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Bill Johnson's Restaurants, Inc. v. NLRB: Reasonably Based, Unpreempted Lawsuits Pronounced Palatable and Unenjoinable, Despite Improper (Retaliatory) Motivation

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BILL JOHNSON'S RESTAURANTS, INC. v. NLRB: REASONABLY BASED, UNPREEMPTED LAWSUITS PRONOUNCED PALATABLE AND UNENJOINABLE, DESPITE IMPROPER (RETALIATORY) MOTIVATION.

After a fired employee filed unfair labor practice charges against a restaurant owner in August 1978,[1] the employer-restaurant owners filed suit in state court for damages and injunctive relief. The employer alleged that the employee had engaged in business interference activities (mass picketing, harassing customers, blocking access to the restaurant, and creating a threat to public safety) and had libeled the owners by the knowingly false statements contained in leaflets. The employee then filed a second charge with the National Labor Relations Board (NLRB or

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1. The NLRB found, in its decision and order in Bill Johnson's Restaurants, Inc. and Myrland R. Helton, 249 NLRB 155, 160 (1980), that the surrounding facts of the initial complaint supported a finding that the restaurant, in discharging Helton, was motivated by its knowledge that she was a union adherent, and that the reasons advanced for her firing were false. The facts accepted by the administrative law judge (ALJ) and affirmed by the Board indicated that Helton was a senior waitress covering the coveted breakfast shift, the only one to receive a large bonus, and had never previously been reprimanded. At a meeting of management with waitresses not on the breakfast shift, those employees were told of a crackdown as to strict enforcement of company rules under penalty of discharge. Such rules included: no gum-chewing, no using a company phone for personal calls, and mandatory call-in on designated "call days." Following the meeting, Helton was told the rules did not apply to breakfast shift waitresses. Feeling insecure with the suggested rules, she recommended to the other employees that they investigate union representation. Shortly thereafter, she was fired, allegedly for breaking the above-listed "rules." No other employee was fired, though others broke the same rules. Id. at 157-58. The Board found the firing in violation of § 8(a)(3) of the National Labor Relations Act, id. at 160. This section, as amended, now appears at 29 U.S.C. § 158(a)(3) (1983) and provides:

> (a) It shall be an unfair labor practice for an employer
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

This finding was upheld by the Ninth Circuit in Bill Johnson's Restaurants, Inc. v. NLRB, 660 F.2d 1335 (9th Cir. 1981). Sanctions imposed by the Board under the NLRA were upheld by the Court of Appeals, including posting of a notice of the order, reinstatement of Helton, and payment by respondent restaurant to all defendants in the civil complaint (state lawsuit) for all legal expenses incurred in defense of the civil suit (in effect, plaintiff paying defendants).

Board), alleging that the employer had filed the state suit in retaliation for her protected, concerted union organizational activities, and for her unfair labor practice charges protesting her discharge.[2] In January 1979, the United States District Court denied the Board's October 1978 petition under section 10(j) of the National Labor Relations Act (NLRA or "the Act") for an order enjoining the employer from continuing the state court suit, pending a final Board decision.[3] The state court dismissed the employee's motion for summary judgment on the employer's business interference claims and the employees' abuse of process counter-claims in May 1979, but retained the libel claim for trial. Furthermore, the court granted the employer's motion for summary judgment in the same state-court suit on the employee's counter-claims of abuse of process, malicious prosecution, and wrongful injunction but also retained the employee's counter-claim of libel for trial.[4] In September 1978, the administrative law judge (ALJ) rendered his decision on the consolidated unfair labor practice charges which he had heard in December 1978. He found that the institution of the civil suit was for the purpose of penalizing the employee and discouraging her from filing Board charges under section 8(a)(4) of the NLRA and therefore constituted an unfair labor practice.[5] On appeal, the Board in April 1980 adopted the ALJ's findings, with minor amendments. The employer petitioned to the Ninth Circuit Court of Appeals for judicial review. The Board sought enforcement, and the Court of Appeals enforced the Board's order in November 1981.

A unanimous Supreme Court, with Justice Brennan concurring, *held* that the prosecution of an unpreempted, reasonably based state court lawsuit by an employer is not enjoinable regardless of the employer's retaliatory motive. The Court further *held* that an unfair labor practice

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2. 249 NLRB at 165.

3. The Supreme Court stated in Bill Johnson's Restaurants, Inc. v. NLRB, 103 S. Ct. 2161, 2174 n.15 (1983), that this denial was based on the erroneous impression that a state suit could *never* be enjoined unless it sought an unlawful objective.

4. See 103 S. Ct. at 2166 n.2. Either the pendancy of the libel claims was not considered by the ALJ or it was not brought to his attention by the employer when he finally made his determination on September 27, 1979 that the employer's suit lacked a reasonable basis.

5. See infra note 17. See also Power Systems, Inc., 239 NLRB 445, 449-50 (1978), enforcement denied, 601 F.2d 936 (7th Cir. 1979), in which the Board held that it is an unfair labor practice for an employer to institute a civil lawsuit for the purpose of penalizing or discouraging its employees from filing charges with the Board or seeking access to Board processes. The Board also inferred that the employer acted with a retaliatory motive from the fact that the suit lacked a reasonable basis.

may be found if a retaliatory motive is established *and* the state court suit is finally adjudged unmeritorious. *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S. Ct. 2161 (1983).

In determining whether under the facts and circumstances of *Bill Johnson's* the Board could stop the proceedings in a state-court suit and whether the filing of such state-court suit, with a retaliatory motive, was an unfair labor practice, the Court touched upon labor history. This included a treatment of the limited circumstances under which such a state-court suit was not preempted by federal law (the NLRA) and the vacillating positions which the Board had taken in prior "improper motive" cases. This history is more fully developed in the following pages. Since the Court analogized this labor problem to those found in the antitrust arena, a brief history of the development of antitrust's *Noerr-Pennington* doctrine and its "sham" exception will also be traced here. Implicit in this analogy is a need to discuss the Constitutional ramifications of the First Amendment, the Supremacy and Commerce clauses, and the similarity of policies underlying antitrust and labor legislation based on the Commerce Clause.

The Prior Labor History

The Unpreempted Suit Determination

In *San Diego Building Trades Council v. Garmon*,[6] unions which had not been designated as collective bargaining agents of employees of a lumber business began peaceful picketing and the business refused to sign an agreement to retain or employ only workers who were or became union members. The unions further exerted pressure on suppliers and customers to coerce the employer to sign the union-shop agreement. The employer filed a state-court suit, and the California court awarded it injunctive relief and damages. The union then filed a representation petition with the NLRB, but the Board refused to take jurisdiction on the basis of insufficient business volume. The Supreme Court found that the Board's jurisdiction preempted both state and federal courts[7] and set out the test for deciding which activities were not to be state regulated: activities either clearly protected under section 7 of the NLRA or clearly prohibited under section 8; and activities even arguably protected or prohibited under the NLRA.[8] However, the *Garmon* Court listed two exceptions under which state courts were not preempted from

6. 359 U.S. 236, 79 S. Ct. 773 (1959).
7. Id. at 245, 79 S. Ct. at 780.
8. Id.

taking jurisdiction: (1) activities deemed of "merely peripheral concern"[9] to a uniform national labor policy,[10] and (2) activities under which the conduct sought to be regulated "touched interests so deeply rooted in local feeling and responsibility."[11]

The second exception has been considerably expanded beyond the pre-*Garmon* feeling that it extended only to maintenance of the domestic peace and came into play only where conduct was violent or threatening violence.[12] After *Garmon*, state jurisdiction to enforce its own laws was found not to be preempted by the NLRA for knowing, malicious libel during a union organizing campaign;[13] the intentional infliction of emotional distress;[14] and, in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,[15] peaceful, though trespassory, picketing. In *Sears*, the company sought in state court to have the picketers removed from their private sidewalks to the public sidewalks some distance away. Here the employer could not have filed an unfair labor practice charge with the Board, and the union itself had not filed such a claim. The Court therefore modified the *Garmon* test. It found the state's jurisdiction not preempted even for "arguably protected," and "arguably prohibited" conduct where: (1) the state's interest is high and the issues proposed to be presented to the NLRB and state court are not identical; and (2) the aggrieved party cannot meet the requirements for bringing his case to the Board and the opposing party has forfeited its opportunity to do so.[16]

Another extension of the non-preemption exemption of state court jurisdiction in matters of "deeply rooted local concern" occurred after the *Bill Johnson's* decision. In June 1983, the Court in *Belknap, Inc. v. Hale*[17] pronounced valid a Kentucky state-court action for misrepresentation and breach of contract, brought by fired replacement workers hired during a strike. The contractor had promised permanent jobs to

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9. Id. at 243, 79 S. Ct. at 779.

10. See International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 78 S. Ct. 923 (1958), in which purely internal union matters were at issue.

11. 359 U.S. at 244, 79 S. Ct. at 779.

12. United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 74 S. Ct. 833 (1954).

13. See Linn v. United Plant Guard Workers, Local No. 114, 383 U.S. 53, 86 S. Ct. 657 (1966).

14. See Farmer v. United Bhd. of Carpenters, Local No. 25, 430 U.S. 290, 97 S. Ct. 1056 (1977), in which the plaintiff-carpenter was involved in a dispute with his union over failure to refer him for jobs. He subsequently accused union officials of verbal abuse and other outrageous conduct.

15. 436 U.S. 180, 98 S. Ct. 1745 (1978).

16. Id. at 185, 187, 197-98, 98 S. Ct. at 1751, 1752, 1757-58.

17. 103 S. Ct. 3172 (1983).

the workers, but in negotiating a strike settlement with union workers, the union had induced the employer to fire the replacement workers as part of the settlement.[18]

The first major case on whether the Board may issue a cease and desist order to stop an allegedly retaliatory[19] state-court lawsuit filed by an employer came before the Board in 1959. In *W.T. Carter & Brothers*,[20] employers owned a "company town." It was therefore nearly impossible to hold a sizable meeting of employees on property that would not be company property. Resisting attempts by union organizers to obtain representation of its employees, employers obtained a state court injunction to prohibit union meetings on their property and had local law enforcement officials arrest the union organizers for trespass. The Board found the company's actions to be improperly motivated by its desire to prevent organizational meetings rather than by its interests in protecting its property. Finding this to be an unfair labor practice in violation of section 8(a)(1), the Board held that the employer's right of access to state courts was limited by the law of malicious prosecution and wrongful institution of state court proceedings.[21] The dissenters in *Carter*[22] felt that an employer's right to seek relief in a judicial forum should be recognized even if its motivation was to interfere with the protected rights of employees.

Ten years later, in *Clyde Taylor Co.*,[23] a former employee and now successor employer in a sheet metal shop discharged union employees and threatened to sue them for libel unless they dropped their unfair labor practice charges. He also obtained a state court injunction banning

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18. Id. at 3184.

19. See infra notes 77-81. In the context of a labor dispute and unfair labor practice charge, retaliatorily motivated activity is that which is intended by the actor to restrain the other party from exercising his § 7 rights and to penalize him if he does so. When, however, the actor has in fact been injured by the other party and files suit to recover damages for libel or other tortious conduct, *Bill Johnson's* recognizes the importance of access to the courts despite the improper motivation. 103 S. Ct. at 2169. This distinction is aptly made in two cases involving well-founded suits filed by citizens against federal officials which were motivated by a desire to impede investigation or cause injury to the official. In Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1343 (7th Cir. 1977) and in United States v. Hylton, 710 F.2d 1106, 1112 (5th Cir. 1983), the courts noted with approval the irrelevancy of the pleased feeling the plaintiff may have to his right of petition under the First Amendment. They recognized that the possibility that a citizen who feels himself to have been abused by a particular federal official may take satisfaction when the official gets his perceived due is too human and common an emotion for First Amendment protection to depend upon its absence. 547 F.2d at 1343; 710 F.2d at 1112.

20. 90 NLRB 2020 (1950).

21. Id. at 2023-25 (1950).

22. Id. at 2029 (1950) (Herzog, Chairman, dissenting).

23. 127 NLRB 103 (1960).

peaceful picketing by the employees. Although the Board upheld the trial examiner's finding of a section 8(a)(1) unfair labor practice for the threats to sue for libel, it reversed the section 8(a)(1) unfair-labor-practice finding for the employer's obtaining state court injunctive relief. To that extent, it overruled *Carter* and adopted *Carter's* dissent.[24]

During the 18 years between *Taylor* and *Power Systems*,[25] not all decisions followed the *Taylor* doctrine. In *S. E. Nichols Marcy Corp.*,[26] the Board found a supervisor's threats to file suit, but not its actual filing, to be a section 8(a)(1) violation.[27] The Board found the actual filing of a state court suit to be an unfair labor practice in *International Organization of Masters, Mates & Pilots*.[28] Raising the bad faith issue, the Board held in *International Union of Operating Engineers, Local Union No. 12*[29] that, absent bad faith, even a suit filed claiming rights pursuant to an illegal contract would not support a finding that the mere filing of a state court suit violated the Act. In *United Aircraft Corp.*,[30] the Board determined that neither a threat to file suit nor the actual filing was an unfair labor practice. The filing of a state court suit to enforce an illegal contract was held by the Board to be a section 8(a)(1)(A) unfair labor practice in *Television Wisconsin, Inc.*[31]

The Board handed down its *Power Systems*[32] decision in 1978, the same year that the ALJ took the *Bill Johnson's* consolidated unfair

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24. Id. at 107-09.

25. 239 NLRB 445 (1978), enforcement denied, 601 F.2d 936 (7th Cir. 1979).

26. 229 NLRB 75 (1977). A company supervisor had threatened to file a slander suit against an employee belonging to the meat cutters union. The employee claimed the supervisor had threatened that she would lose her job if the employer found out she had joined the union.

27. Id. at 75-77.

28. 224 NLRB 1626, 1626-27 (1976), enforced, 575 F.2d 896 (D.C. Cir. 1978). A union had picketed a ship with the object of coercing ship owners into replacing its present union crew with members of the picketing union. After the picketing efforts were unsucessful, the union filed suit in state court.

29. 220 NLRB 530 (1975).

30. 192 NLRB 382, 382-84 (1971), modified, 534 F.2d 422 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976). After a prolonged and costly strike, a state court awarded damages exceeding $1,000,000. The Board found the state court suit was not coercive but was calculated to be a good faith attempt to negotiate an overall settlement of claims. The Second Circuit modified other parts of the Board's opinion but upheld its determination that neither a threat to file suit nor the actual filing constituted an unfair labor practice.

31. 224 NLRB 722, 778-80 (1976). A union filed suit for damages and fines, in a coercive effort to get former union members to rejoin. The Board found that the union-security provision was illegal in that it exceeded what § 8(a)(3) permitted. The union's motive was found to be to enforce an unlawful clause and to restrain workers from exercising their rights to cross a picket line and have the union decertified.

32. 239 NLRB 445 (1978). A millwright union steward was discharged, allegedly for failing to perform assigned work and engaging in various unprotected activities which

labor practice charges under advisement. In *Power Systems* the Board found that an employer had not wrongfully discharged a millwright union steward, and thus, the discharge was not an unfair labor practice. However, since it found the employee's complaints to have a reasonable basis, the employer's attempts to go to state court were designed to penalize the employee and to discriminate against him. This was an unfair labor practice in violation of sections 8(a)(1) and (4).[33] The Seventh Circuit denied enforcement of the Board's order, finding that the record did not support the ALJ's finding that the employer lacked a reasonable basis for its civil action. It noted, however, that in a proper case the Board could act to penalize the filing of civil suits for coercive purposes.[34]

The Board has consistently followed *Power Systems* since that time. It does not regard lack of merit in the employer's suit as an independent element of the unfair labor practice. In its view, a retaliatory motive is the only necessary element of such a violation.[35] One such case decided under *Power Systems* (which later became the first labor case to which an appellate court applied the new *Bill Johnson's* standards) was *Sheet Metal Workers' Union Local 355*.[36] Judging from the diversity of opinions over the years and the short length of time that *Power Systems* had been followed (and the fact that the appellate court had found no unfair labor practice), the precedent upon which the Board relied in *Bill Johnson's* appears very weak.

The Prior Anti-Trust History

California Motor Transport Co. v. Trucking Unlimited,[37] the anti-trust case upon which *Bill Johnson's* was based, was decided in 1972; it carved out the so-called "sham exception" to the *Noerr-Pennington* doctrine[38] (which began with *Noerr* in 1960).

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disrupted and delayed completion of the job. The steward alleged in complaints to OSHA and the Board that he was fired for calling in the Atomic Energy Commission, for making safety complaints, and for union activity. Discovering the steward's penchant for filing unfair labor practice charges (40 of 46 had been dismissed or withdrawn in an 11-year period), the employer filed suit in Illinois state court to recover legal fees incurred in defense of the employee's two complaints. The employer claimed that these charges were wrongful, malicious, without probable cause, and for the purpose of harrassing the employer.

33. See infra note 60.

34. 601 F.2d 936 (7th Cir. 1979).

35. *Bill Johnson's*, 103 S. Ct. at 2168.

36. 254 NLRB 773, 778-80 (1980), rev'd in part, 716 F.2d 1249 (9th Cir. 1983). See infra text accompaning notes 119-29.

37. 404 U.S. 508, 92 S. Ct. 609 (1972).

38. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585 (1965); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct.

In *Noerr*, a group of trucking companies sued a group of railroads for damages and to enjoin them from an alleged conspiracy to monopolize the long-distance freight business in violation of the antitrust laws. The Court held that a complaint alleging mere attempts to influence either the legislative branch for passage of laws (lobbying) or the executive branch for their enforcement (by conducting a publicity campaign) stated no cause of action. The Court so held even though the companies' sole purpose was to eliminate competition and their tactics could be termed "unethical." This decision was premised first upon the Court's refusal to impute to the Sherman Act[39] an intent to regulate political activity. The Court's rationale was that the basis of representative democracy is the ability of the people to make their wishes known to the government.[40] It was further premised upon the Court's refusal to impute lightly to Congress an intent to invade the right of petition, one of the freedoms protected by the Bill of Rights.[41] In a footnote, however, the Court stated that it was unnecessary to decide whether this conclusion was based on the First Amendment rather than on the Sherman Act itself.[42] Further, in *dictum* the Court stated:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.[43]

In *Pennington*, the Court extended *Noerr* to attempts to influence government officials performing purely commercial functions such as the setting of the minimum wage in mining operations (executive action). It held that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[44]

Finally, in *Trucking Unlimited*, plaintiff motor carriers sued defendant motor carriers for treble damages and injunctive relief. Plaintiffs alleged that defendants had conspired to monopolize trade by repeated

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609 (1972); Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the *Noerr-Pennington* Doctrine, 45 U. Chi. L. Rev. 80, 101 (1977); Balmer, Sham Litigation and the Antitrust Laws, 29 Buffalo L. Rev. 39, 60 (1980).

39. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1983).
40. 365 U.S. at 137, 81 S. Ct. at 529.
41. Id. at 138, 81 S. Ct. 530.
42. Id. at 132 n.6, 81 S. Ct. at 526-27 n.6.
43. Id. at 144, 81 S. Ct. at 533.
44. 381 U.S. at 670, 85 S. Ct. at 1593.

institution of state and federal administrative and judicial proceedings in opposition to applications by plaintiffs to acquire motor carrier operating rights in California, "with or without probable cause, and regardless of the merits of the cases."[45] The Court extended the *Noerr* doctrine to concerted attempts to influence the courts and adjudicative administrative bodies. Finding, however, that the allegations in plaintiffs' complaint, if true, did state a cause of action, the Court reversed the District Court's dismissal for no cause of action. It adopted its "sham exception" dictum of *Noerr*, stating that the conspirators in *Trucking Unlimited* had sought not "to influence" public officials but "to bar" their competitors from meaningful access to judicial tribunals (an abuse of process).

For the first time the Court in *Trucking Unlimited* firmly hinged the *Noerr-Pennington* doctrine on the First Amendment. It found that, though the petitioners have a right of access to agencies and courts to be heard on applications sought by competitors, as part of their First Amendment rights, that does not necessarily give them immunity from the antitrust laws. Further, the Court concluded that the tribunal may find an abuse of process from a series of claims, though a single baseless claim may be inconclusive.[46]

In 1982 the Ninth Circuit held in *Clipper Exxpress v. Rocky Mountain Motor Tariff*[47] that a single suit or protest may be sufficient to invoke the sham exception.

The Constitutional Background

The First Amendment

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[48] It does not, however, provide that a particular forum will be available to air those grievances.

The Supremacy Clause

The "Supremacy Clause" provides that the United States Constitution and federal laws are deemed the "supreme Law of the Land," binding the judges in every state. As previously discussed, the extent of

45. 404 U.S. at 512, 92 S. Ct. at 612.
46. Id. at 513, 92 S. Ct. at 613.
47. 674 F.2d 1252, 1265-67 (9th Cir. 1980), cert. denied, 459 U.S. 1227 (1983).
48. U.S. Const. amend I.

preemption of labor law was not clearly expressed in the Act and has been left largely to interpretation by the courts.[49] Where tortious conduct occurs during a labor dispute, going beyond activity protected by the Act, local judicial protection has been allowed—including injunctive relief and recovery of damages in a proper case. It is against this background that the exceptions to federal preemption are considered, "since the 'Board can award no damages, impose no penalty, or give any other relief' to the [state-court] plaintiff."[50]

The Commerce Clause

The protection of interstate commerce is the common thread between labor and antitrust legislation. The Commerce Clause provides: "The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ."[51]

The National Labor Relations Acts

In passing the Wagner Act in 1935 (the first of three national labor relations acts), Congress acted on the belief that economic disruptions caused by labor-management disputes have an undesirable impact on interstate commerce. A uniform scheme of regulation was required to replace the varied, and commonly anti-collective-bargaining, policies embodied in state law at that time. Interestingly, the Wagner Act was a codification of the early view that the First Amendment protection of freedom of speech was the rationale behind prohibited (state) government intrusion into peaceful picketing. The Wagner Act was aimed at fostering collective bargaining. Its doctrine was that federal law, through the Supremacy Clause,[52] worked a pervasive preemption of potentially conflicting state regualtion.[53] By placing formulation of national labor policy in the hands of a federal administrative body entitled to deference in its decisions, Congress removed jurisdiction from the federal courts, including the Supreme Court, as well as from the state courts, subject to limited federal judicial review.[54] Such review is a limited inquiry by

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49. U.S. Const. art VI, cl. 2. See supra text accompanying notes 7-18.

50. *Bill Johnson's*, 103 S. Ct. at 2170 (quoting *Linn*, 383 U.S. at 63, 86 S. Ct. at 663).

51. U.S. Const. art. I, § 8, cl. 3.

52. See supra text accompanying notes 49-50.

53. R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining ch. 32, § 1, at 766 (1976).

54. *Bill Johnson's*, 103 S. Ct. at 2174 (Brennan, J., concurring); Motor Coach Employees v. Lockridge, 403 U.S. 274, 289, 91 S. Ct. 1909, 1919 (1971); *Garmon*, 359 U.S. at 242-43, 79 S. Ct. at 778; Garner v. Teamsters Local No. 776, 346 U.S. 485, 490-91, 74 S. Ct. 161, 165-66 (1953).

the Supreme Court, or other federal courts, into the "reasonableness" of the Board's construction of the Act[55] which need not be "the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[56]

The Antitrust Acts

Another purpose of section 1 of the Sherman Act is the fostering of interstate commerce. Section 1 declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ."[57] Section 6 of the Clayton Act specifically recognizes that labor union activity is not an illegal combination in restraint of trade and that the labor of a human being is not a commodity or an article of commerce.[58] Under the *Noerr-Pennington* doctrine, the filing of a well-founded state court suit is not an activity in restraint of trade, whereas under the *Trucking Unlimited* exception, sham litigation filed for harassment purposes does violate the antitrust acts.[59]

The Issues Before the Bill Johnson's Court

The Court had two basic issues to resolve: first, whether and under what circumstances the ALJ or the Board could issue a cease and desist order or petition a federal District Court for an injunction against the proceedings in a state court civil suit; and second, whether and under what circumstances the ALJ or the Board could find the filing and prosecution of a state court suit, with a retaliatory motive, to be an unfair labor practice.

The Injunction Issue

The Court had to balance the required preemptive application of section 7 (protected activities) and sections 8(a)(1) and (4) (prohibited

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55. *Bill Johnson's*, 103 S. Ct. at 2170; Id. at 2174 (Brennan, J., concurring); FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39, 102 S. Ct. 38, 46 (1981); Train v. National Resources Defense Council, 421 U.S. 60, 75, 95 S. Ct. 1470, 1480 (1975).

56. *Bill Johnson's*, 103 S. Ct. 2161, 2174 (Brennan, J., concurring) (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 39, 102 S. Ct. at 46); NLRB v. Transportation Management Corp., 103 S. Ct. 2469, 2474-75 (1983).

57. Sherman Antitrust Act, 15 U.S.C. § 1 (1983).

58. Clayton Act, 15 U.S.C. §§ 15, 17, 26 (1983); National Labor Relations Act, 29 U.S.C. § 52 (1983).

59. See supra text accompanying notes 37-47.

activities)[60] of the NLRA[61] with (1) the jurisprudentially created exceptions to Board preemption, occasioned by tortious conduct during labor disputes, (2) state interests in providing a forum for its citizens in such instances, (3) an employer's First Amendment right to petition a court for redress of grievances, and (4) the employer's interest in having a state court jury determine factual issues in a civil suit.[62] Emphasizing that its role was that of limited judicial review, the Court applied the historically established standards to determine whether the Board's interpretation of the NLRA was a "reasonable" one.[63] The Board's *Power Systems*[64] position was that it was entitled to stop a state court proceeding upon the finding of a retaliatory motive alone. Further, the Board felt that its own determination that the state court suit was frivolous was a sufficient one from which it could infer that the suit was improperly motivated.[65] In *Bill Johnson's*, however, there was an independent basis from which a retaliatory motive could be found: the alleged threats of one of the managers to the family of a striking waitress that they would "get hurt" and "lose their home" for picketing the employer.[66]

The Court found that although the Board's statutory construction of the text of the NLRA would otherwise have been a permissible one,[67] this was negated, in a reasonably based suit, by the strong state interests in providing a forum and by the employer's First Amendment right to petition the courts.[68] The Court held that the "filing and prosecution

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60. Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1982). Section 8 governs employer-employee relations. Sections 8(a)(1) and (4), which are broad, remedial provisions guaranteeing that employees' enjoyment of their rights under § 7 may not be interfered with by their employer, read as follows:

> (a) It shall be an unfair labor practice for an employer
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> (1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 157 of this title [§ 7 of the Act] . . . ;
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> . . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter [§ 8 of the Act]
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> . . . .

29 U.S.C. §§ 158(a)(1), (4) (1983).

61. 29 U.S.C. §§ 157-158 (1982).

62. See supra text accompanying notes 6-18, 37-56.

63. 103 S. Ct. at 2170, id. at 2174 (Brennan, J., concurring).

64. Power Systems, 239 NLRB at 449-50. See also *Bill Johnson's*, 103 S. Ct. at 2166.

65. *Bill Johnson's*, 249 NLRB at 165; see also 103 S. Ct. at 2166.

66. 249 NLRB at 165; see also 103 S. Ct. at 2166.

67. 103 S. Ct. at 2170.

68. 103 S. Ct. at 2170. See supra text accompanying notes 6-18, 37-58.

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 the Act."[69]

This holding is a well-reasoned and satisfactory one. The conclusions reached by the Court after applying the historical factors of labor policy, antitrust policy and constitutional considerations to the reasonably based suit, to the baseless or frivolous suit, and to the standard of review at the injunctive level, were best expressed by Justice Brennan in his concurring opinion:

> The most reasonable inference to draw from the structure of state-federal relations in this area is that the Board may enjoin prosecution of a state lawsuit if, in addition to whatever other findings are required to decide that an unfair labor practice has been committed, it determines that controlling federal law bars the plaintiff's right to relief, that clear state law makes the case frivolous, or that no reasonable jury could make the findings of fact in favor of the plaintiff that are necessary under applicable law.[70]

The Reasonably Based Suit

Under the facts of *Bill Johnson's*, a finding that the state court libel and business interference claims were reasonably based would clearly bring such claims within the exceptions to Board preemption previously recognized as strong state interests in providing a forum for conduct " 'deeply rooted in local feeling and responsibility.' "[71] Further, libel is a named exception.[72]

In light of widespread preemption by the NLRA of state court jurisdiction and the First Amendment's failure to specify that a plaintiff is entitled to a particular forum for hearing, the Court's words regarding constitutional implications appear to have been carefully chosen. These words may warrant the conclusion that it was not the Court's desire to hinge the right of the employer to bring a reasonably based state court suit solely upon the First Amendment right to petition. The Court noted that in *Trucking Unlimited*, it spoke of "construing" the antitrust laws as allowing anticompetively motivated, but reasonably based, suits

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69. 103 S. Ct. at 2170.
70. 103 S. Ct. at 2176 (Brennan, J., concurring).
71. 103 S. Ct. at 2169 (quoting *Garmon*, 359 U.S. at 244, 79 S. Ct. at 779).
72. *Linn*, 383 U.S. at 65, 86 S. Ct. at 664.

to be filed as an "aspect" of First Amendment rights.[73] Further, the Court in *Bill Johnson's* spoke of "sensitivity" to First Amendment values in "construing" the Act.[74] The apparent intent of the Court was to interpret the NLRA in such a way as to avoid a direct confrontation with the First Amendment. In light of this apparent intent to avoid conflict, it is interesting to note that in two subsequently decided non-labor cases (*United States v. Hylton*[75] and *Doe v. A Corporation*[76]) the Fifth Circuit cited *Bill Johnson's* as standing for the proposition that the First Amendment right to petition protects a plaintiff's right to file a reasonably based action in a judicial forum.

The Baseless Suit

The Court further held that, conversely, "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA."[77] Again applying the historical considerations to the facts in *Bill Johnson's*, it is reasonable to conclude that if the state court suit is found to be frivolous or without a reasonable basis, state interests in protecting domestic peace and in providing a forum for a nonjusticiable controversy are negligible, if existant at all.[78] Further, where litigation is based on knowingly false claims, it does not involve a *bona fide* grievance and is in fact "sham" litigation. Thus, under *Trucking Unlimited*,[79] it falls within the sham exception to the First Amendment

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73. *Trucking Unlimited*, 404 U.S. at 511, 92 S. Ct. at 612; *Bill Johnson's*, 103 S. Ct. at 2169.

74. *Bill Johnson's*, 103 S. Ct. at 2169.

75. 710 F.2d 1106, at 1111 (5th Cir. 1983). Plaintiffs who had a long-running dispute with the Internal Revenue Service were found not to be in criminal violation of federal impediment charges for filing a "factually accurate, non-fraudulent criminal" trespass charge with local officials.

76. 709 F.2d 1043 (5th Cir. 1983). Names of the parties involved were sealed, where former corporate counsel in the employee benefits department sued on behalf of himself and as a class action on behalf of all other employees to recover alleged overcharges by the company on contributory insurance premiums. Judge Rubin, writing for the Fifth Circuit Court of Appeals, found that under *Bill Johnson's*, "[t]he right of access to the courts may, in some circumstances, be protected by the first amendment right to petition the government for redress of grievances." Id. at 1048 n.15. He held that the attorney could not maintain the class action but that under due process and the first amendment, he was not ethically barred from suing for his personal claims by reason of the attorney-client relationship between him and his former employer. Id at 1044.

77. 103 S. Ct. at 2171.

78. Id. at 2170. See also supra text accompanying notes 6-18.

79. 404 U.S. at 512, 92 S. Ct. at 612.

right to petition. By analogy to the rational of *Herbert v. Lando*[80] and *Gertz v. Robert Welch, Inc.*,[81] where knowing and recklessly-made false statements were held not protected by the First Amendment right to freedom of speech, knowingly false claims and frivolous litigation do not constitute a legally protected injury to the plaintiff and are not protected by the First Amendment right to petition the courts for redress of grievances.

The Standard of Review at the Injunction State

The Court emphasized the necessity for deference to the Board in formulating national labor policy. It further emphasized that its own role was that of limited judicial review. At the same time, the Court took great pains to set out detailed suggestions as to acceptable steps which the Board could take.[82] In reversing the Ninth Circuit and the Board in *Bill Johnson's*, the Court noted that it was doing so because the ALJ had gone beyond his authority in conducting a trial on the merits in the state civil suit and in making credibility judgments which the plaintiff-employer was entitled to have determined by a state court. What the ALJ should have done on the libel claim, it reasoned, was avoid making a credibility judgment as to whether genuine issues of material fact were raised by the evidence presented.[83]

Further, in similar cases, the Court suggested that the Board, though formulating its own policy, be mindful of suggested guidelines. It reasoned that the ALJ or the Board should determine first whether there is a genuine issue of material fact to be deferred to a state tribunal for trial. The Board may seek guidance from a summary judgment ("genuine issue") or directed verdict ("reasonable jury") civil practice standard. It may reject outright, plainly unsupportable inferences from the un-

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80. 441 U.S. 153, 99 S. Ct. 1635 (1979). A retired Vietnam war veteran, who accused superiors of covering up war crimes, was depicted as a liar in sensational media coverage. Since he was now a "public figure," he was allowed to inquire into media editorial processes to determine evidence critical to proof of his defamation suit, since "[s]preading false information in and of itself carries no First Amendment credentials." Id. at 171, 99 S. Ct. at 1646.

81. 418 U.S. 323, 94 S. Ct. 2997 (1974). A reputable attorney was hired to represent the family of a murder victim in its civil suit against the Chicago policeman convicted of his murder. In his libel suit against a magazine publisher who depicted him as having a criminal record, being a communist-fronter, and trying to discredit local police, the Court found that "there is no constitutional value in false statements of fact." Id. at 339-49, 94 S. Ct. at 3007-11.

82. *Bill Johnson's*, 103 S. Ct. at 2173.

83. Id.

disputed facts and patently erroneous (knowingly false) submissions with respect to material questions of fact and law.[84] However, the ALJ or the Board may not conduct a trial on the merits and resolve issues of credibility of witnesses and draw inferences from undisputed facts, nor may it decide issues turning on state law or mixed questions of fact and state law. However, it may either rely upon documentary evidence alone or hold a hearing.[85]

Where no facts are found to support a reasonable basis for the suit, the ALJ or the Board may issue a cease and desist order or seek to enjoin a pending state court suit or take the lack of facts tending to show a reasonable basis into account in determining whether there was a retaliatory motive behind the filing of the suit. Further, it may find an unfair labor practice if the retaliatory motive is found, and impose sanctions, including charging the employer with payment of the employee's attorneys fees.

Where, however, the civil plaintiff can sufficiently prove the existence of genuine material issues of fact or law, the Board must suspend its consideration of the unfair labor practice charge until the state proceedings have been finally adjudicated.[86]

The Standard of Review After Final Adjudication of the State Court Suit

The Unfair Labor Practice Issue

The *Bill Johnson's* Court established a clear two-pronged standard for the unfair labor practice action: (1) the filing and prosecution of an unmeritorious action, and (2) the state-court plaintiff's (i.e., the employer) desire to retaliate against the state court defendant for exercising rights protected under the NLRA. The employer must fail both prongs to lose on the unfair labor practice charge. It is for this reason that the adjudication of the charge must be suspended until the state court suit is finally disposed of or the ALJ or the Board permissibly finds that the state claims are so deficient that they cannot pass a summary judgment or similar standard.

The Meritorious Suit

Where the state court suit has been allowed to proceed and the plaintiff wins his damages award, he necessarily passes one prong of

84. Id. at 2171 n.11. Justice Brennan suggested that by analogy to Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979), a "state lawsuit may be regarded as having no reasonable basis if no reasonable factfinder could give a verdict for the plaintiff." Id. at 2176 (Brennan, J., concurring).

85. 103 S. Ct. at 2171 n.11.

86. Id. at 2171-72.

the unfair labor practice test. Therefore, despite an independently proven retaliatory motive, the state court plaintiff must prevail on the unfair labor practice charge.[87] In light of historical considerations, this is a satisfactory and fair result. Further, where a money judgment has been awarded, there is room to infer that the motivation for the suit was more closely related to the "too human" feeling of satisfaction felt by the injured plaintiff when the injuring party gets his just due in court, than it was related to coercion.[88]

The Unmeritorious Suit

The Court again emphasized the deference owed to the Board in determining labor policy in this area. Some of the examples of permissible conclusions which the Board may derive in construing the NLRA appear more ambiguous and less satisfactory in this area than those allowed in the injunction area. At least four such areas can be identified: (1) the definition of unmeritorious, (2) the burden of proof required, (3) the "bootstrapping" of the retaliatory motive, and (4) the "one claim" theory. It is important to keep in mind that the relative economic power and bargaining power of an employer, a union, a union employee, or a non-union employee seeking union representation, and their abilities to harass, coerce, or damage the opposing party in a labor dispute, shift from case to case. In *Bill Johnson's* an employer discharged a non-union, hourly paid employee and then sought a money judgment in state court for libel, under circumstances from which it is reasonable to infer that the employer occupied the stronger position.[89] In *Power Systems*, a union steward caused employers to defend and pay legal fees for some 46 claims before the Board, of which some 40 were dismissed or withdrawn, under circumstances from which it is reasonable to infer that the union steward's ability to harass and damage employers gave him the stronger position.[90] In *Garner v. Teamsters Local 776* a union caused a 95% drop in an employer's business by picketing and using tactics calculated to coerce the employer to violate statutes forbidding the employer to attempt to influence employees to join the union.[91] In that case the union appeared to occupy the stronger position. Further, in *Sheet Metal Workers* a union instructed an employer to discharge a union employee for alleged non-payment of dues and then sued the ex-union employee in state court for libel.[92] Once again the union appeared to occupy the stronger position. The *Bill Johnson's* Court noted that

87. Id. at 2172.
88. See supra note 19.
89. 103 S. Ct. at 2169.
90. 239 NLRB at 458.
91. 346 U.S. 485, 487, 74 S. Ct. 161, 164 (1953).
92. 716 F.2d 1249 (9th Cir. 1983).

the need for Board interference to justify a remedy is at its greatest where an employer sues hourly-paid employees not backed by a union.[93] However, the Board's formulation of a basic policy which always presupposes an employer's superior economic and bargaining strength and improper motivation ignores the realities of the situation. It is suggested that the Board exercise a narrower range of discretion than that found permissible by the Court in these areas, as the Board had already done in construing other sections of the NLRA.

The Definition of Unmeritorious

In *Bill Johnson's*, the Court provided that if judgment goes against the employer in state court *or* if his suit is withdrawn *or* is otherwise shown to be without merit, the Board would be warranted in taking that into account in determining an unfair labor practice and imposing sanctions. If the Board finds that the suit is filed in retaliation for the employee's exercise of his section 7 protected rights, it may order reinstatement, payment of defendant-employees' attorney fees and other expenses, and may grant other proper relief under section 10(c).[94] In his concurring opinion, Justice Brennan noted: "Reasonable people can differ over the wisdom of deciding that a nonfrivolous suit which is withdrawn, or in which plaintiff does not ultimately prevail, constitutes an unfair labor practice, . . . but that is a question of labor policy for the Board to decide in the first instance."[95] The Board probably draws guidance from title VII employment discrimination cases awarding attorneys fees to defendants. In those cases the Court has defined "unmeritorious" in a different manner. These cases appear analogous to *Bill Johnson's* in some respects; for the sanctions imposed on an employer found to have committed an unfair labor practice under section 10(c) include reinstatement of a discharged employee, back pay, and posting of a notice of the adverse findings of the Board. Additionally, a very costly penalty is the imposition on the employer of payment of the employee's attorneys fees. Labor disputes often give rise to two or more unfair labor practice charges, however. In *Bill Johnson's*, for instance, the Board had already imposed reinstatement, back pay, and notice-posting penalties on the employer for wrongful discharge of the employee. Only the state-court attorneys fees remained at stake. This may frequently be the case where the filing of a state-court suit takes place after other disputed activity has resulted in the filing of prior

93. 103 S. Ct. at 2169.
94. Id. at 2172.
95. Id. at 2175 n.3 (Brennan, J., concurring).

unfair labor practice charges. In employment discrimination cases interpreting section 706(k) of title VII of the Civil Rights Act of 1964,[96] the definition given to the unmeritorious suit is more analogous to the *Bill Johnson's* Court's definition of "sham" litigation at the injunctive level. In *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*,[97] the Court held that although a prevailing plaintiff in a title VII discrimination charge[98] is ordinarily to be awarded attorney fees, a prevailing defendant is to be awarded such fees only when the court, in its discretion, has found that the plaintiff's action was "frivolous, unreasonable, or without foundation." In approving, with minor qualifications, earlier Court of Appeals definitions of meritless suits in employment discrimination actions,[99] the *Christiansburg* Court indicated that the term "meritless" meant "groundless" or "without foundation"—it was not to be understood as meaning simply that the plaintiff had ultimately lost his case. In title VII cases, the District Courts have discretion to award attorney's fees to a prevailing defendant upon a finding that the plaintiff's case, even though not brought in subjective bad faith, was unreasonable, frivolous, or without foundation. The *Christiansburg* Court further stated that since a plaintiff can seldom be sure of ultimate success, to hold otherwise would discourage all but the most airtight claims.[100] Further, because the course of litigation is rarely predictable, a plaintiff may still ultimately lose no matter how fervently he believes in his cause and the merit of his claim. The major distinction here is that one prong of the employment discrimination test is milder than that adopted in *Bill Johnson's*, and the other is more rigid. Here, bad faith is irrelevant (compare this with the retaliatory motive).

The meritless suit alone is sufficient to invoke the sanctions (compare the original Board position under its *Power Systems* rationale). The incongruity of results in the title VII suits and unfair labor practice suits can be seen, as follows:

A title VII plaintiff suing in: (1) good faith but losing a suit not found to be frivolous or groundless owes no attorney's fees to defendant, (2) bad faith but losing a suit not found to be frivolous or groundless owes no attorney's fees to defendant, (3) good or bad faith but losing a suit also found to be frivolous or groundless owes attorney's fees to defendant.

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96. 42 U.S.C. § 2000e-5(k) (1983).

97. 434 U.S. 412, 98 S. Ct. 694 (1978).

98. 42 U.S.C. § 2000e-5(k) (1983).

99. See United States Steel Corp. v. United States, 519 F.2d 359, 363, 365 (3rd Cir. 1975); Carrion v. Yeshiva Univ., 535 F.2d 722, 727 (2d Cir. 1976).

100. 434 U.S. at 421-22, 98 S. Ct. at 700-01.

Contrariwise, a section 7 plaintiff suing in state court in: (1) bad faith but losing, at the injunctive level, a suit found to be frivolous or groundless owes attorney's fees to defendant, but the Board has in effect mitigated his damages by cutting off the suit at an early stage so that defendant's attorney fees will be minimized; (2) good faith but losing, in a close vote a suit not found to be frivolous or groundless (and thus allowed to go forward rather than be enjoined) owes attorney fees to defendant, because the Board may "bootstrap" and infer a retaliatory motive, where none may have existed, from the fact that the plaintiff lost the case. This is discussed in this article in the section on "bootstrapping."[101] The test provided in employment discrimination cases produces a more equitable result.

The Burden of Proof Required in Determining an Improper Motive

Another area from which the Board may seek guidance is found within labor legislation itself. The Court and the Board have applied a two-pronged test in the "dual motive discharge" cases under sections 8(a)(1) and (3) and 10(c) of the NLRA.[102] In *NLRB vs. Transportation Management Corp.*,[103] the Court upheld the Board's *Wright Line*[104] rationale which had previously received a mixed reception in the Circuit Courts. In these "dual motive discharge" cases, the Board alleged that an employee was fired for union activity (illegal cause); however, the employer attempted to show that the employee would have been fired anyway for serious infractions of company rules (legal cause). Section 10(c) of the NLRA imposes upon the General Counsel of the Board the burden of persuasion "upon a preponderance of the testimony taken,"[105] to prove the unfair labor practice. Under its *Wright Line* doctrine, the Board had reallocated the burden of proof. The Board's General Counsel must carry the burden of persuasion that the anti-union feeling contributed to an employer's decision to fire an employee. Although this burden does not shift, the employer was effectively extended an affirmative defense. This defense allowed the employer (even the employer who could not counter the General Counsel's showing of union animus) to avoid being found in violation of the NLRA (no unfair labor practice). The employer had to carry the burden of persuasion that the employee had engaged in other activities violating com-

101. See infra text accompanying notes 112-14.

102. See supra note 1.

103. 103 S. Ct. 2469 (1983).

104. Wright Line and Bernard R. LaMoreaux, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

105. 29 U.S.C. § 160(c) (1983).

pany rules for which he would have been fired anyway, even if he had not engaged in union organizing activity.[106] Although in *Transportation Management* the employer failed to carry this burden,[107] the affirmative defense is available in a proper case. The *Transportation Management* Court found that although sections 8(a)(1) and (3) and 10(c) of the Act did not mandate such an allocation of the burden of persuasion, the Board's construction was a permissible one.[108] It seems significant that the Board itself recognized (and the Court agreed) that where an employer has another sufficiently strong legal motive for a discharge, it neutralizes a concurrent illegal anti-union motive, which means no unfair labor practice.

Two observations on *Transportation Management* are appropriate. This sections 8(a)(1) and (3) "dual motive discharge" case was argued the same week as *Bill Johnson*'s and decided two weeks after *Bill Johnson's* was decided. Having both issues before it at the same time, the Court chose to go outside the labor area to compare "dual motive suit filing" in both the labor and antitrust areas rather than to stay within the labor area and compare the "dual motive suit filing" with the "dual motive discharge." First, the Court adopted different two-pronged tests in the sham-litigation cases and in the dual-motive-discharge cases. In the discharge cases, the Board itself had long recognized that perfectly valid legal and illegal motives could be present for the same activity, and that the legal motive could predominate over the illegal one. In the state-court-suit-filing cases, it is the Board itself that held firm to its position that the illegal activity (retaliatory motive) alone should prevail over the legal activity (filing of a well-founded state court suit). The sections 8(a)(1) and (3) preponderance-of-the-testimony test would seem to lend itself to the sections 8(a)(1) and (4) problems identified in *Bill Johnson's*. Generally, any standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."[109] A preponderance-of-the-evidence standard allows both parties to "share the risk of

106. *Transportation Management*, 103 S. Ct. 2469 (1983).

107. See supra note 1. Under facts similar to the original complaint filed by waitress Helton in *Bill Johnson's*, and similar to those in *Wright Line*, a senior favored employee who had never before been reprimanded was fired shortly after the employee began union organizing activities, on charges of minor company rule infractions. Such alleged infractions caused no harm to the employer and gave no real benefit to the employee, and occured under circumstances which investigation showed to appear to have been dreamed up after the firing. Further, no disciplinary action was taken against other employees for similar infractions, and no warnings were given to the fired employee before the firing, which was contrary to usual company practices.

108. 103 S. Ct. at 2474-75.

109. Addington v. Texas, 441 U.S. 418, 423, 99 S. Ct. 1804, 1808 (1979).

error in roughly equal fashion."[110] Any other standard, such as "proof by clear and convincing evidence," expresses a preference for the side's interests that are at stake, such as termination of parental rights, involuntary commitment prodeedings, or deportation proceedings.[111] Thus, in a typical civil suit for money damages or in administrative proceedings which may expose a party to criminal prosecution, "preponderance" is the standard chosen.[112] Thus, the *effect* of the different standards could be the same, and there is no reason why the Board could not, in its discretion, apply the burden of persuasion standard to the sections 8(a)(1) and (4) cases. This would minimize the exposure of an employer, who sued in state court in good faith, to the "bootstrapping" risk discussed below.

"Bootstrapping" the Retaliatory Motive

The preceding two sections of this Article have been concerned with how frivolous or unmeritorious a suit must be before an unfair labor practice may be found. Although the Court clearly precluded the Board from finding an unfair labor practice upon the finding of a retaliatory motive alone,[113] it appears to have opened the door to bootstrapping the necessary retaliatory motive from a finding that a suit was "unmeritorious." The Court propounded that where the employer's suit was found unmeritorious (had an adverse judgment or was withdrawn or was otherwise shown to be without merit), "the Board would be warranted in taking *that fact* into account in determining whether the suit had been filed in retaliation for the exercise of the employees' section 7 rights."[114] In *Bill Johnson's*, both the ALJ and the Board found an allegedly independent basis for the retaliatory motive, the alleged threats to a striking waitress's family by a company manager that they would "get hurt" and "lose their home" for participating in the picketing and handbilling.[115] Where a suit is shown to be so patently frivolous or groundless that it cannot survive a summary judgment or similar standard, it seems reasonable to infer the existence of a retaliatory motive from the facts, whether or not an independent motive could be estab-

110. Id.

111. Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982); Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804 (1979); Woodby v. INS, 385 U.S. 276, 285-86, 87 S. Ct. 483, 487-88 (1966).

112. Herman & MacLean v. Huddleston, 103 S. Ct. 683 (1983); Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804 (1979); SEC v. Joiner Leasing Corp., 320 U.S. 344, 355, 64 S. Ct. 120, 125 (1943).

113. *Bill Johnson's*, 103 S. Ct. at 2168.

114. Id. at 2172 (emphasis added).

115. Id. at 2165.

lished. However, suppose an employer who has suffered monetary losses from a labor dispute brings a reasonably-based, well-prepared case in good faith in state court. If the employer loses such a suit on a close vote or on procedural grounds, reasonable minds might differ as to whether he had a retaliatory motive. However, under the Court's holding, the Board is allowed to infer a retaliatory motive (bootstrapping) from this result and to conclude that the suit was unmeritorious. Furthermore, the Board may use the inferred retaliatory motive to meet both prongs of the unfair labor practice test.

The "One Claim" Theory

In *Trucking Unlimited*, the antitrust case upon which part of the *Bill Johnson's* rationale is based, the Court held that a fact-finder may find an abuse of administrative or judicial processes from a pattern of baseless claims.[116] Further, the Ninth Circuit in *Clipper Exxpress* found that a single suit or protest was sufficient to invoke the sham exception.[117] In a footnote, the *Bill Johnson's* Court appears to have extended to the labor area the rationale of *Clipper Exxpress*: that a single baseless *claim* may give rise to a finding of sham litigation. The language of the Court provided:

> It appears that only the libel count remains pending before the state court. If petitioner's other claims have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that petitioner acted unlawfully by prosecuting these unmeritorious claims if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose.[118]

Did the Court, in the context of *Bill Johnson's*, really have something else in mind and not intend this result? While it may seem appropriate to find that a single suit composed of five or six frivolous claims (in the antitrust context of *Clipper Exxpress*) is the equivalent of a single frivolous claim, it is more difficult to understand a ruling which would allow a state court civil suit, composed of six claims (five of which are won and result in an award of money damages) to be termed "unmeritorious" because the sixth claim either does not survive a summary judgment motion or is lost when finally adjudicated. Further, the ruling would allow a bootstrapping of a retaliatory motive from the one lost claim and a finding of an unfair labor practice, even though the plaintiff

116. 404 U.S. at 513, 92 S. Ct. at 613.
117. 674 F.2d at 1265-67.
118. 103 S. Ct. at 2174 n.15.

has a meritorious suit on five of the six claims originally pursued. It may be that this "one claim" in the *Bill Johnson's* context refers to a grouping of related claims, where the libel count survived summary judgment—the business interference counts, composed of mass picketing, blocking the sidewalk, harrassing customers, etc. did not. It may be that this grouping of a number of claims found baseless by the state court contributed to the statement by the Supreme Court that the Board would be warranted in reinstating its previous finding of an unfair labor practice. Each grouping of claims (libel with business interference, as compared to libel and antitrust, for instance) might be composed of several related claims. It may be that the overall group is found unmeritorious, rather than one single count within the suit.

Application of the Standards

The Board has not yet issued its decision on the remanded *Bill Johnson's* case,[119] nor has any other sections 8(a)(1) and (4) case come before the Board.

The Ninth Circuit has applied the *Bill Johnson's* standards, however, in *Sheet Metal Workers' International Association, Local No. 355 v. NLRB*,[120] an employee-union labor dispute. Sections 8(a)(3), 8(b)(1)(A), and 8(b)(2) were allegedly violated.[121] The ALJ and the Board had decided the case under the *Power Systems*[122] rationale, and the task for the Ninth Circuit was to apply the *Bill Johnson's* concepts after the fact.

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119. Lawrence Katz, counsel for employer, revealed that on remand by the Ninth Circuit the Board asked both parties to submit position papers but, as of March 4, 1984 had taken no further action pending its decision on whether the matter should be further remanded to the ALJ. Telephone interview with Lawrence Katz, of Phoenix, Ariz. (March 4, 1985). In the meantime, a settlement of the state court libel suit and countersuit has been negotiated (withdrawal of claims by both sides). The waitresses remain unrepresented by any union, and issues of reinstatement and back pay were settled by the parties after remand of the § 8(a)(3) claim to the Ninth Circuit. The parties agreed in the settlement of the state court libel suit that attorney fees for the winning side in the Supreme Court decision would be paid by the losing side. In light of the Court's new position however, and its remand to the Board for further action, the matter of attorney fees remains unsettled.

120. 716 F.2d 1249 (9th Cir. 1983).

121. See supra note 1; 29 U.S.C. § 158(a)(3) (1982). See also 29 U.S.C. §§ 158(b)(1)(A), (b)(2), which provide in part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title. . .
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section.

122. 239 NLRB 445 (1978), enforcement denied, 601 F.2d 936 (7th Cir. 1979).

In *Sheet Metal Workers'*, a union left instructions with an employer to discharge an employee if his dues were not paid by Friday. The employee mailed his dues on Thursday, alleging the union had given him an oral extension of time. The employer discharged him on Friday, and the money order arrived on Monday. The employee brought unfair labor practice charges before the Board against the union for wrongfully causing his discharge. The union emphatically denied the oral extension of time and filed suit in state court for $30,000 in unspecified damages (sounding in libel and slander)[123] for the employee's wrongfully claiming the union had breached its duty to the employee. The Board affirmed the ALJ's acceptance of the employee's testimony as to the oral extension, its findings as to an unfair labor practice for the wrongful discharge, and its order for back pay and reinstatement. The decision recognized that the Board may, on its own, address an issue of retaliatory suit-filing (to punish an employee for filing charges before the Board) under the doctrine of *NLRB v. Fant Milling Co.*[124] Further, the Board issued a cease and desist order to stop the state court suit, and ordered payment of the employee's attorney fees. The union appealed to the Ninth Circuit and the Board moved for enforcement.

The Ninth Circuit found that the critical issue was whether or not an oral extension of time to pay dues had been granted. It found that the union's affidavits were insufficient to show there was no genuine issue of material fact and held that the union had violated its fiduciary duty to the employee to give him clear notice of the steps he must take concerning his dues-related obligations in order to keep his job. Finding the union's activities to be an unfair labor practice, the court ordered the union to pay back-pay until the employee was reinstated. The Court of Appeals also found that substantial evidence supported the Board's finding that the state suit was brought in subjective bad faith, but that since it did present genuine issues of material fact, under *Bill Johnson's*, it could not be enjoined.[125] The court noted, however, that the disputed facts underlying the state court suit were already before the board and were within the Board's unfair labor practice jurisdiction.[126]

The disposition of *Sheet Metal Workers'* raises new questions as to the reach of *Bill Johnson's*. In *Bill Johnson's*, the facts giving rise to the initial unfair labor practice charge (firing an employee for engaging in union activity) were entirely separate from the facts giving rise to the second charge (filing a state court suit for damages occasioned by tortious picket line conduct—or to retaliate against the employee for

123. 716 F.2d at 1266-67 (Poole, J., concurring in part and dissenting in part).
124. 360 U.S. 301, 306-09, 79 S. Ct. 1179, 1182-84 (1959).
125. 716 F.2d at 1254-64.
126. Id. at 1263.

filing a Board charge). The discharge claim had already been decided adversely to the employer and was not before the Supreme Court. The Court held, however, that "the Board must await the results of the state-court adjudication with respect to the merits of the state suit."[127] In *Sheet Metal Workers'*, however, the crucial facts and issue underlying both the initial Board charge and the state-court suit were identical—whether an oral extension of time had been granted for the employee to pay his dues. This raises the issue whether, in such cases, the entire Board proceedings must be halted until the state court had made the credibility determination and decided the issues of fact. The majority in *Sheet Metal Workers'* says no. If they are correct, then *Bill Johnson's* affords the risk of inconsistent judgments in the two forums involved—the state court may accept the testimony of the union that no oral extension was granted, award a money judgment to the union, and foreclose the Board from finding an unfair labor practice on the state-court-suit filing. On the other hand, the Board may, as it did here, accept the employee's testimony that an oral extension of time was granted, that he was unlawfully discharged, and find an unfair labor practice on that count and order back pay and other proper remedies. The majority read *Bill Johnson's* to allow the Board to proceed to decision on all charges before it, except the question of whether the state court suit may be enjoined.

Judge Poole, concurring in part and dissenting in part, in a strongly worded opinion, urged the majority to re-read *Bill Johnson's*. His rationale was that where the underlying issues of fact on the consolidated unfair labor practice chargaes are the same, "the Board cannot continue *its* own proceeding if it necessarily involves determining that same issue of which the state-court [*sic*] has acquired proper jurisdiction,"[128] since the state court is entitled to that kind of deference. If the dissent is correct, the Board would be stripped of jurisdiction of the entire proceeding, where the underlying factual issues are the same, though this primary jurisdiction has previously been accorded to it jurisprudentially under the *Sears-Garmon* line of cases.[129] The result, however, would be a state-court determination of factual questions which it appears the Board would be bound to follow when it reacquired jurisdiction after the state-court suit had been finally adjudicated.[130]

Summary and Conclusion

In the course of a labor dispute, an employer or other party may be damaged by tortious conduct of an employee or other opposing party,

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127. 103 S. Ct. at 2173.
128. 716 F.2d at 1265 (Poole, J., concurring in part and dissenting in part).
129. 716 F.2d at 1263. See supra text accompanying notes 6-18.
130. 716 F.2d at 1267 (Poole, J., concurring in part and dissenting in part).

which is beyond the scope of activities protected or prohibited by the NLRA. Where jurisdiction over such conduct is jurisprudentially excepted from preemption by the Board and touches upon interests in which a state has a strong desire to provide a forum for its citizens, the employer may file a state-court civil damage suit as an aspect of his First Amendment right to petition the courts for redress of grievances. Unless the suit is clearly frivolous or baseless, the Board may not issue a cease and desist order or petition a federal court to enjoin its prosecution even if there is evidence that the suit was brought to coerce or punish the other party for using Board processes. The Board's jurisdiction is suspended until the merits of the state suit have been resolved. Further, if the employer wins, the Board may not find the filing of the suit to be an unfair labor practice, regardless of whether an independently proved improper motivation for the suit filing is found.

This limitation on the ability of the Board to halt prosecution of the state civil suit, however, "is not the measure of its ability to determine that such prosecution constitutes an unfair labor practice," or to impose sanctions authorized by subsection 10(c) of the Act,[131] nor does it bear upon the ability of the state court defendant to successfully raise defenses to his conduct.[132] The Board may find the state civil suit to be retaliatorily motivated when "substantial evidence" exists that the suit was so motivated, which may be determined by independent conduct of the employer or may be inferred from the fact that the suit is either so frivolous or baseless that the Board is entitled to enjoin it in the first instance, or from the fact that the suit is ultimately lost or withdrawn. Further, the Board may find an unfair labor practice and impose sanctions where both the retaliatory motive is present and the suit is found to be unmeritorious, whether in the sense of being patently frivolous or groundless, or in the sense of being ultimately lost or withdrawn.

The Board is entitled to deference in formulating national labor policy, within these broad guidelines, subject to limited federal court judicial review as to whether its conclusions are "reasonable" constructions of the NLRA. Keeping in mind the shifting balance of relative economic and bargaining power among an employer, union, and an employee with or without union affiliation, it is hoped that the Board will formulate policy drawn from prior labor and outside precedents which will more narrowly apply the *Bill Johnson's* standards and will allow a retaliatory motive to be inferred from a state-court-suit filing only in the most extreme cases.

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131. 103 S. Ct. at 2175 (Brennan, J., concurring).

132. Accord, United States v. Hylton, 710 F.2d 1106, 1111 n.7 (5th Cir. 1983).