

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1463

CAN-AM PLUMBING, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES
IN THE PLUMBING AND PIPEFITTING INDUSTRY OF THE
UNITED STATES AND CANADA, LOCAL 342, AFL-CIO

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Can-Am Plumbing, Inc. to review, and the cross-application of the National Labor Relations Board to enforce,

a Board order against Can-Am. The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order issued on September 21, 2001, and is reported at 335 NLRB No. 93. (A 1-12.)¹

The Board's order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which authorizes parties to seek review of Board orders in this Circuit. Can-Am filed its petition for review on September 14, 2001, and the Board filed its cross-application for enforcement on November 1, 2001. Both filings were timely; the Act places no time limit on such filings. The charging party before the Board, United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 342, AFL-CIO ("the Union"), has intervened on behalf of the Board.

STATEMENT OF THE ISSUE

Whether the Board reasonably determined that Can-Am violated Section 8(a)(1) of the Act by prosecuting and maintaining a preempted lawsuit against

¹ "A" refers to the joint appendix filed by Can-Am with its brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

another employer for its participation in a Union-sponsored job targeting program.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in the addendum to this brief.

STATEMENT OF THE CASE

Based on unfair labor practice charges filed by the Union, the Board's Regional Director for Region 32, acting on behalf of the Board's General Counsel issued a complaint alleging that Can-Am violated Section 8(a)(1) of the Act by maintaining and prosecuting a state court lawsuit that challenged the Union's job targeting program and union contractor L.J. Kruse Company's ("Kruse") participation in it. (A 1-5.) Following a hearing, an administrative law judge issued a decision and recommended order, finding that Can-Am violated the Act as alleged. The parties filed exceptions and cross-exceptions.

(A 249.) Thereafter, the Board issued a decision and order affirming the judge's findings and conclusions, and adopting the recommended order as modified. (A 249-61.) The Board's factual findings, conclusions and order are summarized below.

1. THE BOARD'S FINDINGS OF FACT

A. The Union Establishes a Job Targeting Program

The Union, headquartered in Concord, California, has long had collective-bargaining relationship with several multiemployer associations, including the

Northern California Piping Contractors. The collective-bargaining agreement relevant here contained a union-security clause, requiring covered employees to become and remain members of the Union as a condition of employment. (A 253-53; A 8 141-42.) Employees represented by the Union work primarily on private industrial construction projects and in the oil refinery industry. (A 48-50, 55, 89-90.)

Since 1989, the Union has maintained a "Job Targeting Program" ("JTP"), designed to expand the job opportunities of covered employees. To achieve that goal, the JTP subsidizes the wages paid to employees by union contractors on targeted projects, thus enabling those contractors to compete against nonunion contractors for the work on the targeted projects. (A 252-53, 256; 10, 134-37.)

Union Business Manager Larry Bevins is solely responsible for identifying the projects that are eligible for JTP subsidies. A union contractor seeking a JTP subsidy on a construction project must submit an application to the Union prior to the date that contractors are required to submit estimated-cost bids for the project. The application must show that the union contractor is directly competing against a "nonsignatory" contractor for the job, give a description of the work to be done, and an estimate of the total journeyman hours required to complete the job. (A 252-53; 10-11, 16-17, 134-36.) Utilizing that information, Business Manager

Bevins decides, on a project-by-project basis, whether to award the subsidy and the amount of the subsidy, based on the "best interest" of covered employees.

(A 253; 10, 16-17, 135-37.)

Once the Union approves a JTP subsidy request, the union contractor takes the amount awarded into consideration when bidding on a targeted project. Union contractors who win contracts for those projects must pay their employees the hourly wage rates set out in the collective-bargaining agreement and then furnish the Union with weekly time and pay sheets that have been certified by the Union's shop steward or foreman on the job. The JTP fund then makes direct monthly reimbursements to the contractor for the difference between the hourly wages listed in the bid and those specified in the collective-bargaining agreement.

(A 253; 16-17, 134-36.)

Originally, union members elected to transfer money from a union-strike fund for use as "seed money" to finance the JTP. (A 253; 10-11, 20, 40, 134-37.) Union members subsequently elected to maintain the fund through the union dues paid by employees working for signatory contractors. Those dues are calculated at the rate of 75 cents per journeyman hour worked, and are routinely deducted from employee paychecks by the employer and remitted to the Union. (A 18-20, 28, 47, 138-46.) The Union's designated fund administrator allocates fixed percentages of

those dues to the Union's nine different benefit and trust funds, including the JTP fund. (A 253; 12-19, 55, 139-40.)

Union contractors have no contractual right to JTP subsidies; they submit reduced wage rate bids on targeted projects at their own risk. (A 253.) The Union reserves the right to cancel an awarded JTP subsidy on any project, if the Union discovers that a contractor has abused the program or engaged in conduct inconsistent with its purposes of fostering competitiveness for contractors using union labor. (A 134-37.)

B. The Union Awards Contractor Kruse a JTP Subsidy on the Ascend Project; Kruse Competes Against Can-Am for the Contract on that Project and Wins the Bid; Can-Am Sues Kruse in State Court Seeking To Enjoin Kruse from Participating in the JTP and Requesting Injunctive Relief and Damages

Kruse, a plumbing and heating contractor located in Berkeley, California, is a signatory to the Union's collective-bargaining agreement. (A 253; 141-46.) From 1991 to 1997, the Union awarded 13 JTP subsidies to Kruse. (A 249-50, 252-53; 64-65, 147-89, 227-41.) In May 1996, Kruse successfully bid to perform plumbing work on a new corporate headquarters for Ascend Communications, Inc., in Alameda, California ("the Ascend Project"). (A 253-54; 66.) Before submitting its bid, Kruse requested and received from the Union a JTP subsidy for that project. On its JTP application, Kruse indicated that it anticipated employing six

journeymen, at an hourly rate of \$15.00, for a maximum of 2,840 hours. (A 253-54; 66-67.)

Can-Am, a nonunion residential and commercial plumbing contractor located in Pleasanton, California, was Kruse's primary competitor for the plumbing work on the Ascend Project. (A 252-53; 1-5.) After losing the contract to Kruse, Can-Am, filed a complaint against Kruse in the Superior Court of the State of California, Alameda County, Northern District. The complaint alleged that Kruse's acceptance of JTP funds from the Union for the Ascend Project constituted a "kickback," in violation of the California Labor Code, and violated Code provisions governing "prevailing wages." (A 253; 1-5.) Specifically, the complaint alleged that Kruse violated Labor Code Section 221, which forbids "any employer to collect or receive from an employee any part of wages . . . paid by said employer to said employee," and Section 223, which provides that "[w]here any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract." By way of relief, Can-Am sought to enjoin Kruse from ever accepting, directly or indirectly, JTP funds from the Union. It also sought disgorgement of any gains received by Kruse from its participation in the JTP, actual and punitive damages, and attorney's fees. (A 253; 1-5.)

C. The Union Files a Charge Against Can-Am; the Board's Regional Director Issues an Unfair Labor Practice Complaint and Advises Can-Am To Seek a Stay of the State Court Lawsuit

On January 9, 1998, pursuant to an unfair labor practice charge filed by the Union, the Board's Regional Director for Region 32 issued a complaint alleging that Can-Am violated Section 8(a)(1) of the Act by prosecuting and maintaining the state court lawsuit against Kruse. In a separate letter, the Regional Director notified Can-Am that the Board was asserting jurisdiction over the matter pending before the state court, and therefore that the state court's jurisdiction was preempted. The Regional Director also advised Can-Am to seek a stay of the state court proceeding pending the outcome of the unfair labor practice case. (A 254; 106, 108-37.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On September 21, 2001, the Board (Members Liebman, Truesdale and Walsh) found, in agreement with the administrative law judge, that Can-Am violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by prosecuting and maintaining a state court lawsuit against Kruse for accepting JTP funds from the Union for Kruse's work on the Ascend Project. (A 249-51.) The Board ordered Can-Am to cease and desist from the conduct found unlawful and from in any other like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7. (A 249-50.) Affirmatively,

the Board ordered Can-Am to seek dismissal of the lawsuit against Kruse; to reimburse Kruse, with interest, for all legal and other expenses incurred in the defense of the lawsuit; to post copies of a remedial notice; and to sign and return to the Board's Regional Director sufficient copies of the remedial notice for posting by Kruse and the Union, if they are willing. (A 249-51 & n.4, 253-54.)

SUMMARY OF ARGUMENT

The Board reasonably found that Can-Am violated Section 8(a)(1) of the Act (28 U.S. C. § 158(a)(1)) by prosecuting and maintaining a state court lawsuit against union contractor Kruse for accepting JTP funds from the Union. Relying on the undisputed evidence, the Board reasonably determined that the sole objective of the JTP was to expand job opportunities for union members, and therefore that it fell squarely under the "other mutual aid or protection" clause of Section 7. Accordingly, the Board concluded that the lawsuit, which sought to dismantle the JTP, was unlawful, because it directly interfered conduct protected by the Act.

Under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983), a state court lawsuit found to be beyond the jurisdiction of the state court because of federal-law preemption "enjoys no special protection," and the Board can find such a lawsuit to violate Section 8(a)(1) of the Act (29 U.S.C. § 8(a)(1)). In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1950), the Supreme Court

held that state law is preempted when it is "clear" that the activity that the state purports to regulate is protected by Section 7.

Can-Am's principal defense is predicated upon an erroneous assumption that the Union's JTP is subject to the restrictions of the Davis-Bacon Act and California Labor Code. However, the Ascend Project involves no federal or state funding, and therefore is not subject to these prevailing wage laws. A miniscule amount of the JTP funds originate from public-works projects, and the Board reasonably found that amount to be de minimus.

Finally, the Company's contention that the local interest in discouraging "wage reversion" schemes should operate to prevent preemption has no merit. It is settled that, when activity that a state purports to regulate is protected by the Act, the state jurisdiction must yield.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT CAN-AM VIOLATED SECTION 8(a)(1) OF THE ACT BY PROSECUTING AND MAINTAINING A PREEMPTED STATE COURT LAWSUIT AGAINST ANOTHER EMPLOYER BECAUSE OF ITS PARTICIPATION IN A UNION-SPONSORED JOB TARGETING PROGRAM

A. Introduction and Standard of Review

Can-Am filed suit in state court against a competitor, union contractor Kruse, alleging that Kruse's acceptance from the Union's JTP of a wage subsidy for the Ascend Project amounted to a kickback, in violation of the California Labor

Code; the suit also alleged that the JTP violated the state's prevailing-wage law governing public works projects. As we now show, the Board properly found that Can-Am violated the Act because it sought state court sanctions against conduct protected by Section 7 of the Act, and therefore its lawsuit was preempted by the Act and its own conduct was subject to the Board's jurisdiction.

Where, as here, there are no genuine issues of material fact in dispute, the Court's only task on review is to ensure that the Board properly applied the law to those facts. *NLRB v. UFCW, Local 23*, 484 U.S. 112, 123 (1987). The Board's construction of the Act must be accepted if it is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). See generally *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 & n.11 (1984). Therefore, a reviewing court cannot displace the Board's choice between two fairly conflicting views, even if the court would justifiably have made a different choice had it heard the case de novo. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

B. Applicable Principles

Section 8(a)(1) of the Act (29 U.S.C. § U.S.C. § 158(a)(1)) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the Act. Section 7 of the Act (29

U.S.C. § 157) protects the rights of employees to engage in union organization and "other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

The Board is charged with primary responsibility for defining and giving scope to the kind of conduct that falls within the protection afforded by the phrase "other mutual aid or protection." *See NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984) (defining the scope of Section 7's protections "is for the Board to perform in the first instance as it considers the wide varieties of cases that come before it"). It has long been settled that the Board is warranted in defining that phrase broadly, to cover a range of concerted activity; a too-narrow application of the statutory standard would defeat the Act's goal of promoting employees' participation in shaping the terms and conditions of their employment, or otherwise improving their lot as employees through channels "outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1979). The sole restriction on the Board's interpretation is that there must be an identifiable nexus between the concerted activity and legitimate employee concerns related to employment matters. *Id.* at 565-68.

Accordingly, it is settled that the Act protects a wide variety of conduct by employees directed against employers other than their own. *Id.* at 565. It often takes the form of a union's economic pressure on nonunion employers to conform

to local union wage, benefit or safety standards--with the aim of not only improving conditions for nonunion employees, but also reducing the wage-cost disparities between union and nonunion employees, to the economic advantage of employees of the former. For example, "area standards picketing" against a nonunion employer by union members is protected. *See, e.g., O'Neil's Markets v. NLRB*, 95 F.3d 733, 737 (8th Cir. 1996). *See also Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 26, 32-33 (D.C. Cir. 2001) (union's filing of environmental objections to zoning and construction permits sought by nonunion contractors held protected, because intended to improve wages and benefits of contractor's employees). Similarly protected are attempts to enhance employment opportunities for unionized employees through programs that "level the playing field," by lowering labor costs for *unionized* employers, thereby improving their competitive position relative to their nonunion counterparts. *Manno Electric*, 321 NLRB 278, 298 (1996) (expressly approving a JTP), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997) ("*Manno*").

C. The JTP Constituted Protected Activity Under the Act

In the instant case, the threshold issue is whether the JTP was statutorily protected under the foregoing principles and, if so, whether Can-Am's state lawsuit attacking the program was unlawful and preempted by the Act. The facts are not in dispute. As shown above, the Union operates the JTP solely to foster

employment opportunities for its members employed by signatory contractors. To that end, the program "targets" certain construction projects at the bidding stage and promises to subsidize the wages paid by union contractors who successfully bid on those projects from JTP funds derived from a membership-approved dues assessment. The subsidies awarded under the JTP enable union contractors to bid based on wage rates at or near parity with lower-paying, nonunion contractors, and, if successful, still pay their employees the hourly wages required by the Union's collective-bargaining agreements. (Above, pp. 4-6.) Because the JTP constituted group action designed to expand employment, it was protected by Section 7 and Can-Am's interference with it therefore violated Section 8(a)(1) of the Act.

Can-Am's challenges to the Board's legal conclusion do not advance its case. Thus, there is no merit to Can-Am's suggestion (Br 1, 4, 20) that its lawsuit cannot constitute an unfair labor practice because it sued Kruse, an employer, and that employers have no Section 7 rights. The Board reasonably found that by suing Kruse, Can-Am interfered with and attempted to stop the JTP, which, as shown above, is conduct protected by Section 7 of the Act.

Although it is true that Sections 7 and 8 expressly protect "employees," it is well settled that conduct directed in the first instance against non-employees, including employers and unions, is unlawful to the extent that it has a tendency to coerce employees or interfere their exercise of statutorily protected activity. *See,*

e.g., Dahl Fish Co., 279 NLRB 1084, 1110-11 (1986), *enfd mem.* 813 F.2d 1254 (D.C.Cir.1987), where the Board held, with Court approval, that an employer's state court lawsuit against a union's action of policing collective-bargaining agreement had the "foreseeable consequences" of coercing and restraining employees rights and therefore violated Section 8(a)(1). "To hold otherwise would destroy the equilibrium the Act was designed to establish, and would divest employees of the advantages gained by their decision to organize and to be represented by the single voice of the [u]nion." *Id.* See also *Diamond Walnut Growers v. NLRB*, 53 F.3d 1085, 1087-90 (9th Cir. 1995) (employer's punitive damages lawsuit against union had an inevitable impact on the employees who were exercising their Section 7 right to strike). *Cf. International Longshoremen's Association, AFL-CIO v. Davis*, 479 U.S. 380, 385 n.4 (1986) (discharging supervisors violates Section 8(a)(1) if it infringes on the Section 7 rights of the employees), citing *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 404 (1982), *enforced sub nom Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C.Cir.1983).

Nor does Can-Am offer support for its related suggestion (Br 1, 3, 4) that a lawsuit cannot be an unfair labor practice unless it seeks directly to prosecute employees themselves. Indeed, the case law is to the contrary. See *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1377 (7th Cir. 1997), *cert. denied*, 522 U.S. 808

(1997) ("It would be anomalous to hold that an employer may not interfere with its employees' right to organize by filing baseless lawsuits against them, but that it may achieve the same result by filing a baseless lawsuit against a union attempting to organize the employees."). *See also Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 394 (D.C.Cir.1995) (suit by employer against union); *Diamond Walnut Growers v. NLRB*, 53 F.3d 1085, 1087-90 (9th Cir. 1995) (same); *NLRB v. International Union of Operating Eng'rs, Local 520*, 15 F.3d 677 (7th Cir.1994) (suit by union against union member); *Hoerber v. Local 30, United Slate, Tile & Composition Roofers*, 939 F.2d 118, 126 (3d Cir.1991) (suit by union against employer).²

D. The Board Can Enjoin State Court Lawsuits that Are Beyond the Jurisdiction of the State Courts Because of Federal Preemption

As the Supreme Court recognized, a lawsuit in the employment context can be a "powerful instrument of coercion," as it can threaten employees who "engage[] in protected activities" that they may be subject to burdensome litigation in one form or another. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731,

² Equally unpersuasive is Can-Am's challenge (Br 1, 4, 24) to the propriety of the Board's order on the ground that the Union lacked "standing" to file the unfair labor practice charge herein. "Any person [except an employee of this agency] or organization" has standing to file charges. *See* NLRB Casehandling Manual (Part One), Unfair Labor Practice Proceedings, Section 10016. *See also NLRB v UFCW, Local 23*, 484 U.S. 112, 118 (1987) (the term "charging party" as used in the Board's regulations (29 C.F.R. § 102.8) includes "without limitation, any person filing a charge or petition under the Act").

740 (1983) ("*Bill Johnson's*"). In *Bill Johnson's*, the Supreme Court discussed the circumstances where the Board could find that a pending lawsuit violated Section 8(a)(1) of the Act. 461 U.S. at 744. In particular, the Court held that the Board could not enjoin as an unfair labor practice the prosecution of a pending lawsuit, unless the suit has a retaliatory motive and lacks a reasonable basis in law or fact. *Id.*

"[T]he basic holding in *Bill Johnson's* [that the prosecution of a pending state court lawsuit may be enjoined by the Board only if it lacks a reasonable basis in law or fact] is, however, "subject to a large exception." *Teamsters Local 776 v. NLRB*, 973 F.3d 230, 235-36 (3d Cir. 1992), *cert. denied*, 507 U.S. 959 (1993). The Supreme Court recognized that in limiting the Board's authority to enjoin a pending action, it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state court because of *federal-law preemption*, or a suit that has an objective that is illegal under federal law," including the Act. *Bill Johnson's*, 461 U.S. at 737 n.5 (emphasis supplied). Those two classes of lawsuits, the Supreme Court stated, enjoy no special protection, and may be found unlawful irrespective of motivation. *Id.*³ See also *Teamsters Local 776 v. NLRB*, 973 F.3d

³ In its recent decision in *BE&K Construction Co. v. NLRB*, ___ U.S. ___, 122 S.Ct. 2390, 2397 (2002), the Supreme Court considered, "not the standard for enjoining ongoing suits, but the standard declaring completed suits unlawful." The Supreme Court there invalidated the Board's latter standard, because it improperly

at 235-36; *Emery Worldwide v. NLRB*, 966 F.2d 1003, 1006 n.4 (5th Cir. 1992).

We show below that Can-Am's state suit falls under the federal-law preemption exception because of its interference with the protected employee rights discussed above.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), the Supreme Court held that state law is preempted "[w]hen it is clear or may fairly be assumed that the activities which a [s]tate purports to regulate are protected by Section 7 . . . ," or are arguably subject to the prohibitions found in Section 8 of the Act. In those circumstances, "due regards for the federal enactment requires that state jurisdiction must yield." *Amalgamated Assoc. of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 290-91 (1971) (quoting *Garmon*, 359 U.S. at 244). See also *Sears, Roebuck & Co. v. San Diego County District of Council of Carpenters*, 436 U.S. 180, 187, 199 (1978) ("there is a constitutional objection to state court interference with conduct actually protected by the Act"). That "rule of preemption is designed to prevent the conflict between, on the one hand, state and local regulation and, on the other, Congress' 'integrated scheme of regulation' embodied in Sections 7 and 8 of the

deemed unlawful under Section 8(a)(1) "all reasonably based but unsuccessful suits filed with a retaliatory purpose." The Court's decision did not address the Board's authority under *Bill Johnson's* to find unlawful and enjoin a pending, preempted lawsuit. Accordingly, the decision in *BE&K* does not affect the outcome here.

Act" *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 225 (1993) (citing *Garmon*, 359 at 247). The regulatory scheme "includes the choice of the Board, rather than state or federal courts, as to the appropriate body to implement the Act." *Id.* (citing *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-49 (1985)). For, "[r]egardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Garmon*, 359 U.S. at 244.

"The threshold question in every labor pre-emption case is whether the conduct with respect to which a state has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power." *Garmon*, 359 U.S. at 250 (Justice Harlan, concurring). *Accord NLRB v. Nash-Finch Co.*, 404 U.S. 138, 149 (1971). Where conduct is protected under Section 7 of the Act, federal supremacy is directly implicated. *See Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 501 (1984). Thus, the Supreme Court has "frequently applied traditional pre-emption principles to find state law barred on the basis of an actual conflict with § 7." *Id.* *See also Livadas v. Bradshaw*, 512 U.S. 107, 120, 134-35 (1994) (holding state policy preempted by conflict with employees' right, implicit in the structure of the Act, "to complete the collective-bargaining process and agree

to an arbitration clause"); *Nash v. Florida Industrial Comm'n*, 389 U.S. 238, 238-40 (1967). Accordingly, where the Board decides that Section 7 protects conduct, federal preemption is applicable, and state courts are ousted of jurisdiction and "must defer to the exclusive competence of the [Board] if the danger of state interference with national policy is to be averted." *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1178 (D.C. Cir. 1993) (quoting *Garmon*, 359 U.S. at 245)).

The issue remains whether federal preemption precludes Can-Am's state court lawsuit against union contractor Kruse for participating in the JTP. In answering the question affirmatively, the Board relied (A 250, 254, 256-59) on its decision in *Manno*, 321 NLRB at 298, *enforced mem.* 127 F.3d 34 (5th Cir. 1997), reaffirmed in *Kingston Constructors, Inc.*, 332 NLRB No. 161 (2000), that JTPs are affirmatively protected by Section 7 of the Act and are not inconsistent with public policy. *See also Associated Builders & Contractors, Inc.*, 331 NLRB No. 5 (2000). As, the Board emphasized in *Manno*, "[t]he objectives of [JTPs] are to protect employees' jobs and wage scales," and those objectives fall squarely under the "other mutual aid and protection" clause of Section 7. *Manno*, 321 NLRB at 298. It follows that Can-Am's state suit is preempted.

E. Can-Am's Remaining Defenses Are Unmeritorious

An argument pervading Can-Am's brief (pp 2, 17, 18, 21, 23) is that the Board--contrary to its holding here--has previously held that state suits attacking

JTPs are not preempted. It is true that the Board has held that a union may not require that an employee pay dues into a JTP on *Davis-Bacon* projects.⁴ *Kingston Constructors* 332 NLRB No. 161, slip op. at 8 (2000). *Kingston* involved a union's admitted practice of threatening employees with discharge for failing to pay JTP dues out of their wages on federally funded public works projects. The Board deferred to certain court-affirmed determinations of the Department of Labor that departmental regulations prohibited the practice on Davis-Bacon projects. (See discussion below, pp. 23-24).

As stated above, however, there can be no question that the Board has squarely held that the opposite is the case on non-public, non-Davis-Bacon projects. Nor can it be doubted that the Ascend Project, which is at the center of Can-Am's state court action against Kruse, is not a Davis-Bacon project, and there is no evidence that Kruse has ever worked on one. Moreover, as the Board also found (A 250, 253, 258 n.11), at most, only 2 to 3 percent of the funds collected for the Union's entire JTP came from the wages of employees working for other contractors on federal or state prevailing wage jobs, and those moneys were not

⁴ The Davis-Bacon Act (40 U.S.C. § 276a(a)) requires contractors on federally funded construction projects to pay prevailing area wages “without subsequent deduction or rebate on any account . . . regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics.” While, California, like other states, has a “little Davis-Bacon Act”--Code Section 221 and 1778--for state-funded projects, the Ascend Project was not state funded.

directly traceable to Kruse. Therefore, as the administrative law judge reasonably concluded (258-59 n.11), the "conjectural, insubstantial amount [of the JTP funds collected from public projects] is a slender reed upon which to anchor state court jurisdiction on the issue." *See San Francisco Shirt Works, Inc. v. NLRB*, 558 F.2d 976, 977 (9th Cir. 1977) (upholding Board's determination that "de minimus" effect of union's conduct did not give rise to unfair labor practice violation).

Nor is there merit to Can-Am's contention (Br 1-2, 8-9, 11-14, 25) that two courts of appeals have held that federal law in fact does prohibit dues deductions for JTPs on *any* project for *any* employer, even on private, non-Davis-Bacon jobs. To the contrary, neither case it cites stands for the proposition for which it is cited. Thus, in *Building & Construction Trades Dept. v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994) ("*Reich*"), the Court upheld, as not "plainly erroneous," a ruling by the Wage Appeals Board of the Department of Labor approving regulations that wage deductions for JTPs fell outside the definition of "membership dues" under the Davis-Bacon Act. 40 U.S.C. § 276(a). The statutory term "membership dues" refers to those limited employee assessments that can lawfully be deducted under Davis-Bacon. The concern reflected in the Department's "anti-kickback" regulations (29 C.F.R. § 3.5), promulgated under Davis-Bacon, was that employers, unless restrained, might attempt to require Davis-Bacon employees to return a part of federally mandated "prevailing wage" minimums by deducting

assessments, disguised as "membership dues," that actually reverted to the employer. *See Building and Construction Trades Unions Job Targeting Programs*, Wage App. Bd. Case No. 90-02 (1991), 1991 WL 494718 *3. In short, the holding in *Reich* relates only to Davis-Bacon projects, which are not relevant here. *Reich*, 40 F.3d at 248-50.

The *Reich* Court also addressed Appellant Building and Construction Trades Department's (representing unions) contention that the NLRB's interpretation of "periodic dues" in Section 8(a)(3) of the Act (29 U.S.C. 158(a)(3)) allowed JTP deductions, and that the Department of Labor's interpretation of Davis-Bacon "membership dues" should be harmonized with the Board's interpretation. In dicta, the Court expressed the opinion that the Supreme Court had rejected the Board's view, citing *Communications Workers of America v. Beck*, 487 U.S. 735, 745 (1988) ("*Beck*").⁵ The Court observed: "The [Supreme Court] concluded that the [statutory] periodic dues . . . are limited to those funds necessary for collective bargaining, grievance adjustment, and contract administration. Thus, *even if the NLRA were relevant* to the meaning of membership dues in [the Davis-Bacon

⁵ In *Beck*, a case that addressed nonunion member objections to mandatory dues deductions for political purposes, the Court concluded that the periodic dues that a nonunion employee may be required to pay to a union under the Act, were limited to funds expended for the union's "core functions" of collective bargaining, grievance adjustment, and contract administration. 487 U.S. at 744-45, 762-63.

regulations], . . . JTP deductions would not qualify as periodic dues under the Act." 40 F.3d at 1282 (emphasis supplied).⁶ As the Board's administrative law judge noted in this case (A 257-58) with Board approval, the dicta in *Reich* and *Brock* do not conflict with the Board's holding here, because those opinions addressed a completely separate statutory scheme regulating conduct in the public-works employment sector only.

Moreover, subsequent cases applying the *Beck* interpretation of the term "periodic dues" have held that the term permits dues to be used for purposes that are "germane" to collective bargaining, grievance adjustment, and contract administration. That standard, we submit, is consistent with the Board's determination that JTPs--which are clearly germane to collective bargaining--are protected and not prohibited on private projects. *See, for example, United Food and Commercial Workers Union, Local 1036 v. NLRB*, 284 F.3d 1099, 1105 (9th Cir. 2002), citing *California Saw and Knife Works*, 320 NLRB No. 224 (1995), *enforced, sub nom. International Association of Machinists and Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir.), *cert. denied*, 525 U.S. 813 (1998).

⁶ In *Int'l Brotherhood of Electrical Workers v. Brock*, 68 F.3d 1194, 1202-03 (9th Cir. 1995), the court similarly rejected a contention that "interpretations of the term 'periodic dues' taken from [the NLRA] context, are relevant in determining whether JTP assessments are 'membership dues' under Davis-Bacon regulations"

Those cases are fully consistent with interpretations of similar provisions under other statutes, including the analogous Railway Labor Act. 45 U.S.C. § 151 et seq., 152, subd. 11. *See Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507, 519-22, 524, 528 (1991) (nonunion members can be assessed for their share of expenses associated with chargeable bargaining activities, "even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit"). *And see Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 666 U.S. 435, 448-56 (1984) (employees can be assessed for convention costs, for strike preparations, and for the costs of union publications reporting on other chargeable union activities).

Can-Am also points (Br 2, 6, 8) to numerous state court decisions applying California Labor Code Sections 221 and 223--the same provisions that are implicated in Can-Am's lawsuit--holding that JTP contributions extracted from wages earned on state prevailing-wages projects are not union dues, and are not exempted from the state "wage reversion" and anti-kickback provisions. Can-Am's reliance is misplaced. None of those state court decisions withstands the Board's determination that JTPs on non-Davis-Bacon jobs are subject to protection under the Act. *See Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 501 (1984);

Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162, 1178 (D.C. Cir. 1993) (citing *Garmon*, 359 U.S. at 245)).⁷

Can-Am, misreading *Bill Johnson's*, also repeatedly argues (Br 1, 2, 3, 18-22, 25) that its lawsuit cannot be preempted because the suit lacked a retaliatory motive, and has a reasonable basis in fact and law. But *Bill Johnson's* made clear that the rules established there regarding enjoining pending suits do not apply where the lawsuit is preempted. Put another way, an employer "necessarily lack[s] a reasonable basis" in law (*Longshoremen v. NLRB*, 887 F.2d 1407, 1414 n.12 (D.C. Cir. 1989)) where the relief requested in the state court "could not lawfully be imposed under the Act," or "'where [the Board's] federal powers preempts the field.'" *Bill Johnson's*, 461 U.S. at 737 n.5 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

⁷ Nor is there merit to Can-Am's suggestion (Br 7) that the JTP at issue is a "pool" operated, not for the benefit of employees, but exclusively for Kruse and other union contractors, and that the Union's only role in the JTP is that of "an intermediary or bag man" for the employer beneficiaries. Can-Am does not dispute the Board's factual finding (A 249-50, 253-54) that employers play no role in the management of the JTP. Thus, while union employers routinely deduct JTP assessments from wages, they remit those deductions to the Union's designated fund administrator for use by the Union, not the employers who deducted the funds. Moreover, as the Board found (A 253-54), deducting employers have no contractual right to a subsidy, and they must strictly comply with the application process established by the Union just to be considered for a subsidy. Indeed, as shown in the facts, pp. 4-6, the Union alone handles every aspect of the program's management, and the Union operates the for the best interests of its members.

Here, the lawsuit, which is based on California Labor Code Sections 221, 223 and 1178, "actually conflicts with Section 7 of the Act," because it interferes with conduct (the JTP) that the Board found to be protected. *See* discussion above pp. 14-19. Accordingly, as the administrative law judge in the instant case concluded (A 257-58), it was unnecessary to address Can-Am's "baseless and retaliatory" defenses. *See Bill Johnson's*, 461 U.S. at 737 n.5 (state court lawsuit may be found unlawful absent retaliatory motivation).

Throughout its brief, Can-Am advances numerous but unavailing assertions about the inequities of a program that, even if protected, bestows "unfair" advantage on union contractors versus nonunion. But, as the Supreme Court stated in *Lodge 76, Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 148 (1976), "The economic weakness of the affected party [that is, Can-Am] cannot justify state aid contrary to federal law." The Act's processes "would be frustrated" if an employer could invoke state law "because it was unable to overcome a union's tactic with its own economic self-help means." *Id* at 149.

In sum, based on its finding that the JTP was protected by the Act, the Board properly found that Can-Am's lawsuit attacking the JTP and Kruse's participation in it was preempted, and hence enjoined, from its inception. The Board reasonably found (A 249-50, 257-58) that Can-Am's prosecution and maintenance

of the preempted lawsuit violated Section 8(a)(1) of the Act, and directed Can-Am to take affirmative action to withdraw or seek to dismiss its lawsuit.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter judgment denying the petition for review and enforcing the Board's order in full.

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November 2002

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAN-AM PLUMBING, INC.	:	
	:	
Petitioner/Cross-Respondent	:	No. 01-1463
	:	
v.	:	
	:	
NATIONAL LABOR RELATIONS BOARD	:	Board Case No.
	:	32-CA-16097
Respondent/Cross-Petitioner	:	
and	:	
	:	
UNITED ASSOCIATION OF JOURNEYMEN AND	:	
APPRENTICES IN THE PLUMBING AND	:	
PIPEFITTING INDUSTRY OF THE UNITED STATES,	:	
AND CANADA LOCAL 342, AFL-CIO	:	
	:	
Intervenor	:	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Local Rule 32, the Board certifies that its final brief contains 6,483 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used is Microsoft Word 2000.

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Dated at Washington, D.C.
this 7th day of November, 2002

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	:	
Intervenor	:	

CERTIFICATE OF SERVICE

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this 7th day of November 2002