The Burger Court Opinion Writing Database

Bill Johnson's Restaurants, Inc. v. NLRB

461 U.S. 731 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 11, 1983

Re: 81-2257 - Bill Johnson's Restaurants, Inc. v. NLRB

Dear Byron:

I join.

Regards,

WEB

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 4, 1983

Re: No. 81-2257

Bill Johnson's Restaurant, Inc. v. NLRB

Dear Thurgood, Harry and John,

We four are in dissent in the above. I will be glad to try the dissent.

Sincerely,

Bill

Justice Marshall
Justice Blackmun
Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1983

No. 81-2257 Bill Johnson's Restaurants v. NLRB

Dear Thurgood, Harry, and John:

Byron's opinion seems to represent a shift from his conference position. However, I still think that he may be wrong in demanding that the Board use a summary judgment standard rather than a directed verdict standard in making its determination that a particular state-court suit is "baseless" on factual grounds. The prospects are, therefore, that I'll try a dissent, at least to that extent. I'll let you know when I come to rest.

Sincerely,

Bill

WJB, Jr.

WOW

Justice Marshall

Justice Blackmun

Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1983

No. 81-2257 Bill Johnson's Restaurants v. NLRB

Dear Byron:

After conference, I feared that your approach to this case and mine were so fundamentally different that it would require a lengthy dissent to express my views. Your opinion, however, is largely consistent with what I think, and, to the extent that I might have had doubts about some of the propositions you advance, it has convinced me to moderate my views.

For that reason, I would be willing to join your opinion vacating and remanding if one ambiguity in its last sections were resolved. I read in your opinion two somewhat different descriptions of when the Board has authority to enjoin prosecution of a state court suit on the ground that it is factually baseless. In parts IV and VI, you state that the Board may not interfere if the employer shows that its suit presents "issues of material fact." See p. 13 ("triable issues of material fact"); pp. 16-17 ("genuine material factual . . . issues"); cf. n. 11. On the other hand, in part V you say that the Board "should have determined . . . whether a jury could reasonably find [the employees' statements] to be knowingly false . . . [and] whether petitioner's allegations could reasonably be found to be true." P. 16. The difference between these standards is like the difference between the standard for summary judgment and the standard for a directed verdict or a j.n.o.v. Under the former, a case must proceed to trial if the documentary evidence discloses a material dispute of fact. Under the latter, after the evidence is in, the court may (and should) decide whether a reasonable jury could believe the nonmoving party's evidence and draw the requisite inferences from it.

I think the "reasonable jury" standard is more appropriate for this case, and more consistent with the rest of your opinion. An employer's right of access to state court is protected not only by the First Amendment interests discussed in California Motor Transport but also by the separate state interests addressed in Linn.

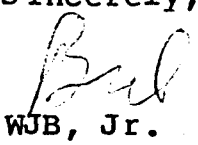
Nevertheless, as you hold, both those interests yield to the federal interest in protecting §7 activities where the claim brought to state court is "baseless." An employer's right to have a jury determine factual issues derives only from the state interest in providing a jury, and, where that interest conflicts with the federal interest in protecting employees, the state interest can extend no further than providing a reasonable jury. To vindicate federal law, the Board has authority to decide whether a reasonable jury could draw the necessary inferences from the employer's evidence if the case goes to trial, and it may hold a limited hearing appropriate to making that determination. All the employer has to do is provide evidence that a reasonable jury could believe, and the Board must stay its proceedings pending the state trial. But the federal interests that the Board is charged with protecting require at least that showing, not the somewhat different showing required to survive a summary judgment motion.

If you could adjust parts IV and VI to reflect a consistent "no reasonable jury" test, I would be willing to go along with a remand so the Board could apply that standard explicitly.

My other differences with your opinion are comparatively minor, and would not prevent my joining you. I have no quarrel with what you say about questions of state law, but I would prefer that you made clear what is already implicit on page 16--that the mixed question of "malice" is a federal overlay. Finally, would you consider changing the first sentence on page 12 to read some thing like the following? "Just as the First Amendment right to freedom of speech does not immunize false statements, . . . the First Amendment right to petition does not immunize baseless litigation."

In closing, let me again express admiration for this virtuoso job. If we disagree at all in this case, it is a matter of inches, not miles.

Sincerely,



WJB, Jr.

Justice White
Justice Marshall
Justice Blackmun
Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 19, 1983

Re: No. 81-2257

Bill Johnson's Restaurtants, Inc. v. NLRB

Dear Byron,

Your changes in your second circulation meet all of my difficulties. I am going to join but add a few more words.

Sincerely,

Bill

Justice White

Copies to the Conference

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: MAY 2 1 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC.,
PETITIONER *v.* NATIONAL
LABOR RELATIONS BOARD

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

[May ——, 1983]

JUSTICE BRENNAN, concurring.

The Court holds today that the National Labor Relations Board may not enjoin the prosecution of a state court lawsuit unless the suit lacks a "reasonable basis," *ante*, at 11–12, and, further, that to find that the suit lacks a reasonable basis on factual grounds the Board must find that there is no "genuine issue of material fact," *id.*, at 13–17. For me, those are no delphic pronouncements. They are standards that take their content from the basic structures of federal and state—and of administrative and judicial—authority over labor disputes, and they should not be read in an artificial way that ignores their provenance.

It is important to remember that our focus in this case is on the function of judicial review. On the one hand, the National Labor Relations Act constitutes the Board, and not this Court, the principal arbiter of federal labor policy.

> "Here, as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life. *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793, 798; *Phelps Dodge Corp.* v. *Labor Board*, [313 U. S. 177,] 194, and of '[appraising] carefully the interests of both sides of any

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

p 3, 6

From: **Justice Brennan**

Circulated: _____

Recirculated: MAY 31 1983

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD

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

[May ——, 1983]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 14, 1982

Re: 81-2257 - Bill Johnson's Restaurants v. NLRB

Dear Chief,

As my records have it, there were two votes to grant this case and two votes to join three. I was one of the latter. Having looked at the case again, I shall vote to grant certiorari.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

cpm

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAY 9 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

[May ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

We must decide whether the Board may issue a cease-and-desist order to halt the prosecution of a state court civil suit brought by an employer to retaliate against employees for exercising federally-protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law.

I

The present controversy arises out of a labor dispute at "Bill Johnson's Big Apple East," one of four restaurants owned and operated by the petitioner in Phoenix, Arizona. It began on August 8, 1978, when petitioner fired Myrland Helton, one of the most senior waitresses at the restaurant. Believing that her termination was the result of her efforts to organize a union, she filed unfair labor practice charges against the restaurant with the Board.

On September 20, after an investigation, the Board's General Counsel issued a complaint. On the same day, Helton, joined by three co-waitresses and a few others, picketed the restaurant. The picketers carried signs asking customers to boycott the restaurant because its management was unfair to the waitresses. Petitioner's manager confronted the picketers and threatened to "get even" with them "if it's the last

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 10, 1983

Re: 81-2257 -

Bill Johnson's Restaurants v. NLRB

Dear Bill,

I appreciate your comments and will take another close look at the circulating draft.

Sincerely yours,

Byron

Justice Brennan

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 13, 1983

Re: 81-2257 - Bill Johnson's Restaurant, Inc. v. NLRB

Dear Bill,

I agree with you that we should adhere to one standard in determining whether the Board may enjoin a state-court suit. You prefer the directed verdict standard, while Bill Rehnquist has advised me that his choice is the summary judgment rule. As you will see from my response to Brother Rehnquist, I would rather have the summary judgment formulation. Substantively, the two standards are almost identical; but as you indicate, they are applied at different stages in the proceeding. My view is that if at an early stage it can be determined that there is a genuine issue of material fact or law to be resolved, the Board need not go further and hear all the evidence and then decide if there is an issue for a judge or jury. Unless you anticipate that the Board would perform some fact-finding function after the evidence is in that it could not do at an earlier stage--which I do not think it should do--I see no purpose in suggesting to the Board that the ALJ hear all the evidence, or any more than necessary, before refusing the cease-and-desist order.

You will see that I have other differences with Bill Rehnquist. I would prefer not to hold that if it is determined that the employer's suit has a reasonable basis and should not be enjoined, the Board should not only stay its hand, but should dismiss the unfair labor practice proceeding. Rather, as the draft indicates, if the employer loses his case and has filed it for a retaliatory motive, there is still something to be done by the Board.

As I indicated to Bill Rehnquist, I shall recirculate changing page 16 to reflect the summary judgment rule. I shall drop at an appropriate point the following footnote, which I hope will alleviate your concerns about my use of the summary judgment rule:

In civil practice, the "genuine issue" test is used for adjudging motions for summary judgment, see Fed. Rule Civ. Proc. 56. Substantively, it is very close to the "reasonable jury" rule applied on motions for directed verdict, see Brady v. Southern Railroad, 320 U.S. 476, 479-480 (1943) (directed verdict should be granted when the evidence is such "that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict"). In the civil context, most courts treat the two standards identically, although some have found slight differences. See generally 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §§2532, 2713.1 (1983); 5A Moore's Federal Practice ¶¶ 50.03[4], 56.04[2] (1982); Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U. Chi. L. Rev. 72 (1977). The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. Ibid.

In making reasonable-basis determinations, the Board should be guided by the summary judgment and directed verdict jurisprudence, although it is not strictly bound by either. Procedurally, the Board definitely should not require that the entire case be presented to an ALJ. As with summary judgment motions, documentary evidence alone should almost always establish whether an employer's case will present genuine issues of fact or law. Although genuine disputes about historical facts should be reserved for the state court, plainly unsupportable inferences from the undisputed facts and patently erroneous submissions with respect to mixed questions of fact and law may be rejected.

Sincerely,

Justice Brennan

cc: The Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 13, 1983

Re: 81-2257 - Bill Johnson's Restaurant, Inc. v. NLRB

Dear Bill,

I agree with you that the opinion should purport to specify only one standard for determining whether the Board may enjoin a state-court suit, and I shall change page 16 to reflect the summary judgment standard.

I do not, however, believe that there is any inconsistency in holding that the Board may not enjoin a state-court suit unless there is no genuine issue of material fact and holding that if the employer loses his suit, even a close one, his case has proved to be without merit and the Board may then proceed to inquire whether the suit was filed for a retaliatory purpose. The unfair labor practice is thus filing a retaliatory suit that is either wholly without basis or that proves to be unmeritorious after trial in the state court. The unfair practice is complete and may be adjudicated if the Board initially finds that the case is without foundation and also concludes that it was filed in response to the exercise of protected rights. Otherwise, the unfair practice is not made out until the employer loses his case in the state court and then the Board makes the requisite retaliatory finding. In this respect, I should prefer not to change the draft. Of course, as of now, I have only three votes including my own.

Sincerely yours,

Justice Rehnquist

cc: The Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 13, 1983

Re: 81-2257 -
Bill Johnson's Restaurant, Inc. v. NLRB

Dear Lewis,

My response to Bill Rehnquist, which is enclosed, indicates what my approach is to the unfair labor practice charged in this case. You are quite right that I say that if the employer has lost his suit--that it has proved to be unmeritorious--that fact may be taken into account by the Board. But losing a suit is not alone an unfair labor practice. The Board must still find that the suit was filed for a retaliatory purpose, a finding that is not a foregone conclusion from the fact that the employer has lost his case, especially if it appears to have been a close one. I would prefer to leave the draft as it is in this respect. As you know, employers are not beyond filing retaliatory suits that they should not have filed. We should give them their day in court but suggest that losing the suit may cost them attorney's fees.

Sincerely,

Byron

Justice Powell

cc: The Conference

cpm

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

pp. 12-15, 17 and stylistic

Circulated: _____

Recirculated: MAY 19 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

[May ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

We must decide whether the Board may issue a cease-and-desist order to halt the prosecution of a state court civil suit brought by an employer to retaliate against employees for exercising federally-protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law.

I

The present controversy arises out of a labor dispute at "Bill Johnson's Big Apple East," one of four restaurants owned and operated by the petitioner in Phoenix, Arizona. It began on August 8, 1978, when petitioner fired Myrland Helton, one of the most senior waitresses at the restaurant. Believing that her termination was the result of her efforts to organize a union, she filed unfair labor practice charges against the restaurant with the Board.

On September 20, after an investigation, the Board's General Counsel issued a complaint. On the same day, Helton, joined by three co-waitresses and a few others, picketed the restaurant. The picketers carried signs asking customers to boycott the restaurant because its management was unfair to the waitresses. Petitioner's manager confronted the picketers and threatened to "get even" with them "if it's the last

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 23, 1983

Re: No. 81-2257-Bill Johnson's Restaurants, Inc. v. National Labor Relations Board et al.

Dear Byron:

Please join me.

Sincerely,

T.M.

Justice White

cc: The Conference

October 14, 1982

Dear Byron:

Re: No. 81-2257 - Bill Johnson's Restaurants v. NLRB

Thank you for letting me see this proposed dissent. It is returned to you herewith. I shall adhere to my join three status. If Bill Rehnquist and Sandra continue to vote for a grant, the case will be taken. This is an interesting one.

Sincerely,

HAB

Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 12, 1983

Re: No. 81-2257 - Bill Johnson's Restaurants, Inc. v. NLRB

Dear Byron:

Like Bill Brennan and John, I am close to being able to join your opinion. I share their concerns. If you make the changes Bill Brennan suggests, making clear at pages 13 and 17 that the appropriate standard is the "reasonable jury" standard that you set forth at page 16, I think I shall be able to join you.

Sincerely,

Harry

Justice White

cc: Justice Brennan
Justice Marshall
Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 19, 1983

Re: No. 81-2257 - Bill Johnson's Restaurants, Inc. v. NLRB

Dear Byron:

I am glad to join your recirculation of May 19.

Sincerely,

Harry

Justice White

cc: The Conference

May 12, 1983

81-2257 Bill Johnson's Restaurants v. NLRB

Dear Byron:

I am in basic agreement with your opinion, but suggest a clarification that I think is consistent with your views.

I refer to your discussion of the separate issue of what showing need be made to find an unfair labor practice. On p. 17, you state that "it is an unfair labor practice to prosecute an unmeritorious law suit for a retaliatory purpose". You state earlier, however, that if the employer's suit fails on its merits, "the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation . . . " (p. 15).

It occurs to me that these passages taken together can be read as saying that whenever a lawsuit proves unsuccessful, this may justify an unfair labor practice finding. As you and I know from experience, a good many suits that are perfectly well founded - presenting close and difficult questions - may not in the end be successful.

If you will make clear that the mere fact that the employer's suit is unsuccessful does not necessarily mean that it was unmeritorious, I will be happy to join you.

Sincerely,

Justice White

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 16, 1983

81-2257 Bill Johnson Restaurant v. NLRB

Dear Byron:

Although I may end up joining you, or possibly writing a paragraph in concurrence, for the time being I will see what else is written.

I do not think the outcome of an employer's suit should invariably be relevant to whether the suit was filed for a retaliatory or improper purpose. Perhaps I have lost too many law suits that were at least filed for legitimate purposes.

Sincerely,

Lewis

Justice White

Copies to the Conference

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 20, 1983

81-2257 Bill Johnson's Restaurants v. NLRB

Dear Byron:

Please join me.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 20, 1983

Re: No. 81-2257 Bill Johnson's Restaurants v. NLRB

Dear Byron:

Please join me.

Sincerely,

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 10, 1983

Re: 81-2257 - Bill Johnson's Restaurant
v. NLRB

Dear Byron:

On the whole I think your analysis is consistent with the position we took at Conference, but I still have a problem with the disposition.

On page 16 you state that the ALJ should not have determined whether the statements in the leaflets were true, but rather whether a jury could reasonably find them to have been made with knowledge of their falsity. I agree. But on pages 13 and 17 you state that if a plaintiff is able to present the Board with evidence that shows his lawsuit raises triable issues of material fact, the Board should proceed no further. On that point I hesitate. It seems to me that the petr could have presented evidence raising a triable issue of material fact (knowing falsity), but that the General Counsel might well have responded with such an avalanche of material that no jury could reasonably find knowing falsity. Under such circumstances, I believe the Board may issue the injunction.

In this case the ALJ found unambiguously that the statements were true. I am presently grappling with the question of whether it would not follow inexorably that no jury could reasonably find (a) that they were false and (b) that respondents knew they were false. If it would, then I believe it would be appropriate to affirm. If not, then perhaps I could go along with a decision to vacate and remand.

Thus, although I am very close to joining you, subject to further study and perhaps further education by you, I remain doubtful about the bottom line.

Respectfully,

JL

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 24, 1983

Re: 81-2257 - Bill Johnson's Restaurant v. NLRB

Dear Byron:

Please join me.

Respectfully,

JPS

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 10, 1983

No. 81-2257 Bill Johnson's Restaurants, Inc. v. NLRB

Dear Byron,

Please join me.

Sincerely,

Sandra

Justice White

Copies to the Conference