DePaul Law Review

Volume 33
Issue 3 *Spring 1984*

Article 7

Employers' Right of Access to State Courts: Bill Johnson's Restaurants v. NLRB

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EMPLOYERS' RIGHT OF ACCESS TO STATE COURTS: *BILL JOHNSON'S RESTAURANTS V. NLRB*

Section 8(a)(4) of the National Labor Relations Act (NLRA) was designed to protect employees who file unfair labor practice charges with the National Labor Relations Board (NLRB) from discrimination by their employer.[1] Congress intended section 8(a)(4) to be construed broadly so that employees would not be inhibited from reporting employer interference with protected activities to the NLRB.[2] An employer's lawsuit against an employee, brought in bad faith to retaliate for filing a charge with the NLRB, exemplifies conduct which Congress sought to prohibit by enacting section 8(a)(4).[3]

When an employer files a lawsuit against an employee in state court, the NLRB has the authority to seek an injunction in a federal district court to enjoin the state court's proceedings if the state suit amounts to an unfair

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1. Section 8(a)(4) provides:

> It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.

U.S.C. § 158(a)(4) (1976). Congress established the NLRB to protect the rights of employees which are guaranteed by the NLRA. The NLRB is comprised of five members appointed by the President of the United States, with the advice and consent of the Senate. Each member serves a five-year term. For a detailed discussion on the origin and structure of the NLRB, see J. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD (1974).

Section 10 of the NLRA authorizes the NLRB to prevent both employers and employees from engaging in unfair labor practices. 29 U.S.C. § 160(a) (1976).

The NLRA also protects other employee rights from employer interference. For example, § 7, the key provision of the NLRA, recognizes the employees' right to organize, the right to bargain with the employer for a collective agreement and the right to engage in other concerted activities for the purposes of collective bargaining. *Id.* at § 157. Section 7 provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Id.

In order to protect the rights granted to employees by § 7, § 8(a) of the NLRA bans employer labor practices which infringe on these rights. *Id.* at § 158(a). If the employer violates any of these sections, the NLRB can invoke sanctions. *Id.* at § 160.

2. *See, e.g.*, NLRB v. Scrivener, 405 U.S. 117, 121 (1972). In *Scrivener*, the Court recognized that Congress intended for employees to feel free from coercion when reporting any possible unfair labor practices to the NLRB. *Id.* (quoting Nash v. Florida Indus. Comm'n, 389 U.S. 235, 238 (1967)).

3. *See, e.g.*, Power Systems, Inc., 39 N.L.R.B. 445 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979). In *Power Systems*, the NLRB found that the employer lacked a reasonable basis for filing the lawsuit. The NLRB observed that the employer's motive in filing the suit was to punish his employees for filing charges with the NLRB. 39 N.L.R.B. at 450. Furthermore, the NLRB noted that the employer sought to discourage and interfere with his employees' right of access to the NLRB. *Id.* The court of appeals, however, refused to enforce the NLRB's order because the record did not support the finding that the lawsuit lacked a reasonable basis.

labor practice.[4] No single test, however, has been applied consistently to determine when an employer's lawsuit against an employee amounts to an unfair labor practice.[5] Some courts have applied a motive test to judge the propriety of an employer's suit.[6] Under this motive test, courts have ruled that if the employer's motive was to retaliate against employees, filing the suit violated section 8(a)(4) of the NLRA. Improper motive was the sole element that had to be proven for the NLRB to dismiss the employer's lawsuit.[7] Other courts, however, have rejected this rationale and applied their own ad hoc tests. For example, the Second Circuit held that even if an employer possessed an improper motive when he filed a lawsuit against his employees, "this alone would not make resort to the courts unlawful so

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For further discussion of *Power Systems* see *infra* notes 26-33 and accompanying text. *See also* Clyde Taylor Co., 127 N.L.R.B. 103, 108 (1960) (employer's implied threat to file suit violates the NLRA if intended to restrain employees in exercise of their federally protected rights).

An employer who files a retaliatory lawsuit may also violate § 8(a)(1) because the lawsuit may interfere with the employees' right to organize and engage in other concerted activities. 29 U.S.C. § 158(a)(1) (1976).

4. The NLRB is empowered by 29 U.S.C. § 160(j) (1976) to seek an injunction from a federal district court to enjoin unfair labor practices. The United States Supreme Court held in NLRB v. Nash-Finch, 404 U.S. 138, 144 (1971), that § 160(j) gives the Board the implied authority to seek to enjoin state court proceedings when federal authority preempts the field.

The courts have balanced the federal and state interests to determine whether a state court may assume jurisdiction over a case which collaterally relates to a labor dispute. A state court will not be permitted to exercise its jurisdiction if that exercise would interfere with federal regulation. *See* Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290, 300 (1977); Bill Johnson's Restaurants, Inc. v. NLRB, 249 N.L.R.B. 155, *enforced*, 660 F.2d 1335 (9th Cir. 1981), *vacated*, 103 S. Ct. 2161 (1983).

In *Bill Johnson*, for example, the NLRB dismissed the employer's state suit because of potential interference with the NLRB's administration of the NLRA. 249 N.L.R.B. at 168. The NLRB noted that the employer's suit would interfere with the NLRB's administration of the NLRA because the NLRB did not have the proper authority to limit the state's broad discovery procedures. *Id.* The NLRB's discovery rules are more restrictive than those of state courts in order to protect witnesses and avoid the costs and time involved in a full discovery procedure. *Id.* This purpose would be defeated, the NLRB noted, if an employer filed a state lawsuit and thereby gained access to liberal state discovery rules. *Id.* In *Bill Johnson*, therefore, the NLRB concluded that the employer's suit would interfere with the NLRB's administration of the NLRA by allowing the employer to take advantage of the state's broad discovery rules. *Id.*

5. *See, e.g.*, United Stanford Employees, Local 680, 232 N.L.R.B. 326 (1977) (NLRB focused on plaintiff's objective for filing suit), *enforced*, 601 F.2d 980 (9th Cir. 1979); Television Wis., Inc., 224 N.L.R.B. 722, 722 n.2 (1976) (union's lawsuit was improper "not because of the Union's subjective intent but because of the unlawful objective sought by the Union"); Clyde Taylor Co., 127 N.L.R.B. 103, 109 (1960) (holding that the NLRB would not interfere with an employer filing a state action even if the suit was "part of a bad-faith scheme to defeat union organization").

6. *See, e.g.*, United Credit Bureau of Am., Inc. v. NLRB, 242 N.L.R.B. 921, *enforced*, 643 F.2d 1017 (4th Cir.) (suit filed as a result of employer's anti-union attitude constituted an unfair labor practice), *cert. denied*, 454 U.S. 994 (1981); Power Systems, Inc. v. NLRB, 601 F.2d 936, 939 (7th Cir. 1979) (improper motive inferred if suit lacks a reasonable basis); *see also* Associated Gen. Contractors v. NLRB, 637 F.2d 556, 561 (8th Cir. 1980) (stating that an employer's or union's intent in filing suit is not relevant to determine the propriety of a lawsuit).

7. *See, e.g.*, United Credit Bureau of Am., Inc., 242 N.L.R.B. 921, *enforced*, 643 F.2d 1017, 1026 (4th Cir.) (court enforced NLRB order requiring the employer to halt its suit against

as to justify an unfair labor practice finding."[8]

The conflict that existed in the past among the circuits in deciding which test to apply was recently resolved by the United States Supreme Court in *Bill Johnson's Restaurants, Inc. v. NLRB.*[9] In that decision, the Supreme Court established a standard that requires the NLRB to permit state courts to adjudicate even retaliatory lawsuits, unless the lawsuit lacks a "reasonable basis."[10] The Court essentially rejected the earlier motive test, under which the employer's motive, rather than the reasonableness of the suit, determined whether or not the NLRB could dismiss the prosecution of a state court lawsuit.[11] Further, the Court's analysis suggested a standard for determining what constitutes a "reasonable basis": if the NLRB determines that the employer's complaint contains "genuine issues of material fact," then the NLRB must halt its own proceeding and await the adjudication of the state claim.[12] If, however, the suit is found to contain no "genuine issues of fact," the NLRB may proceed and preempt the state court's right to rule on the matter.[13]

In reaching this decision, the Court recognized that, after *Bill Johnson,* employees might be inhibited from participating in certain protected activities for fear that they might be sued by their employer.[14] Nevertheless, the Court concluded that the right of an employer to seek judicial protection in labor disputes may not always be preempted by federal labor law.[15] Thus, the Court balanced two opposing interests: the employer's right of access to the courts and the employee's right to engage in activities protected by the NLRA without interference or harassment from his employer.

After examining prior decisions in this area, this Recent Case will analyze the Court's decision in *Bill Johnson* and emphasize the importance of allowing

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an employee because it was in reaction to the employee's resort to the NLRB), *cert. denied,* 454 U.S. 994 (1981); Power Systems, Inc., 293 N.L.R.B. 445, *enforcement denied,* 601 F.2d 936 (7th Cir. 1979); George A. Angle v. NLRB, 242 N.L.R.B. 744, 748 (employer's suit for malicious prosecution against his employee was dismissed because the employer's suit was in retaliation for his employee participating in the NLRB's contempt proceedings), *enforced,* 683 F.2d 1296 (10th Cir. 1979).

8. Lodge 743, Int'l Ass'n of Machinists & Aerospace Workers v. United Aircraft Corp., 534 F.2d 422, 464-65 (2d Cir. 1975), *cert. denied,* 429 U.S. 825 (1976). For a discussion of other cases in which employers are allowed access to the courts despite retaliatory motives, see *infra* note 22 and accompanying text.

9. 103 S. Ct. 2161 (1983).

10. *Id.* at 2170.

11. *See infra* note 100 and accompanying text.

12. 103 S. Ct. at 2171-72.

13. *Id.*

14. Section 7 of the NLRA describes certain rights of employees. *See supra* note 1. Sections 8(a)(1) through (5) of the NLRA further protect the employee by prohibiting violations of an employee's § 7 rights. 29 U.S.C. §§ 157, 158(a)(1)-(5) (1976).

15. 103 S. Ct. 2169. The *Bill Johnson* Court stated that "[t]he right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right." *Id.* (quoting Peddie Bdgs., 203 N.L.R.B. 265, 272 (1973), *enforcement denied on other grounds,* NLRB v. Visceglia, 498 F.2d 43 (3d Cir. 1974)).

the NLRB broad discretion in resolving disputes involving labor and management. A detailed analysis of the decision leads to the conclusion that the *Bill Johnson* Court properly employed an equitable balancing approach to reach a just result that respects the rights of both parties.

BACKGROUND

The NLRA proscribes employer conduct that infringes upon certain employee rights and authorizes the NLRB to enforce those rights.[16] In enacting the NLRA, Congress intended to create a national labor policy which would unify the state laws that had previously regulated labor relations. Congress viewed exclusive authority over labor-management matters to be necessary for the NLRB to implement a unified labor policy.[17] Nevertheless, after the passage of the NLRA, situations arose in which state courts adjudicated matters arguably within the NLRB's jurisdiction.[18] In some instances, state courts were directly prohibited from regulating any conduct that was under the NLRB's jurisdiction.[19] Yet, in other instances, particularly where Congress has not specifically barred state proceedings dealing with certain conduct, the courts have allowed the state proceedings to continue.[20]

In determining what conduct the states may regulate, the Supreme Court has recognized an individual's right of access to the courts under the first

16. *See supra* note 1 and accompanying text.

17. Federal preemption of state matters affecting federal labor law, therefore, is necessary to achieve a uniform labor policy. *See, e.g.*, Garner v. Teamsters Local 776, 346 U.S. 485, 498-99 (1953). In *Garner*, the Court articulated its reasons for preempting such state matters. The *Garner* Court stated that Congress intended for the NLRB, a centralized administrative agency, to implement the NLRA by applying uniform standards, procedures, and remedies when deciding labor law issues. The Court further noted that a uniform application of standards would avoid conflicting decisions that would likely arise if each state applied its own local procedures. *Id.* at 498-99; *see infra* note 37. For an overview on the preemption of state labor law, see generally A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 916-17 (1981).

18. *See, e.g.*, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978). In *Sears, Roebuck & Co.*, the Court recognized that the picketing involved was, in the absence of a trespass, protected by § 7 of the NLRA. *Id.* at 204. The Court noted that it was "arguable" whether the peaceful picketing, which was trespassory, was protected. *Id.* at 205. The Court, however, held that the state court could decide the trespass suit because the picketing would not interfere with conduct which the NLRB might deem to be protected. The Court reasoned that trespass is more likely to be "unprotected than protected." *Id.* at 205. *But cf.* Capital Serv., Inc. v. NLRB, 347 U.S. 501 (1954). In *Capital Service*, an employer obtained a state court injunction against a union, in addition to filing an unfair labor practice charge against the union based on the same conduct. The Court held that the NLRB had authority to halt state court actions which interfere with NLRB proceedings in violation of § 8(a)(4) of the NLRA. *Id.* at 504.

19. *See, e.g.*, Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290, 295 (1977) (citing Vaca v. Sipes, 386 U.S. 171, 178-79 (1967)); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959); Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953).

20. *See, e.g.*, United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954). In this case the Court upheld a state's award for injuries incurred due to the tortious conduct of a union agent. The agent had threatened violence against the company's employees if they

amendment.[21] Some lower courts have adopted the position that an employer's right to seek judicial relief should not be denied, even if the employer possessed the discriminatory motive of retaliating against employees for the exercise of their rights under the NLRA.[22] Although an employer has a right of access to the courts, this right is not absolute.[23] When lawsuits are filed in furtherance of an unlawful objective, such as retaliation against employees for exercising protected rights, this right of access is limited.[24]

The Court of Appeals for the Seventh Circuit addressed the issue of an employer's right of access to a state court to file a suit against an employee in *Power Systems, Inc. v. NLRB.*[25] In *Power Systems,* John Sanford filed numerous charges with the NLRB and OSHA after being discharged by Power Systems for failing to perform his duties.[26] All charges were dismissed

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failed to join the union. *Id.* at 664. The Court noted that if the state was preempted from adjudicating the claim, the union agent would be shielded from liability for his wrongful conduct. *Id.; accord* Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 61-62 (1966); Automobile Workers v. Russell, 356 U.S. 634, 646 (1958).

21. The first amendment provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. Courts have consistently interpreted this provision to include the right of access to the courts. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition."). For a discussion of *California Motor Transport,* see Fishel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine,* 45 U. CHI. L. REV. 80 (1977). *See also* United Transp. Union v. State Bar, 401 U.S. 576, 585 (1971) ("meaningful access to the courts is a fundamental right within the protection of the First Amendment"); Clyde Taylor Co., 127 N.L.R.B. 103 (1960) (employer's right of access to the courts cannot be denied unless it is clear that the "employer's resort to the civil courts [is] a tactic calculated to restrain employees in the exercise of their rights under the NLRA").

22. *See, e.g.,* S.E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977) (no unfair labor practice found when an employer filed a $50,000 libel suit against an employee, even though the libel claim was found to have no basis); *see also* Peddie Bldgs., 203 N.L.R.B. 265, 272 (1973), *enforcement denied on other grounds,* 498 F.2d 43 (3d Cir. 1974) ("The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right."); Clyde Taylor Co., 127 N.L.R.B. 103, 121 (1960) (despite the ALJ's finding that the employer's suit had the improper motive of restraining employees from exercising their § 7 rights, NLRB refused to find an unfair labor practice).

23. *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("There is no constitutional value in false statements of fact"); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972) (no first amendment right of access if lawsuit is a "mere sham" and filed to harass competitors).

24. *See, e.g.,* International Org. of Masters, Mates, and Pilots, 224 N.L.R.B. 1626 (1976) (because ALJ found that union action was only "a stratagem to mask [its] real intent," NLRB found union's lawsuit to have been filed in furtherance of an unlawful objective, and thus unprotected); *see also* United Standford Employees Local 680, 232 N.L.R.B. 326 (1977), *enforced,* 601 F.2d 980 (9th Cir. 1979) (suit to enforce illegal union membership was denied); Television Wis., Inc., 224 N.L.R.B. 722 (1976) (union's lawsuit improper because of union's invalid security clause).

25. 239 N.L.R.B. 445 (1978), *enforcement denied,* 601 F.2d 936 (7th Cir. 1979).

26. 239 N.L.R.B. at 445-46.

by the NLRB due to lack of evidence.[27] Subsequently, Power Systems filed suit against Sanford after discovering that he had filed forty-six separate unfair labor practice charges against his former employers and labor unions.[28] The NLRB ordered Power Systems to cease and desist from prosecuting its state claim against John Sanford because its lawsuit lacked reasonable grounds and had been motivated by anti-union sentiments.[29] In addition, the NLRB ordered Power Systems to compensate Sanford for all his legal expenses.[30] If there had been sufficient evidence of improper motive, the Seventh Circuit would have enforced the NLRB's order.[31] The Court of Appeals stated, however, that there was not "substantial evidence"[32] on the record to imply that the employer's suit was prompted by an improper motive, and hence, refused to enforce the NLRB order.[33] In subsequent cases, the NLRB has adopted the rule established in *Power Systems* and has held that an employer who filed a civil action against its employee with a retaliatory motive has violated section 8(a)(4) of the NLRA.[34]

Regardless of which test a court applies, the employer's suit must be enjoined if it pertains to an area of law that has been preempted by federal labor law.[35] For example, in the 1953 case of *San Diego Building Trades*

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27. *Id.*

28. *Id.* at 446. Thirty of these cases were against labor organizations and the remaining 16 were against Sanford's former employers.

29. It appears that the NLRB will infer that reasonable grounds for the suit exist if an employer's suit is not filed with the intent to restrain employees from exercising their protected rights. *Id.* at 449.

30. *Id.* at 451.

31. Power Systems, Inc. v. NLRB, 601 F.2d 936, 939 (7th Cir. 1979).

32. *Id.* at 940.

33. *Id.*

34. *See, e.g.*, Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773, 778-80 (1981) (meritless suit); United Credit Bureau of Am., Inc., 242 N.L.R.B. 921, 925-26 (1979) (fraud), *enforced*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981); George A. Angle, 242 N.L.R.B. 744 (1979) (malicious prosecution), *enforced*, 683 F.2d 1296 (10th Cir. 1982).

35. To determine whether a state civil suit is preempted, the courts rely on statutory construction to ascertain congressional intent. State court jurisdiction of a civil action will not be preempted if it is evident that Congress did not intend to regulate the particular matter in dispute. *See* Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 289 (1971). State regulation will not be preempted if Congress has not yet acted with respect to the state's right to regulate the labor activity in question.

Earlier preemption decisions suggested that if congressional intent was ambiguous regarding state authority to regulate a particular area, then there was a presumption in favor of the state regulation. *See* Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 778 (1947) (Frankfurter, J., concurring) (if the NLRB is unable to effectuate the policies of the NLRA, then states should have concurrent jurisdiction with the federal government in regulating labor relations); *see also* Hill v. Florida, 325 U.S. 538, 547 (1945) (Frankfurter, J., dissenting) (states should be allowed to regulate labor related areas if Congress has not provided or supplemented its own regulation in the area). For a discussion of the doctrine of federal preemption, see generally TRIBE, AMERICAN CONSTITUTIONAL LAW 376-401 (1978) and for an historical perspective of federal preemption in the field of labor relations, see generally Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1058-59 (1958).

Council v. Garmon,[36] the Supreme Court established the principle that since cases which involve activities protected or prohibited by the NLRA fall within the "primary jurisdiction" of the NLRB, states are preempted from adjudicating such cases.[37] The Court stated, however, that if the regulated conduct is of "peripheral concern" to the NLRA or involves "interests deeply rooted in local feeling and responsibility," the state has an interest in providing judicial remedies that override federal interest in a uniform labor policy.[38]

Certain types of conduct are neither protected nor prohibited by the NLRA. A leading case addressing such conduct is *Linn v. United Plant Guard Workers, Local 114*.[39] The *Linn* Court held that Congress had not preempted state courts from exercising jurisdiction over certain libel actions which arise in labor disputes.[40] The Court noted that a state has a proper interest in protecting its citizens from libel in a labor context if the libel suit does not interfere with the administration of federal labor policy.[41] The *Linn* Court's holding was narrow and limited recovery to those cases where the allegedly libelous statements were made with malice and caused actual harm.[42] Yet in cases involving intentional infliction of emotional distress,[43] malicious prosecution,[44] intimidation,[45] and other tort actions,[46] states also have been

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36. 359 U.S. 236 (1959).

37. *Id.* at 245. The NLRB has interpreted the NLRA as being subject to limited judicial review. In some instances, the United States Supreme Court has ordered states to yield to the NLRB if a state decision might conflict with federal labor policy. The *Garmon* Court noted the importance of allowing the NLRB the power to determine the "precise and closely limited demarcations between federal and state jurisdiction over concerted activities" in the area of labor law. *Id.*

38. *Id.* at 243-44.

39. 383 U.S. 53 (1966).

40. *Id.* at 64-65. In *Linn*, an assistant manager of a detective agency brought a libel suit to recover damages which resulted from the distribution of defamatory leaflets during a union campaign. *Id.* at 56. The Court of Appeals for the Sixth Circuit affirmed the lower court's dismissal of the case on the grounds that the subject matter was exclusively within the NLRB's jurisdiction. Linn v. United Plant Guard Workers, Local 114, 337 F.2d 68 (6th Cir. 1964).

41. 383 U.S. at 67. The *Linn* Court stated that, in the case of libel, "the exercise of state jurisdiction would be a merely peripheral concern of the Labor Management Relations Act, provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Id.* at 61. This reasoning was based on the conclusion that states have a compelling interest in protecting their citizens from libel. *Id.*

42. The Court adopted the standards established in New York Times v. Sullivan, 376 U.S. 254 (1964), which require that the statements be made with "actual malice" or "with knowledge of their falsity" in order to be found defamatory. 383 U.S. at 65.

43. *See, e.g.*, Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977).

44. *See, e.g.*, George A. Angle, 242 N.L.R.B. 744, *enforced*, 683 F.2d 1296 (10th Cir. 1982).

45. *See, e.g.*, Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

46. *See, e.g.*, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (trespass); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (interference with business); Allen-Bradley Local III v. Wisconsin Employment Relations Bd., 315 U.S. 740, 748 (1942) (mass picketing).

allowed to retain their jurisdiction. Thus, with respect to tort claims, federal courts previously had recognized that state courts were not entirely preempted by the NLRA.[47]

Outside of these few cases, important questions remained regarding other preemption concerns.[48] Until *Bill Johnson,* no case had addressed the questions regarding the legality of the motives for bringing the suit, the remedy for a baseless suit, or whether state or federal courts should determine the reasonableness of the suit. The Supreme Court confronted these problems in *Bill Johnson* and established a standard creating a uniform federal policy with respect to civil actions arising in the context of a labor dispute.

THE *BILL JOHNSON* DECISION

Facts and Procedural History

Ruth Helton worked at Bill Johnson's Big Apple East, a restaurant in Phoenix, Arizona, which is owned and operated by Bill Johnson's Restaurants, Inc. Helton was one of the top waitresses in seniority.[49] In early August 1978, she attempted to organize a union, but was discharged as a result of her activities.[50] On September 20, 1978, Helton filed an unfair labor

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47. The *Bill Johnson* Court stated, in a footnote, that federal preemption was not an issue in *Bill Johnson.* 103 S. Ct. at 2167 n.5. Nevertheless, the Court in its analysis analogized to other cases involving situations where state and federal concerns were in opposition. *See* Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180 (1978); Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966). The Supreme Court in *Linn* and *Sears, Roebuck & Co.* applied a balancing test to determine whether federal preemption rules should apply. In both cases the Court held that the state had a compelling interest in deciding matters affecting the safety and welfare of its citizens, especially in the absence of any clear congressional direction to the contrary.

The *Bill Johnson* Court applied a similar test whereby it balanced the opposing state and federal interests. Thus, it seems anomalous that the *Bill Johnson* Court stated that federal preemption rules were inapplicable in this case. The Court, in fact, engaged in a balancing test to specifically determine whether the federal interest of developing a uniform labor policy should preempt the state's interest in providing its citizens with a judicial forum. 103 S. Ct. at 2169-70. Despite the Court's refusal to acknowledge that *Bill Johnson* involved a preemption issue, the court actually applied a preemption-type analysis in reaching its decision.

48. The *Bill Johnson* Court also noted that the *Nash-Finch* doctrine, allowing the NLRB to enjoin state proceedings if the NLRB has preempted the field, did not apply in this case. 103 S. Ct. at 2167 n.5. In NLRB v. Nash-Finch Co., 404 U.S. 138 (1971), the Court held that, even if no unfair labor practice charge is pending before the NLRB, it can sue in federal court to enjoin a state court action. Thus, the *Nash-Finch* Court stated that 28 U.S.C. § 2283, which prohibits private parties from petitioning federal courts to enjoin state proceedings, was inapplicable in situations where the NLRB filed suit to prevent unfair labor practices. 404 U.S. at 146. In spite of the Court's comment in *Bill Johnson* regarding *Nash-Finch,* the Court never stated why *Nash-Finch* was inapplicable to *Bill Johnson.*

49. Bill Johnson's Restaurants, Inc. v. NLRB, 249 N.L.R.B. 155, 157 (1980).

50. *Id.* On July 25, 1978, the Vice President called a meeting to inform the employees of new, stricter company rules regarding days off and phone calls. He stated that a violation of the rules would result in termination of employment. A few days following the speech, Helton discussed with other employees the possibility of forming a union. *Id.*

practice charge with the NLRB alleging that she had been illegally terminated because of her attempts to organize a union.[51]

The same day that she filed the charge, Helton and three other waitresses picketed the restaurant and urged customers to boycott the restaurant, complaining that management treated the waitresses unfairly.[52] A manager of the restaurant approached the picketers and told them that he would "get even" with them.[53] In addition to the picketing, the restaurant employees distributed leaflets charging management with making "unwarranted sexual advances" toward the female employees, and with failing to maintain clean restrooms for employees.[54] The leaflet also stated that the unfair labor practice charge was pending against Bill Johnson's Restaurants.[55]

In response to these activities, the management filed a civil complaint in an Arizona state court against the employees. The complaint alleged that the leaflets contained libelous statements which were published with a malicious intent to harm management.[56] Additional allegations included mass picketing, violence, and trespass.[57] The restaurant sought compensatory and punitive damages in addition to a temporary restraining order to stop the picketing and leafleting.[58] In response to management's suit, Helton filed a second charge with the NLRB, claiming that the suit was filed in retaliation for her having brought charges under the NLRA.[59]

An administrative law judge (ALJ) heard the case on September 27, 1979. The ALJ relied on the *Power Systems* case and ruled that the employer did not have a reasonable basis for its libel suit. The ALJ, therefore, inferred that the employer had the improper motive of punishing the employees for

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51. *Id.* at 158.

52. *Id.* at 160.

53. *Id.* at 161. In addition, Gene Johnson, one of the restaurant owners, phoned one of the waitresses, Cheryl Nichols, at home and requested to speak with her husband. Johnson asked Nichols's husband why he and his wife had been picketing the restaurant. Nichols's husband replied that they were protesting Helton's discharge. Johnson then said to Nichols's husband that he would hate to see the Nicholses "get hurt by all this and lose their new home." *Id.* at 162.

54. *Id.* at 162. The leaflet also listed the following waitresses' complaints: eight hour shifts with no breaks; no overtime pay allowed even though the waitresses were not allowed to leave until their last customer had left; the threat of discharge if they failed to appear for work over the Christmas holidays or due to illness; and inconsistent management practices. *Id.*

55. *Id.* The leaflet specifically stated: "THE [NLRB] HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT . . . FOR UNFAIR LABOR PRACTICES."

56. *Id.*

57. *Id.*

58. *Id.* Following a hearing, the state court refused to enjoin the leafleting, but did grant the temporary restraining order to stop the picketing. *Id.*

59. Id. at 156. The NLRB issued its second complaint against the restaurant claiming that the filing of the restaurant's suit constituted a violation of § 8(a)(4) of the NLRA. *Id.* The NLRB found that the restaurant's suit discriminated against the employees for reporting information to the NLRB. *Id.* at 169. Additionally, the NLRB held that the restaurant violated § 8(a)(1) of the NLRA because the restaurant had interferred with the exercise of the employees' protected rights. *Id.*

filing charges with the NLRB.[60] Accordingly, the ALJ concluded that the restaurant had committed seven unfair labor practices, including violations of sections 8(a)(1) and (4).[61] Upon review, the NLRB essentially adopted the ALJ's decision.[62] The Court of Appeals for the Ninth Circuit affirmed the NLRB's decision.[63]

The Supreme Court's Decision

The United States Supreme Court granted certiorari[64] to determine whether the NLRB could properly enjoin the prosecution of a state court libel suit which was filed in retaliation for an employee's filing of an unfair labor practice charge. In a majority opinion written by Justice White, the Supreme Court vacated the decision of the court of appeals and remanded for further proceedings consistent with its opinion.[65] The Court concluded that a showing of bad motive alone was insufficient to justify enjoining the state court suit.[66] The Supreme Court held that for the NLRB to enjoin a state court suit, the plaintiff's suit must lack a reasonable basis in addition to having a retaliatory motive.[67]

According to the Court, the NLRB is to determine whether the employer's suit has a "reasonable basis."[68] The Court, however, established the criteria by which the NLRB is to decide whether a "reasonable basis" exists. The NLRB must first determine whether there are "genuine issues of material fact" in the case.[69] If factual or legal issues exist, the NLRB must stay its proceedings until the state court proceedings are concluded.[70] If the NLRB stays its proceedings and the state court's decision is against the employer, the NLRB may then take the state decision into account in determining whether or not the employer violated the NLRA.[71] But, if the employer's suit contains no genuine factual or legal issues, the NLRB may dismiss the

60. *Id.* at 165. The ALJ, adopted the reasoning of *Power Systems,* and found that the employer's lawsuit was an attempt to punish Helton for filing charges with the NLRB and also to punish the other defendants for helping Helton. *Id.* at 169-70.

61. *Id.* at 168-69.

62. *Id.*

63. 660 F.2d 1335 (9th Cir. 1981). The Ninth Circuit stated that the employer did not offer substantial evidence to support the NLRB's finding that the statements were published with malice; instead, the Ninth Circuit concluded that the restaurant's motive in filing the suit was to retaliate and intimidate its employees, and discourage the organization of a union. *Id.* at 1343.

64. 103 S. Ct. 253 (1982).

65. 103 S. Ct. at 2173.

66. *Id.* at 2170.

67. *Id.* at 2173.

68. *Id.* at 2171-72.

69. *Id.* The Court stated that in situations where legal or factual issues exist, the plaintiff has a compelling first amendment right to allow a state jury to decide these issues. Thus, the Court concluded that the state's interest in protecting its citizens should be free from NLRB interference. *Id.*

70. *Id.*

71. *Id.* at 2172. If, however, the employer convinces the state court that his suit is "meritorious," then his filing of the state civil suit is not an unfair labor practice. *Id.*

state suit and use the lack of basis for the suit as evidence of improper motive in filing the suit, thereby demonstrating a violation of section 8(a)(4) of the NLRA.[72] The Court suggested that the NLRB, in making its determination, apply the standards traditionally used in evaluating motions for summary judgment and directed verdict to determine the reasonableness of the suit.[73]

In reaching its decision, the Court limited the NLRB's broad discretion over matters arising in labor management relations to determining whether the state suit has a "reasonable basis," rather than deciding the merits of the suit.[74] Further, the Court acknowledged that sections 8(a)(1) and 8(a)(4) of the NLRA have been interpreted broadly to protect employee activity so that employees will not be inhibited from exercising their rights to unionize and engage in other concerted activity.[75] These broad interpretations of the NLRA are consistent with the NLRB's policy of encouraging complete freedom of access to the NLRB for any prospective grievance and prohibiting employer interference with that right of access.[76]

The Court recognized that an employer's lawsuit against employees can be used as "a powerful instrument of coercion or retaliation."[77] Employees who exercise federally protected rights may be exposing themselves to burdensome litigation.[78] This is especially true, the Court noted, in cases where the suit is against employees who do not have the support of a union.[79] Despite this potential burden on employees, the Court recognized that employers are entitled to their first amendment right of access to the courts.[80]

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72. *Id.* at 2172 n.12.

73. *Id.* at 2171 n.11. The Court suggested that the NLRB may use the summary judgment and directed verdict standards for guidance when determining the existence of a reasonable basis for a lawsuit. The Court, however, left the particular procedures to be employed to the NLRB's discretion. *Id.*

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment determinations. Summary judgment is proper when there are no genuine material issues of fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Directed verdicts are governed by rule 50 of the Federal Rules Of Civil Procedure. The grant of a directed verdict is appropriate only when it is clear that reasonable men could come to but one conclusion from the evidence. Coffy v. Multi-County Narcotics Bureau, 600 F.2d 570, 579 (6th Cir. 1979).

74. 103 S. Ct at 2171. The Court noted that the ALJ did not have the authority to consider the merits of the employer's claim. The Court suggested that on remand the ALJ should only determine whether genuine issues of fact exist regarding the truthfulness of the statements contained in the leaflet. *Id.* at 2173. The Court also noted that the ALJ should make the same limited inquiry into the employer's business interference charges. *Id.*

75. *Id.* at 2168, 2169 n.9.

76. John Hancock Mut. Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951) (congressional intent was to "prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses"); Briggs Mfg. Co., 75 N.L.R.B. 569, 570-71 (1947) (the objective of § 8(a)(4) is "to assure an effective administration of the [NLRA] by providing immunity to those who initiate or assist the Board in proceedings under the [NLRA]").

77. 103 S. Ct. at 2169.

78. *Id.*

79. *Id.*

80. *Id.; see supra* notes 21-23 and accompanying text.

The Court reasoned that the mere filing of an unfair labor practice charge should not allow the NLRB to interfere with an individual's first amendment right of access to the courts or to halt the prosecution of a lawsuit that has a "reasonable basis."[81] Thus, in order to protect the employer's right of access to the courts, the Court concluded that the NLRB can only dismiss a suit if it lacks a reasonable basis. Justice White, writing for the unanimous Court, stated that even if an employer uses a state court lawsuit as a rataliatory weapon, the NLRB may not dismiss the suit unless it is "knowingly frivolous."[82] The Court analogized to the premption exception recognized in *Garmon* which allowed state courts to proceed in cases that involved conduct which affected interests "deeply rooted in local feeling and responsibility."[83] In such cases, courts have repeatedly allowed an employer to seek judicial relief in a state court.[84] For example, the *Bill Johnson* Court reaffirmed its holding in *Linn* that an employer can seek state court relief and recover damages in a libel action arising in the context of a labor dispute if malice and actual injury are proven.[85]

To resolve the conflicting state and federal interests, the Court engaged in a balancing test which weighed the state's interest in providing a forum for its citizens against the federal interest of promoting a uniform federal labor policy.[86] The *Bill Johnson* Court held that this type of analysis is only applicable in situations where the state court suit has a reasonable basis.[87]

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81. 103 S. Ct. at 2169.

82. *Id.* at 2170.

83. *Id.* at 2169 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)); *see supra* notes 35-37 and accompanying text.

84. *See, e.g.*, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (trespass suit brought by employer in state court was found to contain a compelling local interest so that state civil suit was not preempted); Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977) (potential for interference created by a state civil suit for intentional infliction of emotional distress against a union for engaging in tortious and outrageous conduct in its discriminatory implementation of hiring hall obligations is "insufficient to counterbalance the legitimate and substantial interest of the state in protecting its citizens").

85. 103 S. Ct. at 2169 (citing Linn v. Plant Guard Workers, Local 114, 383 U.S. 53 (1966)). The *Linn* Court adopted the test established in New York Times v. Sullivan, 376 U.S. 254 (1964), requiring proof of actual malice to be shown in a libel action. 383 U.S. at 65.

86. 103 S. Ct. at 2170.

87. *Id.* The Court stated that suits which lack a reasonable basis are not awarded first amendment protection. According to the Court, the states have very little interest in adjudicating frivolous claims. Therefore, the Court concluded that under these circumstances, the federal interest in protecting employees' rights under the national labor policy should prevail. *Id.*

In addition to balancing state and federal interests, the Court engaged in another test which weighed two opposing first amendment rights. The employer's first amendment right of access to the courts was in direct opposition to the employee's first amendment right of free speech. *Id.* The Court noted that the employee's right of free speech is not protected if the speech is defamatory. *Id.* The Court relied on Herbert v. Lando, 441 U.S. 153, 171 (1979) (no first amendment privilege of freedom of the press where defamed party seeks to elicit information relevant to his suit), and Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (false factual statements are not awarded constitutional protection), to conclude that " baseless litigation is not immunized by the First Amendment." 103 S. Ct. at 2161.

The employer's right to prosecute a state claim, however, is outweighed by the federal interest in promoting a uniform labor policy if the suit is found to lack a reasonable basis.[88] The Court left the determination of reasonableness of the employer's suit to the NLRB's discretion.[89] If the suit is found to contain a reasonable basis, the employer may then exercise its first amendment right of access to the courts.[90]

The Concurrence

Justice Brennan agreed with the Court's conclusion that Congress had not intended for the NLRB to be able to dismiss a state lawsuit, even though filed with an illegal motive, if it had not been preempted by federal law.[91] Justice Brennan, however, disagreed with the Court's focus on the NLRA.[92] According to Justice Brennan, the real issue in the case was one of judicial review rather than statutory interpretation. He noted that Congress intended for the NLRB to be subjected to limited judicial review.[93] Thus, the Court's emphasis should have been whether the NLRB's determination of a "reasonable basis" was "sufficiently reasonable to be accepted by a reviewing court" instead of developing a standard to determine what constitutes a "reasonable basis."[94]

Although Justice Brennan agreed with the "reasonable basis" test developed by the Court, he stated that the NLRB has broad discretion in controlling the use of an employer's right of access to the courts as a "powerful instrument of coercion or retaliation."[95] Justice Brennan acknowledged that because Congress intended for the NLRB to decide a wide range of issues affecting labor policy, the scope of the NLRB's reviewing power is extremely broad.[96] To ascertain whether Congress, under the NLRA, authorized the NLRB to intervene and preempt a state's right to adjudicate factual and legal issues, Justice Brennan developed a three part analysis. He stated that the NLRB should be able to prevent the prosecution of a state lawsuit if, in addition to the elements required to establish a particular unfair labor practice, (1) federal law would bar the plaintiff from obtaining relief; (2) state law would denounce the case as being "frivolous"; or (3) no jury would be able to

88. 103 S. Ct. at 2170.

89. *Id.* at 2171; *see supra* notes 68-73 and accompanying text.

90. 103 S. Ct. at 2171-72.

91. *Id.* at 2175 (Brennan, J., concurring).

92. *Id.* (Brennan, J., concurring).

93. *Id.* (Brennan, J., concurring) (quoting Labor Bd. v. Truck Drivers Union, 353 U.S. 87, 96 (1957)); *see also* Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 194 (1941). In *Phelps,* the Court stated that Congress established an administrative agency, the NLRB, with expertise in the labor law field to resolve matters between labor and management. Moreover, the Court stressed the importance of a limited judicial review over NLRB decisions. The *Phelps* Court cautioned courts not to exceed their authority and interfere with the NLRB's ruling upon reviewing the NLRB's order. *Id.*

94. 103 S. Ct. at 2174 (Brennan, J., concurring) (quoting FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981)).

95. *Id.* at 2177 (Brennan, J., concurring).

96. *Id.* at 2175 (Brennan, J., concurring); *see supra* note 93 and accompanying text.

find in the plaintiff's favor under the applicable law.[97] Justice Brennan concluded that only in circumstances where the NLRB clearly has overstepped its authority or failed to follow its own procedures should a court intervene and specify the standards to be followed.[98]

ANALYSIS

Prior to *Bill Johnson,* the circuits were in conflict over which test should be employed to determine whether an employer's lawsuit should be dismissed when it is filed in a state court against employees during a labor dispute.[99] To resolve this conflict, the *Bill Johnson* Court developed a new test and rejected the *Power Systems* test.[100] The Court rejected the *Power Systems* test because it overlooked the important consideration of an employer's first amendment right of access to the courts.[101] Before a state suit will be dismissed under the Court's new approach, the NLRB must find, in addition to a retaliatory motive, that the employer's lawsuit lacks a reasonable basis.[102]

This "reasonable basis" test allows the NLRB to make a general inquiry with respect to whether the employer's lawsuit raises factual and legal issues.[103] The Court's approach in allowing the NLRB broad discretion in making "reasonable basis" determinations concerning employers' lawsuits promotes the development of a uniform labor policy.[104] The NLRB, and not the courts, has the primary responsibility for matters affecting the nation's labor policy.[105] Limiting the NLRB's power is harmful to labor policy because it restricts NLRB protection of employee rights guaranteed by the NLRA.[106] Accordingly, the Supreme Court has favored limited judicial review of NLRB decisions.[107] Thus, the *Bill Johnson* Court correctly observed that the plenary power of the NLRB is required to implement a unified labor policy.

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97. 103 S. Ct. at 2176 (Brennan, J., concurring).

98. *Id.* at 2176 (Brennan, J., concurring) (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (courts should not intrude in administrative agency proceedings to impose their own views regarding the format and procedure to be followed when determining the merits of a case)).

99. *See supra* notes 6-8, 24 and accompanying text.

100. 103 S. Ct. at 2168. The Court noted that the NLRB had applied the *Power Systems* test since 1978. *See* Sheet Metal Workers Union Local 355, 254 N.L.R.B. 773, 778-80 (1981); George A. Angle, 242 N.L.R.B. 744 (1979), *enforced,* 683 F.2d 1296 (10th Cir. 1982); United Credit Bureau of Am., Inc., 242 N.L.R.B. 921, 926 (1979), *enforced,* 643 F.2d 1017 (4th Cir.), *cert. denied,* 454 U.S. 994 (1981).

101. 103 S. Ct. at 2169; *see supra* note 15.

102. 103 S. Ct. at 2173. The Court stated that "[r]etaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease and desist order against a state suit." *Id.*

103. *Id.*

104. *See supra* notes 17, 37 and accompanying text.

105. *See supra* notes 1, 4, 17, 37, 93 and accompanying text.

106. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242-43 (1959); Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953).

107. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266-67 (1975); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); Labor Bd. v. Truck Drivers Union, 353 U.S. 87, 96 (1957);

Justice Brennan's concurrence also recognized the NLRB's role in effectuating a federal labor policy. His approach would allow virtually complete deference to the NLRB in determining the reasonableness of a suit.[108] In a more extensive analysis than that provided by Justice White, Justice Brennan attempted to provide the NLRB with guidelines for balancing state and federal interests. Justice Brennan agreed with the Court that a suit may be dismissed if no "genuine issues" exist, but also included two other grounds for dismissal.[109] According to Justice Brennan, the state lawsuit also should be dismissed if it is preempted by federal law[110] or if, under the relevant state law, the claim would be frivolous.[111]

Justice Brennan's approach appears to cover more situations in which it would be desirable to allow dismissal of a state suit. Therefore, Justice Brennan's analysis is more valuable than Justice White's because it specifically outlines the circumstances in which state suits may be properly dismissed by the NLRB. Additionally, unlike Justice White, Justice Brennan stressed the importance of deferring to the NLRB in labor-management matters.[112] This deference is crucial to the proper implementation of the nation's labor policy because it allows for one national body to make the decisions rather than a number of courts with limited jurisdiction.

If the state courts were allowed to assume jurisdiction over labor-management matters, it is conceivable that state and local interests would be adverse to the national interest.[113] Justice Brennan's approach appears to be the best way to avoid this problem because it would promote a unified labor policy by deferring labor related matters to the NLRB. Finally, Justice Brennan appropriately noted that appellate courts should be limited in their scope of review.[114] Rather than decide the merits of the case, a reviewing court should concentrate on whether the NLRB followed fair and proper procedures in making its determination .[115] This would effectively allow the

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NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 111-112 (1956); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

108. 103 S. Ct. at 2174-75 (Brennan, J., concurring).

109. The Court's analysis only indirectly mentioned the two other bases for dismissal. *Id.* at 2169-70.

110. *Id.* at 2176 (Brennan, J., concurring); *see supra* notes 17, 35, 47 and accompanying text. *See generally* Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassary Union Activity,* 83 HARV. L. REV. 552 (1970) (discussing the need to balance state and federal interests in determining whether trespass cases should be preempted); Cox, *Labor Law Preemption Revisited,* 85 HARV. L. REV. 1337 (1972) (analyzing the evolution of the preemption doctrine in labor cases).

111. 103 S. Ct. at 2176 (Brennan, J., concurring).

112. *Id.* at 2176-77 (Brennan, J., concurring).

113. *See generally* 2 THE DEVELOPING LABOR LAW chs. 29-32 (C. Morris ed. 1971) (discussing congressional policy of granting jurisdictional power to the NLRB in labor-management areas in order to achieve a uniform national policy).

114. 103 S. Ct. at 2176-77 (Brennan, J., concurring).

115. In a footnote, Justice Brennan compared the NLRB to another administrative agency, the Federal Elections Commission, and emphasized the importance of allowing the NLRB great deference in making its decisions. *Id.* at 2174 n.1 (Brennan, J., concurring). Quoting the Court's

NLRB enough deference to formulate a cohesive labor policy. Justice Brennan's approach of discouraging judicial intervention in labor management areas is also appropriate because, otherwise, inconsistent state decisions would disrupt a unified body of federal labor law.

Both the Court's opinion and the concurrence recognized that past Supreme Court decisions had allowed the states to decide matters of local concern,[116] even though those matters were arguably within the NLRB's jurisdiction.[117] In those cases, the Court held that Congress had not manifested its intent to exclude matters of local concern from state court jurisdiction.[118] For example, the *Linn* Court recognized the inequity that might result if a state court was deprived of deciding a well founded lawsuit when important state interests were at issue.[119] To prevent this inequity, the *Linn* Court attempted to balance the state and federal interests.[120]

The *Bill Johnson* Court employed a balancing test similar to the one adhered to by the *Linn* Court.[121] Although recognizing that the NLRB has

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language in FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981), Justice Brennan stated that "the NLRB [like the FEC] is also 'precisely the type of agency to which deference should presumptively be afforded.'" 454 U.S. at 37.

116. The Court noted, however, that it would not be unlawful for the NLRB to enjoin a state court action if it is found to lack a reasonable basis. 103 S. Ct. at 2170. The Court stated that a "plaintiff in a baseless suit has not suffered a legally-protected injury" and thus, no state interest exists to protect its citizens. *Id.*

117. *Id.* at 2169-70, 2176 (Brennan, J., concurring); *see* Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Garner v. Teamsters Local 776, 346 U.S. 485 (1953). *See generally* Houton, *The Exceptional Garmon Doctrine,* 26 LAB. L.J. 49 (1975) (discussing the numerous exceptions to the preemption doctrine).

118. *See, e.g.,* Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977); Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966). The *Bill Johnson* Court noted that in these cases, as well as in other cases involving matters of local concern, Congress had not intended to overlook the state's interest in protecting the safety and welfare of its citizens. 103 S. Ct. at 2170 (quoting Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290, 302-03 (1977)).

119. 383 U.S. at 64-65 (1966). Had the *Linn* court upheld the enjoining of the state civil suit, the plaintiff would have been denied relief for his injuries due to the NLRB's limited remedial powers. *Linn* involved allegedly defamatory statements made by the union and two of its officials against a representative of an employer during a union organization campaign. *Id.* at 55-56. The NLRB may set aside the election under the NLRA in a situation similar to the one present in *Linn.* In doing so, however, the NLRB looks to whether the statements were misleading or coercive, not whether they were defamatory. *See* Bok, *The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act,* 78 HARV. L. REV. 38 (1964). If the statements are found to be defamatory, a state court may award damages for libel. *Linn,* 383 U.S. at 67. The NLRB cannot, however, award damages or provide the defamed party with other appropriate relief. *Id.*

120. 383 U.S. at 59. The *Linn* Court noted that since the NLRA does not prevent parties from uttering defamatory statements, state jurisdiction of the libel claim would be only a "peripheral concern" of the NLRA. *Id.* (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959)).

121. 103 S. Ct. at 2170. The *Bill Johnson* Court noted that in view of the first amendment right of access to the courts, the states have a strong interest in adjudicating civil actions which have a reasonable basis. Thus, the Court observed that the NLRB's interpretation of the NLRA,

been allowed great deference in effectuating federal labor policy, the *Bill Johnson* Court stated that an allegation of defamation is primarily a matter of state concern.[122] Accordingly, the Court balanced the state's interest in hearing the employer's claim against the NLRB's interest in protecting the employee's federally guaranteed rights.[123] Both the Court and Justice Brennan concluded that, in the absence of any congressional direction, a libel claim arising in the course of a labor dispute was merely a collateral concern to the NLRB.[124] That is, a libel claim would not interfere with the NLRB's adjudication of the related unfair labor practice charge because the NLRB was not created to resolve libel claims.[125] The Court, therefore, determined that a compromise was necessary to satisfy both the federal and state interests. The Court held that the state's interest in hearing the case overrides the federal interest in effectuating national labor policy if the NLRB determines that a suit has a reasonable basis.[126] If, however, the NLRB determines that the suit lacks a reasonable basis, the federal interest overrides the state's interest in adjudicating the suit.[127]

IMPACT

Despite the *Bill Johnson* Court's claim that libel suits are only collateral to labor law, allowing libel suits to proceed when they arise in a labor context could have a significant effect on labor policy. After *Bill Johnson,*

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which would allow the NLRB to preempt the state's power to hear the suit, would be unjust if the suit had a reasonable basis. *Id.*

122. *Id.* at 2169 (citing Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 65 (1966)). In a footnote, the Court stated that libel claims are not completely governed by state law since the United States Constitution imposes a malice requirement. *Id.* at 2172 n.13 (citing Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 64-65 (1966)).

123. *Id.* at 2170. In addition to balancing the state and federal interests, the Court implicitly engaged in another balancing test involving two conflicting first amendment rights. An employer's first amendment right of access to the courts and an employee's first amendment right of free speech were competing concerns in *Bill Johnson.* The Court concluded that in cases where the speech is defamatory, the right of free speech must yield to the right of access to the court system since defamatory speech is not protected under the first amendment. *Id.*

Justice Black's dissent in *Linn* presented an alternative view regarding libel in labor contexts. 383 U.S. at 67-68 (Black, J., dissenting). In *Linn,* Justice Black felt that libel suits should be prohibited in labor disputes because such suits could curtail speech in the labor law field. *Id.* (Black, J., dissenting). He believed the right to speak freely needed the utmost protection. Justice Black concluded that chilling of speech would disrupt the collective bargaining process and would clearly be contrary to the first amendment. *Id.* (Black, J., dissenting).

124. 103 S. Ct. at 2169-70, 2175 (Brennan, J., concurring).

125. Justice Brennan stated that the standard the NLRB applies when deciding an unfair labor practice charge differs from the standard applied when deciding whether to enjoin a state suit. *Id.* at 2175 (Brennan, J., concurring). Thus, the possibility of the state suit interfering with the NLRB's administration of the NLRA is not substantial where the conduct in the state suit is unrelated to the NLRB proceedings. *See, e.g.,* Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966) (libel); Allen Bradley Local 111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942) (mass picketing).

126. 103 S. Ct. at 2170-71.

127. *Id.*

employer lawsuits may arise that would seriously impair employees' right to unionize, but the NLRB would be powerless to enjoin.[128] For example, employees may be inhibited from voicing their opinions on working conditions or other work related matters protected by the NLRA if they fear that they might be faced with a libel suit.[129] Conceivably, employers who are anti-union may wish to suppress their employees' activities by forcing them into state court to defend themselves.[130] The effect may be to intimidate employees and deter their involvement in certain activities protected by the NLRA. Following *Bill Johnson,* therefore, employers may have the power to limit speech and other employees' rights in the workplace indirectly through state civil suits.

Prosecuting such suits is typically not a problem for the employer because litigation costs are generally tax-deductible as a business expense.[131] Employees, however, are not afforded this tax benefit. Moreover, employees typically do not have the same resources available as employers to bear the costs of litigation.[132] Consequently, the time and costs of potential litigation may pose an insurmountable problem for employees who wish to exercise their right to engage in activities protected under the NLRA.

Despite the potential for abuse by employers, the Court's rule lessens the likelihood of abuse enough to balance fairly between the competing federal and state interests. It is significant that only those suits that are meritorious or contain a "reasonable basis" are beyond the power of the NLRB to enjoin.[133] The NLRB still has power to enjoin suits that do not meet the threshold requirement of having a reasonable basis for the suit, thus protecting employees' rights. Yet, the Court's analysis also protects the employer's first amendment right of access to the courts by allowing the

128. Under the Court's ruling in *Bill Johnson,* the NLRB would be unable to dismiss those suits which contain a reasonable basis. *Id.* at 2173. According to Arthur Fox, an attorney with the Public Citizen Litigation Group in Washington, the reasonable basis requirement would not be difficult to fulfill since one must only establish that genuine factual or legal issues exist. Hentoff, *Libel and Labor,* 47 PROGRESSIVE 25, 27 (1983) (quoting Arthur Fox). Fox stated that "any plaintiff's lawyer can always frame a . . . complaint in sufficient detail to preclude its being dismissed as baseless." *Id.* at 27.

129. In Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966), the Court noted that the NLRB does tolerate inaccurate statements by the union during organizational campaigns. *Id.* at 60. The NLRB leaves it to the voter's discretion to decipher the truthfulness of the statements. *Id.* at 60 (quoting Stewart-Warner Corp., 102 N.L.R.B. 1153, 1158 (1953)). The *Linn* Court noted that terms like "scab," "unfair," and "liar" have been tolerated by the NLRB in the past. Despite the fact that they might be false or defame someone, such statements are still protected by § 7 of the NLRA. *Id.* at 60-61. Nevertheless, statements which intentionally seek to defame an individual and are knowingly false fall outside the protection of the NLRA. *Id.* at 61.

130. Even the Court recognized that an employee who exercises his rights may be "subjecting himself to the possiblity of a burdensome lawsuit." 103 S. Ct. at 2169.

131. For a discussion of the possible adverse impact of *Bill Johnson,* see Hentoff, *supra* note 128, at 27.

132. *Id.*

133. 103 S. Ct. at 2170. The Court observed that the "states have only a negligible interest, if any, in having insubstantial claims adjudicated by their courts, particularly in the face of

state court to adjudicate a valid libel claim.[134] Therefore, the NLRB's power to resolve labor disputes is not usurped by the state court whenever an employer files a civil suit. But neither is an employer's right to sue eliminated solely because his cause of action arises in the context of a labor dispute.

CONCLUSION

The approach taken by the NLRB and the courts in the past with regard to employers' lawsuits against employees who had filed unfair labor practice charges was confusing and uncertain. The Court's decision in *Bill Johnson* finally established a uniform standard for the NLRB and the courts to apply in the future. Under the Court's new standard, the NLRB may dismiss a state suit that is found to be "frivolous." If, however, the suit has merit, the state court may proceed and try the case.

In view of the important first amendment right of access to the judicial system, the Court struck a reasonable balance between the competing state and federal interests. The Court correctly observed that an employer's first amendment right of access to the courts can not be overlooked merely because the tort arose in a labor dispute. Moreover, the Court's ruling allows the NLRB to dismiss frivolous suits, negating the possibility of employers bringing spurious claims solely for the purpose of retaliating against employees who exercise their protected rights.

Because employer lawsuits may inhibit employees in the exercise of their federally protected rights, the NLRB still retains the ultimate authority in determining the reasonableness of the employer's lawsuit. This ensures adequate protection of the employees' federal rights. To further ensure that employees' federal rights are protected adequately, Justice Brennan's concurrence urges the courts to allow the NLRB great deference in making its "reasonable basis" determinations.

Justice Brennan's concurrence covers all the circumstances where the NLRB may appropriately dismiss a state suit, and therefore, should provide guidance for lower federal courts which determine whether to dismiss an employer's state suit. Justice Brennan's concurrence is also significant because it emphasizes the importance of allowing the NLRB great deference in deciding matters affecting labor and management relations. This deference is essential to implement an effective uniform labor policy. To hold otherwise would hinder the NLRB from acheiving its goal of a national labor policy.

In view of these concerns, both the Court and Justice Brennan reached

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the strong federal interest in vindicating the rights protected by the national labor laws." *Id.*

134. *See* Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641 (1961). Michelman suggests that in libel cases, an employer should be entitled to receive the same remedies for libel and slander regardless of the fact that the libel occurs within a labor context. *Id.* at 667. He further notes that state courts are better equipped than the NLRB to decide libel and other state-related issues. Also, Michelman observes that permitting state courts to adjudicate civil suits causes very little interference with the nation's labor policy. *Id.*; *see also* NLRB v. Boeing Co., 412 U.S. 67 (1973) (Court rejected argument that NLRB was a more suitable forum than a state court to determine the reasonableness of a union fine).

an equitable result by giving more weight to an employer's first amendment right of access to the courts when the focus of the employer's state lawsuit is a matter of only collateral concern to the NLRB. Under these particular circumstances, the Court properly concluded that an employer has an undeniable right to file a state suit.

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