Beverly Health and Rehabilitation Services, Inc., its Operating Regional Offices, wholly-owned subsidiaries and individual facilities and each of them and/or its wholly-owned subsidiary Beverly Enterprises-Pennsylvania, Inc. *and* Pennsylvania Social Services Union Local 668, affiliated with Service Employees International Union, AFL–CIO, CLC *and* District 1199P, Service Employees International Union, AFL–CIO, CLC *and* Service Employees International Union, Local 585, AFL–CIO, CLC. Cases 6–CA–28130–1, 6–CA–28130–2, and 6–CA–28130–3

August 8, 2000

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On May 19, 1997, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel and the Charging Parties filed exceptions and supporting briefs, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

1. Factual background

The complaint in this case alleges that the Respondent violated Section 8(a)(1) of the Act by filing and maintaining a defamation lawsuit against Locals 668 and 585 and District 1199P of the Service Employees International Union, AFL–CIO, CLC (the Unions) and District 1199P President Thomas DeBruin. An amendment to the complaint further alleges that the Respondent failed to stay its lawsuit within 7 days of the complaint's issuance, which the complaint alleges it was required to do, because issuance of the complaint preempted state court jurisdiction.

The defamation lawsuit at issue, which the Respondent filed in the Court of Common Pleas for Crawford County, Pennsylvania, on March 29, 1996,[1] concerned statements made in two handbills and a union-sponsored radio "spot." The two handbills were distributed and the radio spot broadcast in the context of an ongoing labor dispute between the Unions and the Respondent, focused on 20 nursing homes operated by the Respondent in the Commonwealth of Pennsylvania. The Unions distributed the first handbill outside of 20 of the Respondent's Pennsylvania nursing homes on about March 23 and 24 and distributed the second handbill outside of the Respondent's Camp Hill Care Center nursing home on March 28. The union-sponsored radio spot was broadcast on various Pennsylvania and Maryland radio stations during the week beginning March 25.

The first handbill, headed "Must We Strike To Make Beverly Obey the Law" (Appendix A), contained a number of statements that the Respondent alleged as defamatory.[2] It stated that the "federal government is prosecuting Beverly for illegally imposing work rules designed to stop us from speaking out publicly about patient care and other concerns." It also stated that "[i]n the last ten years Beverly has engaged in hundreds of illegal firings, threats, harassment, intimidation, bribes and other coercive acts." Further, the handbill stated that "[i]n 1993 and 1994, Beverly was cited by OSHA for forcing nursing home employees to work in unsafe and hazardous conditions." Additionally, it stated that "[i]n 1996, Beverly was sued by a family member for the wrongful death of a resident. The resident was given a lethal overdose of morphine sulfate." Four lines below this statement, the handbill declared: "Family members, residents and the public deserve to know the truth about the quality of care."

The second handbill, headed "Family Alert" (Appendix C), concerned health and safety problems that it said were identified in an employee survey at the Respondent's Camp Hill Care Center. It included the following statement:

> One of the most dangerous problems we have is that the hot water in the kitchen and laundry is not hot enough to sterilize and sanitize the dishes, linens and clothes. The water is not warm enough to give the residents a hot bath or shower.

The radio spot (Appendix B) included several statements alleged to be defamatory. It stated that "Beverly's attempt to impose a gag order on its workers was recently declared illegal by government officials." It also stated that "last month, 250 more unfair labor practice violations were filed against Beverly." Additionally, it stated that "workers' concerns about improving staffing and patient care and other working conditions have fallen on deaf ears." Finally, it stated that "Beverly refuses to bargain in good faith and instead is forcing its workers to strike."

As set forth by the judge, DeBruin testified concerning the Unions' basis for the statements in the handbills and radio spots. Bradley Shiverick, director of information services of the American Health Care Association, was the sole witness called by the Respondent. He gave testimony to show that, according to data collected by the Health Care Finance Administration, the Respondent's nursing homes receive fewer citations for deficiencies than do those of its competitors.

[1] All dates are in 1996, unless otherwise indicated.

[2] The judge set forth the full text of both handbills and the radio spot as attachments to his decision (Appendixes A, B, and C).

2. The judge's decision

As the judge noted, under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Board may not enjoin as an unfair labor practice the filing and prosecution of a pending lawsuit unless the lawsuit lacks a reasonable basis in law or fact and is filed or maintained to retaliate against the exercise of Section 7 rights. Examining the evidence in this case, the judge concluded that there was a reasonable basis for the Respondent's lawsuit. In section III, C of his decision, he found that "much of the objected to flyers (particularly Appendix C, the flyer distributed at Camp Hill Care Center) and the radio spot allege that substandard patient and resident care is being provided by Respondent." He also noted a decision of the Pennsylvania court in the Respondent's defamation lawsuit finding that the Respondent's defamation action was well pleaded consistent with the requirements of *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966).[3] The judge concluded that there were "genuine material factual and state law disputes to be decided in the state court action."

The judge further observed that, to be actionable under *Linn*, labor speech must be defamatory, false, and published with malice. The judge then stated that "[v]irtually none of the statements in the [first] handbill . . . or the statements in the radio spot . . . appear to be false. The statements in the handbill distributed at Camp Hill Care Center . . . on the other hand could meet the test of defamatory, false, and published with malice." The judge therefore found that there was a "genuine issue of fact and law to be decided in state court" regarding the Camp Hill Care Center handbill. The judge noted that the contents of the first handbill and the radio spot were "relevant to the issue of malice even if . . . not separately actionable for defamation."

As the judge found that the Respondent's lawsuit had a reasonable basis in law and fact, he recommended that the complaint in the present case be held in abeyance pending the outcome of the lawsuit. He declined to pass on the issue of retaliatory motive, finding that it would be better addressed after conclusion of the lawsuit.

3. The parties' exceptions

In their exceptions, the General Counsel and the Unions contend that, contrary to the judge, the Respondent's lawsuit lacks a reasonable basis in law and fact. The General Counsel argues that, at worst, the Unions' allegedly defamatory statements were merely hyperbole and expressions of opinion. The General Counsel and the Unions also except to the judge's failure to find that the Respondent's lawsuit was filed and maintained with a retaliatory motive and his failure to enjoin the lawsuit as preempted by the issuance of the complaint.

In its exceptions, the Respondent contends that the judge erred in concluding that virtually none of the statements in the first handbill and the radio spot appear to be false. Additionally, the Respondent contends that the judge erred in concluding that DeBruin was a credible witness and that Shiverick's testimony did not add much evidence.

4. Analysis

Having carefully considered the parties' arguments, we cannot say that the General Counsel has conclusively proven that the Respondent's state court defamation lawsuit lacks a reasonable basis in law or fact. Accordingly, we must allow the suit to proceed in state court, but we will hold the unfair labor practice proceeding in abeyance pending the state court resolution of the suit. In making this determination, we are mindful of the scope of inquiry that the Supreme Court in *Bill Johnson's* permits the Board in evaluating whether a state-court suit lacks the requisite reasonable basis for it to be maintained. In that case, the Court stated:

> Although the Board's reasonable basis inquiry need not be limited to the bare pleadings, if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined. When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, lead us to construe the Act as not permitting the Board to usurp the traditional factfinding function of the state-court jury or judge. Hence, we conclude that if a state plaintiff is able to present the Board with evidence that shows his lawsuit raises genuine issues of material fact, the Board should proceed no further with the §8(a)(1)–§8(a)(4) unfair labor practice proceedings but should stay those proceedings until the state-court suit has been concluded.
>
> In the present case, the only disputed issues in the state lawsuit appear to be factual in nature. There will be cases, however, in which the state plaintiff's case turns on issues of state law or upon a mixed question of fact and law. Just as the Board must refrain from deciding genuinely disputed material factual issues with respect to a state suit, it likewise must not deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary. While the Board need not stay its hand if the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous, the Board should allow such issues to be decided by the state tribunals if

[3] *Linn* held that, where a party to a labor dispute circulates false and defamatory statements, a state court defamation lawsuit is not preempted by the Act "if the complainant pleads and proves that the statements were made with malice and injured him." 383 U.S. at 55.

there is any realistic chance that the plaintiff's legal theory might be adopted.[4]

Thus, the Court made clear that, with regard to a state court lawsuit, the Board is to refrain from either deciding genuinely disputed material factual issues or depriving a litigant of his first amendment right to have genuine state-law legal questions decided by the state judiciary. Given both the strong first amendment and state interests involved, as described by the court, the Board may not enjoin a state court suit if there is a "genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts." Id. We agree with the judge that the Respondent's state court defamation lawsuit raises a "genuine issue of material fact" as defined in *Bill Johnson's.*

At trial, the General Counsel and the Respondent each put on one witness, DeBruin and Shiverick, respectively. DeBruin testified about the basis for the statements made by the Union in the two handbills and the radio spot. Shiverick testified that, according to data collected by the Health Care Financing Administration, the Respondent's nursing homes receive fewer citations for deficiencies than those of its competitors. No actual credibility conflicts were created by their testimony. We nonetheless find that a genuine issue of material fact exists by virtue, at the least, of the "proper inferences to be drawn from undisputed facts" about the Unions' statements, viewed in their entirety. We cannot summarily reject the inferences which the Respondent seeks to draw as "plainly unsupportable." Id. at 746 fn. 11. To do so here would, in our view, usurp the role that *Bill Johnson's* assigns to the state court, not the Board.[5]

At a minimum, there is a factual issue as to certain assertions in the Camp Hill Care Center handbill. The handbill stated that the Union had conducted an employee survey of health and safety matters at the nursing home and that "one of the most dangerous problems we have is that the hot water in the kitchen and laundry is not hot enough to sterilize and sanitize the dishes, linens and clothes. The water is not warm enough to give the residents a hot bath or shower." The Respondent argues that these assertions may constitute charges of substandard patient care, and it introduced Shiverick's testimony to put this claim in dispute. To substantiate its assertions, the Charging Party introduced at the unfair labor practice trial an exhibit which showed that one unidentified employee had written on a survey questionnaire that the "hot water in Dietary is not hot enough to kill germs and in Laundry it is not hot enough to kill bacteria and resident [sic] have take warm bath water!" In our view, while there may be no actual factual dispute turning on the credibility of witnesses, there is a question of what, if any, inferences may be drawn from the evidence about this handbill. Under *Bill Johnson's*, a state court judge or jury is entitled to evaluate those asserted "inferences with respect to mixed questions of fact and law." Id.[6]

In declining to enjoin the prosecution of this suit, we emphasize, as the Pennsylvania court has already recognized in finding that the complaint was well-pleaded under *Linn v. Plant Guard Workers*, 383 U.S. 53, that for the plaintiff to prevail it cannot just prove defamation under Pennsylvania state law. Rather, it must also prove the Federal overlay of actual malice, as pleaded in the state suit complaint. *Bill Johnson's* makes clear that state libel suits are "of course, not governed entirely by state law, since federal law superimposes a malice requirement." Id. at 746 fn. 13, citing *Linn*. Under *Linn*, if the defamation plaintiff cannot prove both actual malice and injury allegations, then its case will lack merit.[7]

[4] 461 U.S. at 744–747 (footnotes omitted).

[5] Having so concluded, we do not adopt the judge's finding that "[v]irtually none of the statements in the [first] handbill . . . or the statements in the radio spot . . . appear to be false." Rather than leaving to the state tribunal the determination of the truth or falsity of the statements in the handbill or radio spot, the judge decided this issue himself. Such a determination appears to exceed the permissible scope of inquiry allowed the Board under *Bill Johnson's.* Likewise, we find it unnecessary to pass at this point on the judge's crediting of DeBruin's testimony. Should this case be reopened following completion of the state court proceedings, the Respondent may raise the arguments it makes in its exceptions regarding DeBruin's credibility to the judge, who should consider them at that time.

[6] There are also such questions about some of the assertions in the first handbill and radio spot, as the judge discussed. As the Unions acknowledge, DeBruin's own testimony reveals that the publications contained what they call several "technical errors," "technical misstatements," "technical misuse" of terms, "typographical errors," or "imprecision in language." For example, in the radio spot, the Unions stated that "Beverly's attempt to impose a gag order on its workers was recently *declared illegal* by government officials." DeBruin testified that this statement was based on the General Counsel's issuance of a complaint *alleging as unlawful* the Respondent's promulgation of a rule subjecting employees to discipline for "[m]aking false or misleading work-related statements concerning the Company, the facility or fellow associates." As another example, in the first handbill, the Unions stated that in 1993 and 1994, the Respondent "was cited by OSHA for forcing nursing home employees to work in unsafe and hazardous conditions." In his testimony, DeBruin admitted that the OSHA citations actually occurred in 1991 and 1992, but that the error was typographical, and that the OSHA citation had been dismissed by an Occupational Safety and Health Review Commission administrative law judge, although it was pending review by the Commission.

Whether or not these errors rise to the level of the reckless disregard for truth or falsity that is required to prove actual malice necessary for actionable defamation in a labor dispute (see discussion, infra), we believe that *Bill Johnson's* does not permit the Board to make that mixed determination of fact and law. We recognize the difference between the issuance of a complaint and an adjudication of illegality, but we leave it to the state court to decide what, if any, inferences may be drawn from this "imprecision of language." Likewise, we leave it to the state tribunal to decide whether the Respondent can establish that the Unions falsely or recklessly termed the disciplinary rule a "gag order." The judge apparently credited DeBruin's explanation that the discrepancy in the OSHA citation dates was a typographical error, but as *Bill Johnson's* makes clear, the Board should not weigh the credibility of witnesses. In short, we must refrain from usurping the role of the state court in making these determinations.

[7] The Respondent has alleged various theories of defamation. It contends that, not only are statements in the Unions' handbills and radio

We further emphasize that the necessary malice requirement is a heavy burden in defamation cases arising out of labor disputes. The Eleventh Circuit Court of Appeals has recently explained that burden in a decision which the Supreme Court declined to review. *Dunn v. Air Line Pilots Assn.*, 193 F.3d 1185, 1192 (11th Cir. 1999), cert. denied 120 S.Ct. 2197 (2000). To show actual malice, a plaintiff must establish that the speaker made the challenged statements with knowledge of their falsity, or with reckless disregard of whether they were true or false. Id. at 1192. See also *Linn*, 383 U.S. at 61, 65. Malice must be shown by "clear and convincing proof." *Dunn v. Air Line Pilots Assn*., 193 F.3d at 1192, citing *New York Times v. Sullivan*, 376 U.S. 254, 280, 285–286 (1964). "In addition, '[b]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact.'" *Dunn*, 193 F.3d at 1192, citing *Letter Carriers Branch 496 v. Austin*, 418 U.S. 264, 284 (1974). "Thus, a defamation claim escapes labor-law preemption only if (1) there is a false statement of fact; and (2) the plaintiff proves actual malice by clear and convincing evidence." *Dunn*, 193 F.3d at 1192.

The Respondent has alleged actual malice in its suit. The Unions correctly state that the Respondent did not introduce evidence of actual malice at the unfair labor practice hearing. Nonetheless, we cannot agree, as the Unions argue, that "the General Counsel proved that [the Respondent] cannot carry the *Linn* burden of proving actual malice in the publication of th[ese] statement[s]." We leave to state court adjudication whether the Respondent can establish that the Unions "acted with a 'high degree of awareness of probable falsity of' factual statements or in fact 'entertained serious doubts as to the truth of [its] publication.'" Id. at 1197–1198. Whether the Respondent can meet this burden will determine whether its defamation suit is actionable under *Linn*.

Given the genuine issues of material fact and law, and the circumscribed role defined for us by the Supreme Court, we are unable to conclude at this stage that the Respondent's lawsuit is wholly ill-founded or without any reasonable basis in fact or law. Accordingly, we adopt the judge's recommendation that this unfair labor practice case be held in abeyance pending the outcome of the state court lawsuit.[8]

As mentioned above, the General Counsel amended the complaint in this case to allege that the Respondent's lawsuit was preempted by issuance of the complaint and that the Respondent failed to fulfill its obligation to stay the lawsuit within 7 days after the complaint's issuance. While it is not clear whether the General Counsel intended this amendment to allege a separate, additional 8(a)(1) violation, the General Counsel and the Unions excepted to the judge's failure to enjoin the Respondent's lawsuit as preempted by the issuance of the complaint. The General Counsel and the Unions premise their exceptions principally on the basis of the Board's decision in *Loehmann's Plaza*, 305 NLRB 663 (1991), which found that a state court lawsuit seeking to enjoin peaceful union picketing or handbilling on private property becomes preempted when the General Counsel issues a complaint alleging that the lawsuit violates the Act.

Defamation lawsuits, however, such as the one at issue here, are not governed by the preemption analysis that *Loehmann's Plaza* set forth. Rather, the Supreme Court set forth specific rules governing the preemption of defamation lawsuits in *Linn v. Plant Guard Workers*, supra. As noted above, the Court there held that, where a party to a labor dispute circulates false and defamatory statements, a state court defamation lawsuit is not preempted by the Act "if the complainant pleads and proves that the statements were made with malice and injured him."[9] Moreover, *Linn* rejected the argument that permitting state action in such cases would impinge on national labor policy. Rather, the Court expressly countenanced the possibility of simultaneous court and Board proceedings in such cases.[10] Consequently, we shall dismiss the amended complaint to the extent that it alleges that the Respondent violated the Act by failing to stay its state court lawsuit after the General Counsel issued his complaint in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the complaint allegations in Cases 6–CA–28130–1, 6–CA–28130–2, and 6–CA–28130–3 that the Respondent violated Section 8(a)(1) of the Act by filing and maintaining a defamation lawsuit in the Court of Common Pleas for Crawford County, Pennsylvania, against the Unions and District 1199P President Thomas DeBruin are remanded to the administrative law judge. The judge is directed to hold those allegations in abeyance until he receives notification that the state court has resolved the matter pending before it. At that point, the judge can determine, based on the state court's ac-

spot false, but that, even if true, they imply other facts that are false. Specifically, the Respondent contends that the handbills and radio spot, by implication, if not by express statement, convey the message that the Respondent provides substandard patient and resident care. Further, the Respondent contends that, under Pennsylvania law, false implications of true statements may be found defamatory. The Respondent cites Pennsylvania case law supporting its proposition. We do not pass on the merits of any of these contentions, but rather leave them for state court adjudication.

[8] As we find that this case should be held in abeyance pending the state court lawsuit, we decline to adopt the judge's Conclusion of Law 3, which states that the Respondent did not violate the Act when it filed and subsequently maintained the lawsuit. Given our finding that this case should be held in abeyance, resolution of the ultimate issue that it presents, i.e., whether the Respondent's filing and maintaining the lawsuit violated the Act, is not appropriate at this juncture.

[9] 383 U.S. at 55.

[10] Id. at 66.

tion, whether the state court suit lacked merit and, if so, whether it was filed for a retaliatory motive.

IT IS FURTHER ORDERED that the amended complaint is dismissed to the extent that it alleges that the Respondent violated the Act by failing to stay its state court lawsuit after the General Counsel issued his complaint in this case.

MEMBER HURTGEN, concurring.

I agree with the majority on all points, including the rejection of the General Counsel's argument concerning preemption. However, I have a separate view concerning the preemption issue.

In *Loehmann's Plaza*, 305 NLRB 663 (1991), the General Counsel alleged that an employer's trespass lawsuit against a union's picketing was preempted and unlawful. Under *Sears v. Carpenters*, 436 U.S. 180 (1978), the court had jurisdiction over the lawsuit so long as there was no NLRB involvement. However, once the Board entered the fray, i.e., upon the General Counsel's issuance of complaint alleging that the picketing was protected, the lawsuit was preempted. Since the employer continued to prosecute the suit after this time, that prosecution was condemned as unlawful.

The General Counsel argues that a similar result should obtain with respect to libel lawsuits. That is, once the Board enters the fray, i.e., when the General Counsel issues complaint alleging that the Union's conduct was protected, the court loses jurisdiction. However, there is nothing in *Sears* or in *Loehmann's* which requires that result. To the contrary, the Court in *Linn* expressly indicated the contrary, i.e., that there could be concurrent Board and court jurisdiction.[1] In addition, I note that the courts have traditionally and competently handled libel suits. And, by employing Linn standards, they can take into account Federal labor policy. For these reasons, I agree that *Loehmann's* should not be extended to cases involving libel lawsuits.

Barton A. Meyers, Esq., for the General Counsel.
Michael T. McMenamin and *Frederick W. Whatley, Esqs.*, of Cleveland, Ohio, for the Respondent.
Claudia Davidson, Esq., of Pittsburgh, Pennsylvania, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On April 30 and October 3, 1996, a charge and amended charge in Case 6–CA–28130–1 was filed by Local 668, SEIU. On April 30 and October 3, 1996, a charge and amended charge in Case 6–CA–28130–2 were filed by District 1199P, SEIU. On April 30 and October 3, 1996, a charge and amended charge in Case 6–CA–28130–3 were filed by Local 585, SEIU. All charges and amended charges were filed against Beverly Enterprises, Respondent herein.

On November 29, 1996, the National Labor Relations Board, by the Regional Director for Region 6, issued a consolidated complaint (the complaint), alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), when on March 29, 1996, it filed and has since maintained a lawsuit for defamation against Local 668, District 1199P, Local 585, and Thomas DeBruin, president of District 1199P and trustee ad litem of all three Unions. The lawsuit was filed in the Court of Common Pleas of Crawford County for the Commonwealth of Pennsylvania. The alleged defamation is that false and defamatory statements published with malice accused Respondent of providing substandard care to the patients and residents in its nursing homes.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Pittsburgh, Pennsylvania, on February 25 and March 10, 1997. Only two witnesses testified, i.e., Thomas DeBruin for the General Counsel and Bradley Shiverick for Respondent. Both DeBruin and Shiverick impressed me as very credible witnesses. DeBruin testified as to why certain statements were contained in the allegedly defamatory flyer and radio spot and Shiverick testified that, according to certain records maintained by the Federal Government, Respondent has been cited less for deficiencies than other nursing homes.

On the entire record in the case, to include posthearing briefs submitted on behalf of the General Counsel, the Respondent, and the Charging Parties, and on my observation of the demeanor of the witnesses I issue the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, more specifically the entities that are the plaintiffs in the lawsuit filed in state court in Pennsylvania, i.e., Beverly Health and Rehabilitation Services, Inc. and Beverly Enterprises Pennsylvania, Inc., is in the business of operating nursing homes. Hereinafter these two entities will be referred to as Respondent.

Respondent admits, and I find, that at all times material it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that at all material times Local 668, District 1199P, and Local 585 have been labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Respondent and the Unions have been involved in labor disputes going back over many years.

Three very long cases involving numerous unfair labor practice allegations against Respondent have been litigated. They were referred to in this litigation as *Beverly I, Beverly II*, and *Beverly III*.[1]

[1] *Linn v. Plant Guard Workers*, 383 U.S. 53, 55 (1966).

[1] *Beverly I*, 310 NLRB 222 (1993), enforcement granted in part and denied in part sub. nom. *Torrington Extend-a-Care Employees Assn. v. NLRB*, 17 F.3d 580 (2d Cir. 1994). I was the administrative law judge who heard this case over 78 days in 1988 and 1989. Administrative law judge decisions have issued in *Beverly II* (JD 119–94) and *Beverly III* (JD (Atl–22–95). *Beverly II* and *III* are awaiting decision by the

Currently, Administrative Law Judge Robert A. Wallace of the Board is conducting hearings in a case generally known by the attorneys involved in this litigation as *Beverly IV*. In connection with *Beverly IV* Judge D. Brooks Smith, U.S. district judge for the Western District of Pennsylvania on April 4, 1997, issued an injunction under Section 10(j) of the Act which, among other things, ordered reinstatement of hundreds of Respondent's employees who had engaged in a 3-day strike in the beginning of April 1996.

In the spring of 1996 the Unions, in connection with their labor dispute with Respondent, which was focusing on 20 nursing homes Respondent operates in the Commonwealth of Pennsylvania, caused two handbills to be distributed and a radio spot to be broadcast over the air. This was done just prior to the 3-day April strike. The Unions had prior to the strike and prior to the publication of the allegedly defamatory handbills and radio spot filed numerous charges against Respondent, which charges along with numerous other charges filed after the 3-day strike resulted in the complaint in *Beverly IV*.

The first of the two handbills was distributed to the general public by the Unions outside the 20 Pennsylvania nursing home facilities on or about March 23 and 24, 1996. A copy of that handbill is attached to this decision as Appendix A.

During the week beginning March 25, 1996, the Unions disseminated by paid radio broadcast through various radio stations in Pennsylvania and Maryland a statement concerning Respondent. A copy of that statement is attached to this decision as Appendix B.

A second flyer was distributed by the Unions to the general public on March 28, 1996, outside of one of Respondent's Pennsylvania nursing homes, i.e., Camp Hill Care Center. A copy of that handbill is attached to this decision as Appendix C.

On March 29, 1996, Respondent filed and has since maintained a lawsuit in the Court of Common Pleas for Crawford County, Pennsylvania, against the three Unions and Thomas DeBruin.

The lawsuit alleges that the Unions and Thomas DeBruin defamed Respondent by publishing the two handbills and radio spot which Respondent maintains untruthfully conveys the message that Respondent delivers substandard care to residents and patients in its nursing homes.

It is alleged in the complaint before me which issued on November 29, 1996, that Respondent violated Section 8(a)(1) of the Act by filing and maintaining this lawsuit. In addition, in an amendment to the complaint issued on December 23, 1996, the National Labor Relations Board, by the Regional Director for Region 6, alleges that when the complaint issued on November 29, 1996, state court jurisdiction was preempted under the principles set forth by the U.S. Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and Respondent had a duty within 7 days of the issuance of the November 29, 1996 complaint to stay the state court action.

Respondent did not move to stay the state court action and, in fact, opposed the Unions' motion to stay proceedings in state court. The Court of Common Pleas for Crawford County on January 9, 1997, denied the Union's motion to stay proceedings and stated that the state court lawsuit, in its opinion, was not preempted by *San Diego Building Trades Council v. Garmon,* supra. I agree for the reasons set forth below.

On April 30, 1997, the National Labor Relations Board, by the Regional Director for Region 6 filed a petition for an injunction under Section 10(j) of the Act in the U.S. District Court for the Western District of Pennsylvania petitioning the court to enjoin Respondent from going forward with its defamation lawsuit. That petition is pending before the Court as of the date of this decision.

B. Analysis

The result in this case will require the balancing of two rights, one is the right of a person, to include a corporate entity, to seek redress in state court for tortious conduct and the right of employees and their collective-bargaining representatives to be free to engage in the rough and tumble of a labor dispute without fear of being sued and having to incur huge legal bills.

The key case authority in deciding whether or not Respondent violated the Act when it filed and continues to violate the Act by maintaining this defamation lawsuit against the Unions and a union official are *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966), and *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

Under *Linn* the Supreme Court made it clear that a lawsuit sounding in defamation could be filed and maintained for published libel occurring in the context of a labor dispute if what is published is false and the publication of the falsehood is done with malice. And this is so even though coarse or intemperate language may be okay and be permissible labor speech but deliberate malicious lies are not permissible labor speech.

Under *Bill Johnson's Restaurants* the Supreme Court held that the filing and maintaining of a lawsuit in a non-preemption case will be an unfair labor practice and enjoinable if, and only if, (1) the lawsuit lacks a reasonable basis in law or fact, and (2) the lawsuit was filed and/or maintained to retaliate for the exercise of rights guaranteed under Section 7 of the Act.

1. Appendix A

Appendix A to this decision is the flyer distributed at all 20 nursing homes on or about March 23 and 24, 1996.

In its complaint and amended complaint in the defamation suit filed in state court Respondent maintains that what is stated in this flyer is defamatory, false, and was published with malice, i.e., the Unions and DeBruin knew it was false or recklessly published the statements without verifying their truth or falsity. The handbill is headed, "Must We Strike to Make Beverly Obey the Law?" It contains a number of statements, several of which Respondent singled out as being false and defamatory in its amended complaint in state court. The first states that the Federal Government is prosecuting Beverly for "illegally imposing work rules designed to stop us from speaking out publicly about patient care and other concerns." In support of this statement DeBruin cites the NLRB complaint issued in Case 6–CA–27453 at page 4, paragraph 6(b), headed, "Rule 1.6" which contains the so-called gag rule unilaterally implemented by Respondent which reads that employees, "Making false or misleading work-related statements concerning the Company, the facility or fellow associates" would be subject to discipline up to and including discharge.

The next statement from this handbill which is specifically cited by Respondent as defamatory reads "In the last ten years Beverly has engaged in hundreds of illegal firings, threats, harassment, intimidation, bribes and other coercive acts" and continues, that the U.S. General Accounting Office issued a report singling out Beverly as having "a history of labor law viola-

Board. The administrative law judges in *Beverly II* and *III* found that Respondent committed numerous violations of the Act.

tions." This statement, of course, is based primarily on the litigation record in the cases generally known as *Beverly I, II,* and *III* which encompass violations dating back to 1986 and covering all of the sorts of violative activity set forth in the handbill. In addition, in evidence before me as General Counsel's Exhibit 12 is a portion of a General Accounting Office report concerning violations of Federal labor law by various Federal contractors, including Beverly, which is also referred to in the handbill.

Beverly, in its amended complaint, also cites the following statement from the handbill as being defamatory "In 1993 and 1994, Beverly was cited by OSHA for forcing nursing home employees to work in unsafe and hazardous conditions." While, as DeBruin explained, the handbill contains a typographical error in that the OSHA activity referred to occurred in 1991 and 1992 rather than 1993 and 1994, in evidence as General Counsel's Exhibit 11(a) through (e) are the OSHA citations referred to therein. DeBruin further related that although an OSHRC administrative law judge had found against the Agency in a trial of these citations, the Agency and the Union had appealed the judge's decision to the Occupational Safety and Health Review Commission (OSHRC) itself for final decision and that is where the matter rests at present.

DeBruin was also questioned about an additional statement in the handbill that "In 1996 Beverly was sued by a family member for the wrongful death of a resident. The resident was given a lethal overdose of morphine sulfate." That assertion was based on the filing of a wrongful death action in Venango County, Pennsylvania, on behalf of patient Adella Foster. The Union had obtained a copy of the actual complaint (GC Exh. 13) as well as researched other suits filed against Beverly in Pennsylvania and elsewhere.

Also in the handbill is the statement "Family members, residents and the public deserve to know the truth about the qualify of care."

The juxtaposition in the handbill of a reference to the death of a resident and the statement that the public deserves to know the truth about the quality of care certainly suggests substandard care being provided by Respondent.

2. Appendix B

The second publication alleged by Respondent to be defamatory and false consists of radio spot announcements which were broadcasted during the week of March 25, 1996, in Pennsylvania and parts of Maryland. Respondent, in its amended complaint in state court, focuses on certain specific statements in the transcript of the spot announcement as allegedly libelous and defamatory. First, the statement "Beverly's attempt to impose a gag order on its workers was recently declared illegal by government officials." This, as DeBruin testified, was, of course based on the issuance by the Regional Director of the complaint in Case 6–CA–27453 which alleges that the so-called "gag rule" unilaterally implemented by Respondent was violative of the Act.

The next allegedly defamatory statement reads, "And last month, 250 more unfair labor practice violations were filed against Beverly." This statement, according to DeBruin was based on a calculation of the charges filed by the Union at that time concerning violations occurring at the Pennsylvania facilities and counting each violation at each facility as a separate instance, which is in keeping with the Board's practice in alleging violations in a complaint, and this yielded at least 250 such instances.

The next statement singled out by Respondents reads, "Workers concerns about improving staffing and patient care and other working conditions have fallen on deaf ears." Here, DeBruin pointed out that in the course of contract negotiations the Union had raised and was raising a number of issues related to health and safety and patient care issues including proposals for a joint union-management patient care committee to be established and that management's response to these efforts had been a complete refusal to discuss such issues on the ground that they were exclusively the concerns of management. Similarly, the final statement targeted by Respondent from the radio broadcasts reading, "Beverly refuses to bargain in good faith and instead is forcing its workers to strike," stems both from the Union's opinion, as supported by numerous unfair labor practice complaints that Respondent was engaging in unilateral changes in terms and conditions of employment without bargaining and also to its opinion that Respondent was not bargaining in good faith in the current contract negotiations and was thus in effect provoking a strike. Many of the allegations against Respondent resulted in the consolidated complaint being tried before Judge Wallace, which case has been referred to as *Beverly IV*. Interestingly enough the Union was claiming the 3-day strike in April 1996 was an unfair labor practice strike. Federal District Court Judge Smith ordered Respondent to reinstate all the strikers who Respondent had claimed were economic strikers and whom they had permanently replaced.

3. Appendix C

The third publication alleged to be defamatory is a handbill headed "Family Alert" distributed on or about March 28, 1996, at the Camp Hill Care Center nursing home facility. DeBruin testified that this handbill was developed as part of a process involving all of Respondents' facilities concerning health and safety issues. The Union sought to involve their member employees in the process in various ways. They surveyed employees at the facilities regarding what health and safety issues existed which they considered were not being addressed by management. Union and employee representatives complied a list of the 10 most important of these concerns at each facility and from those lists prepared a letter which was supposed to be submitted to the administration at each facility identifying these concerns. In addition, the Union prepared a form leaflet to be used in connection with these lists. The form leaflet was designed to be tailored to each facility by entering the main concerns at the specified facility. The Camp Hill leaflet was similar to several others which were developed for and distributed at other facilities. DeBruin also testified that at some facilities where the local administration adequately responded to the list of health and safety concerns, the Union composed no similar leaflet because none was necessary. Appendix C was handed out to the general public only at the Camp Hill Care Center.

In the case of Camp Hill the lack of hot water was apparently the principal concern and that is why it was singled out for mention in the handbill which was ultimately prepared and distributed at that location. If the procedure worked according to the way DeBruin claimed it should have worked the information and statements contained in this handbill should have been based on a survey of employees and data collected as a result of that survey as to the most pressing health and safety concerns at the Camp Hill Care Center.

However, the only evidence presented at the hearing before me directly relevant to the issue of lack of hot water at Camp Hill Care Center was Charging Party's Exhibit 2, which was

filled out apparently by an employee at Camp Hill. Charging Party's Exhibit 2 is attached to this decision as Appendix D. This is the only evidence presented to support the allegations in the handbill distributed at Camp Hill Care Center (Appendix C). DeBruin testified that he did not know the identity of the employee who filled out Appendix D nor had he even seen the exhibit prior to the day he first testified before me. Further neither the Union nor the General Counsel represented to me that they knew the identity of the person who prepared Appendix D but did not want to disclose that person's identity for one reason or another.

The lack of water hot enough to sterilize and sanitize the dishes, linens and clothes or even warn enough to give residents a hot bath or shower certainly allege substandard patient care at this facility and a jury based on evidence at trial may conclude it was published with actual malice. I also note the bold print on Appendix C which states "Beware—You may be entering a hazardous area."

4. Respondent's case

Respondent called but one witness. The witness was Bradley Shiverick and he was a credible witness but he did not add much by way of evidence. He testified that he reviewed data collected by the Health Care Finance Administration (HCFA), which is a Federal agency and part of the Department of Health and Human Services (HHS). Shiverick presented charts he prepared from HCFA data which support the proposition that with respect to citations issued for deficiencies that Respondent both nationally and in Pennsylvania receives less citations than their competitors. The charts do not reflect the type, kind, or severity of the violations leading to the citations. And, in any event, the Unions in the two flyers and radio spot never claimed the Respondent received more citations than its competitors.

C. Conclusion and Remedy

It is my conclusion that there is a reasonable basis for the defamation lawsuit to be filed and maintained. It seems clear to me that much of the objected to flyers (particularly Appendix C, the flyer distributed at Camp Hill Care Center) and the radio spot allege that substandard patient and resident care is being provided by Respondent. I note from Joint Exhibit 1(n) that Judge Anthony A. Vardaro of the court of Common Pleas is of the opinion that the defamation action is well pleaded consistent with the requirements of *Linn,* supra. Accordingly, I conclude there are genuine material factual and state law disputes to be decided in the state court action. Since I conclude that the Respondent has filed and is maintaining a lawsuit that has a reasonable basis in law or fact I will recommend that this unfair labor practice case be held in abeyance pending the outcome of the defamation lawsuit and will not address the issue of whether or not the lawsuit was filed to retaliate for the exercise of Section 7 rights at this time.

The General Counsel and the Unions maintain that the statements in the two handbills and radio spot are all permissible labor speech and expressions of opinion protected under Section 7 of the Act.

Respondent maintains that the "gist" or "sting" of the statements in the two handbills and radio spot are defamatory and published with malice.

It seems to me that under *Linn,* supra, and *Letter Carriers v. Austin*, 418 U.S. 264 (1974), to be actionable labor speech must be defamatory, false, and published with malice.

Virtually none of the statements in the handbill distributed at all 20 Pennsylvania nursing homes (Appendix A) or the statements in the radio spot (Appendix C) appears to be false. The statements in the handbill distributed at Camp Hill Care Center (Appendix C) on the other hand could meet the test of defamatory, false, and published with malice. That is for a jury to decide and not me. I find that based on the state court pleadings wherein Respondent denies the accuracy of the statements in Appendix C and the evidence that the Unions published Appendix C that there is a genuine issue of fact and law to be decided in state court. It would not assist me in deciding the case if the Administrator at Camp Hill Care Center testified and claimed that there was *no* shortage of hot water at the Camp Hill Care Center.

The defamation lawsuit will be in the hands of a Pennsylvania state court judge who no doubt will be competent in state defamation law and versed in labor law thanks, in part, to the attorneys for the Unions and DeBruin in the defamation lawsuit who have cited the state court to applicable labor law as can be seen by an examination of the state court pleadings in the defamation case. See Joint Exhibits 1(a–t).

The state court trial judge will be in the best position in instructing the jury in the defamation action to accommodate state defamation law and the special rules involving labor speech.

The contents of Appendixes A and B certainly are relevant on the issue of malice even if they are not separately actionable for defamation.

After the defamation lawsuit concludes any of the parties may petition to reopen the record in this case. It could be that Respondent will prevail in the defamation suit and that will be the end of this case and I would entertain a motion by Respondent to dismiss the complaint or it could be that the Respondent loses the defamation suit in which event the General Counsel or one or all of the Charging Parties will petition to reopen the record for a decision on the issue of retaliatory motive and an appropriate remedy.

If I had concluded that the defamation suit lacked a reasonable basis in law or fact, I would address at this juncture the issue of retaliatory motive but I feel it best to address retaliatory motive *after* the conclusion of the defamation suit because the strength or weakness of Respondent's case in the defamation action could impact on the issue of retaliatory motive.

In reaching the decision I reach, I am not unmindful of the impact this defamation action will have on the Charging Parties. Indeed as of the time of the hearing before me the Unions had spent no less than $15,000 in defense of the defamation lawsuit. On the other hand I must be conscious of the rights of parties to seek redress in state court in appropriate cases.

CONCLUSIONS OF LAW

1. The Respondent, Beverly Health and Rehabilitation Services, Inc., and Beverly Enterprises Pennsylvania, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Parties Local 668, District 1199P, and Local 585, SEIU, are labor organizations within the meaning of the Act.

3. Respondent did not violate the Act when it filed and has since maintained a defamation lawsuit against the Unions and Union Official Thomas DeBruin in the Court of Common Pleas, Crawford County, Commonwealth of Pennsylvania.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is held in abeyance until the conclusion of the defamation case in state court in Pennsylvania at which time any of the parties may petition me for such relief as they deem appropriate.

APPENDIX A

Must We Strike to Make Beverly

OBEY THE LAW?

For over 10 years, we have been fighting for dignity, rights and respect for nursing home residents and workers. The residents deserve the best quality of care with sufficient personal attention to live in dignity.

Rather than work together to improve the quality of care, Beverly has cut our hours, threatened and harassed us, and retaliated against us for speaking out. They have threatened to replace us if we strike, which shows just how little Beverly really cares about the residents or their employees.

In fact, the federal government is prosecuting Beverly for illegally imposing work rules designed to stop us from speaking out publicly about patient care and other concerns. Government agents are also investigating over 250 allegations that Beverly violated federal labor laws in its efforts to harass, intimidate and silence its employees.

YOU SHOULD KNOW THAT BEVERLY HAS BEEN CHARGED WITH FLAGRANT ABUSES OF THE LAW

The federal government has prosecuted Beverly four times for massive violations of federal labor law. In the last 10 years Beverly has engaged in hundreds of illegal firings, threats, harassment, intimidation, bribes and other coercive acts. The U.S. General Accounting Office issued a report singling out Beverly has [sic] having a "history of labor law violations."

In 1993 and 1994, Beverly was cited by OSHA for forcing nursing home employees to work in unsafe and hazardous conditions.

In 1996, Beverly was sued by a family member for the wrongful death of a resident. The resident was given a lethal overdose of morphine sulfate. This is only one of a number of lawsuits by family members alleging wrongful death or neglect by Beverly management in Pennsylvania.

despite the lawbreaking, harassment and intimidation

WE WILL NOT BE SILENCED

Family members, residents and the public deserve to know the truth about the quality of care. We, the hard-working employees of Beverly Enterprises who provide the direct care, are the best source of truthful and accurate information, not corporate spin doctors. We want to provide the highest quality care, but we will not allow Beverly to trample our rights in the name of corporate profits.

Thousands of nursing home workers employed by Beverly in Pennsylvania may be forced on strike on March 29. We are outraged by an unprecedented level of federal law breaking by Beverly, one of the richest national nursing home chains.

You can help get Beverly to obey the law by calling their corporate headquarters at 1–800–571–9981 and telling them to *stop breaking the law*.

SEIU Locals 585, 668 & District 1199P * 1–800–797–8890

APPENDIX B

What does Beverly Enterprises care about? People or profits? Beverly Enterprises, the nation[']s largest nursing home chain, operates 42 nursing homes in Pennsylvania. In 1994 alone, Beverly made almost $115,000,000 in pre-tax profits. But even with all that money, Beverly continues to violate labor laws and harass its workers. Beverly's attempt to impose a gag order on its workers was recently declared illegal by government officials. And last month, 250 more unfair labor practice violations were filed against Beverly. Workers' concerns about improving staffing and patient care and other working conditions have fallen on deaf ears. Beverly refuses to bargain in good faith and instead is forcing its workers to strike. Beginning March 29th, workers will be on strike at Beverly homes throughout Pennsylvania. For information, or to support our strike, call the Dignity Campaign Hotline at 1–800–797–8890. We're the Service Employees' Union. We care for your loved ones everyday and we won't be silenced.

APPENDIX C

FAMILY ALERT

We, the employees of *Camp Hill Care Center* nursing home have been working to make this nursing home safer for your family members.

Recently we surveyed the nursing home for things we believe may endanger the health and safety of you family member and the employees. After the survey we delivered a letter to the administrator listing the 10 biggest health and safety concerns we have. Unfortunately the management has not corrected all the problems, so we want to let you know about them.

One of the most dangerous problems we have is that the hot water in the kitchen and laundry is not hot enough to sterilize and sanitize the dishes, linens and clothes. The water is not warm enough to give the residents a hot bath or shower.

BEWARE—YOU MAY BE ENTERING A HAZARDOUS AREA

Please report any things you believe may be hazardous to the administrator of this facility or call the Beverly Family In Touch Line at 1–800–572–9981.

Please feel free to contact us also so we can help make sure the nursing home is as safe as possible.

SEIU Locals 585, 668 & District 1199P * 1–800–797–8890

SEIU Union Labor

APPENDIX D

FAMILY ALERT

We, the employees of *CHCC* [*Camp Hill Care Center*] nursing home have been working to make this nursing home safer for your family members.

Recently we surveyed the nursing home for things we believe may endanger the health and safety of you family member and the employees. After the survey we delivered a letter to the administrator listing the 10 biggest health and safety concerns

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

we have. Unfortunately the management has not corrected all the problems, so we want to let you know about them.

[T]he hot water in Dietary is not hot enough to kill germs, and in laundry it is not hot enough to kill bacteria and resident have take warm bath water! [Sic.]

BEWARE –YOU MAY BE ENTERING A HAZARDOUS AREA

Please report any things you believe may be hazardous to the administrator of this facility or call the Beverly Family in Touch Line at 1–800–572–9981.

Please feel free to contact us also so we can help make sure the nursing home is as safe as possible.

SEIU Locals 585, 668 & District 1199P * 1–800–797–8890

SEIU Union Labor