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

August 24, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 21, 2001, the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The Board found that the Respondent violated Section 8(a)(1) by maintaining and prosecuting a preempted State court lawsuit against competitor L. J. Kruse Company for accepting job targeting program (JTP) funds from the Union for the Ascend Communications project (the Ascend project).[2] In reaching its decision, the Board relied on precedent holding that a JTP constitutes protected activity under the National Labor Relations Act (the NLRA or the Act). *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997); *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492 (2000), enfd. 345 F.3d 1049 (9th Cir. 2003); *Associated Builders & Contractors*, 331 NLRB 132 fn. 1 (2000), vacated in part not here relevant pursuant to a settlement 333 NLRB 955 (2001).

Subsequently, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit, and the Board cross-petitioned for enforcement. On February 28, 2003, the court held that the Respondent's State court lawsuit was preempted with respect to dues from employees working on non-Davis-Bacon projects. The court also ruled that a preempted lawsuit was not subject to the First Amendment analysis in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). However, the court remanded the proceeding to the Board for further consideration of the issue of whether the inclusion of dues from Federal public works projects covered by the Davis-Bacon Act[3] rendered the entire JTP unprotected by the NLRA.[4] Specifically, the court found that "[t]he Board's conclusory findings that these [Davis-Bacon] moneys did not taint the job targeting program are inadequate to support its determination that the operation of the program as a whole was protected conduct under section 7."[5]

The court emphasized, however, that "the Board on remand may yet determine that the JTP is protected under Section 7."[6] In addition, the court noted that the Respondent's lawsuit was based entirely on State law, and recognized that this could be relevant to the Board's analysis.[7]

By letter dated July 30, 2003, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. The Respondent and the Charging Party filed statements of position.[8] On December 22, 2003, the Board issued a Notice and Invitation to File Briefs soliciting other amicus briefs in this proceeding.[9]

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

Analysis on Remand—Review of Theories Litigated

A. Introduction

The court's opinion fully sets forth the relevant facts of the case and describes the Board's original decision. We accept the court's holding as the law of the case.[10] Further, in response to the court's remand, we acknowledge the Board's obligation to accommodate the NLRA to other Federal statutes such as the Davis-Bacon Act. *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47, 62 (1942); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). In attempting to harmonize the Board's enforcement of the Act with another Federal statute, the

[1] 335 NLRB 1217 (2001).

[2] The JTP subsidizes the wages paid to employees of signatory contractors on targeted projects in order to enable those contractors to competitively bid with nonunion contractors. A signatory contractor may request that the Union make available a JTP subsidy for signatory bidders on an upcoming project, which request can be approved at the discretion of the Union.

[3] 40 U.S.C. § 276a, et seq.

[4] *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145 (D.C. Cir. 2003).

[5] Id. at 147.

[6] Id. at 154. The court suggested that additional evidence on any of several different fact issues might justify such a determination.

[7] Id.

[8] The Respondent also requested oral argument. That request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[9] Briefs were filed by amici curiae Building and Construction Trades Department, AFL–CIO and the International Brotherhood of Electrical Workers, AFL–CIO; International Brotherhood of Electrical Workers, Local 48; National Right to Work Legal Defense Foundation; Sierra Nevada Chapter of Associated Builders & Contractors and Electro-Tech Inc.; and the Minnesota State Building and Construction Trades Council, AFL–CIO. The Respondent and the General Counsel filed replies to the amicus briefs.

[10] The court held that, to the extent that a lawsuit is preempted, it is unlawful under the NLRA, without regard to *Bill Johnson's Restaurants v. NLRB*, supra, 461 U.S. 731, and *B E & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). See *Can-Am Plumbing, Inc. v. NLRB,* 321 F.3d at 151. We accept that as the law of the case, and do not pass on this issue. However, we note that the Board has previously endorsed this proposition. See *Manufacturers Woodworking Assn. of Greater New York,* 345 NLRB 538, 540 fn. 7 (2005); *Allied Trades Council*, 342 NLRB 1010, 1013 fn. 4 (2004).

Board considers the rulings of the agency and courts authorized to interpret that statute.[11]

However, the Board only decides issues that are presented and litigated by the parties. Therefore, before we undertake to resolve the issue of the possible conflict between the policies of the NLRA and the Davis-Bacon Act, as directed by the court, we must first address the threshold question of whether this issue was presented to the Board. Pursuant to the court's remand, we have carefully examined our prior decision and the record in this proceeding. Based on this review, we find that, in the record before the Board and particularly in the Respondent's exceptions, the Respondent failed to assert that the JTP's inclusion of dues derived from wages on Davis-Bacon Act projects violated that statute or undermined the protected status of the JTP as a whole under the NLRA. Instead, the Respondent relied only on provisions of California law in contending that the JTP was not protected and that the State lawsuit was not preempted.

B. Theories of the Respondent's State Court Lawsuit and the General Counsel's Amended Complaint

The Respondent's State court action on which the General Counsel's amended complaint in this proceeding was based alleged, among other things, that Kruse, by accepting JTP money from the Union, violated provisions of the California Labor Code and the California Business and Professions Code pertaining to unfair trade practices, unfair competition, prevailing wages, and wage kickbacks to employers.[12] The Respondent further alleged that its bid on the Ascend project was unsuccessful because of Kruse's unlawful conduct. The Respondent's State court complaint included no allegations concerning the Davis-Bacon Act. Indeed, it did not even mention that the JTP included any contributions from wages earned on Davis-Bacon Act projects.

The General Counsel's amended complaint alleged, in essence, that the Respondent's California lawsuit violated Section 8(a)(1) because, under *Bill Johnson's Restaurants*, supra, it was baseless and retaliatory, and was directed at conduct protected by the Act.[13] In its answer to the amended complaint, the Respondent asserted several affirmative defenses, including that its lawsuit had a reasonable basis *in California law*.[14] Nowhere in its answer did the Respondent contend that the JTP was not protected activity under the Act because it included dues collected in violation of the Davis-Bacon Act.

C. Litigation Before the Administrative Law Judge

In the proceedings before the administrative law judge, the Respondent again failed to argue that the JTP was unprotected based on the Davis-Bacon Act. In a motion to dismiss, the Respondent asserted, among other things, that its lawsuit was not preempted. In this regard, the Respondent argued that *State* minimum labor standards, when they neither encourage nor discourage collective bargaining, do not conflict with the NLRA.[15]

We recognize that the Respondent also broadly urged that JTPs are not protected under the NLRA under Ninth Circuit precedent, citing *Brock* and *Reich*, each of which applied the Davis-Bacon Act.[16] However, even in citing the Davis-Bacon Act cases, the Respondent did not maintain that either those cases or the Davis-Bacon Act itself pertain directly here. Rather, it contended only that they apply by analogy, i.e., that "if the Ninth Circuit found no conflict between the NLRA and the Davis-Bacon Act regulations prohibiting JTP deductions, it will not find that California statutes prohibiting JTP deductions are preempted by the [NLRA]."

Moreover, in his oral opening statement at the hearing, the Respondent's counsel expressly disavowed any assertion based on the Davis-Bacon Act violation found in

[11] The Board's decision in *Kingston Constructors,* supra, specifically recognized these obligations with regard to the Davis-Bacon Act. 332 NLRB at 1497–1502. In that case, the Board relied on the Department of Labor's interpretation of the Davis-Bacon Act as enforced by the D.C. and Ninth Circuits. See *Building & Construction Trades Department, AFL–CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994) (*Reich*) (Davis-Bacon Act prohibits the withholding of JTP deductions from wages earned on Federal public works projects), and *Electrical Workers Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995) (*Brock*) (same). Thus, the Board held that the union's enforcement of a requirement for employees to pay JTP moneys for work performed on Davis-Bacon Act projects violated that statute, and that the union violated Sec. 8(b)(1)(A) of the NLRA by threatening to have employees discharged for their failure to make the required payments.

[12] Cal. Labor Code, Secs. 221, 223, 225, 1778; Cal. Bus. and Prof. Code, Sec. 17200, et seq.

[13] As noted above, the court found that the *Bill Johnson's* analysis does not apply in the circumstances of this case.

[14] The fifth affirmative defense stated:

> The Lawsuit cannot be deemed baseless because the monies received by L.J. Kruse Company from the Union's Job Targeting Program are kickbacks prohibited by the California Labor Code. The Supreme Court and the United States Court of Appeals for the Ninth Circuit have repeatedly held that minimum labor standards, such as those embodied in the sections of the California Labor Code that prohibit kickbacks, are not preempted by the National Labor Relations Act.

[15] The Respondent also cited *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) (*State*-mandated insurance benefit law, applicable to unionized and nonunionized employers and employees, not preempted by the Act), and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (*State* law requiring one-time severance payment to employees upon plant closing established minimum labor standard but did not intrude on collective-bargaining process and thus was not preempted by the Act).

[16] See fn. 11, supra. In those cases, the Ninth and D.C. Circuits found reasonable the Department of Labor's determination that the Davis-Bacon Act prohibited unions from requiring JTP dues based on earnings on Federal prevailing wage jobs.

Brock and *Reich*. In contending that JTP contributions were unprotected under the Act, counsel specifically stated that, unlike in *Brock*, the Respondent was not contesting the payment of contributions to the JTP, but only their use for alleged anticompetitive purposes in violation of California law.

Review of the hearing transcript reveals little testimony regarding Federal prevailing wage projects, including those covered by the Davis-Bacon Act. On direct examination, Union Business Manager/Financial Secretary Larry Blevins stated that a maximum of 1–2 percent of JTP contributions were derived from Federal prevailing wage projects and that "probably 2 percent" were received from State prevailing wage projects. On cross-examination, Blevins acknowledged that these figures were estimates based on his general knowledge of the industry.

In her decision concluding that the Respondent's California lawsuit was preempted and therefore violated Section 8(a)(1), the administrative law judge found that although 2–3 percent of the JTP originated from Federal and State prevailing wage jobs combined, the Ascend project was not a public works job governed by Davis-Bacon Act regulations. In addition, the judge rejected the Respondent's attempt to distinguish *Manno Electric,*[17] assertedly on the ground that it did not involve a *substantial State interest*. In *Manno*, the Board held that an employer's lawsuit against the JTP was preempted and thus unlawful.

D. The Respondent's Exceptions to the Board

Finally, and most significantly under Section 102.46 of the Board's Rules,[18] the Respondent's exceptions and brief to the Board did not argue that the judge erred in failing to find that the outcome of this proceeding is controlled by the Davis-Bacon Act. In fact, they made no mention at all of the Davis-Bacon Act. Rather, the Respondent argued, as it had to the judge, that JTPs were unprotected and cited *Reich* and *Brock* in support of that general proposition.[19] However, as noted above, those cases were cited only by analogy. The Respondent also reiterated its argument that its lawsuit was not preempted and did not violate Section 8(a)(1) under the *Bill Johnson's* analysis.

In adopting the judge's conclusion that the Respondent had violated Section 8(a)(1) of the Act by maintaining and prosecuting its State lawsuit against Kruse, the Board found that its decision in *Kingston Constructors*, supra, 332 NLRB 1492, did not dictate a different result. In that case, as previously noted, the Board found unlawful a union's admitted practice of threatening employees with discharge for failing to make JTP contributions from wages earned on public works projects funded under the Davis-Bacon Act. In distinguishing *Kingston Constructors*, the Board stated that the Ascend project was not a Davis-Bacon job, that there was no evidence that Kruse had ever worked on Davis-Bacon projects, and that a maximum of 2–3 percent of the JTP fund was collected from employees working on State or Federal prevailing wage jobs combined. Of course, these statements should not be interpreted to mean that the inclusion of contributions from wages earned on Davis-Bacon projects would be unlawful. The Board has not ruled on that question and it is not raised here. Rather, the Board's observations explained why *Kingston Constructors* did not control in this case, in which the litigated issues involved Federal preemption and the effect of California law, rather than the Davis-Bacon Act, on the protected status of the JTP as a whole.

Conclusion

Based on our review of the Respondent's exceptions and the underlying record and in accordance with the Board's Rules, we find that the issue of whether the JTP in this proceeding violated the Davis-Bacon Act, not having been raised by the Respondent before the Board, was waived and therefore cannot be considered.[20] In the absence of any litigation of that issue before the Board, we apply the Board's holding in *Manno Electric* and find that the JTP constitutes protected activity under the NLRA. On that basis, and in view of the court's decision, we affirm the Board's previous conclusion that the

[17] Supra, 321 NLRB 278, 298 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997).

[18] Sec. 102.46(a) of the Board's Rules and Regulations permits parties to file "exceptions to the administrative law judge's decision or to any other part of the record or proceedings . . . together with a brief in support of said exceptions." Subsec. (b)(1) of the same section requires, among other things, that "[e]ach exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken . . ." Sec. 102.46 also clearly prescribes the consequences of a party's failure to include a matter in its exceptions to the judge's decision:

> (b)(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.
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> . . . .
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> (g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

[19] In support of his cross-exceptions urging a finding of preemption under *Bill Johnson's*, the General Counsel argued that the Respondent's lawsuit was baseless under the California Labor Code, noting the lack of evidence that Kruse received any money derived from prevailing wage jobs. Like the Respondent, the General Counsel's brief did not discuss the Davis-Bacon Act.

[20] We further point out that our decision here does not preclude the Respondent from raising allegations that any aspect of the JTP violates the Davis-Bacon Act in an appropriate manner and forum, as occurred, for example, in *Reich, Brock,* and *Kingston Constructors*.

Respondent, by maintaining and prosecuting its preempted lawsuit against Kruse, violated Section 8(a)(1) of the Act.[21]

[21] We believe that our decision is consistent with the court's remand order. The court asked us to consider whether there should be a distinction between projects covered by Davis-Bacon and those that are not so covered and, if there is a distinction, whether that affects the entire JTP. However, we do not believe that the court required that our consideration ignore our fundamental procedural rules. We have applied those rules, and we have concluded that the issue cannot be considered by the Board. And, in our view, Sec. 10(e) and (f) bar the Respondent from raising the matter before an appellate court.

ORDER

The National Labor Relations Board affirms its original Decision and Order, 335 NLRB 1217 (2001).