects in a timely, efficient and cost effective manner.” Count Two of each Complaint alleges that the Charging Parties breached their duty of loyalty by

communicating with a direct competitor while they were employed by the Employer contrary to its interests and with the intent to harm it. In this regard, Count Two of each Complaint specifically alleges that the Charging Parties obtained confidential and proprietary business information that they now use for the express purpose of harming the Employer and benefiting its competitors. As a remedy, each Complaint seeks, *inter alia*, compensatory, incidental, and consequential damages, reasonable attorneys' fees, and such other relief that the court finds just and proper.

On (b) (6), (b) (7)(C), the Charging Parties filed identical motions to dismiss the state court lawsuits for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. In support of the motions, the Charging Parties argued that the state court lawsuits are preempted under *San Diego Bldg. Trades Council v. Garmon*, because employee discussions of matters such as wages and benefits, as well as job security, are protected by Section 7 of the Act. They further argued that the issue of whether their actions were protected or prohibited by the Act is a question that only the Board can address. The Charging Parties also maintained that the lawsuits fail to state an actionable claim under New Jersey state law because none of the information they allegedly misused is either confidential or proprietary. In opposing the Charging Parties' motions to dismiss, the Employer clarified that the confidential and proprietary information the Charging Parties allegedly used for the benefit of a competitor includes: (i) its Apprenticeship Standards Manual, (ii) information relating to its preparation and response to requests for proposals ("RFPs"), such as credentialed workforce, marketing materials, and overall capabilities to perform necessary work, and (iii) crew lists that identify key employees, the jobsites to which they have been assigned, and the machinery they have been assigned to operate.

After the Employer filed these lawsuits, Charging Party B received phone calls from two of (b) (6), (b) former coworkers who wanted to know about the lawsuits. Charging Party B replied that, in (b) (6), (b) view, the Employer sued (b) (6), (b) as a scare tactic to show its remaining employees that if they leave the company to join Local 825, they too will be sued. One of (b) (6), (b) former coworkers asked, "[a]m I trapped here? Can I never leave without being sued?" Charging Party B stated that (b) (6), (b) didn't know.

On (b) (6), (b) (7)(C) the Employer served identical discovery requests on the Charging Parties that included requests for admissions, interrogatories, and requests for the production of documents. Although the Charging Parties responded to the discovery requests, on (b) (6), (b) (7)(C) 2016, the Employer served each with a motion to compel discovery, arguing that they had failed to provide full and complete responses to its initial requests. The Charging Parties then filed oppositions to those motions.¹¹

¹¹ In (b) (6), (b) (7)(C) 2016, the Charging Parties filed unfair labor practice charges in Cases 22-CA-167616 and 22-CA-167278 alleging that the Employer's discovery

On (b) (6), (b) (7)(C), 2016, the state court found that the lawsuits were not preempted and denied the Charging Parties' motions to dismiss. Subsequently, the state court denied the Charging Parties' opposition to the Employer's motion to compel discovery.

ACTION

We conclude that the Employer's state claims of employee piracy and breach of the duty of loyalty are both baseless and retaliatory under the principles of *Bill Johnson's*. Thus, the Region should issue complaint, absent settlement, alleging that the Employer's state lawsuits violated Section 8(a)(1). We also conclude that the lawsuits will be preempted under the principles of *Garmon*¹² after the Region issues complaint alleging that the lawsuits violate Section 8(a)(1) because they are baseless and retaliatory. Thus, the Employer must hold its state proceedings in abeyance while the Board is permitted in the first instance to decide whether the relevant employee conduct constituted protected activity. If the Employer fails to hold its state proceedings in abeyance after the Region issues complaint, the Region should amend the complaint to also allege that the Employer's continued prosecution of the preempted state lawsuits violates Section 8(a)(1).

I. The Employer's State Court Lawsuits Violate Section 8(a)(1) Because they are Baseless and Retaliate Against its Former Employees' Section 7 Activities.

In *Bill Johnson's*, the Supreme Court held that the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only when the lawsuit: (1) lacks a reasonable basis in law or fact; and (2) was commenced with the motive of retaliating against the exercise of Section 7 protected activities.¹³ Both of these elements are satisfied here, as set forth below.

requests violate Section 8(a)(1) because they seek information pertaining to their protected concerted and Union activities. In (b) (6), (b) (7)(C) 2016, the Charging Parties similarly filed unfair labor practice charges in Cases 22-CA-169681 and 22-CA-169698 alleging that the Employer's motions to compel discovery violated Section 8(a)(1) on that same basis. The Region has not submitted a request for advice regarding these additional allegations.

¹² 359 U.S. at 243-45.

¹³ 461 U.S. 731, 748-49 (1983). *See also Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 3 (Nov. 26, 2014).

A. The Employer's State Court Lawsuits are Baseless.

A lawsuit will be deemed objectively baseless when its factual or legal claims are such that “no reasonable litigant could realistically expect success on the merits.”¹⁴ When a charge attacks the prosecution of an ongoing lawsuit as baseless, the General Counsel's burden is to prove that the respondent, when it filed its complaint or during the pendency of the lawsuit, “did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its causes of action.”¹⁵ In determining whether the respondent's lawsuit has any merit, the Board must assess the elements of the cause of action at issue in the underlying lawsuit and evaluate the evidence the General Counsel offered to satisfy this burden of proof, while also considering the respondent's evidence to prove the contrary.¹⁶

In making its determination, the Board cannot make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.¹⁷ At the same time, the Board's inquiry need not be limited to the bare pleadings.¹⁸ Where a respondent fails to present the Board with any evidence demonstrating a reasonable belief that it could acquire the necessary factual support for its state claim through discovery or other means, a lawsuit may be enjoined as an unfair labor practice prior to completion.¹⁹ Claims by a respondent that undisclosed

¹⁴ *BE&K Construction Co.*, 351 NLRB 451, 457 (2007).

¹⁵ *Milum Textile Services Co.*, 357 NLRB 2047, 2053 (2011). By contrast, where a lawsuit or a major part of a lawsuit has been litigated to completion, the Board will evaluate the actual arguments and evidence presented by the respondent to determine whether it had reasonable grounds for seeking relief. *Id.* at 2052.

¹⁶ *Id.*

¹⁷ *Bill Johnson's*, 461 U.S. at 744-46. See also *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 3 & n.20 (quoting *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 962 n.6 (2000)).

¹⁸ *Bill Johnson's*, 461 U.S. at 744-46.

¹⁹ *Id.* at 746. See also *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 4 & n.25 (citing, among other cases, *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1376 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997)); *Milum Textile Services Co.*, 2012 WL 1951390, JD(SF)-26-12, slip op. at 7, 11, 13 (ALJD dated May 30, 2012) (respondent did not have and could not have believed it could acquire

additional evidence exists will not prevent a lawsuit from being enjoined where that party fails to “explain, in testimony, by affidavit, or otherwise, why such evidence (assuming it existed) was not available (for example, because it could be obtained only through pretrial discovery).”²⁰

1. Count One – Employee Piracy is Baseless Because the Employer Cannot Establish an Essential Element of the Claim.

The Employer alleges that the Charging Parties “pirated” key employees by inducing them to leave its employ so as to impede the company’s ability to compete for new contracts and to perform existing work. The Employer argues that the Charging Parties did so maliciously and with the intent of harming its business by forcing it to incur the substantial cost of replacing the pirated employees and to cause it to lose current or future business.

In New Jersey, the claim of employee piracy derives from the more general action of tortious interference with advantageous relations. To establish an actionable claim for tortious interference, a plaintiff must prove: (1) that it had a reasonable expectation of economic advantage (i.e., the plaintiff was “in pursuit of business”), (2) the interference and harm inflicted by the defendant was done intentionally and with “malice,” not necessarily in the sense of ill will, but in the sense of conduct that is wrongful and without justification or excuse under all the circumstances, (3) the interference caused a lost prospective gain, and (4) the loss or injury caused damage.²¹ Applying these underlying factors to the claim of employee piracy, “[t]he general rule appears to be that the mere inducement of an employee to move to a competitor is not in itself actionable where the employment is terminable at will, but that such inducement is actionable if the party offering the inducement either has an unlawful or improper purpose or uses unlawful or improper means.”²²

through discovery or other means, evidence needed to prove essential elements of its cause of action), *on remand from 357 NLRB at 2053 & n.25, 2057.*

²⁰ *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 4 & n.25 (citing, among other cases, *Geske & Sons*, 103 F.3d at 1376).

²¹ *See Platinum Management, Inc. v. Dahms*, 285 N.J. Super. 274, 305-06 (Law Div. 1995) (citing *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 751-52 (1989)). *See also Varrallo v. Hammond, Inc.*, 94 F.3d 842, 848 (3d Cir. 1996).

²² *Avtec Industries, Inc. v. Sony Corp. of America*, 205 N.J. Super. 189, 194 (App. Div. 1985). *See also Wear-Ever Aluminum, Inc. v. Towncraft Industries, Inc.*, 75 N.J. Super 135, 141-42 (Ch. Div. 1962) (“[m]erely to persuade a person to break his

The question of whether a defendant acted with “malice” or by “improper means” is determined on a case-by-case basis, and the standard is flexible, viewing the defendant’s actions in the context of the facts presented.²³ New Jersey courts have often stated that “the relevant inquiry is whether the [defendant’s] conduct was sanctioned by the ‘rules of the game,’ for where a [plaintiff-employer’s] loss of business is merely the incident of healthy competition, there is no compensable tort injury.”²⁴ To be actionable, the defendant’s conduct must be fraudulent, dishonest, or illegal and thereby interfere with the plaintiff-employer’s economic advantage.²⁵

An examination of the cases in which a plaintiff-employer has prevailed on a claim of tortious interference/employee piracy shows that New Jersey courts have focused on ascertaining the presence of egregious conduct directed toward the destruction of the plaintiff-employer’s business. For example, in *Wear-Ever Aluminum*,²⁶ the plaintiff-employer’s district manager had been secretly recruited by the defendant-competitor, and concealing that fact, used his position of trust and confidence while still an employee of the plaintiff to organize a covert meeting of the plaintiff’s door-to-door salesmen to recruit them for the defendant. As a result of that meeting, the plaintiff’s entire Philadelphia sales force was induced to desert to the defendant in a mass exodus. The court characterized the defendant-competitor’s conduct as “malicious” and found that it was “designed and intended to promote the interests of the defendant at the expense of the plaintiff.”²⁷

In light of the foregoing legal principles, the Employer here did not and could not reasonably believe it could acquire through discovery or other means evidence needed

contract, may not be wrongful in law or in fact. . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant, at the expense of the plaintiff, it is a malicious act . . . and an actionable act if injury ensues from it.”) (citing *Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 587-89 (1934)).

²³ *Platinum Management*, 285 N.J. Super. at 306; *Lamorte Burns & Co. v. Walters*, 167 N.J. 285, 306 (2001).

²⁴ *Lamorte Burns & Co.*, 167 N.J. at 306-307.

²⁵ *Id.* (citing *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc.*, 282 N.J. Super. 140, 205 (App. Div.), *cert. denied*, 141 N.J. 99 (1995)).

²⁶ 75 N.J. Super. at 140-41, 144.

²⁷ *Id.* at 145.

to prove essential elements of employee piracy claims against the Charging Parties. Initially, the evidence fails to show that the Charging Parties, after ending their employment with the Employer, ever induced any of their former coworkers to leave the Employer. Both Charging Parties A and B were rank-and-file employees who operated heavy construction machinery at the Employer's various job sites. The evidence shows that they resigned from their positions to become Local 825 members because they were unhappy with their conditions of employment. The Charging Parties testified that their work for the Employer involved eight to twelve hour days for six or seven days a week, with no breaks, and supervisors who treated them badly. Charging Party A also testified that the Employer had "screwed" [REDACTED] on [REDACTED] pay. Faced with those same unpleasant working conditions, the Charging Parties' former coworkers contacted them to inquire about their new employment conditions as Local 825 members. Notably, although some of their coworkers asked for their help in joining Local 825, the Charging Parties advised them that the only assistance they could provide was the contact information of the organizer who had helped them become members. The Charging Parties' did not engage in any conduct to even suggest they were inducing their former coworkers to leave the Employer.

Second, the Employer did not and cannot provide any evidence that the Charging Parties acted with the requisite "malice" or by "improper means" to establish its claim. Other than the Employer's bare assertions, there is not a scintilla of evidence that the Charging Parties intentionally sought to harm the Employer by luring its employees away to work for a direct competitor or to establish a competing construction business. The Charging Parties here simply found what they considered to be better jobs and conveyed that sentiment when asked by former coworkers. This stands in stark contrast to the actionable conduct of the district manager in *Wear-Ever Aluminum*, who secretly took a job with a direct competitor while simultaneously exploiting his position with the plaintiff-employer to induce that entity's salesmen to work for the competitor. In short, because the Employer here does not have, and cannot reasonably believe that it can acquire through discovery or other means, evidence needed to prove an essential element of its claim, Count One of each Complaint is baseless.

**2. Count Two – Breach of the Duty of Loyalty is Baseless
Because the Employer Proffered No Evidence of Disloyalty.**

The Employer argues with regard to Count Two that the Charging Parties breached their duty of loyalty to it by communicating with a direct competitor while still employed, "absconded" with confidential information that they gained access to through their employment, and then used that information to the detriment of the Employer and for the benefit of a competitor. In New Jersey,

[a]n employee who is not bound by a covenant not to compete after the termination of employment, and in the absence of any breach of trust,

may anticipate the future termination of his employment and, while still employed, make arrangements for some new employment by a competitor or the establishment of his own business in competition with his employer.²⁸

In other words, the mere planning to obtain new employment, without more, is not a breach of an employee's duty of loyalty and good faith to his current employer.²⁹ At the same time, an employee would breach his or her duty of loyalty by soliciting his employer's customers while still employed or engaging in similar acts in direct competition with the employer's business.³⁰ Indeed, like many jurisdictions, New Jersey courts have held that an employee's taking of confidential or proprietary information from his employer in order to seek a competitive advantage upon resignation, constitutes a breach of the duty of loyalty.³¹ However, matters of general knowledge within an industry cannot be classified as confidential.³²

Here, the Employer has failed to offer a scintilla of evidence that the Charging Parties "purloined" confidential or proprietary information that they learned in their

²⁸ *Auxton Computer Enterprises, Inc., v. Parker*, 174 N.J. Super. 418, 423 (App. Div. 1980), quoted in *Lamorte Burns & Co.*, 167 N.J. at 303.

²⁹ *See Auxton*, 174 N.J. Super. at 424.

³⁰ *Id.* *See also Lamorte Burns & Co.*, 167 N.J. at 303.

³¹ *See Lamorte Burns & Co.*, 167 N.J. at 304-05 (finding breach of the duty of loyalty where defendants-former employees "purloined" protected information from plaintiff-former employer's claim files while they were still employed, for the sole purpose of effecting an advantage in competing with plaintiff immediately upon their resignation and the commencement of their new competitive business); *United Board & Carton Corp. v. Britting*, 63 N.J. Super. 517, 524 (Ch. Div. 1959) (finding plaintiff established a claim for breach of the duty of loyalty where defendants secretly set up rival corporation while in plaintiff's employ, pirated a substantial part of plaintiff's corrugated paper business, stole customers' information, and then resigned en masse), *aff'd as modified*, 61 N.J. Super. 340 (App. Div. 1960).

³² *See Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 33-34 (1971) (reversing grant of preliminary injunction enforcing covenant not to compete against plaintiff's former manager because information he obtained was neither trade secret nor confidential); *Ingersoll-Rand Co. v. Ciavatta*, 216 N.J. Super. 667, 675 (App. Div. 1987) (finding that the general skills and information gleaned by defendant from his prior employment are not proprietary rights of the former employer).

former positions to effect an economic advantage with a direct competitor. None of the information the Charging Parties allegedly “absconded” with qualifies as confidential or proprietary information because it is either already public information or not considered confidential as a matter of law. With respect to the wages and health benefits of the Employer’s employees, that information is detailed in its collective-bargaining with the Steelworkers, which is a public document readily available to the Employer’s competitors. Similarly, the Employer’s current job sites are listed on its website. Also, because most of its work involves public projects, information pertaining to its future job sites can be found on the website of New Jersey’s Department of Transportation, which posts the names of the companies that have been awarded public work. Further, New Jersey courts have held that information about a company’s response to RFPs does not warrant protection.³³ Nor has the Employer demonstrated that the information contained in its Apprenticeship Manual is proprietary or confidential. In the construction industry, apprenticeship programs are ubiquitous and to prevail on this claim the Employer must establish that the methods and means set forth in the manual were exclusively its own and not general secrets of the trade.³⁴ The Employer has clearly failed to do so. Finally, any information the Charging Parties may recall regarding the Employer’s crew lists does not qualify for protection. The New Jersey courts have long recognized that “an employee is not compelled to shut his eyes to what goes on in his place of business, nor is he required to wipe his memory clear of those matters which he learns during the course of that employment.”³⁵ Thus, the Employer’s breach of the duty of loyalty claim fails, in part, because it cannot show that the Charging Parties absconded with any confidential or proprietary information.

Moreover, the Employer cannot show that the Charging Parties have used any information to obtain a competitive advantage over the Employer. As discussed above, the Charging Parties did not terminate their employment to work for a direct competitor or to establish a competing business. Rather, the evidence demonstrates that they were rank-and-file construction workers who simply resigned from their

³³ See *Whitmyer Bros.*, 58 N.J. at 37-38 (addressing claims of company engaged in erecting highway guards rails, signs, and fences and finding that information with respect to its bidding procedures and constituent elements did not constitute trade secrets or confidential information) (citing *Aetna Bldg. Maintenance Co. v. West*, 39 Cal. 2d 198, 206 (1952) (concluding that employer’s procedures for estimating prices on new contracts for janitorial services and building maintenance were not trade secrets or business confidences)).

³⁴ *Id.*

³⁵ *Subcarrier Communications, Inc. v. Day*, 299 N.J. Super. 634, 641 (App. Div. 1997).

positions to join Local 825 to improve their own employment conditions. As noted above, an employee who is still employed may make arrangements for new employment. Indeed, it is self-evident that Local 825 is a labor-organization and therefore does not compete with the Employer's construction business. Furthermore, after the Charging Parties joined Local 825 they were put on its out-of-work list and dispatched to various jobsites as work became available. Consequently, prior to resigning, they had no way of knowing the companies to which they would be dispatched and, thus, could not have communicated with a direct competitor while still employed. In sum, Count Two of the Employer's state lawsuits is baseless because the Employer cannot establish the essential elements of that claim.

B. The Employer Initiated the State Lawsuits to Retaliate Against the Charging Parties' Section 7 Activities and to Chill that of its Current Employees.

A respondent's retaliatory motive for filing a lawsuit may be inferred from examining whether the lawsuit was filed in response to protected concerted activity; evidence of the respondent's prior animus toward protected rights; and the respondent's claim for punitive damages.³⁶ And, although a lawsuit's baselessness alone is insufficient to establish retaliatory motive, the Board will consider it as one factor in its analysis of motive.³⁷

Three of these factors are present in this case and establish the Employer's retaliatory motive. First, the Employer filed the state court lawsuits in direct response to the Charging Parties' protected activities and that of its current employees. Specifically, the lawsuits were filed at a time when its employees were contacting the Charging Parties to inquire about their new employment conditions and, based on those discussions, deciding that they too would like to join Local 825. Ultimately, approximately 13 of the Employer's employees also resigned from their positions to become Local 825 members. By filing the lawsuits, the Employer sought to prevent these conversations – in which the Charging Parties and their former coworkers had a right to engage – and keep its employees from exploring other employment opportunities.³⁸ This is clearly illustrated by the warnings the Charging

³⁶ See, e.g., *Atelier Condo. & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 5; *Milum Textile Services Co.*, 357 NLRB at 2049, 2051-52 & n.22.

³⁷ *Id.* See also *Allied Mechanical Services*, 357 NLRB 1223, 1234 (2011).

³⁸ Regardless of whether the Charging Parties were seeking to improve their own terms and conditions of employment by engaging in these discussions, they were contributing to other statutory employees' attempts to improve their terms and

Parties received from the Employer's high-level managers, as well as its supervisors, not to burn bridges or talk to any of its employees.

Second, the baselessness of the lawsuits underscores the Employer's retaliatory motive. The Board has observed that by suing an employee who engages in protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to a burdensome lawsuit and, regardless of how unmeritorious the lawsuit is, employees know they will likely incur substantial legal expenses in defending against it.³⁹ In this case, there is no doubt that the Employer's lawsuits have similarly placed its employees on notice and have had the intended coercive effect. The evidence shows that its current employees fear that if they make arrangements for new employment, they too will be sued, as illustrated by a conversation between Charging Party B and a former coworker who asked [REDACTED], "[a]m I trapped here? Can I never leave without being sued?"

Finally, the Employer's animus toward Local 825 and its fear of losing employees to that labor organization is established by Charging Party B's testimony that it was well known the Employer was "anti-Local 825" and any employee caught talking to Local 825 members would be subject to retaliation.⁴⁰ Here, consistent with the

conditions of employment, which is clearly within the definition of mutual aid or protection under the Act. *See, e.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978) ("[Section 2(3)] was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own. In recognition of this intent, the Board and the courts long have held that the 'mutual aid or protection' clause encompasses such activity."); *Reliant Energy*, 357 NLRB 2098, 2100 & n.19 (2011) (employee engaged in mutual aid or protection by collecting authorization cards and answering questions "in support of employees of an employer other than his own"); *Yellow Cab, Inc.*, 210 NLRB 568, 569 (1974) (employee engaged in mutual aid or protection by seeking to enlist aid of coworkers to support employees of other employers on strike). As to the Employer's current employees, they also were engaged in protected concerted activity by seeking information from outside the immediate employer-employee relationship to improve their employment conditions. *See generally Eastex, Inc. v. NLRB*, 437 U.S. at 565-67.

³⁹ *See Bill Johnson's*, 461 U.S. at 740-41.

⁴⁰ *See, e.g., Milum Textile Services Co.*, 357 NLRB at 2052 (finding retaliatory motive behind motion for a temporary restraining order against the union where, in addition to other unfair labor practices, the employer "further demonstrated animus when, in discussing the union campaign with his customers, its president referred to the Union as 'cockroaches' and 'monsters' and compared the Union campaign to an organized crime shakedown").

Employer's well-known position, it retaliated against the Charging Parties for becoming Local 825 members and speaking to its current employees about what they perceived were the benefits of that membership. Thus, in light of the Employer's demonstrated animus against its employees interacting with Local 825 and the preceding factors, we conclude that the Employer's lawsuits were motivated by a desire to retaliate against the protected concerted activity of the Charging Parties and its current employees.

Accordingly, because the Employer filed baseless state lawsuits against the Charging Parties to retaliate against their protected activities and those of its current employees, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act, as set forth above.

II. The Employer's State Court Lawsuits are also Preempted and the Employer Will Violate Section 8(a)(1) by Continuing to Process Them After Receiving a *Loehmann's* Letter from the Region.

In footnote 5 of *Bill Johnson's*, the Supreme Court made clear that it did not intend to preclude the enjoining of state court lawsuits that are preempted by the Board's jurisdiction.⁴¹ Thus, "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."⁴²

In *San Diego Bldg. Trades Council v. Garmon*, the Supreme Court held that "a presumption of preemption applies even when the activity that the State seeks to regulate is only 'arguably' protected . . . or prohibited" by the Act.⁴³ In such circumstances, the Board must exercise its "primary jurisdiction" and determine in

⁴¹ 461 U.S. at 737, n.5; 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 Constr.* "did not affect the footnote 5 exemption in *Bill Johnson's*").

⁴² *Federal Security*, 359 NLRB No. 1, slip op. at 13 (Sept. 28, 2012). Although *Federal Security* was issued by a panel that under *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), was not properly constituted, it is the General Counsel's position that this case was soundly reasoned. The Region should therefore urge the ALJ and Board to apply the principles set forth in that case. See *DHL Express, Inc. v. NLRB*, 813 F.3d 365, 377 n.2 (D.C. Cir. 2016) (noting that the rationale in a voided, two-member Board decision was "instructive").

⁴³ See 359 U.S. at 245, cited in *Federal Security*, 359 NLRB No. 1, slip op. at 6.

the first instance whether the challenged conduct is protected or prohibited by the Act, thereby potentially divesting the states of all jurisdiction.⁴⁴ The Court, however, recognized that not every state 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 ‘deeply rooted in local feeling and responsibility.’”⁴⁵ Thus, *Garmon* preemption is designed to prevent state and local interference with the Board’s interpretation and enforcement of the integrated scheme of regulation established by the Act.⁴⁶

In *Loehmann’s Plaza* the Board, in interpreting *Garmon*, held that when the activity the 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.⁴⁷ At that point, the pending state lawsuit is preempted and the “normal requirements of established law apply” rather than “the special requirements” of *Bill Johnson’s*.⁴⁸ In other words, if the preempted lawsuit is unlawful under traditional Board principles, it can be condemned as an unfair labor practice. Under well-settled principles, a violation of Section 8(a)(1) is established if it is shown that the employer’s conduct has a tendency to interfere with a Section 7 right.⁴⁹

⁴⁴ *Garmon*, 359 U.S. 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), *affd. sub nom.*, *UFCW Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), *cert. denied sub nom.*, *Teamsters Local 243 v. NLRB*, 519 U.S. 809 (1996).

⁴⁵ *Federal Security*, 359 NLRB No. 1, slip op. at 6 (citing *Garmon*, 359 U.S. at 243-44, and *Webco Industries*, 337 NLRB 361, 362 (2001)).

⁴⁶ See *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224-25 (1993). See also *Federal Security*, 359 NLRB No. 1, slip op. at 6 (quoting *Garmon*, 359 U.S. at 246 (“The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.”)).

⁴⁷ 305 NLRB at 669-70.

⁴⁸ *Id.* at 671.

⁴⁹ *Id.* (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

In this case, based on our conclusion that the Employer's state court lawsuits are baseless and retaliatory, we additionally conclude that the lawsuits will be preempted after the Region issues complaint alleging that the lawsuits violate Section 8(a)(1). Although the complaint allegations will concern only the state court lawsuits and no additional unlawful conduct, if the Board determines in the exercise of its primary jurisdiction that the Employer's state court lawsuits are baseless and retaliatory, the subject of those lawsuits is employee conduct protected by Section 7.⁵⁰ Thus, until the Board decides whether the conduct of the Charging Parties that is alleged to violate state law concerning employee piracy and breach of the duty of loyalty is protected by the Act, the disputed conduct is *arguably* protected.⁵¹ The Employer must therefore hold its state proceedings in abeyance until the Board rules in the first instance because a prior determination by the state court that the disputed conduct constituted a state tort would interfere with national labor policy.⁵²

Based on the foregoing analysis, after the Region issues a Section 8(a)(1) complaint alleging that the Employer's state lawsuits are baseless and retaliatory, it should also send the Employer a *Loehmann's* letter directing it to take affirmative action to stay its state court proceeding within seven days.⁵³ If the Employer then fails to take the necessary steps to stay the state court proceeding, the Region should issue an amended complaint alleging that the Employer independently violated Section 8(a)(1) by maintaining the preempted lawsuits post-complaint because that

⁵⁰ See *Industrial Electric Manufacturing, Inc.*, Case 32-CA-12908, Advice Memorandum dated April 27, 1993 (finding employer's state lawsuit for malicious prosecution, abuse of process, tortious interference with contract, and other claims to be baseless and retaliatory, as well as preempted).

⁵¹ See footnote 38 *supra* and the cases cited therein.

⁵² The Board's decision in *Beverly Health & Rehabilitation Services*, 336 NLRB 332 (2001), does not defeat a preemption argument here. In that case, the Board rejected the General Counsel's argument that "issuance of a complaint against a defamation lawsuit preempts the State court suit, pending litigation on the 'baselessness' issue." *Id.* at 333. The Board held that defamation suits are not preempted until *the Board* determines that the suit was baseless and retaliatory. *Beverly* is distinguishable because, as set forth in that decision, the Supreme Court has determined that *Garmon* principles do not apply to state court defamation cases (under the "deeply rooted state interest" exception), so long as the complainant pleads and proves actual malice. See *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966).

⁵³ Contrary to the procedure set forth in *Loehmann's Plaza*, 305 NLRB at 671-72, n.56, the Region should *not* send a similar letter to the state court.

action would interfere with the exercise of employees' Section 7 rights, such as engaging in discussions to improve their own terms and conditions of employment, as well as the terms and conditions of other statutory employees.⁵⁴

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) as set forth above.

/s/
B.J.K.

ADV.22-CA-158928.Response.GHC. (b) (6), (b) (7)

⁵⁴ See *Federal Security*, 359 NLRB No. 1, slip op. at 13-14; *Loehmann's Plaza*, 305 NLRB at 671-72. In that event, the Region should also submit this case to the Injunction Litigation Branch with its recommendation as to whether Section 10(j) proceedings are warranted to protect the Board's jurisdiction. See, e.g., *Sharp v. Webco Industries, Inc.*, 265 F.3d 1085, 1089-90 (10th Cir. 2001) (affirming Section 10(j) order temporarily enjoining state court lawsuit on preemption grounds).