Can-Am Plumbing, Inc. *and* United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local 342, AFL–CIO. Case 32–CA–16097

September 21, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE AND WALSH

On January 29, 1999, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The Respondent filed an answering brief.

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

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

We affirm the judge's conclusion that the Respondent unlawfully maintained and prosecuted a state court lawsuit against competitor employer L. J. Kruse Company for accepting job targeting program funds from the Union for Kruse's work on the Ascend Communications project. The Board's recent holding in *Kingston Constructors*, 332 NLRB 1492 (2000), that unions may not lawfully exact dues from employees working on Davis-Bacon projects to support job targeting programs, does not require a different result. As the judge noted in this case, the Ascend Communications project is not a Davis-Bacon project and there is no evidence in the record that Kruse has ever worked on a Davis-Bacon project. Furthermore, at most only 2 to 3 percent of the funds collected for the Union's job targeting program came from Federal or State prevailing wage jobs, and those moneys are not directly traceable to Kruse. Therefore, under Board precedent that was specifically reaffirmed in *Kingston Constructors*, we find that the job targeting program at issue in this case is protected by Section 7 of the Act. Id., at 1496, citing *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997); *Associated Builders & Contractors*, 331 NLRB 132 fn. 1 (2000), vacated in part not relevant here pursuant to a settlement 333 NLRB 955 (2001). Consequently, the Respondent's lawsuit, which broadly attacks the entire job targeting program and Kruse's participation in it as unlawful under State law, is preempted by the Act. *Manno Electric*, supra; *Associated Builders*, supra.

A preempted lawsuit "enjoys no special protection under *Bill Johnson's*"[1] and can be condemned as an unfair labor practice if it is unlawful under traditional NLRA principles. Under settled law, a violation of Section 8(a)(1) is established if it is shown that the employer's conduct has a tendency to interfere with the free exercise of a Section 7 right.[2] Here, it is clear that the Respondent's lawsuit tends to interfere with (indeed it is designed to stop) conduct that is protected by Section 7 (the job targeting program). Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) by maintaining and prosecuting its preempted lawsuit.

AMENDED REMEDY

Pursuant to our authority under Section 10(c) of the Act, we shall require the Respondent to take affirmative action within 7 days to have the lawsuit at issue in this case dismissed. This requirement is intended to speedily terminate an otherwise continuing violation of Section 7 rights, and also to minimize the possibility of State court action that might have additional coercive impact on employees' protected activities. We have imposed the same prompt-dismissal requirement in an analogous case, *Loehmann's Plaza*, 305 NLRB 663, 671 (1991), revd. denied 74 F.3d 292 (D.C. Cir. 1996). There, the Board held that, in order to avoid committing an unfair labor practice, a respondent who has filed a State court lawsuit seeking to enjoin concerted employee activity must take affirmative action to stay the lawsuit within 7 days after the General Counsel issues a complaint alleging that the employee activity is protected by Section 7, thereby preempting the lawsuit. While the lawsuit at issue in this case is preempted under a different theory than that on which *Loehmann's Plaza* rests,[3] we see no reason why the same remedial requirement should not be applied. Accordingly, we will modify the recommended Order to include a provision requiring the Respondent to take affirmative action, within 7 days of service of this Decision and Order, to have the lawsuit dismissed.[4]

[1] *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991) (referring to *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983)), enfd. 973 F.3d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

[2] *NLRB v. Illinois Tool Works,* 153 F.2d 811, 814 (7th Cir. 1946).

[3] In *Loehmann's Plaza*, the Board held that the employee activity was "arguably" protected by Sec. 7 and that the lawsuit consequently was preempted by the Act when the General Counsel issued his complaint. By contrast, a State court lawsuit like the one in this case is preempted, and accordingly violates Sec. 8(a)(1), from the time it is filed, since it is directed against activity which is "actually" or "clearly" protected by Sec. 7. *Associated Builders & Contractors*, supra, at 132 fn. 1 (maintenance of lawsuit against job targeting program constitutes interference with conduct that is actually protected by Sec. 7; unnecessary to pass on second theory under *Loehmann's Plaza*).

[4] We shall also modify the judge's recommended Order to require the Respondent to sign and return to the Regional Director sufficient

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Can-Am Plumbing, Inc., Pleasanton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and prosecuting a preempted lawsuit that interferes with activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 7 days after service of this Decision and Order by the Region, withdraw and, if necessary, otherwise seek to dismiss its lawsuit against L. J. Kruse Company in any and all courts where it is pending or to which it has been remanded.

(b) Reimburse L. J. Kruse Company, with interest, for all legal and other expenses incurred in the defense of the Respondent's lawsuit, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days after service by the Region, post at its place of business in Pleasanton, California, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1996.

(d) Sign and return to the Regional Director sufficient copies of the attached notice for posting by L. J. Kruse Company and by the Union, if they are willing, at all locations where notices to employees of L. J. Kruse are customarily posted, and at all locations of the Union where notices to members are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT continue to maintain and prosecute a lawsuit filed by us against L. J. Kruse Company in the Superior Court of the State of California, challenging the validity of the job targeting program of the United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local 342, AFL–CIO, a program that involves activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 7 days of the Board's Order, withdraw and, if necessary, otherwise seek to dismiss the lawsuit described above in any and all courts where it is pending or to which it has been remanded.

WE WILL reimburse L. J. Kruse Company for all legal and other expenses incurred during the period set forth in the Board's decision in the defense of our lawsuit, plus interest.

CAN-AM PLUMBING, INC.

Jeffrey L. Henze, Esq., for the General Counsel.
Mark R. Thierman, Esq. and *Donald G. Ousterhout*, Esq. *(Thierman Law Firm),* of San Francisco, California, for Respondent.

copies of the attached notice for posting by the L. J. Kruse Company and by the Union, if they are willing. *Associated Builders & Contractors*, supra, 331 NLRB at 142.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

John L. Anderson, Esq. (*Neyhart, Anderson, Freitas, Flynn &Grosboll),* of San Francisco, California, for the Charging Party.

Donald Lawrence Blevins, of Concord, California, for Party in Interest, U.A. Local 342 Joint Labor-Management Cooperation Committee, Inc.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Oakland, California, on April 16, 1998. The charge was filed by United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local 342, AFL–CIO (the Union) on May 16, 1997[1] and the amended complaint was issued January 21, 1998. At issue is whether by maintenance and prosecution of a lawsuit against one of its competitors, L. J. Kruse Company, Respondent Can-Am Plumbing, Inc. has violated Section 8(a)(1) of the Act. More specifically, the amended complaint alleges that the lawsuit is baseless and retaliatory within the meaning of *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731, 747 (1983), and further alleges that all allegations therein were preempted within the meaning of *Loehmann's Plaza,* 305 NLRB 663, 670 (1991).

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and for Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a California corporation, with an office and place of business in Pleasanton, California, is a residential and commercial plumbing contractor engaged in the construction industry. During the 12 months preceding issuance of the amended complaint, Respondent purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of California, and provided services valued in excess of $50,000 to customers or business enterprises within the State of California who themselves meet one of the Board's jurisdictional standards, other than indirect inflow or indirect outflow. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since 1989, the Union has maintained a job targeting program. The program is funded by a special dues assessment. It is administered solely for the purpose of expanding work opportunities available to employees working under the Union's collective-bargaining agreements by subsidizing the wages of employees of targeted employers, thus allowing targeted employers to compete on projects against nonunion contractors.

Pursuant to the program, a contractor whose employees are represented by the Union may petition the Union for the subsidy. The Union's business manager has sole discretion to determine whether to approve the subsidy request. Business manager Blevins credibly testified that he alone makes this decision based upon the interests of the membership and, if he determines the subsidy is in the best interest of the membership, he then determines the amount of the subsidy.

Union contractors do not have any contractual right to the subsidy. A union contractor submits a reduced wage rate bid at its own risk. However, if the Union awards a successful contractor the subsidy, employees' wages are augmented with the funds.

The job targeting program was originally funded by a membership-approved transfer of moneys from a strike fund. Additional funds have been added solely from "working" dues calculated at the rate of 75 cents per hour worked. A small amount of these funds, approximately 2 to 3 percent, originated from Federal or State prevailing wage jobs. For calendar years 1995 and 1996, about 6 percent of the targeted funds were distributed on prevailing wage jobs.

Kruse is a plumbing and heating contractor whose plumbers, pipefitters, apprentices and welders are represented by the Union. Kruse is bound to the 1993–1998 master collective-bargaining agreement between the Union and the Northern California Piping Contractors. From 1991 to 1997, Kruse received job targeting funds from the Union on 13 occasions. In May 1996, Kruse bid for work on the Ascend Communications project. One of its competitors for this work was Respondent, a nonunion contractor. Kruse was awarded the contract by Ascend Communications. This project was not a public works project and was not governed by Davis-Bacon prevailing wage regulations. Kruse requested and received job targeting funds for this project.

B. The State Court Litigation

On October 15, 1996, Respondent filed a complaint against Kruse in the Superior Court of the State of California, Alameda County, Northern District. The complaint alleges that Kruse's acceptance of money from the job targeting program constitutes an unlawful kickback scheme or, alternatively, violates California's prevailing wage statute governing public works, prevailing wage jobs. Respondent requests that Kruse's actions be enjoined and further asks for actual and punitive damages, restitution, and disgorgement. The parties agree that the state court action has been stayed pending litigation of these unfair labor practices.

C. Analytical Framework

The contours for accommodation between the right of access to State courts, the state interest in maintaining domestic peace and protecting its citizens' health and welfare, and the right to engage in activities protected by the National Labor Relations Act are set forth in *NLRB v. Bill Johnson's Restaurants,* 461 U.S. 731 (1983). Prosecution of a state court action which lacks

[1] All dates are in 1997 unless otherwise indicated.

a reasonable basis in fact or law violates Section 8(a)(1) of the Act if the action was filed with a retaliatory motive. In analyzing whether a State court action is baseless prior to the State court's ruling, it is necessary to determine whether any genuine issues of material fact or law exist. If there are none and the suit is unfounded, the suit is baseless and the second issue, whether the suit was filed for a retaliatory purpose, may be examined. If genuine issues of material fact or law are present, a determination of baselessness is not possible and the Board must stay its proceedings until the State court litigation has been concluded.

Bill Johnson's is specifically limited to cases in which an employer's lawsuit would not be barred by Federal law except for its allegedly retaliatory motivation. The Court stated, "We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law." Id. at footnote 5.

Comity between the jurisdictions of State courts and the NLRB is governed by a series of preemption decisions including *Brown v. Hotel & Restaurant Employees Local 54,* 468 U.S. 491 (1984), and *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). When state law regulates conduct which is actually protected by Federal law, the Federal law must prevail by direct operation of the supremacy clause of the Constitution. *Brown,* 468 U.S. at 501: "If employee conduct is protected under §7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause." "Preemption under these circumstances is not a matter of protecting the primary jurisdiction of the NLRB. Rather, it is a substantive right." Id. at 503.

Alternatively, when activities are arguably subject to Section 7 or Section 8 of the Act, both State and Federal courts must defer to the exclusive jurisdiction of the NLRB. *Garmon,* 259 U.S. at 244–245. This preemption occurs no later than the date of issuance of the unfair labor practice complaint. *Loehmann's Plaza,* 305 NLRB 663, 670 (1991) (interpreting *Sears Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978)).

D. Arguments

1. Baseless and retaliatory lawsuit

Counsel for the General Counsel argues that Respondent's State court lawsuit is baseless. Focusing on the first theory in the State court lawsuit, violation of California Labor Code Section 1770, et seq. by accepting job targeting money on the Ascend Communications project contributed from employees while working on publicly funded projects, counsel for the General Counsel initially notes that the Ascend Communications project was a private, nonprevailing wage job. Accordingly, the withholding of working dues from employees' wages on that project could not violate that requirement that public projects be paid at the prevailing wage. Moreover, counsel for the General Counsel asserts that because the Union commingled all job targeting funds from working dues on both private nonprevailing wage projects and public prevailing wage projects, there is no direct evidence upon which to find that Kruse accepted job targeting funds originating from public works prevailing wage projects. Further, counsel contends that because only 3 percent of the commingled funds is from Federal or State prevailing wage work, the amount of such money received by Kruse is de minimus.

Counsel asserts that the second theory in the State court lawsuit, the antikickback allegation, is similarly baseless. Counsel notes that although the California labor code prohibits employer withholdings for purposes other than insurance premiums, hospital or medical dues, the code specifically permits deductions authorized by the National Labor Relations Act. In *Manno Electric,* 321 NLRB 278 (1996), the Board adopted the administrative law judge's finding that a union job targeting program which had the objective of protecting employees' jobs and wage scales was protected by Section 7 of the Act. Id. at 298. Relying on *Manno Electric,* counsel argues that Respondent's reliance on the California Labor Code antikickback provisions is baseless. Indeed, counsel notes that the California Department of Industrial Relations has held under similar circumstances that deduction of working dues (including amounts for job targeting programs) pursuant to appropriate employee authorization is exempted from the antikickback portion of the California Labor Code.

Because Respondent seeks punitive damages and penalties and attacks conduct protected by Section 7 of the Act, counsel for the General Counsel asserts that the lawsuit is retaliatory relying on *H. W. Barss,* 296 NLRB 1286, 1287 (1989), and *Phoenix Newspapers,* 294 NLRB 47, 48–50 (1989). Counsel also notes that another object of the lawsuit is to prevent Kruse and other union contractors from ever participating again in the job targeting program and contends that this fact supports an inference of retaliation.

On the other hand, counsel for Respondent characterizes this dispute as a private one, between two companies, in which the Union seeks to interject itself. Respondent contends that the purpose of the lawsuit is to ensure even footing among construction employers just as the Act, "seeks to maintain a level playing field between workers and management." Respondent asserts that the lawsuit is not baseless pursuant to *Bill Johnson's* because the lawsuit has a solid foundation in the California Labor Code, minimum labor standards. With regard to whether Kruse has withheld working dues from employees' wages on public works prevailing wage projects, Respondent contends that the Union's evidence is unclear as to whether Kruse has actually worked on any public works prevailing wage projects in the last 6 years. Respondent concedes that even if Kruse did not work on any prevailing wage projects within the relevant timeframe, its claims based upon the antikickback provisions of the California Labor Code are well founded. In this respect, Respondent notes that there is no dispute that Kruse received job targeting monies which were deducted from employees' wages. Accordingly, Respondent claims that Kruse violated California Labor Code §221 which prohibits employer receipt of employee wages and California Labor Code §223 which prohibits secretly paying a lower wage than required by contract.

Moreover, Respondent views *Bill Johnson's* holding as limited to State court lawsuits by employers against employees for the exercise of Section 7 rights. Accordingly, Respondent argues that a lawsuit brought against an employer is not impli-

cated under the holding of *Bill Johnson's* because there is no chilling effect on employee Section 7 rights.

Further, Respondent asserts that no Section 7 rights are implicated not only because *Manno Electric* is a poor starting point for analysis of the issue due to the myriad of other issues determined in that case but also because *Manno Electric* is distinguishable. In asserting that no Section 7 rights are implicated in the job targeting program, Respondent relies by analogy on *Allen Bradley Co. v. Electrical Workers Local 3,* 325 U.S. 797 (1945), which dealt with the term "mutual help" in the Clayton Act and mutual aid in the Norris-LaGuardia Act. Specifically, the Court held that the phrase could not be construed to cover activities for the purpose of employer help in controlling markets and prices.[2]

In asserting that *Manno Electric* is distinguishable, Respondent notes that *Manno Electric* did not involve any State statutes prohibiting employers from accepting money paid to employees. Respondent contends that this raises an important state interest. Respondent also claims that although *Manno Electric* held that the objective of the job targeting program therein was protected by the Act, it did not specifically hold that the manner and means of such a program would always fall within the protection of the Act. Further, Respondent points out that there is no conflict between a regulation which prohibits job targeting deductions and the National Labor Relations Act. *Electrical Workers Local 357 v. Brock,* 68 F.3d 1194 (9th Cir. 1995); *Building & Trades Council v. Reich,* 40 F.3d 1275 (D.C. Cir. 1994).

Finally, focusing on the retaliatory component of *Bill Johnson's,* Respondent contends that there is no evidence that Respondent was motivated by feelings of animosity toward the employees of Kruse. Indeed, Respondent claims that the only focus of the lawsuit is to attain compensation for its loss of profits on the Ascend Communications project.

2. Preemption

The General Counsel's second theory of violation is that the lawsuit filed by Respondent is preempted pursuant to *Brown v. Hotel & Restaurant Employees Local 54,* 468 U.S. 491 (1984), which held that State law which interferes with the exercise of employee conduct protected by Section 7 is preempted by direct operation of the Supremacy Clause. Alternatively, the General Counsel asserts that the State lawsuit was preempted as of the date the complaint issued herein pursuant to *Loehmann's Plaza,* 305 NLRB 663 (1991). This theory relies on the absence of a compelling state interest that would permit State regulation when an activity is arguably subject to Sections 7 or 8 of the Act.

Respondent counters that State statutes containing minimum protections for all employees cannot be preempted by the Act. Further, relying on *Electrical Workers Local 357 v. Brock,* 68 F.3d 1194 (9th Cir. 1995), Respondent argues that job targeting programs are not protected by Section 7 of the Act and, thus, the NLRB will ultimately fail in attempting to halt Respondent's State court lawsuit pursuant to a preemption theory because the Ninth Circuit will not enforce such an order.

E. Analysis

I find that the job targeting program at issue in this case is indistinguishable from the job targeting program in *Manno Electric.* Accordingly, pursuant to *Manno Electric,* I find that the job targeting program was protected by Section 7 of the Act. Further, pursuant to *Manno Electric,* a lawsuit to enjoin a job targeting program falls within the exception set forth in footnote 5 of *Bill Johnson's:* "[C]laimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law." Accordingly, because the facts of this case are controlled by *Manno Electric* and, pursuant to the holding therein, I find that Respondent violated Section 8(a)(1) by filing and maintaining the lawsuit against Kruse.[3]

In *Manno Electric,* the company filed suit in State court against the Union, one of its business agents, and 19 union members for conspiracy to injure its business, to restrain its trade, to slander the company, and because defendants made statements to the NLRB and other government agencies in bad faith. In addition, the state court action contained an allegation that the union's job targeting program was a restraint of trade.[4]

In describing the job targeting program in *Manno Electric,* the judge stated:

> The Union supplements the wages of the employees of certain union employers so that they may bid on a parity with nonunion contractors whose payscale is lower. By this method the Union is able to maintain the union wage

[2] In addition, Respondent argues that no other section of the Act protects job targeting programs and asserts that working dues which are deducted from employees' paychecks do not qualify as "periodic dues," relying on *Building & Trades Council v. Reich,* 40 F.3d 1275 (D.C. Cir. 1994), and may in fact be illegal pursuant to Sec. 302(c)(4) of the Labor-Management Relations Act, 29 U.S.C. §186(c)(4).

[3] The holding in *Manno Electric* is consistent with *Brown v. Hotel & Restaurant Employees Local 54,* 468 U.S. 491 (1984). There the Court noted that State law must be displaced when it actually conflicts with federal law. Id. at 501. "If employee conduct is protected under §7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause." Id. The Court specifically rejected balancing the state interest against the interference to federally protected rights, as envisioned in *Garmon,* and held that, "[i]f the state law regulates conduct that is actually protected by federal law, however, pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right." Id. at 503. Clearly, the job targeting program is protected by Sec. 7 of the Act. Accordingly, Respondent's lawsuit to enjoin the job targeting program is preempted.

[4] The paragraph of the petition at issue read:

> Upon information and belief, Local 995 participates in a "job targeting program" with certain union contractors offering to pay a portion of the wages of certain employees of employer competitors of Manno Electric with the intent of benefiting Local Union 995, its signatory employers, and its members and with the intent of injuring and restraining the trade of Manno Electric. The libelous statements, harassment and intentional infliction of emotional distress committed by Local 995 and its named defendant members were, in part, motivated by the attempt of Local 995 to injure the business of Manno Electric to the benefit of the union business of the [apparently a portion of the allegation is missing here in the reported decision] of Manno Electric and to benefit the union members of Local 995.

> scale on the job and obtain work for its members. Obviously, it also benefits the union contractor.

Id. at 298. The same may be said of the job targeting program herein.

In *Manno,* the Board held:

> Section 7 provides that employees shall have the right "to engage in other concerted activities for the purpose of . . . other mutual aid or protection." The objectives of the "job targeting program" are to protect employees' jobs and wage scales. These objectives are protected by Section 7. Thus, the plaintiff's suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a)(1) of the Act. The claims which the Plaintiff sought to press were preempted.

Manno Electric, 231 NLRB at 298.[5] Specifically, a majority of the three-member panel considering this issue adopted the judge's analysis in full and agreed that the lawsuit was, "grounded in matters preempted by the Act, and with an illegal objective."[6]

In adhering to the ruling in *Manno Electric,* I am cognizant of Respondent's arguments to the contrary and will address each of them. Initially, Respondent urges that its lawsuit has nothing to do with employee Section 7 rights. As characterized by Respondent, the State court lawsuit is by one employer against another employer and neither of the employers has any Section 7 rights. Specifically, Respondent relies on *Allen Bradley Co. v. Electrical Workers Local 3,* 325 U.S. 797 (1945). There the Court held generally that when a union joined with businesses in a scheme to monopolize electrical equipment supplies in the New York metropolitan area, the exemptions of the Clayton and Norris-LaGuardia Act did not insulate the union from antitrust prosecution. Relevant to the Court's holding was Section 6 of the Clayton Act which exempted the operation of labor organizations for purposes of mutual help and the Norris-LaGuardia Act which emphasized the right of employees to organize into unions and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection. The Court noted that these exemptions might insulate the Union when it acted alone. However, the Court held that when the union acted with employers to create a monopoly, the union could be prosecuted for antitrust violation. In other words, the mutual help and mutual aid and protection exemptions did not insulate unions when they engaged in employer help.

By relying on *Allen Bradley Co.,* Respondent argues that when the Union aided Kruse, it acted outside the bounds of "mutual aid and protection" and thus its lawsuit against Kruse, another employer, does not involve Section 7 rights. However, Respondent's argument is misplaced. *Allen Bradley Co.* held that when a union combines with employers to create a monopoly, it is not acting for mutual aid and protection. However, the Court was clear that a Union acting alone might engage in actions which constituted a restraint of trade. The facts herein do not indicate any scheme between Kruse and the Union. Rather, it appears that the job targeting program is run unilaterally by the Union. The direct and foreseeable consequence of suing Kruse was to interfere with the concerted, protected activities of employees to achieve the job targeting program's protected goals. Accordingly, by suing Kruse to attack the Union's job targeting program, Respondent has interfered with Section 7 activities of the employees.[7]

Respondent's also argues that *Bill Johnson's* is specifically limited to suits by employers against employees in retaliation for exercise of Section 7 rights. Additionally, Respondent urges that its lawsuit is not baseless or retaliatory. Because *Manno Electric* does not deal with a baseless, retaliatory lawsuit but, rather, a preempted lawsuit or a lawsuit with an illegal objective, it is unnecessary to address these arguments.

Additionally, Respondent suggests that preemption should not be lightly inferred because the establishment of labor standards falls within the traditional police powers of the State. Respondent notes instances in which the Act was held not to preempt a statute barring voluntary agreements between employers and employees for reimbursement of employee debts,[8] and a statute prohibiting unauthorized payroll deductions for

[5] The administrative law judge concluded that his first inquiry must be whether the lawsuit was encompassed within fn. 5 of *Bill Johnson's. Manno Electric,* 231 NLRB at 297. Reading his decision in this light, his conclusion that the job targeting program was preempted must be read as a finding that the job targeting allegation was preempted within the meaning of *Bill Johnson's* fn. 5 as "claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law."

[6] Thus in analyzing par. 2 of the petition therein (alleging conspiracy to injure the Company by making statements to the NLRB), the judge held that the lawsuit was incompatible with the objectives of the Act and had an illegal object as its purpose. In analyzing par. 5 of the petition (alleging that the job targeting program was a restraint of trade), the judge held that this suit interfered with, restrained, and coerced employees in their exercise of Sec. 7 rights, thus offending Sec. 8(a)(1) of the Act. *Manno Electric,* 321 NLRB at 298. The judge concluded, "The claims which the Plaintiff sought to press were preempted." Although at fn. 29 of his decision, the judge referred to preemption pursuant to *Garmon* and *Loehmann's Plaza,* it appears that his holding was actually based on preemption pursuant to *Bill Johnson's* fn. 5: grounded in matters preempted by the Act (not arguably protected by the Act as in *Garmon* and *Loehmann's Plaza*) or with an illegal objective. Member Cohen joined his colleagues in adopting the judge's conclusion regarding par. 5 of the state court litigation utilizing the *Garmon/Loehmann's Plaza* "arguably protected" analysis and did not pass on whether the state court lawsuit to enjoin the job targeting program had an unlawful objective within the meaning of *Bill Johnson's* fn. 5.

[7] Respondent also argues that no other section of the Act protects job targeting programs. Relying on *Building & Trades Council v. Reich,* 40 F.3d 1275 (D.C. Cir. 1994), Respondent claims that working dues for job targeting programs do not constitute periodic dues within the meaning of Sec. 8(a)(3). Further, Respondent opines, such deductions may be illegal under Sec. 302 of the Labor-Management Relations Act. If so, deduction of working dues cannot be protected by the Act, Respondent argues. Theorizing further, Respondent characterizes the Union, through its job targeting program, as acting on behalf of employers rather than as a representative of employees and further, of coercing employees from refraining from joining the Union. I reject Respondent's argument as speculative. In any event, the holding in *Manno* precludes examination of this area.

[8] *Beckwith v. United Parcel Service,* 889 F.2d 344 (1st Cir. 1989).

job targeting funds,[9] as well as a holding that a State court lawsuit alleging that a public works job targeting program violated Labor Code section 1778 was not preempted by Section 301 of the LMRA.[10] Respondent notes that *Manno Electric* did not involve the substantial State interest in prohibiting employers from accepting money paid to employees while the instant case does. Respondent also claims that *Loehmann's Plaza* preemption is limited by the holding in *Bill Johnson's;* that is, according to Respondent, *Loehmann's Plaza* preemption may occur only when the State court lawsuit is baseless and retaliatory. Were the Board to reconsider its holding in *Manno Electric,* these arguments would be thoroughly examined. However, while *Manno Electric* controls the issue, these arguments have been decided against Respondent.

In this same vein, Respondent urges that *Manno Electric* conflicts with decisions in the District of Columbia and Ninth Circuit Courts of Appeals. *Building & Trades Council v. Reich,* 40 F.3d 1275 (D.C. Cir. 1994), and *Electical Workers Local 357 v. Brock,* 68 F.3d 1194 (9th Cir. 1995), involved the Department of Labor's Wage and Hour Division interpretation of the Davis-Bacon Act, which requires prevailing wages on public construction projects. The interpretation stated that "membership" dues (allowable as a deduction) did not include job targeting deductions. The courts held this interpretation was not plainly erroneous. In discussing potential conflict between the Act and the Department of Labor regulations, the courts were careful to qualify their comments with caveats regarding the relevance of such an inquiry: "Thus, even if the NLRA were relevant to the meaning of membership dues in Labor's regulations . . . ." *Reich,* 40 F.3d at 1282; "The D.C. Circuit also rejected union contentions 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 Act regulations. . . . We agree with the D.C. Circuit's analysis." 68 F.3d at 1203. Accordingly, I conclude that Respondent has overstated its case. These courts have not held that a State court lawsuit seeking to enjoin operation of a job targeting program on a nonpublic works, nonprevailing wage job is not preempted by the Act. Rather, these cases deal with the reasonableness of a Department of Labor Wage and Hour regulations governing public works jobs.[11] Accordingly, I cannot agree with Respondent's premise that these cases conflict with the holding in *Manno Electric.*

CONCLUSION OF LAW

By maintaining and prosecuting a State court lawsuit against Kruse for accepting job targeting program contributions from the Union for its work on Ascent Corporate Campus Phase I Project with the direct and foreseeable consequence of interfering with employees' concerted ability to achieve the job targeting program's protected objectives, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent must cease and desist from maintaining and prosecuting the lawsuit and must request withdrawal or dismissal of the lawsuit. Respondent shall also be responsible for reimbursement of all reasonable legal fees and expenses incurred pursuant to the lawsuit, with interest, from December 16, 1996, 6 months prior to filing of the unfair labor practice charge.[12] Interest shall be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[9] *J. A. Croson Co. v. J. A. Guy,* 1996 Ohio App. LEXIS 4548 (1996).

[10] *Associated Builders & Contractors v. Electrical Workers Local 302,* 109 F.3d 1353 (9th Cir. 1997).

[11] Similarly, I reject Respondent's argument regarding public works construction preemption based upon the holding in *Building & Trades Council v. Association Builders & Contractors (Boston Harbor),* 507 U.S. 218, 227–230 (1993). There is no evidence that Kruse has worked on a public works project and at most 3 percent of the job targeting funds originate from public works employees' wages. In agreement with counsel for the General Counsel, I find this conjectural, insubstantial amount a slender reed upon which to anchor state court jurisdiction of the issue.

[12] Based upon *Bill Johnson's* baseless and retaliatory theory, the General Counsel seeks reimbursement of all expenses incurred since December 16, 1996 (6 months prior to filing the unfair labor practice charge herein). Based on the *Loehmann's Plaza* preemption theory, the General Counsel seeks reimbursement of all expenses incurred since January 9, 1998, the date complaint issued herein. Because I have found preemption pursuant to *Manno Electric,* I find that reimbursement would ordinarily begin at the time of filing the lawsuit. At the time the lawsuit was filed, the decision in *Manno Electric,* which issued May 22, 1996, had made clear that a lawsuit seeking to enjoin a job targeting program interfered with, restrained, and coerced employees in their Sec. 7 rights and thus was a lawsuit was an illegal objective, preempted at its inception by virtue of *Brown v. Hotel & Restaurant Employees.* However, because the unfair labor practice charge was not filed until May 16, 1997, it is appropriate to require reimbursement of expenses only 6 months prior to that date or December 16, 1996.