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

Advice Memorandum

DATE: July 9, 2010

TO : J. Michael Lightner, Regional Director
Region 22

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

SUBJECT: Statue Cruises
Case 22-CA-29222 133-0600
220-2500
512-5009

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by instituting and maintaining a state court lawsuit against the Union for fraud in the inducement and breach of the implied covenant of good faith and fair dealing. We conclude that the Region should dismiss the instant charge. Regardless of whether or not the Employer's lawsuit is preempted, the maintenance of the suit is not an unfair labor practice as it does not coerce or restrain employees in their exercise of Section 7 activity.

FACTS

In 2007, Local 333, United Marine Division, ILA (the Union) and Statue Cruises, LLC (the Employer) negotiated a collective bargaining agreement covering all full-time deckhands and engineers employed by the Employer on vessels in the Port of New York and New York Harbor, effective January 1, 2008 to January 31, 2011. The collective bargaining agreement includes a provision relating to overtime in Section X which states the following: "Work performed in excess of forty-eight hours in the work week shall be paid for at the overtime rate of time and one-half an employee's straight time rate of pay."[1]

On or about September 25, 2009, employee Howard Flecker, III filed a class action lawsuit in New Jersey Superior Court alleging that the Employer had violated New Jersey's wage and hour laws by failing to pay overtime for work performed in excess of 40 hours in a workweek. The Employer denied the allegations in its answer and alleged as an affirmative defense that Section 301 of the LMRDA preempted the state court wage and hour lawsuit.

[1] Section 13(b)(6) of the Fair Labor Standards Act provides an exemption from overtime pay for "any employee employed as a seaman."

Thereafter, by a letter dated October 1, 2009, the Employer informed unit employees of the wage and hour lawsuit. Although the letter stated that the Employer disputed the legal theory underlying the wage and hour lawsuit, the Employer wrote that it would henceforth limit its potential liability by scheduling employees for no more than 40 hours in a workweek. The letter further alleged that the Union supported the wage and hour lawsuit. Specifically, the letter noted that the named plaintiff (Howard Flecker III) is "the brother of an official in Local 33." The letter concluded by stating the following: "I leave it to your good judgment whether Local 333's possible involvement in this lawsuit was in your best interests."

The Union denies that it has had any involvement in the wage and hour lawsuit and notes that the named plaintiff's brother is only an administrative assistant to the Union's president.

On January 12, 2010, the Employer filed a third party complaint against the Union in the same state court hearing the wage and hour lawsuit. In its third party complaint, the Employer alleged that the Union had committed two torts: fraud in the inducement and breach of the implied covenant of good faith and fair dealing. The Employer alleged that the Union committed fraud in the inducement by proposing and then agreeing to the collective bargaining agreement's overtime provisions "with knowledge that such a term was arguably unenforceable and with the intention of inducing [the Employer] to withdraw certain other economic proposals." Secondly, the Employer alleged that the Union breached the implied covenant of good faith and fair dealing by acting in "bad faith" by orchestrating the filing of the class action lawsuit and thus depriving the Employer "of the benefits of" the collective bargaining agreement. The Union denied the Employer's allegations in its third party answer and alleged as an affirmative defense that the third party lawsuit is preempted by the NLRA.

The Union filed the instant Section 8(a)(1) charge, alleging that the Employer's lawsuit is preempted and, consequently, "objectively baseless" and brought with a "retaliatory purpose" as defined by the Board in BE&K.[2]

[2] BE&K Construction Co., 350 NLRB 450 (2007).

ACTION

We conclude that the Region should dismiss the instant charge because the Employer's lawsuit does not interfere with protected, concerted activity. Even if the Employer's lawsuit is preempted, it does not violate Section 8(a)(1) absent interference with Section 7 rights. Here, the lawsuit does not restrain or coerce employees' exercise of Section 7 rights. Accordingly, the Region should dismiss the charge, absent withdrawal.

Absent interference with Section 7 rights, the analysis under Bill Johnson's and BE&K to determine if a state lawsuit is protected under the First Amendment is not implicated. The Supreme Court's decisions in those cases were premised upon a state lawsuit filed in retaliation for the exercise of Section 7 rights; only in those circumstances must the Board weigh the litigating party's First Amendment right to petition the courts against employees' Section 7 rights.[3] Thus, absent interference with Section 7 rights, there is no need to determine whether a lawsuit is preempted and therefore "enjoys no special protection."[4]

The lawsuit in the instant case does not implicate Section 7 conduct. Under similar circumstances, in Bakery Workers Local 6 (Stroehmann Bakeries), the Board held that the "maintenance of [a] preempted lawsuit was not an unfair labor practice."[5] Specifically, the Board concluded that a union's federal district court suit seeking its certification as the bargaining representative and contract damages from the employer's alleged breach of a Stipulated Election Agreement did not violate the Act "because

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[3] See Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 734-737 (1983) (lawsuit based on picketing and handbilling filed in retaliation for the filing of unfair labor practice charges); BE&K Construction Co. v. NLRB, 536 U.S. 516, 507-508 (2002) (lawsuit based on union's lobbying of local authorities, picketing and handbilling, and filing of contractual grievances).

[4] Bill Johnson's, 461 U.S. at 738, fn.5. The Board has held that the Supreme Court's decision in BE&K Construction Co., 536 U.S. 516 (2002), "did not affect the footnote 5 exemption in *Bill Johnson's*." Allied Trades Council (Duane Reade, Inc.), 342 NLRB 1010, 1013 fn. 4 (2004), quoting Can-Am Plumbing v. NLRB, 321 F.3d 145, 151 (D.C. Cir. 2003).

[5] 320 NLRB 133, 137 (1995).

statutory restraint or coercion [was] lacking."[6] In making this determination the Board noted, amongst other factors, that the lawsuit was not filed against the employees, and the lawsuit sought monetary damages only from the employer rather than individual employees.[7]

Similar to Stroehmann Bakeries, the third party lawsuit in the instant case was filed against the Union rather than individual employees. Moreover, the lawsuit seeks economic damages from the Union rather than individual employees. Even if the third party lawsuit succeeds, the employees will be free to pursue their class action suit against the Employer for any alleged violations of New Jersey's wage and hour laws.

In sum, since the Employer's lawsuit here does not target protected activity, there is no Section 8(a)(1) violation regardless of whether or not that lawsuit is preempted. Accordingly, absent withdrawal, the Region should dismiss the instant charge.

B.J.K.

[6] Id.

[7] Id.