SUPREME COURT OF THE UNITED STATES

No. 01–518

BE&K CONSTRUCTION COMPANY, PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 24, 2002]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, concurring in part and concurring in the judgment.

As I understand the Court's opinion, it focuses on employer lawsuits that are (1) reasonably based, (2) unsuccessful, and (3) filed with a "retaliatory motive," *i.e.*, a motive to interfere with protected union conduct. See *ante*, at 15. The Court holds that the National Labor Relations National Labor Relations Act (NLRA or Act) does not permit the National Labor Relations Board to declare unlawful under §8(a) of the Act, 29 U. S. C. §158(a), an employer's filing suit *in the circumstances present here*, which is to say, in the kind of case in which the Board rests its finding of "retaliatory motive" almost exclusively upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union. *Ante*, at 4–6. The Court expressly leaves open *other circumstances* in which the evidence of "retaliation" or antiunion motive might be stronger or different, showing, for example, an employer, indifferent to outcome, who intends the reasonably based but unsuccessful lawsuit simply to impose litigation costs on the union. *Ante*, at 19; see also *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.,* 508 U. S. 49, 73–76 (1993) (STEVENS, J., joined by O'CONNOR, J.,

concurring in judgment) (discussing colorable suits that would not be filed but for an illegal purpose). And it does not address at all lawsuits the employer brings as part of a broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under §7(a) of the NLRA, 29 U. S. C. §157.

I concur in the Court's opinion insofar as it holds no more than I have just set forth. While I recognize the broad leeway the Act gives the Board to make findings and to determine appropriate relief, §10(c), 29 U. S. C. §160; see *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 612, n. 32 (1969); *Shepard* v. *NLRB,* 459 U. S. 344, 349 (1983), I concur because the descriptions given by the Board and the Court of Appeals of the Board's reasons for finding unlawful employer activity here, insofar as they are probative, seem to me to rest on little more than the fact that the employer filed a reasonably based but ultimately unsuccessful lawsuit. See 329 N. L. R. B. No. 68 (1999), App. to Pet. for Cert. 59a–61a (finding retaliatory motive because the suit was "directed at protected conduct," "necessarily tended to discourage similar protected activity," was admittedly brought to stop conduct BE&K Construction Company thought was unprotected, involved unions other than those parties to certain suits against the company, and was unmeritorious); 246 F. 3d 619, 629–630 (CA6 2001). *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U. S. 731, 747 (1983), suggested that "the Board would be warranted in taking . . . into account" for unfair labor practice purposes the fact that an employer had lost its suit, but it did not suggest, as it seems the Board thought here, that losing a lawsuit against a union, in and of itself, virtually alone, shows retaliation. See *id.*, at 743 (suggesting that retaliatory suits might be those that "would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act").

Insofar as language in the Court's opinion might suggest a more far-reaching rule, see *ante*, at 6–15, I do not agree. For one thing, I believe that *Bill Johnson's* decided many of the questions the Court declares unanswered. See *ante*, at 10, 19. It held that while the Board may not *halt* the prosecution of a lawsuit unless the suit lacks an objectively reasonable basis, it nonetheless "may . . . proceed to adjudicate the §8(a)(1) and §8(a)(4) unfair labor practice case" when an employer brings a merely "unmeritorious" retaliatory suit and loses. 461 U. S., at 747. It added that the "employer's suit having proved unmeritorious, 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' §7 rights." *Ibid*. (emphasis added). The courts, the Board, the bar, employers, and unions alike have treated the Court's discussion of completed lawsuits in *Bill Johnson's* as a holding and have followed it for 20 years. See, *e.g.*, *Petrochem Insulation, Inc.* v. *NLRB*, 240 F. 3d 26, 32 (CADC), cert. denied, 534 U. S. 992 (2001); *Diamond Walnut Growers, Inc.* v. *NLRB*, 53 F. 3d 1085, 1088 (CA9 1995); *NLRB* v. *International Union of Operating Engineers, Local 520, AFL–CIO,* 15 F. 3d 677, 679 (CA7 1994); *Braun Elec. Co.*, 324 N. L. R. B. 1, 2 (1997); *Summitville Tiles,* 300 N. L. R. B. 64, 65, and n. 6 (1990); *Machinists Lodge 91 (United Technologies)*, 298 N. L. R. B. 325, 326 (1990), enf'd, 934 F. 2d 1288 (CA2 1991). I can find no good reason to characterize the statements in *Bill Johnson's* as dicta—though I recognize that the Court's language so characterizing *Bill Johnson's* is itself dicta.

For another thing, I do not believe that this Court's antitrust precedent determines the outcome here. See *Professional Real Estate, supra; Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961). That precedent finds all but sham lawsuits exempt from the reach of the *antitrust laws. Professional*

Real Estate, *supra*, at 60–61; *Noerr*, *supra*, at 144. It does not hold employers enjoy a similar exemption from the reach of the *labor laws*. And it should not do so, for antitrust law and labor law differ significantly in respect to their consequences, administration, scope, history, and purposes.

Certain differences, while minor, are worth noting given the Court's concern to avoid discouraging legitimate lawsuits. To apply antitrust law to a defendant's reasonably based but unsuccessful anticompetitive lawsuit, for example, threatens the defendant with treble damages—a considerable deterrent. See *ante*, at 10. To apply labor law to an employer's reasonably based but unsuccessful retaliatory lawsuit threatens the employer only with a shift in liability for attorney's fees. See *ante,* at 11. Similarly, to apply antitrust law to a defendant's reasonably based but unsuccessful anticompetitive lawsuit threatens the defendant with high court-defense costs against any and all who initiate suit. To apply labor law to an employer's reasonably based but unsuccessful retaliatory lawsuit threatens the employer only with the typically far lower costs of defending the charge before a congressionally authorized and politically accountable administrative agency that acts as a screen for meritless complaints. See *ibid.;* see also 64 NLRB Ann. Rep. 5 (1999) (showing that of 27,450 unfair labor practice cases closed in 1999, only 1.4% were resolved by an order of the Board in a contested case).

Other differences, those related to scope, purpose, and history, are major and determinative. Antitrust law focuses generally upon anticompetitive conduct that can arise in myriad circumstances. Anticompetitively motivated lawsuits occupy but one tiny corner of the anticompetitive-activity universe. To circumscribe the boundaries of that corner does not significantly limit the scope of antitrust law or undermine any basic related purpose.

By way of contrast, the NLRA finds in the need to regulate an employer's antiunion lawsuits much of its historical reason for being. Throughout the 19th century, courts had upheld prosecutions of unions as criminal conspiracies. C. Tomlins, The State and the Unions 36–45 (1985). They had struck down protective labor legislation—for, say, shorter working hours or better working conditions. W. Forbath, Law and the Shaping of the American Labor Movement 38, and n. 7 (1991) (by 1900, courts had struck down roughly 60 labor laws, and by 1920, roughly 300). They had granted injunctions against employees and labor unions that weakened the unions' ability to organize. *Id.,* at 61–62 (conservatively estimating at least 4,300 injunctions issued in labor conflicts between 1880 and 1930). And in the process they had reinterpreted federal statutes that Congress had not intended for use against the organizing activities of labor unions. See, *e.g.*, *In re Debs*, 158 U. S. 564 (1895) (applying Interstate Commerce Act of 1887 to union activities); *Loewe* v. *Lawlor,* 208 U. S. 274 (1908) (applying Sherman Act); see generally F. Frankfurter & N. Greene, The Labor Injunction (1930).

Congress initially passed the Clayton Act, 15 U. S. C. §§12–27, 44 to prevent employers from using the law, particularly antitrust law, in this way. In doing so, Congress hoped to "substitut[e] the opinion of Congress as to the propriety of the purpose [of union activities] for that of differing judges" who were "prejudicial to a position of equality between workingman and employer." *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 485–486 (1921) (Brandeis, J., joined by Holmes and Clarke, JJ., dissenting). When the Clayton Act proved insufficient, Congress passed the Norris-LaGuardia Act, 29 U. S. C. §101, which made the labor injunction unlawful. See *United States* v. *Hutcheson*, 312 U. S. 219, 235–236 (1941) ("The underlying aim of the Norris-LaGuardia Act was to restore the broad

purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction"); see also *Marine Cooks* v. *Panama S. S. Co.,* 362 U. S. 365, 369–370, n. 7 (1960) (enactment of Norris-LaGuardia "was prompted by a desire . . . to withdraw federal courts from a type of controversy for which many believed they were ill-suited"). Similar objectives informed Congress' later enactment of the NLRA, which took from the courts much of the power to regulate "the relations between employers of labor and workingmen" by granting authority to an administrative agency. *Duplex Printing*, *supra*, at 486 (Brandeis, J., dissenting); see *Mine Workers* v. *Pennington,* 381 U. S. 657, 703 (1965) (Goldberg, J., dissenting) (describing how Justice Brandeis' dissent in *Duplex Printing* "carried the day in the courts of history" when Congress passed Norris-LaGuardia and the NLRA).

The upshot is that an employer's antiunion lawsuit occupies a position far closer to the heart of the labor law than does a defendant's anticompetitive lawsuit in respect to antitrust law. And that fact makes all the difference. Indeed, given these differences of history and purpose, I do not see how the Court could treat labor law, which sought to give the Board power to regulate an employer's anti-union conduct, including retaliatory lawsuits, as if it were antitrust law, where no comparable purpose is evident. Perhaps that is why this Court previously made clear that these two areas of law significantly differ. Compare *Professional Real Estate*, 508 U. S., at 55–60, with *Bill Johnson's*, 461 U. S., at 747.

I do not know why the Court reopens these matters in its opinion today. See *ante*, at 10, 19. But I note that it has done so only to leave them open. It does not, in the end, decide them. On that understanding, but only to the extent that I describe at the outset, see *supra*, at 1–2, I join the Court's opinion.