

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1472

FEDERAL SECURITY, INC.,
AND ITS ALTER EGOS OR AGENTS, JAMES R. SKRZYPEK
AND JANICE M. SKRZYPEK, INDIVIDUALS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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 Federal Security, Inc. (“Federal Security”) and James R. Skrzypek and Janice M. Skrzypek (the Skrzypeks”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board order issued against Federal Security and

the Skrzypeks.¹ The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act" or "the NLRA"). The Court has jurisdiction over the case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Board's decision and order (Members Liebman, Truesdale and Walsh) issued on October 1, 2001, and is reported at 336 NLRB No. 52. (D&O 1-8.)² That order is final under Section 10(e) and (f) of the Act. The petition for review

¹ By order dated June 17, 2002, the Court dismissed the petition for review filed by Federal Security, Inc., for failure to submit an appearance by counsel. As discussed below, pp. 31-32 the Board's cross-application for enforcement seeks enforcement of its order against Federal Security, and, because Federal Security has failed to contest the Board's application, the Board is entitled to summary enforcement of its order with respect to Federal Security.

The Skrzypeks, who are appearing pro se, filed a brief submitted to the 7th Circuit Court of Appeals in response to the Board's appeal of a district court order denying the Board's request for an injunction pending the completion of the administrative proceeding before the Board. See Section 10(j) of the Act (29 U.S.C. § 160(j)). That appeal was dismissed as moot when the Board issued its decision and order on October 1, 2001. Because the issues in the Section 10(j) appeal differ significantly from those presented in this proceeding, the Board has responded only to those arguments that relate to the issue of enforcement of the Board's order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

² The Board's record references in this brief are to the original record. "D&O" refers to the Board's decision and order, including the decision of the administrative law judge, which follows the Board's decision and is numbered sequentially; "Tr" refers to the transcript of the hearing before the administrative law judge; "GCX" and "RX" refer, respectively, to exhibits of the General Counsel and Federal Security and the Skrzypeks (respondents before the Board) References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

was filed on October 30, 2001, and the Board filed its cross-application for enforcement on November 26, 2001. Both were timely filed; the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably determined that Federal Security and the Skrzypeks violated Section 8(a)(1) of the Act by prosecuting a preempted malicious prosecution lawsuit against former employees for filing unfair labor practice charges and cooperating in the investigation of those charges.

APPLICABLE STATUTES

The relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

Based on an unfair labor practice charge filed by former Federal Security employee Joseph Palm, the Board's Regional Director for Region 13, acting on behalf of the Board's General Counsel, issued a complaint on January 29, 2001, alleging that Federal Security and its alter egos or agents James and Janice Skrzypek violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by filing a state court lawsuit. (GCX 1(a), 1(c), 1(g).) Federal Security and the Skrzypeks filed an answer, denying that they had committed any unfair labor practices. (GCX 1(l).) Following a hearing, the administrative law judge issued a decision and recommended order, finding that Federal Security and the Skrzypeks violated Section 8(a)(1) as alleged. (D&O 2-8.) After Federal Security and the Skrzypeks

filed exceptions to the judge's decision, the Board, on October 1, 2001, affirmed the judge's rulings, findings and conclusions, and adopted the recommended order as modified. (D&O 1-2.) The Board's findings of fact are summarized directly below; its conclusions and order are described immediately thereafter.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Prior Unfair Labor Practice Proceeding Against Federal Security

Federal Security contracted with the Chicago Housing Authority to provide security guard services at various public housing sites. (D&O 3.) James and Janice Skrzypek were the sole shareholders and served, respectively, as president and vice president of the company. (D&O 3; Tr 116, 123, 135, GCX 1(c), 1(l).)

In August 1992, the guards struck Federal Security, which then terminated them for abandoning their posts. Joseph Palm, one of the terminated guards, filed an unfair labor practice charge with the Board's Region 13 on August 20, 1992. Based on that charge, the Regional Director, on behalf of the Board's General Counsel, issued an unfair labor practice complaint, alleging that Federal Security had discriminatorily terminated 19 employees. On August 18, 1995, the Board, affirming the decision of an administrative law judge, found that the walkout was protected activity intended to protest both the terms and conditions of the guards' employment as well as the previous discharge of two other employees, and therefore concluded that the guards' discharges violated Section 8(a)(1) of the Act

(29 U.S.C. § 158(a)(1)). *Federal Security, Inc.*, 318 NLRB 413 (1995) ("*Federal Security I*"). (GCX 2.) The United States Court of Appeals for the Seventh Circuit denied enforcement of the Board's order. The court determined that the walkout was unprotected activity, because the security guards had exposed the residents to a heightened threat of danger when they abandoned their posts. *NLRB v. Federal Security, Inc.*, 154 F.3d 751, 757 (7th Cir. 1998). (GCX 3.) The Seventh Circuit did not disturb the Board's conclusion that the guards' walkout was conducted to protest the terms and conditions of their employment. (D&O 3-4.)

B. The Skrzypeks File a State Court Lawsuit Against 17 Former Guards for Prosecuting the 1992 Unfair Labor Practice Charge

On June 2, 2000, the Skrzypeks filed a lawsuit in the Circuit Court of Cook County, Illinois, against Joseph Palm and 15 of the terminated guards named in the original Board charge, and former guard Michael Davenport, who was not named in the 1992 unfair labor practice charge, but who testified at the unfair labor practice hearing (collectively, the "defendant employees"). *James R. Skrzypek and Janice M. Skrzypek v. Kelvin Brewer et al.*, (Case No. 00 L 06317). (GCX 4.) Because Federal Security ceased doing business in 1994 and was involuntarily dissolved in 1997, the Skrzypeks filed the lawsuit in their capacity as the sole former shareholders of and "successors-in-interest" to Federal Security. (D&O 4; Tr 119, GCX 1(c), 1(l), GCX 4 at 2.) The four-count complaint asserted claims for malicious prosecution, abuse of process, and conspiracy to commit those torts, and

sought \$140,000 in attorney's fees and costs, plus punitive damages. (D&O 4-5; GCX 4 at 8-14.)

On October 12, 2000, the state court entered default judgments against 11 defendants, later vacated as to one of the defendants. (D&O 5; RX 2, 3.) On March 6, 2001, the state court, ruling on a motion filed by the nondefaulting defendants, dismissed the abuse of process and corresponding conspiracy counts, without prejudice. The state court denied the defendant employees' motion to dismiss the malicious prosecution and the corresponding conspiracy counts, but ordered the Skrzypeks to replead those allegations. (D&O 5; GCX 6.) The Skrzypeks filed an amended complaint containing only the repled malicious prosecution and conspiracy counts. On August 17, 2001, the state court denied the nondefaulting defendants' renewed motion to dismiss. (D&O 1 n.2.)³

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Liebman, Truesdale and Walsh), affirming the administrative law judge, found that Federal Security and its alter egos or agents the Skrzypeks violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by prosecuting state lawsuit because (1) it was preempted as directed

³ The Skrzypeks misstate (Br. 8, 10, 26, 30, 32) that their suit survived a motion for "summary judgment." Summary judgment is governed by Illinois Code of Civil Procedure Section 2-1005. The state defendants filed motions to dismiss under Illinois Code of Civil Procedure Sections 2-615 and 2-619, the denial of which indicated only that the complaint was properly pled.

against activity protected by Section 7 of the Act (29 U.S.C. § 157)), and (2) it was baseless and in retaliation for protected activity. (D&O 1 and n. 1, 5-7.)⁴

The Board's order requires Federal Security and the Skrzypeks to cease and desist from the unfair labor practices found and any like or related interference with rights protected by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's order requires Federal Security and the Skrzypeks to withdraw or otherwise seek dismissal of the state court lawsuit and to take affirmative action to have the default orders in the proceeding vacated, reimburse the defendants in the state court lawsuit for all legal and other expenses incurred in defending the lawsuit, and mail to them an appropriate notice. (D&O 1, 7.)

SUMMARY OF ARGUMENT

The Board reasonably found that Federal Security and the Skrzypeks violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by filing and maintaining a state court lawsuit against 17 discharged Federal Security guards. That lawsuit alleged that the 17 employees engaged in malicious prosecution by filing unfair labor practice charges with the Board based on their discharge and cooperating with the investigation of those charges.

Under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983), a state court lawsuit found to be beyond the jurisdiction of the state court because of

⁴ As explained below p. 15 n.6, the Board in this proceeding seeks enforcement of its order only the ground that the state court lawsuit is preempted.

federal-law preemption "enjoys no special protection," and the Board can find such a lawsuit to violate Section 8(a)(1) of the Act. In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), 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.

The Board reasonably found that the state court lawsuit here was preempted because it sought sanctions against its former guards for engaging in the protected activity of filing unfair labor practice charges and cooperating in the investigation of those charges. "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972), quoting *Nash v. Florida Industrial Commn.*, 389 U.S. 235, 238 (1967). The Board cannot initiate its own unfair labor practice proceedings but must rely instead on the initiative of individual complainants, and complete freedom from coercion is necessary "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (quoting *John Hancock Mutual Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)).

The Board reasonably found (D&O 1 n. 3, 6-7) that the state court suit was directed at activity clearly protected by the Act. As shown, based on a charge filed by Joseph Palm, a guard discharged by Federal Security, the General Counsel

issued a complaint charging Federal Security with unlawfully discharging 19 employees for engaging in a protected walkout. At the unfair labor practice hearing on that complaint, six of the guards named as defendants in the state court suit, including Palm, testified and were subject to cross-examination. The administrative law judge and the Board relied on the credited testimony of some of those witnesses in finding that the guards' walkout was protected activity to protest working conditions, and that Federal Security violated the Act.

The evidence wholly fails to sustain the claim that, contrary to those findings, the discharged guards engaged in those actions in bad faith or with malice by lying about the reason for their walkout. *See generally Linn v. Plant Guard Workers*, 383 U.S. 53, 64-65 (1966) (imposing, in state libel cases attacking speech uttered during a labor dispute, federal standard permitting recovery “only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false”). The sole record evidence presented was testimony by James Skrzypek about an alleged conversation with a former guard, who was peripheral to the events that were the subject of the original unfair labor practice proceeding, and who allegedly made conclusory assertions about the thoughts and motives of other guards. The Board reasonably determined that such uncorroborated hearsay testimony that one individual made general "conclusory assertions" about other people's thoughts and actions did not constitute clear and convincing evidence that the former guards involved in the 1992 unfair labor

practice proceeding knowingly falsified any statement or acted with reckless disregard of the truth or falsity.

Contrary to the Skrzypeks' contentions, the Board was not precluded from relying on the preemption theory, even though that theory was not alleged in the complaint. The complaint gave "fair notice of the acts alleged" to be unlawful. The Skrzypeks also had an opportunity to litigate the relevant issues, and have not shown any prejudice resulting from the omission of the theory from the complaint.

There is no merit to the claim that the Board lacks jurisdiction over Federal Security because Federal Security has not engaged in interstate commerce since it ceased doing business in 1994 and was dissolved in 1997. The Board indisputably had jurisdiction over Federal Security in 1992, when the discharged guards filed the unfair labor practice charge and cooperated in the investigation. This case is inextricably linked to *Federal Security I*: the issue is whether the employees who invoked the Board's jurisdiction in *Federal Security I* can lawfully be subjected to a state court lawsuit seeking to hold them liable for that very action. Absent the Board's retention of jurisdiction in the circumstances presented here, a closed and/or dissolved business could, with impunity, sue former employees who had relied on the Board to protect their good faith participation in the Board's process. Further, by filing the state court suit in their capacity as the former sole shareholders of and the "sole successors-in-interest" to Federal Security, seeking to recover damages assertedly incurred by Federal Security in defending *Federal*

Security I, the Skrzypeks continued Federal Security for that limited purpose, and properly are subject to Board jurisdiction over complaint allegations involving that conduct, as agents of Federal Security.

Although the Skrzypeks argue that the Board lacks jurisdiction because the former guards who are the defendants in the state court lawsuit were not shown to be statutory employees, employee status has no bearing on Board jurisdiction. Further, the Board's finding that the defendants in the state court lawsuit, who were statutory employees at the time they were involved in the first proceeding, are statutory employees is reasonable and consistent with the policies of the Act.

Finally, the *Rooker-Feldman* doctrine, which provides that inferior federal courts lack jurisdiction to adjudicate claims seeking review of state court judgments, does not preclude the Board's order requiring the Skrzypeks to take affirmative action to have the default judgments vacated. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). First, the Board is a federal administrative agency, not an inferior federal court. Second, the Board did not review the state court judgment, but rather determined that the filing and maintenance of the suit itself was unlawful. Finally, the weight of authority holds that the *Rooker-Feldman* doctrine does not bar an action by a federal plaintiff who was not a party to the state court proceeding.

STANDARD OF REVIEW

A reviewing court must affirm the Board's findings if they are supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). *See also Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 29 (D.C. Cir. 2001). A reviewing court must accept the Board's construction of the Act 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*, 467 U.S. 837, 843-44 & n.11 (1984).

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT FEDERAL SECURITY AND THE SKRZYPEKS VIOLATED SECTION 8(a)(1) OF THE ACT BY PROSECUTING A PREEMPTED LAWSUIT AGAINST FORMER EMPLOYEES FOR FILING UNFAIR LABOR PRACTICE CHARGES AND COOPERATING IN THE INVESTIGATION OF THOSE CHARGES

A. Introduction

As the Supreme Court has long recognized, "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972), *quoting Nash v. Florida Industrial Commn.*, 389 U.S. 235, 238 (1967). This complete freedom is necessary "to prevent the Board's channels of information from being dried up by employer intimidation of

prospective complainants and witnesses.” *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (quoting *John Hancock Mutual Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)). Because the Board cannot initiate its own unfair labor practice proceedings but must rely instead on the initiative of individual complainants, *Scrivener*, 405 U.S. at 122, *Nash*, 389 U.S. at 238, *Roberts v. NLRB*, 350 F.2d 427, 429 (D.C. Cir. 1965), this freedom is integral to protecting “the function of the Act as an organic whole.” *NLRB v. Industrial Union of Marine & Shipbuilding Workers of Am.*, 391 U.S. 418, 424 (1968).

Indeed, freedom from coercion is of such paramount importance that Congress has rendered its violation an unfair labor practice. Section 8(a)(4) of the Act (29 U.S.C. § 158(a)(4)) provides that “[i]t shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the Act],” and is liberally construed in order to fully effectuate the section’s remedial purposes. *Scrivener*, 405 U.S. at 122, 124. Such protection assures ““effective administration of the Act by providing immunity to those who initiate or assist in proceedings under the Act.”” *John Hancock*, 191 F.2d at 485 n.8 (quoting *Briggs Mfg. Co.*, 75 NLRB 569, 570-71 (1947)).

In this case, James and Janice Skrzypek, the sole shareholders and former president and vice president of Federal Security, filed suit in state court against 17 former Federal Security guards, charging them with malicious prosecution for

filing unfair labor practice charges with the Board and cooperating in the investigation and prosecution of the resulting unfair labor practice case. As we show below, the Board properly found that the state court lawsuit violated the Act, because it sought state court sanctions against the protected right of access to the Board, and was therefore preempted.

B. The Board Can Find Illegal and Enjoin State Court Lawsuits that Are Beyond the Jurisdiction of the State Courts Because of Federal Law Preemption

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7” of the Act.⁵ It is established that a lawsuit can be “a powerful instrument of coercion.” *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983) (“*Bill Johnson’s*”).

In *Bill Johnson’s*, the Supreme Court discussed circumstances where the Board could find a pending lawsuit to violate Section 8(a)(1) of the Act and enjoin it. The Court there held that the Board cannot 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. *Bill Johnson’s*, 461 U.S. at 744.

⁵ Section 7 (29 U.S.C. § 157) grants employees the right “to self organization, to form, join, or assist labor organizations, ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”

"[T]he basic holding of *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 and is retaliatory--is, however, "subject to a large exception." *Teamsters Local 776 v. NLRB*, 973 F.2d 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 pending actions, 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 object that is illegal under federal law," including the Act. *Bill Johnson's*, 461 U.S. at 737 n.5. As to the latter two categories, the Supreme Court recognized that the state court lawsuit "enjoys no special protection," and may be found unlawful, even absent retaliatory motivation.⁶ *Emery Worldwide v. NLRB*,

⁶ In its recent decision in *BE&K Construction Company v. NLRB*, ___ U.S. ___, 122 S. Ct. 2390, 2397 (Sup.Ct. No. 01-518 June 24, 2002), the Supreme Court considered "not the standard for enjoining ongoing suits, but the standard for declaring completed suits unlawful." The Supreme Court there invalidated the Board's latter standard because it improperly deemed unlawful under Section 8(a)(1) of the Act "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 lawsuit as preempted. Accordingly, the decision in *BE&K* does not affect the enforceability of the Board's order based on the Board's finding that the state court suit here is preempted.

The Board, however, is not seeking enforcement of its order on the Board's alternative rationale that the state court lawsuit is baseless and retaliatory, because the Supreme Court's decision in *BE&K* may have an impact on that finding. If this Court determines that it is necessary to reach that finding, the Board requests the Court to remand the case.

966 F.2d 1003, 1006 n.4 (5th Cir. 1992). *Accord Teamsters Local 776 v. NLRB*, 973 F.2d at 235-236.

C. The Board Properly Found that the State Court Malicious Prosecution Lawsuit Was Preempted

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) ("*Garmon*"), 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. *See generally Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 436 U.S. 180, 199 (1978) ("there is a constitutional objection to state-court interference with conduct actually protected by the Act"). Where preemption is applicable, state courts are ousted of jurisdiction and "must defer to the exclusive competence" of the Board. *Garmon*, 359 U.S. at 245.

States are prohibited from taking actions that have "a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." *Nash v. Florida Industrial Commn.*, 389 U.S. 235, 239 (1967). Thus, in *Nash v. Florida Industrial Commn.*, the Supreme Court invalidated a state policy denying unemployment insurance to individuals solely because they had filed unfair labor practice charges, because the financial burden imposed by that policy would "impede resort to the Act and thwart congressional reliance on individual action" to bring unfair labor practice charges. *Id.*

The same concern over the impact of state regulation on the right under the NLRA to file unfair labor practices charges and cooperate in the investigation of those charges supports the Board's determination that the state court malicious prosecution suit filed by Federal Security and the Skrzypeks is preempted. *See Manno Electric, Inc.*, 321 NLRB 278, 295-298 (1996), *enf'd per curiam mem.*, Case No. 96-60587 (5th Cir. Sept. 8, 1997). Thus, the Board reasonably found (D&O 1 n. 3, 6-7) that the activity challenged in the state court suit was clearly protected by the Act's policies protecting access to the Board.

The state court lawsuit sought to subject the defendants in that suit to sanctions for filing unfair labor practice charges and cooperating with the Board. As shown in the statement of facts, in 1992, Joseph Palm, one of the defendants in the state court lawsuit, filed an unfair labor practice charge alleging that Federal Security discharged him and other employees for their protected activity. After an investigation, the General Counsel issued a complaint charging Federal Security with unlawfully discharging 19 employees. At the 1994 unfair labor practice hearing in *Federal Security I*, six of the guards, including Palm, testified and were subject to cross-examination. The administrative law judge and the Board relied on the credited testimony of some of those witnesses in finding that the walkout

was protected as relating to working conditions, and that Federal Security violated the Act.⁷ *Federal Security I*, 318 NLRB at 418-419. (GCX 2.)

As the Board further found (D&O 6), the evidence wholly fails to sustain the claim that the discharged guards acted in bad faith or with malice in filing the unfair labor practice charge and cooperating with the Board in *Federal Security I*. In determining whether the filing of charges or other participation in a Board proceeding was undertaken in bad faith, the necessary inquiry is whether there is clear and convincing evidence that those actions were undertaken maliciously, that is, undertaken with knowledge that the charge allegations and information provided were false or made with reckless disregard of the truth.⁸ Application of such a stringent standard recognizes that protecting those who file charges and provide information to the Board is fundamental to the Board's ability to enforce

⁷ The fact that the Seventh Circuit declined to enforce the Board's order does not render the filing of the charge and other cooperation with the Board unprotected. *See NLRB v. Auto Workers Local 212*, 690 F.2d 82, 84-85 (6th Cir. 1982) ("[e]mployees, whether right or wrong, have the right to invoke the processes of the Board"). As shown, the court did not disturb the finding that the walkout related to working conditions, but found it unprotected because the guards had exposed the residents to a heightened threat of danger when they left their posts.

⁸ *See generally Linn v. Plant Guard Workers*, 383 U.S. 53, 64-65 (1966), where the Supreme Court held that in state libel cases attacking speech uttered during a labor dispute, recovery was permitted "only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false . . .," adopting the federal standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1192 (11th Cir. 1999), *cert. denied*, 530 U.S. 1204 (2000) (under *Linn*, party asserting malice must establish actual malice "by clear and convincing evidence").

any of the rights guaranteed by the NLRA, because absent such initiators the Board would be unable to act. Giving wide latitude to those who file charges or otherwise cooperate in the investigation of those charges provides the "broad rather than narrow protection" Congress intended for those who provide information to the Board. *NLRB v. Scrivener*, 405 U.S. 117, 121-122 (1972).

The Board reasonably found (D&O 6) that the record fell far short of the requisite showing that the former Federal Security guards acted with knowledge that the charge allegations and information provided were false or made with reckless disregard of the truth. The sole record evidence was the testimony of James Skrzypek about a chance meeting he had in May 1999 with former Federal Security guard Michael Davenport.⁹ Skrzypek testified that Davenport told him that Skrzypek had been "set up to take a fall" and that "everyone was out to get [Skrzypek]," that counsel for the General Counsel in the original case "falsified the affidavits," and that "the reasons [the employees] gave were lies in order to get their jobs back." (Tr. 127-128.)¹⁰

⁹ Davenport denied that he made the statements Skrzypek attributed to him. (Tr. 65-66, 75-76.) The administrative law judge did not find it necessary to make a credibility resolution, based on his finding that Skrzypek's testimony did not establish bad faith. (D&O 6.)

¹⁰ Skrzypek also testified that one paragraph in the state court complaint "summarized" Davenport's comments. (Tr. 128.) That paragraph asserted that Davenport told him that the guards "fabricated the facts, circumstances and the reasons for the [1992] [w]alkout to the NLRB agents and attorneys ... to make it appear that the [w]alkout was concerted union activity so that the NLRB would

The Board reasonably found that Skrzypek's testimony was not clear and convincing evidence of bad faith, specifically that the guards had lied about the reasons for the walkout. Skrzypek's testimony about Davenport's alleged statement is hearsay, and therefore, in itself, does not establish the truth of those statements. The probative value of Skrzypek's testimony is even further diminished by the fact that Davenport's alleged comments concern the thoughts or motives of other people, and nothing in Skrzypek's testimony even suggests a foundation for Davenport's asserted representations. Thus, there is nothing to show that Davenport "could . . . have known what was or was not true in the affidavits other than his own" (D&O 6.) Moreover, as the administrative law judge observed (D&O 6), Davenport neither filed the charge nor was a discriminatee in the 1992 case and therefore had only "a limited connection" with that proceeding. In short, the Skrzypeks presented only uncorroborated hearsay testimony about alleged statements that amounted to "conclusory assertions" made by one individual with peripheral involvement in the first case. The Board reasonably determined that such testimony did not constitute clear and convincing evidence that those involved in the 1992 unfair labor practice proceeding

become involved" and that "the only reason the [g]uards left their posts was to show support for and loyalty to [supervisor] Short after he was suspended." (Tr. 128, GCX 4 at 7-8.)

knowingly falsified any statement or acted with reckless disregard of the truth or falsity (D&O 6.)¹¹

Accordingly, the Federal Security guards who filed the unfair labor practice charge challenging their discharge and who cooperated in the investigation and prosecution of that case were engaged in activity protected by Section 7 of the Act (29 U.S.C. § 157). Based on its finding that the conduct was actually protected by the Act, the Board properly found that the state court lawsuit charging those individuals with malicious prosecution for that very conduct was preempted.¹² The Board, therefore, reasonably found that the filing and maintenance of that preempted lawsuit violated Section 8(a)(1) of the Act, and directed Federal Security and the Skrzypeks to withdraw or seek to dismiss its lawsuit and to take affirmative action to have the default orders vacated.

¹¹ Significantly, James Skrzypek's unsubstantiated hearsay testimony is not the type of evidence that would warrant reopening a Board hearing based on claims of witness falsification. *See International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 915 n.15, 922-923 (D.C. Cir. 1972) (valid probative document evidencing falsification justified Board's reopening the record); *Pacific Micronesia Corporation*, 337 NLRB No. 66, 2002 WL 832012 *38 (2002)(record reopened based on affidavit from witness that he had committed perjury during initial hearing).

¹² The Board's decision in *Beverly Health and Rehabilitation Services, Inc.*, 336 NLRB No. 25, 2001 WL 1243609 (2001), is inapposite, as that case addressed a pending state court defamation suit. The right at stake here concerning the filing of unfair labor practice charges and cooperation in the investigation of those charges is fundamental to the Board's ability to perform its statutory role, and for that reason, the Board properly determined whether the conduct challenged in the state court lawsuit was, in fact, protected by the NLRA.

D. The Skrzypeks' Contentions Are Without Merit

1. The Board's finding did not exceed the scope of the complaint

The Skrzypeks' contend (Br. 10, 37 n. 22) that the Board's finding that the lawsuit violated the Act because it was preempted was improper because that theory was not alleged in the complaint or litigated. However, Section 102.15 of the Board's Rules and Regulations (29 C.F.R. § 102.15) requires only that the complaint include "a clear and concise description of the acts which are claimed to constitute unfair labor practices," not of the legal theory relied on. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993). Nor does a failure to state the correct legal theory violate due process. *Id.* Rather, due process is satisfied where the complaint gives an employer "fair notice of the acts alleged" to be unlawful and where the allegations have been "fully and fairly litigated." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1980). *Accord Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993).

Those two requirements were satisfied here. Thus, the complaint made clear that the conduct alleged to violate Section 8(a)(1) was the filing of the state court lawsuit by the Skrzypeks against 17 named former guards because those individuals had filed the unfair labor practice charge in *Federal Security I*, submitted affidavits during the investigation of that charge and/or participated in the Board hearing in that case. (GCX 1(c).) Moreover, the Skrzypeks had an opportunity to, and did, present evidence relevant to their claim that the former

guards acted in bad faith. Significantly, the Skrzypeks have failed to show any prejudice as a consequence of the complaint's failure specifically to allege that they violated Section 8(a)(1) by filing a preempted lawsuit. *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993). Thus, in their exceptions to the administrative law judge's decision, the Skrzypeks excepted to the administrative law judge's finding that the state court lawsuit was preempted, on the grounds that the preemption theory had not been alleged or litigated and was contrary to law. (Respondent's Exceptions Paragraphs 49-51). However, they did not proffer any evidence that they would have introduced had the theory been spelled out in the complaint, or even assert that they would have introduced any additional evidence.

2. The Skrzypeks' jurisdictional argument is without merit

In *Federal Security I*, the Board, affirmed by the Seventh Circuit, found that it had jurisdiction over Federal Security. *Federal Security, Inc.*, 318 NLRB 413 (1995), *enforcement denied on other grounds*, 154 F.3d 751, 754-755 (7th Cir. 1998). The Skrzypeks argue that the Board lacked jurisdiction over this proceeding because Federal Security has not engaged in interstate commerce since it ceased doing business in 1994 and was dissolved in 1997. The Board properly rejected this argument. The Board had jurisdiction because the issue here, whether the employees who invoked the Board's jurisdiction in *Federal Security I* can lawfully be subjected to a state court lawsuit seeking to hold them liable for that very action, is inextricably linked to *Federal Security I*.

The Board's retention of jurisdiction in those circumstances is analogous to court decisions upholding Board jurisdiction where respondents have ceased engaging in interstate commerce during litigation. *See NLRB v. Cleveland-Cliffs Iron Co.*, 133 F.2d 295, 300 (6th Cir. 1943) (court refused to oust Board of jurisdiction due to the discontinuance of employer commerce during litigation); *NLRB v. Forest Lawn Memorial Park Ass'n*, 198 F.2d 71, 71-72 (9th Cir. 1952) (same). Similarly, the Board has retained jurisdiction over employers whose operations have terminated, to adjudicate alleged bargaining violations arising after the closing, so long as the Board had jurisdiction over the employer at the time of the closing. *See Composite Energy Management Systems*, 332 NLRB No. 39, slip op. 2, 2000 WL 1475573 *2-4 (2000) (Board retained statutory jurisdiction where alleged failure to bargain over effects of closing occurred over 3 years after the employer permanently closed its plant); *Kranz Heating and Cooling*, 328 NLRB 401 (1999) (refusal to provide information nearly 7 months after employer permanently closed business); *Benchmark Industries*, 269 NLRB 1096 (1984) (Board had statutory jurisdiction to pass on employer's refusal to bargain over the effects of decision to close plant after fire, even though corporation was in the process of dissolution). Absent retention of jurisdiction in those circumstances, the employer's obligation to bargain would be meaningless. *See Composite Energy Management Systems*, 332 NLRB No. 39, slip op. 2, 2000 WL 1475573 *4 (2000) (unless Board retained jurisdiction, employer could engage in effects bargaining in

good faith for a predetermined period of time after it closed its doors and then abruptly cease bargaining, leaving union without recourse and Board without jurisdiction to determine and remedy the violation).

Similarly, absent the Board's retention of jurisdiction in the circumstances presented here, a closed and/or dissolved business could, with impunity, sue former employees who had relied on the Board to protect their good faith participation in the Board's process. *See Children's Baptist Home*, 215 NLRB 303, 303-304 (1974), *enforced*, 576 F.2d 256, 260-261 (9th Cir. 1978) (Board had jurisdiction of second case, despite change in discretionary standard between first and second case, because it would be "unconscionable" for Board subsequently to decline to afford employees the protection of the Act which the Board led them to believe they enjoyed). The Board's inability to retain jurisdiction would frustrate the important policy of promoting full and complete access to the processes of the Board, and have a clear chilling effect on the exercise of employee rights under Section 7. *See NLRB v. Scrivener*, 405 U.S. 117, 123-124 (1972).

Contrary to the Skrzypeks' argument, the Board also properly asserted derivative jurisdiction over James and Janice Skrzypek. The Skrzypeks served as Federal Security's president and vice-president, and were the sole shareholders in Federal Security. Their state court complaint asserts that they brought the state court lawsuit in their capacity as the former sole shareholders of and the "sole successors-in-interest" to Federal Security, and that they seek to recover damages

assertedly incurred by Federal Security in defending *Federal Security I*. (Tr 118-119, 120, GCX 4 at 2, 8-14.) Because the Skrzypeks' asserted right to file the state court lawsuit derives solely from their connection with Federal Security, the Board reasonably asserted jurisdiction over them as a limited continuation of Federal Security for the purposes of deciding whether the state court lawsuit was unlawful. To deny jurisdiction would not only, as the administrative law judge observed (D&O 3), "permit the Skrzypeks to rely on their relationship to Federal Security to bring their state court action and to reject that relationship to defend this case," but would, for the reasons stated above pp. 24-25, impair enforcement of the Act. *See Manno Electric, Inc.*, 321 NLRB 278, 278 n.3 (1996), *enf'd per curiam mem.*, Case No. 96-60587 (5th Cir. Sept. 8, 1997) (denying motion to dismiss allegations against employer's president and owner, who, with corporation, filed lawsuit against employees who gave statements to the Board; appropriate to include individual as respondent "to avoid frustrating the remedial purposes of the Act"). *Cf. White Oak Coal Co., Inc.*, 318 NLRB 732, 735 (1995), *enf'd mem.* 81 F.3d 150 (4th Cir. 1996) (holding two individuals, who were owners and officers of corporation, liable for corporation's obligations where "adherence to the corporate form would result in injustice and would lead to an evasion of legal obligations").¹³

¹³ Contrary to Federal Security's contention (Br. 20), the fact the Skrzypeks exercised shareholder litigation rights under Illinois law does not preclude the Board's conclusion that the Skrzypeks were subject to the National Labor Relations Act because they "in effect continued Federal Security for the limited

3. The Skrzypeks' claims concerning the "employee" status of the state court defendants must be rejected

The Skrzypeks (Br. 2, 14-15, 20-22) also challenge the propriety of the Board's order on the ground that the defendants in the state court suit were not shown to be "employees" within the meaning of the Act. To the extent the Skrzypeks argue (Br. 15) that the Board lacks jurisdiction because certain state court defendants are no longer "employees" under the Act, that argument is without merit. The Board's jurisdiction turns on employer status, not employee status. *See Management Training Corp.*, 317 NLRB 1355, 1358 (1995) (in determining whether to assert jurisdiction, "the Board will only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards").

To the extent the Skrzypeks suggest that the Board was precluded from finding a violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) because there was no evidence that all of the state court defendants were "employees" at the time the state court suit was filed, that position also must be rejected. The state court defendants were statutory employees when they filed the unfair labor practice

purpose encompassed by the complaint in this case." (D&O 3.) *See generally NLRB v. West Dixie Enterprises, Inc.*, 190 F.3d 1191, 1194-95 (11th Cir. 1999) ("personal liability for remedial obligations arising from corporate unfair labor practices under the National Labor Relations Act is a question of Federal law because it arises in the context of a Federal labor dispute").

charge in *Federal Security I* and cooperated with the investigation in that case. However, apart from three of the state court defendants, the Skrzypeks failed even to suggest any change in status in the other 14 defendants. *See* Section 2(3) of the NLRA (29 U.S.C. § 152(3)) (term "'employee' shall include any employee, and shall not be limited to the employees of a particular employer").

Moreover, for purposes of evaluating whether a state court lawsuit challenging the filing of unfair labor practice charges violated Section 8(a)(1), the Board is not compelled to adopt a view of the statutory term "employee" that depends solely on the particular circumstance of an individual at the moment the lawsuit was filed. As shown above, the instant proceeding grows out of that first case and is inextricably linked with it. The Skrzypeks sued their former guards for actions they took as employees in the earlier case. The Board's determination (D&O 3) that the term "employee" encompasses individuals who were employees when they filed charges or otherwise reported information to the Board, and who are being sued in state court for those actions, is consistent with the "broad rather than narrow protection" Congress intended for those who seek recourse with the Board. *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972). *See John Hancock Mutual Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951) (court, construing Section 8(a)(4) of the Act, observed that the term employee is broad enough to include "not only the existing employees of an employer but also, in a generic sense, members of the working class"); *Clark & Hinojosa, Attorneys at Law*, 247

NLRB 710 (1980) (Section 8(a)(4) forbids discrimination against a validly discharged former employee), *enforcement denied on other grounds*, (5th Cir. No. 80-1143 1981). *See generally NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91 (1995) (Board's broad interpretation of word "employee" is consistent with several of the Act's purposes, such as protecting right of employees to organize for mutual aid without employer interference and "encouraging and protecting the collective-bargaining process").

4. The *Rooker-Feldman* doctrine is inapplicable to this proceeding

There is no merit to the Skrzypeks' contention (Br. 22-25) that the Board was barred from permanently enjoining enforcement of default judgments entered by the state court against 10 of the defendants, under a doctrine known as *Rooker-Feldman*. The *Rooker-Feldman* doctrine provides that inferior federal courts lack jurisdiction to adjudicate claims seeking review of state court judgments. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). The Board is a federal administrative agency, not an inferior federal court. Thus, the *Rooker-Feldman* doctrine is inapplicable. *See American Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 799-801, n.9 (5th Cir. 2000) (rejecting application of *Rooker-Feldman* doctrine where U.S. Department of Transportation adjudication eviscerated prior state court ruling), *cert. denied*, 530 U.S. 1284 (2000). *Cf. NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320 (3d Cir. 1991) (the NLRB, by virtue of its status

as an agency rather than a court, was not required to give full faith and credit to an earlier state court judgment).

Second, the *Rooker-Feldman* doctrine applies only if “the injury alleged by the federal plaintiff resulted from the state court judgment itself....” *Long v. Shorebank Devanna. Corp.*, 182 F.3d 548, 555 (7th Cir. 1999). Federal courts retain jurisdiction over an “independent [federal] claim ... alleging a *prior* injury that a state court failed to remedy.” *Id.* (emphasis supplied). Thus, “the important issue remains the source of the injury: the issue is whether the federal plaintiff is injured by the state court judgment or by a prior injury at the hands of the defendant.” *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510 (7th Cir. 1996). *See also Stanton v. District of Columbia Court of Appeals*, 127 F.3d 72, 75 (D.C. Cir. 1997). The source of the injury here was *not* the Illinois court’s entry of the default judgments against certain defendants. Rather, it was the filing and maintenance of the suit charging the defendant-employees with malicious prosecution for initiating Board processes and participating in the agency’s investigation. *Cf. NLRB v. Nash-Finch Co.*, 404 U.S. 138, 142-144 (1971) (federal district court can enjoin state proceedings where Board’s federal power preempts the issue). Hence, the Board’s General Counsel asserted an independent claim and Federal Security’s reliance on the *Rooker-Feldman* doctrine is error.

Finally, the weight of authority holds that the *Rooker-Feldman* doctrine does not bar an action by a federal plaintiff who was not a party to the state court

proceeding. See *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994) (“the invocation of *Rooker-Feldman* is just as inapt here, for unlike *Rooker* or *Feldman*, the United States was not a party in the state court. ... The United States merely seeks to litigate its [federal] case for the first time, and the Government’s claims, like those of the private plaintiffs, are properly before the federal courts”); *E.B. v. Verniero*, 119 F.3d 1077, 1092 (3d Cir. 1997); *Gross v. Weingarten*, 217 F.3d 208, 218 n.6 (4th Cir. 2000); *United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995); *Allen v. Allen*, 48 F.3d 259, 261 (7th Cir. 1995); *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1351 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc); *Bennett v. Yoshina*, 140 F.3d 1218, 1224 (9th Cir. 1998); *Johnson v. Rodrigues*, 226 F.3d 1103, 1109-10 (10th Cir. 2000); *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995). But see *T.W. & M.W. v. Brophy*, 124 F.3d 893, 898 (7th Cir. 1997) (*Rooker-Feldman* applied, without discussing *De Grandy*); *Lemons v. St. Louis County*, 222 F.3d 488, 494-496 (8th Cir. 2000), *cert. denied sub nom. Halbman v. St. Louis County*, 531 U.S. 1183 (2001). Because neither the Board’s General Counsel, nor the Board itself, was a party to the Illinois proceeding, the *Rooker-Feldman* doctrine is inapplicable.

E. The Court Should Summarily Grant the Board's Application
for Enforcement of Its Order Against Federal Security

As noted above, n. 1, the Court dismissed Federal Security as a petitioner, because of the lack of a new appearance by an attorney on behalf of Federal

Security. The Board, however, continues to seek enforcement of its order against Federal Security, which is named in the order. Because Federal Security failed to file a brief contesting the Board's application for enforcement, the Board is entitled to summary enforcement of its order with respect to Federal Security.

CONCLUSION

For the foregoing reasons, the Court should deny the Skrzypeks' petition for review, grant the Board's cross application for enforcement, and enter a judgment against Federal Security and the Skrzypeks, enforcing the Board's order in full.

LINDA DREEBEN
Assistant General Counsel

RICHARD J. LUSSIER
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570
(202) 273-2977
(202) 273-3826

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

AILEEN A. ARMSTRONG
Deputy Associate General Counsel

National Labor Relations Board

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