Building & Construction Trades Council of Buffalo v. Downtown Development: The Interest and Purpose of a Labor Union as Plaintiff in an Environmental Citizen's Suit

I. OVERVIEW OF THE CASE

The City of Buffalo, New York, planned to redevelop for mixed use a 113-acre brownfield known as the "Hanna Furnace site."[1] On a portion of the site, workers excavated, removed and redeposited soils allegedly contaminated by toxic substances.[2] The Building and Construction Trades Council of Buffalo (Trades Council or Council) brought suit in the United States District Court for the Western District of New York against developers and the City of Buffalo (Defendants).[3] The Trades Council, a labor organization affiliated with the AFL-CIO, asserted three causes of action arising out of the project—two violations of the Resource Conservation and Recovery Act (RCRA) and one violation of the Clean Water Act (CWA).[4] The Trades Council alleged that some of its members were exposed to contaminated soil and waste materials while working at the site.[5] The Trades Council also alleged that many of its members lived and worked near the site, drank water from public water supplies polluted by runoff from the site, and used the surrounding area for recreation and aesthetic enjoyment.[6]

The district court judge ruled that defendants' motion to dismiss was moot because the Trades Council failed to state a complaint sufficient to establish standing under Article III of the United States Constitution.[7] The district court also ruled that the Trades Council lacked

1. Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., 448 F.3d 138, 142 (2d Cir. 2006).
2. *Id.* at 143.
3. *Id.* The City of Buffalo was later dismissed as a defendant.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

standing to bring the CWA claim because the alleged violation had been rectified by the time the Trades Council filed its amended complaint.[8]

On appeal, the United States Court of Appeals for the Second Circuit *held* that the Trades Council's complaint was sufficient to establish standing at the pleadings stage, and the court vacated the district court's order that the case be dismissed for lack of standing.[9] However, the Second Circuit *held* that the Trades Council failed to comply with the waiting period requirements of RCRA and CWA.[10] Therefore, the court remanded with instructions to dismiss without prejudice.[11] *Building & Construction Trades Council of Buffalo v. Downtown Development*, 488 F. 3d. 138, 158 (2d Cir. 2006).

II. BACKGROUND

RCRA and CWA include citizen suit provisions.[12] The purposes of citizen suit provisions are (1) to provide authority to abate violations of environmental laws, (2) to encourage voluntary compliance with environmental regulations, and (3) to prod the government into enforcing these laws more effectively.[13] RCRA and CWA bar citizen suits when the government is "diligently prosecuting" the same violation, and when the violation is corrected and clearly will not recur.[14]

In most cases, before a complaint can be filed under the citizen suit provisions of both RCRA and CWA, notice must be given to the EPA, the state and the violator, and a certain waiting period must be observed.[15] The purpose of the waiting period is to stimulate government action or voluntary compliance so that excessive citizen suits will not burden the courts.[16]

The language of RCRA and CWA convey standing to "any person" (RCRA) or "any citizen" (CWA).[17] However, the standing doctrine limits who may bring suit in a federal court.[18] The "case or controversy" clause

---

8. *Id.* at 143-44.
9. *Id.* at 158.
10. *Id.*
11. *Id.*
12. 42 U.S.C. § 6972 (2000); 33 U.S.C. § 1365 (2000).
13. Adam Babich & Kent E. Hanson, *Opportunities for Environmental Enforcement and Cost Recovery by Local Governments and Citizen's Organizations*, 18 ENVTL. L. REP. 10165, 10166 (1988).
14. *Id.*
15. *Id.*; *see also* 42 U.S.C. § 6972; 33 U.S.C. § 1365.
16. Babich & Hanson, *supra* note 13, at 10166.
17. 42 U.S.C. § 6972; 33 U.S.C. § 1365.
18. Amy L. Major, *Foxes Guarding the Henhouse: How To Protect Environmental Standing from a Conservative Supreme Court*, 36 ENVTL. L. REP. 10698, 10699 (2006).

in Article III of the Constitution is the basis for the standing doctrine.[19] The purpose of the standing doctrine is to ensure that suits are brought by a proper party, and that the courts do not intrude into other branches of government.[20] Generally, standing requires an actual injury in fact; a causal connection between the injury and the challenged conduct; and redressability of the injury.[21] To establish standing under a citizen suit provision, a party must show both statutory authorization and injury in fact.[22]

In *Lujan v. Defenders of Wildlife*, the United States Supreme Court held that a plaintiff must show "concrete and particularized" and "actual or imminent" injury to have standing.[23] However, the Court reaffirmed that the loss of an aesthetic opportunity to enjoy nature could be an injury sufficient to meet the standing requirement.[24]

In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court held that an organization has standing to bring suit on behalf of its members (1) if the members would have standing in their own right; (2) if the interests it seeks to protect are germane to the organization's purpose; and (3) if neither the claim nor the relief requested requires the participation of individual members.[25]

The Supreme Court has not elaborated further on what makes an interest "germane to the organization's purpose." However, the United States Court of Appeals for the District of Columbia in *Humane Society of the United States v. Hodel* held that the germaneness requirement was met if the association's litigation goals were pertinent to its expertise and the grounds that brought the membership together.[26] The *Hodel* court found support for this holding in *UAW v. Brock*, in which the Supreme Court explained that the primary reason people form organizations is to "create an effective vehicle for vindicating interests that they share with others."[27] According to this reasoning, almost anything an organization does in the interest of its members is germane to its purpose.

Environmental groups have obtained standing under the citizen suit provisions of environmental laws, since environmental issues are

---

19. *Id.*
20. Elizabeth Lefever, Note, Lujan v. Defenders of Wildlife*: The Injury in Fact Component of Standing Doctrine*, 6 TUL. ENVTL. L.J. 449, 450 (1993).
21. *Id.*
22. *Id.*
23. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992).
24. *Id.* at 562-63.
25. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).
26. Humane Soc'y of the U.S. v. Hodel, 840 F.2d 45, 56 (D.C. Cir. 1988).
27. *Id.* (citing Int'l Union, UAW v. Brock, 477 U.S. 274, 289-90 (1986)).

unambiguously germane to the purpose of such organizations.[28] As in the noted case, labor unions also have filed suit under the citizen suit provisions of environmental laws.[29] Protecting workers from environmental hazards on the job is an interest germane to the purpose of labor unions. Unions can invoke environmental laws to protect the health and safety of their membership.[30]

However, labor unions also have used environmental laws as a tool to promote other interests.[31] Unions may threaten to bring environmental suits as a way of pushing businesses to hire union labor, and unions may search for environmental violations at a work site as the basis for such suits.[32] Developers have dubbed this tactic "environmental extortion."[33] This use of environmental laws is part of a broader range of strategies adopted by labor unions in the last few decades.[34] In response to these tactics, businesses have brought antitrust, defamation, RICO, and other retaliatory suits against unions.[35]

Before filing complaint in the noted case, the Trades Council picketed the Hanna Furnace site in protest of the lack of minorities and women hired at the site.[36] In a press release decrying hiring practices at the site, the Trades Council also announced that an environmental law firm had been retained to investigate possible environmental violations at the site.[37] This shows evidence that nonenvironmental interests may have motivated the Trades Council to file suit.

---

28. *Id.*

29. *Id.*

30. *See* Richard Toshiyuki Drury, *Rousing the Restless Majority: The Need for a Blue-Green-Brown Alliance*, 19 J ENVTL. L. & LITIG. 5, 18 (2004) (explaining the interests unions have in environmental issues).

31. *See* E. Thayer Nelson, *Strategic Use of Environmental Laws by Labor Unions: Legitimate Labor Tactic or Environmental Extortion?*, 13 VA. ENVTL. L.J. 469, 470 (1994) (explaining the tactical use of environmental suits by labor unions and exploring strategies businesses may use in response); *see also* Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 CAL. L. REV. 757, 758 (1992); Reed W. Neuman, *You Mean They Can Sue? Creative Citizen Environmental Lawsuits Can Burnish Traditional Remedies*, 12 BUS. L. TODAY 43, 47 (2002).

32. Nelson, *supra* note 31, at 470 (citing instances of labor union use of this tactic).

33. *Id.*

34. *See* Paul More, *Protections Against Retaliatory Employer Lawsuits After* BE&K Construction v. NLRB, 25 BERKELEY J. EMP. & LAB. L. 205, 210-14 (2004) (explaining new strategies in union campaigns).

35. *Id.* at 215; *see also* Drury, *supra* note 30.

36. Press Release, Buffalo Building & Construction Trades Council, Construction Unions Decry Lack Of Minorities And Women On Union Ship Canal Project (May 11, 2004), *available at* http://www.buffalotrades.com.

37. *Id.*

In *Eastern Conference of Railway Presidents v. Noerr Motor Freight*, the Supreme Court noted that the First Amendment protects the right to petition the government for redress of grievances.[38] Railroad companies campaigned for laws and law enforcement practices that would harm long-distance trucking companies.[39] Trucking companies alleged violations of the Sherman Act.[40] The Court described the case as a "no holds barred" fight between two industries.[41] Each industry was free to use its political power to seek legislation that would help itself and harm the other.[42] However, the Court noted that there might be instances in which a petition was a sham truly aimed not at influencing legislation, but at directly harming a competitor.[43] Such a petition would not be protected by the Constitution.[44]

In *California Motor Transport v. Trucking Unlimited*, the Court extended *Noerr* to lawsuits.[45] Regardless of the merits of the case, a lawsuit could be a sham when the plaintiffs' intent was to prevent the other party from having access to the courts.[46] Such a motive for a lawsuit could be a violation of antitrust laws.[47] However, in *Bill Johnson's Restaurants v. NLRB*, the Court protected the right of businesses to bring suits against labor organizations, regardless of plaintiffs' motive, as long as the suit has reasonable basis in fact or law.[48] The Court ruled that the National Labor Relations Board (NLRB) could not halt a restaurant's suit against picketing waitresses because of the First Amendment right of access to the courts.[49] If the suit was eventually found to be without merit, and if brought with the intent to interfere with protected employee rights, NLRB then could prosecute the employer for unfair labor practice if[50] Sham litigation does not involve a bona fide grievance and is not protected by the First Amendment, but a suit is not a sham if it raises genuine issues of fact or law.[51]

---

38. E. Conference of Ry. Presidents v. Noerr Motor Freight, 365 U.S. 127, 137-38 (1961).
39. *Id.* at 129.
40. *Id.*
41. *Id.* at 144.
42. *Id.* at 144-45.
43. *Id.* at 144.
44. *Id.*
45. Cal. Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 512 (1972).
46. *Id.*
47. *Id.*
48. Bill Johnson's Rests. v. NLRB, 461 U.S. 731, 748-49 (1983).
49. *Id.* at 744-46.
50. *Id.* at 747.
51. *Id.* at 743.

In *BE & K Construction v. NLRB*, the Court held that NLRB could not sanction an employer simply because the employer's retaliatory lawsuit was unsuccessful in court.[52] A nonunion construction company filed several lawsuits against a group of unions over the unions' attempts to delay a construction project through litigation and lobbying campaigns.[53] The construction company lost in court or withdrew each of its complaints.[54] NLRB then sanctioned the construction company for bringing sham litigation.[55] The Court held that the suit was genuine and protected by the First Amendment if the construction company's complaint was both "subjectively genuine and objectively reasonable," meaning that it honestly and reasonably believed the unions' conduct was illegal.[56]

III. THE COURT'S DECISION

In the noted case, the Trades Council appealed the lower court's ruling that the Council did not have standing under Article III of the Constitution.[57] The Second Circuit began its analysis by noting that an organization has standing to bring suit on behalf of its members (1) if the members would have standing in their own right, (2) if the interests it seeks to protect are germane to the organization's purpose, and (3) if neither the claim nor the relief requested requires the participation of individual members.[58]

Defendants argued that the Trades Council must demonstrate that its members suffered "personal and individual" injury in fact by naming those members who had been injured and who had standing to sue in their own right.[59] The Second Circuit found this argument unpersuasive on a motion to dismiss, when standing is based solely on pleadings, although it might have validity at the summary judgment stage.[60] Citing *Lujan v. Defenders of Wildlife* and *Lujan v. National Wildlife Federation*, the court wrote that on a motion to dismiss, it is presumed that "general allegations embrace those specific facts that are necessary to support the

52. BE & K Constr. v. NLRB, 536 U.S. 516, 536 (2002).
53. *Id.* at 519.
54. *Id.*
55. *Id.*
56. *Id.* at 533-34.
57. Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., 448 F.3d 138, 143-44 (2d Cir. 2006).
58. *Id.* at 144 (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).
59. *Id.*
60. *Id.* at 144-45.

claim."[61] The court was aware of no precedent that supported the proposition that an association must "name names" to properly allege injury in fact to its members.[62]

Defendants also argued that the alleged injuries were conjectural and hypothetical, focusing on language in the complaint which speculated that members of the Trades Council would be employed at or visit the site in the future.[63] However, according to the Second Circuit, the question was not whether any of the allegations were speculative, but whether all of them were speculative.[64] The Trades Council's claim of worker exposure to contamination at the site unambiguously alleged an injury in fact.[65] The claim that Council members drank from contaminated public water supplies also was sufficiently concrete, as was the alleged loss of aesthetic or recreational enjoyment.[66] "These allegations, whatever may be said of their ultimate merits, are plainly not speculative," the court commented.[67] The court concluded that the Trades Council had successfully pleaded injury in fact to its members and thereby met the first requirement for suing on behalf of those members.[68]

To establish associational standing, the Trades Council next had to show that the interests the Council sought to protect were germane to its purpose.[69] Defendants argued that the Trades Council did not meet this requirement because the Council was not established for the purpose of enforcing environmental laws.[70] Rather, the Council was a labor organization established to protect labor interests.[71]

The Second Circuit noted that the Supreme Court has not discussed the issue of germaneness since *Hunt*, but the District of Columbia Circuit gave some direction in *Hodel*. In turn, the District of Columbia Circuit found guidance in *UAW v. Brock*, in which the Supreme Court defined the features of an association that distinguish it from the class in a class action.[72] An association has the ability to draw on capital and expertise to vindicate the interests of its members, and the primary reason people join such organizations is to "create an effective vehicle for vindicating

---

61. *Id.* at 145.
62. *Id.*
63. *Id.* at 145-46.
64. *Id.* at 146.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 146-47.
70. *Id.* at 147.
71. *Id.*
72. *Id.* (citing Int'l Union, UAW v. Brock, 477 U.S. 274, 289-90 (1986)).

interests that they share with others."[73] The *Hodel* court reasoned that if the reason for banding together in an organization is to promote common interests, those interests would almost certainly be reflected in the association's policies and litigation goals.[74] The *Hodel* court therefore decided on a "modest interpretation of the germaneness requirement."[75] Germaneness means simply that the association's litigation goals are pertinent to its expertise and the purpose that brought the membership together.[76] The United States Court of Appeals for the Ninth Circuit, citing *Hodel*, also has found that the germaneness test is undemanding.[77]

The Second Circuit decided to follow the *Hodel* court's reasoning.[78] In the noted case, defendants agreed that the Trades Council's purpose was to protect the rights and benefits of its members.[79] The Trades Council described its purpose as to improve "the working conditions and occupational health and safety of its members."[80] The first cause of action, based on the alleged disposal of solid and hazardous wastes at the site, was therefore germane to the Trades Council's purpose.[81] The court found it more difficult to determine the germaneness of the second and third causes of action.[82] However, since those causes of action concerned activities at the site where members of the Trades Council worked, the court ultimately decided that they also were germane to the Trades Council's purpose.[83]

The third requirement for associational standing is that the participation of individual members is not required for the claim asserted nor the relief requested.[84] The Second Circuit previously stated that when an association seeks a legal ruling without requesting individual damages to its members, the participation of individual members is not required.[85] The Trades Council was seeking only civil penalties and injunctive relief, and therefore the third requirement was satisfied.[86]

---

73. *Id.*
74. *Id.* (citing Humane Soc'y of the U.S. v. Hodel, 840 F.2d 45, 56 (D.C. Cir. 1988).
75. *Id.* at 147-48 (citing *Hodel*, 840 F.2d at 56 (internal punctuation removed)).
76. *Id.* (citing *Hodel*, 840 F.2d at 56).
77. *Id.* at 148 (citing Presidio Golf Club v. Nat'l Park Serv., 155 F.3d 1153 (9th Cir. 1998)).
78. *Id.* at 148.
79. *Id.* at 149.
80. *Id.*
81. *Id.*
82. *Id.* at 150.
83. *Id.*
84. *Id.*
85. *Id.* (citing Bano v. Union Carbide Corp., F.3d 696, 714 (2d Cir. 2004)).
86. *Id.*

The Second Circuit held that the Trades Council had standing under CWA, although the alleged violation had been rectified by the time the amended complaint was filed.[87] The *Federal Rules of Civil Procedure* provide that an amendment to a pleading relates to the date of the original pleading, so the date of the original complaint is the relevant one.[88] Also, although the violation had been corrected, it was not clear that the violation would not recur.[89] Therefore, it was not clear to the court that the Trades Council's claim was moot.[90] Even if the claim was moot, defendants still could be liable for civil penalties for the violation.[91]

However, the Second Circuit held that the Trades Council's complaint should have been dismissed because it did not comply with the waiting period provisions of RCRA and CWA.[92] In a previous case, the Second Circuit held that in hybrid claims, when a plaintiff alleged violations under subchapter III of RCRA (which does not require a waiting period) and another closely related violation under a different subsection of RCRA, the waiting period required by the other subsection would be waived.[93] However, the Trades Council's complaint did not allege a violation of subchapter III.[94] Therefore, the complaint was not a hybrid and not exempt from the waiting period requirement.[95]

As a final matter, the Second Circuit addressed defendants' allegations that the Trades Council's notice would have been insufficient even if it had complied with the waiting period since the notice did not identify the particular pollutants which allegedly were discharged.[96] The notice alleged that "solid waste as defined in 40 C.F.R. § 257.2" and "one or more" of a list of contaminants were disposed of at the site.[97] The court concluded that the notice was sufficient because it provided enough information to allow defendants to promptly rectify the problem.[98]

Having concluded that the Trades Council's complaint was sufficient to establish standing at the pleadings stage of litigation but for the failure to comply with the waiting period requirements of RCRA and

---

87. *Id.* at 151.
88. *Id.* (citing FED. R. CIV. P. 15(c)(2)).
89. *Id.* at 151-52.
90. *Id.* at 152.
91. *Id.*
92. *Id.* at 157.
93. *Id.* at 154 (citing Dague v. City of Burlington, 935 F.2d 1343, 1352 (2d Cir. 1991)).
94. *Id.* at 155-56.
95. *Id.* at 157.
96. *Id.*
97. *Id.* at 158.
98. *Id.*

CWA, the Second Circuit vacated the judgment of the district court and remanded with instructions to dismiss without prejudice.[99]

IV. ANALYSIS

The Second Circuit's decision in *Building & Construction Trades Council of Buffalo* affirms that labor unions may have standing to bring environmental citizens suits under the three-part test established in *Hunt*. The decision allows such suits to survive the pleadings stage even if the complaint is fairly general and does not provide details of specific injury to specific union members. More importantly, the Second Circuit's decision asserts that environmental interests may be germane to the purpose of labor unions.

Labor organizations undoubtedly have an interest in environmental issues that affect workplace safety. However, the Trades Council website states that its purpose is to "create opportunity through development and partnership."[100] The Trades Council's efforts seem mostly directed toward promoting union labor.[101] Apparently, the Trades Council's underlying motive for filing suit against Downtown Development was to promote minority labor or to retaliate against the developer for not using minority labor.[102]

Is it fair to allow a labor union to bring an environmental citizen suit against an employer if the union may have a retaliatory motive? Yes, if the union reasonably believes that an actionable environmental violation has occurred, if the violation harms the health and safety of workers at a worksite, and if protecting the health and safety of those workers is germane to the union's purpose. By meeting these conditions, the union will also meet the first two requirements of the associational standing test in *Hunt*.

In *BE & K Construction*, the Supreme Court held that the First Amendment right to petition protects employers who file retaliatory lawsuits against labor, as long as the suit involves a genuine legal issue and the plaintiff has a "subjectively genuine and objectively reasonable" belief in the merits of his complaint.[103] Labor unions ought to have the same right to bring retaliatory lawsuits as long as they have the same

---

99. *Id.*

100. Buffalo Building Trades, http://www.buffalotrades.com/building-trades-council.shtml (last visited Oct. 15, 2000).

101. *Id.* The Web site provides links to articles and press releases about the Council's activities, most of which involve promoting union or minority labor, or endorsing political candidates.

102. Buffalo Building & Construction Trades Council, *supra* note 36.

103. *BE & K Construction v. NLRB*, 536 U.S. 516, 536 (2002).

belief in the merits of their suit and they meet all other standing requirements. The first condition is not hard to meet. Considering the expense of litigation, it seems unlikely that a union would file a retaliatory environmental suit if it did not have a genuine belief in the merits of its case.

In the noted case, the Second Circuit did not address the Trades Council's motives in filing suit because defendants did not directly raise the issue. However, defendants implicitly questioned the Trades Council's motives by arguing that environmental interests are not germane to the interests of a labor union. If the Trades Council had no essential interest in environmental issues, it must have had another reason for filing suit. The Second Circuit was right to recognize that environmental issues may be germane to the interests of a labor union; the standing doctrine does not require that a plaintiff have a single, pure and unambiguous motive for filing suit.

The ultimate outcome of this case depends on many conditions. If the Trades Council is to successfully refile its claims, it will have to play by the rules and comply with the waiting period requirements of RCRA and CWA, giving defendants a chance to correct any violations. If the Trades Council genuinely is concerned about the alleged violations, it should be happy to see them corrected. If the Trades Council is to ultimately prevail in court, it will have to prove that violations of RCRA and CWA occurred, and that the violations caused concrete and actual injury to individual members. If the Trades Council complies with the rules and successfully asserts its claims, it also will demonstrate that its suit is not the equivalent of sham litigation as defined in *Bill Johnson's Restaurants* and *BE & K Construction*. If the Trades Council has filed sham litigation, it will not face the equivalent of sanctions from the NLRB, but it will probably lose in court after accumulating large legal bills and face the subsequent displeasure of its constituents.

That is the risk involved in using a lawsuit as ammunition. Labor disputes are often hostile proceedings in which both parties ruthlessly use any and all available tactics. In such a context, both parties should have equal opportunity to petition a court with legitimate complaints.

V. CONCLUSION

In *Building & Construction Trades Council of Buffalo*, the Second Circuit held that environmental interests may be germane to the purpose of a labor union if those interests are pertinent to the union's expertise and the purpose that brought the membership together. The court thereby affirmed that a labor union may meet the second part of the *Hunt* test for

associational standing when it files a complaint under the citizen suit provisions of environmental statutes. The court properly required the union to comply with the notice and waiting period requirements of RCRA and CWA. The court also stated that the union will have to allege a more sufficiently concrete actual injury to individual members if it is to survive the summary judgment phase. Nevertheless, the court's decision supports labor unions that seek to assert valid environmental complaints in court.

Heather A. Heilman*

* J.D. candidate 2008, Tulane University School of Law; M.F.A. 1999, Bennington College; B.A. 1993, University of Memphis.