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## When Can the NLRB Sanction an Employer for Filing a Losing Retaliatory Lawsuit?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 387-390. © 2002 American Bar Association.

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**Editor's Note:** The respondent's brief in this case was not available by *PREVIEW's* deadline.

### ISSUES

May the NLRB impose liability on an employer for filing a losing retaliatory lawsuit even if the employer could show the suit was not objectively baseless?

### FACTS

BE&K Construction Co., an industrial general contractor operating throughout the United States, contracted with USS-POSCO Industries Inc. to modernize a steel mill in Pittsburg, Calif. BE&K formed a joint venture with Eichleay Constructors Inc. to perform the contract work. BE&K claims that various labor unions objected to the BE&K agreement with USS-POSCO because BE&K did not have a collective bargaining relationship or agreement with the unions. BE&K contends that in retaliation for USS-POSCO's awarding the modernization contract to a nonunion contractor, the unions engaged in various activities designed to delay the project.

According to BE&K, the unions advocated the adoption and enforcement of a toxic-waste emission standard for the construction project, although the unions had no genuine concern that the modernization of the steel mill would be environmentally harmful. The unions picketed and hand-billed at BE&K's premises without disclosing the nature of the disagreement with BE&K, encouraged employees of subcontractors to engage in a strike at the project, filed a civil action in state court in an effort to delay the modernization project and increase costs, and initiated contract grievances against Eichleay under collective bargaining agreements that did not apply to Eichleay, BE&K said.

BE&K and USS-POSCO then filed suit in federal court in California against the unions, seeking damages for the allegedly unfair activities. After the trial court dismissed some of their claims, USS-POSCO and

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*BE&K CONSTRUCTION CO. V.  
NATIONAL LABOR RELATIONS  
BOARD ET AL.*  
DOCKET NO. 01-518

ARGUMENT DATE:  
APRIL 16, 2002  
FROM: THE SIXTH CIRCUIT

# Case at a Glance

The Supreme Court has held that a well-founded lawsuit may not be enjoined as an unfair labor practice even if it would not have been filed "but for" the plaintiff's desire to retaliate against the defendant for exercising rights protected by federal labor legislation. Thus the National Labor Relations Board may only enjoin improperly motivated suits that also lack a reasonable basis. This case asks when the NLRB can impose liability on an employer for filing a losing retaliatory lawsuit.

BE&K filed an amended complaint that included not only some claims similar to those upon which the trial court had previously granted summary judgment, but also a claim alleging for the first time antitrust violations of the Sherman Act. The trial court dismissed the amended complaint as unacceptable because the first cause of action included a restatement of several of the claims upon which summary judgment for the defendants had already been granted.

Eventually, USS-POSCO and BE&K filed a second amended complaint with the trial court, reasserting many of the same claims that had been previously advanced, including the allegations of antitrust violations, improper picketing, lobbying, hand-billing, and improper filing of grievances and court actions. The trial court dismissed this complaint insofar as it raised allegations already addressed in prior rulings and sanctioned the plaintiffs. The remaining issues went forward through the discovery process, with BE&K the only remaining plaintiff.

As an initial matter, the trial court concluded that, to succeed on its antitrust claims, BE&K must prove the unions improperly combined with nonlabor groups and that the combination had occurred for an illegitimate purpose. The court then ordered that discovery be limited to the issue of whether BE&K could establish that the unions actually combined with nonlabor entities. When BE&K could not adduce any evidence in support of that prong of the court-defined analysis, the trial court granted the unions' motion for summary judgment on the antitrust cause of action. At that point, BE&K voluntarily dismissed the remaining allegations of labor law violations, which asserted that the unions had illegally fomented violence against the company.

Following entry of final judgment, BE&K appealed to the U.S. Court of Appeals for the Ninth Circuit, contending that the district court had erred in its application of antitrust law and in its imposition of sanctions. The Ninth Circuit agreed with BE&K and held that the trial court had erred in ruling that before the unions' statutory exemption from antitrust liability could be circumvented, BE&K had to establish both that the unions had combined with a nonlabor group and that it had not been acting in its own legitimate self-interest. *USS-POSCO*

*Industries v. Contra Costa County Building & Construction Trades Council*, 31 F.3d 800 (9th Cir. 1994). However, the court found that any error in the trial court's analysis was harmless because, under the *Noerr-Pennington* doctrine, the unions enjoyed antitrust immunity while lobbying government officials or petitioning administrative agencies or courts unless they were engaging in "sham" petitioning. The court pointed out that 15 of the 29 lawsuits alleged by BE&K as part of a pattern of filings "without regard to the merits" had actually proved successful.

The Ninth Circuit thus affirmed the trial court's dismissal of the antitrust claims against the unions. However, it reversed the trial court's award of sanctions on the ground that the company had repleaded previously dismissed claims in its amended complaint only out of a legitimate, although incorrect, belief that such reallegation was necessary to preserve the issues for future appeal.

Meanwhile, during the pendency of the litigation, the unions had filed charges with the National Labor Relations Board (NLRB), alleging that BE&K's court filings constituted an unfair labor practice. The NLRB held the charges in abeyance until

the litigation was concluded. With the conclusion of the litigation, the NLRB reasserted jurisdiction and determined that BE&K had attempted to retaliate against the unions and their members for engaging in activities protected by federal labor legislation by filing a meritless lawsuit. Based on the Supreme Court's ruling in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the NLRB ordered BE&K to cease and desist from its illegal activities and, additionally, ordered the company to reimburse the unions for their attorney fees and costs.

BE&K appealed the NLRB's decision to the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit found that the evidence supported the NLRB's finding that BE&K had acted with a retaliatory motive. The Sixth Circuit also found that the NLRB had the authority to award attorney fees to the unions. 246 F.3d 619 (6th Cir. 2001). Relying on *Bill Johnson's*, the Sixth Circuit held that the "mere failure of the company to prevail on its claims against the union in regular judicial proceedings was sufficient to strip BE&K of some of its First Amendment protection because of the company's prior opportunity to avail itself of a judicial forum for redress of its grievances."

The Sixth Circuit ruled that the Supreme Court's decision in *Professional Real Estate Investors, Inc. v. Columbia Picture Industries, Inc.*, 508 U.S. 49 (1993), was "inapplicable" and set forth the following analysis for determining the First Amendment protections to be afforded an employer for filing a retaliatory lawsuit against employees and/or unions:

Prior to a court ruling on the merits of the employer's suit, the board will not find an unfair labor practice unless the underlying lawsuit was

without reasonable basis. Following a court determination that the employer's claims are without merit, however, there is no longer a need to prevent interference with the First Amendment right to seek judicial redress. At that point, the board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives.

The Supreme Court thereafter granted BE&K's petition requesting review of the Sixth Circuit's decision. 122 S.Ct. 803 (2002).

## CASE ANALYSIS

The Supreme Court has held that under the *Noerr-Pennington* doctrine, the First Amendment's petition clause protects the right to seek redress in the courts when the petition is not "objectively baseless." *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). BE&K argues that the NLRB and the Sixth Circuit have articulated an unwarranted "completed case" labor law exception to the *Noerr-Pennington* doctrine. According to BE&K, the consistency of the Supreme Court's decisions both before and after *Bill Johnson's* belies the claim that the Court intended to create two separate constitutional standards—one standard for the period before a court has reached a final decision on the merits of an employer's underlying case and another standard for the period after the underlying case has been decided.

BE&K argues that the Supreme Court's holding in *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 U.S. 49 (1993),

should have clarified any misunderstanding that might have arisen out of the *Bill Johnson's* opinion. BE&K urges that no exception to the consistent decisional standard first announced in *Noerr-Pennington* is now justified.

BE&K explains that the bifurcated standard adopted by the NLRB and enforced by the Sixth Circuit in this case is both unfair and untenable as a guideline for behavior. BE&K claims that the bifurcated standard plainly chills employers' rights to petition the courts, since it is impossible for employers to know in advance how litigation will be resolved and, therefore, impossible to avoid committing an "unfair labor practice" except by not going to court in the first instance.

BE&K claims that its suit was unquestionably filed with "probable cause" and was not "objectively baseless." As a result, it asks the Court to reverse the Sixth Circuit and deny enforcement of the NLRB's order.

## SIGNIFICANCE

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Supreme Court held that "it is an unfair labor practice to prosecute a meritorious lawsuit for a retaliatory purpose." On the other hand, the Supreme Court also recognized potential First Amendment implications if the NLRB were to sanction an employer for exercising its right to petition the courts for a redress of grievances. When a lawsuit initiated by an employer lacks a reasonable basis in fact or law and when it was filed to retaliate against employees for engaging in activity protected by federal labor legislation, the First Amendment concerns are ameliorated, and the NLRB may enjoin the prosecution of the case. The Supreme Court held that, in situations in which the employer has

already availed itself of the protections of the court system and a judgment adverse to the plaintiff has been rendered, there is no need to meet the heightened burden that must be satisfied when an employee seeks to enjoin an ongoing judicial proceeding.

According to the Supreme Court in *Bill Johnson's*, the filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice even if it would not have been commenced "but for" the plaintiff's desire to retaliate against the defendant for exercising rights protected by federal labor legislation. Thus, under *Bill Johnson's*, the NLRB may only enjoin the prosecution of an improperly motivated suit lacking a reasonable basis. *Bill Johnson's* did not address the First Amendment implications of liability for an unsuccessful plaintiff once the litigation has run its course, however.

*Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 U.S. 49 (1993), involved a claim of *Noerr-Pennington* immunity from antitrust liability. In *Professional Real Estate Investors*, the Supreme Court held that, although those who petition the government for redress are generally immune from antitrust liability, such immunity is withheld when the petitioning activity, ostensibly directed toward influencing governmental action, is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor. The court stated that an objectively reasonable effort to litigate cannot be a "sham" within the meaning of the exception to the *Noerr-Pennington* doctrine immunity from antitrust liability, regardless of a plaintiff's subjective motive. To constitute "sham" litigation, the lawsuit must be objectively baseless in the sense that no reason-

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able litigant could realistically expect success on the merits, and it must conceal an attempt to interfere directly with the business relationships of a competitor through the use of a governmental process, as opposed to the outcome of that process.

The Supreme Court is now called upon to determine whether it is the “objectively reasonable” standard of *Professional Real Estate Investors*, or the “bifurcated standard” derived from *Bill Johnson’s* and used by the Sixth Circuit, that is applicable to labor cases. Affirming the Sixth Circuit will make it easier for unions to prevail in unfair labor practice proceedings that claim a lawsuit was retaliatory when another court has already determined that the lawsuit was without merit. On the other hand, reversing the Sixth Circuit and applying *Professional Real Estate Investors* would protect employers who file actions in good faith but simply lose on the merits.

### **ATTORNEYS FOR THE PARTIES**

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### **AMICUS BRIEFS**

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