

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: January 30, 2009

TO : Robert Chester, Regional Director  
Region 18

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Midwest Pipe Insulation  
Case 18-CA-18838

133-7600  
220-2500  
240-6760  
512-5009  
560-2575-6737

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by instituting and maintaining a state court lawsuit for tortious interference with contract, alleging that the Union threatened to withhold market recovery program funds from a pipefitter contractor unless it terminated its subcontract with the Employer.

We conclude that the Region should dismiss the instant charge because the Employer's lawsuit is based upon Union conduct that violated Section 8(b)(4)(ii)(B) and is not protected under the Act. Moreover, the Employer is seeking injunctive relief that would interfere with the operation of the Union's market recovery program only with respect to prevailing wage act projects, and that activity also is not protected.

### FACTS

Pipefitters Local Union No. 539 ("the Union") has operated a market recovery program ("MRP") for about ten years, in order to organize nonsignatory contractors and to increase job opportunities for Union members. The Union grants MRP funds to Union contractors who perform pipefitting work, to enable them to bid competitively with nonunion contractors. The MRP is funded from the Union's general dues. The Union estimates that less than 10% of those dues are from employees working on Davis-Bacon and Minnesota Prevailing Wage Act projects. Moreover, the Union does not offer MRP grants to contractors on Davis-Bacon or Minnesota Prevailing Wage projects.

MD Mechanical is engaged in plumbing and pipefitting work and is signatory to the Union's collective-bargaining

agreement with the Minnesota Mechanical Contractors Association. On June 8, 2006,<sup>1</sup> the Union granted MD Mechanical \$80,000 in MRP funds in connection with its performance of pipefitting work on the St. Michael/Albertville Elementary school project. This project was not covered by Davis-Bacon or the Minnesota Prevailing Wage Act. On June 26, MD Mechanical agreed to subcontract the pipe insulation work on the project to Midwest Pipe Insulation, Inc. ("the Employer") and sent the Employer a standard subcontract agreement signed by MD Mechanical's president, Michael Brum.

The Employer claims that on July 11, Brum telephoned the Employer's office manager and advised her that the Union was pressuring Brum to cancel its contract with the Employer, by threatening to rescind the MRP grant if the Employer's nonunion employees worked on the project. That same day, MD Mechanical sent a letter to the Employer terminating its subcontract. MD Mechanical then hired a union contractor to perform the pipe insulation work on the project.

The Union denies that any of its agents threatened MD Mechanical, noting that the Union does not have jurisdiction over pipe insulation work. MD Mechanical asserts that it rescinded the contract because the Insulators Union threatened to shut the job down with pickets. MD Mechanical's president claims also that a Union representative told him that if the Insulators Union picketed the project, Union members would not cross the picket line.

On May 10, 2007, the Employer filed an action against the Union in state court asserting claims for tortious interference with contract, unfair competition, and violation of the Minnesota Prevailing Wage Act.<sup>2</sup> The Employer sought compensatory damages, a disgorging of any profits received, and a permanent injunction enjoining the Union from: "[a]ttempting to promote, solicit, contract and/or use 'target money' and/or market recovery programs on Davis-Bacon and Minnesota Prevailing Wage construction jobs."

The Union moved for judgment on the pleadings on the ground that the lawsuit was preempted by federal labor law. The Hennepin County District Court granted the Union's

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<sup>1</sup> All dates are in 2006 unless otherwise indicated.

<sup>2</sup> The Employer subsequently dismissed the Minnesota Prevailing Wage Act claim.

motion on August 23, 2007. The Employer appealed, and on August 26, 2008, the Minnesota Court of Appeals reversed. The Court of Appeals held that the state claims were not preempted, citing Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978), because the MRP is only arguably protected under Board law, and there was no pending unfair labor practice charge that would enable the Board to resolve the issue of whether the MRP was protected.

On August 29, 2008, the Union filed the instant Section 8(a)(1) charge, alleging that the Employer's lawsuit is preempted and interferes with the exercise of Section 7 rights, and, alternatively, that the lawsuit is baseless and filed and maintained in retaliation for protected, concerted activity. The Union has also appealed the Court of Appeals decision to the Minnesota Supreme Court, and that appeal is pending.

#### ACTION

We conclude that the Region should dismiss the instant charge because the Employer's lawsuit does not interfere with protected, concerted activity. The lawsuit is based on a Union threat that constituted prohibited secondary conduct and seeks to enjoin the operation of the MRP only on publicly-funded projects, which also is unprotected.

We note first that even if the Employer's lawsuit is preempted, it does not violate Section 8(a)(1) in the absence of interference with Section 7 rights. The Supreme Court has long held that the Act preempts state court lawsuits challenging activities that are actually protected by Section 7 or prohibited by Section 8.<sup>3</sup> The Court also has held that activities that are either arguably protected or arguably prohibited are also subject to the Board's primary jurisdiction.<sup>4</sup> A preempted state court lawsuit,

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<sup>3</sup> San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959) ("If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction.").

<sup>4</sup> Id. at 246. In such instances, however, a state court lawsuit is not preempted by the Board's primary jurisdiction if the party who could have presented the issue to the Board has not done so and the other party has no means of doing so. Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. at 202-203.

however, does not, in itself, violate the Act absent interference with Section 7 rights.<sup>5</sup>

Second, absent interference with Section 7 rights, the analysis under Bill Johnson's<sup>6</sup> and BE&K<sup>7</sup> to determine if a state lawsuit is protected under the First Amendment is not implicated. The Supreme Court's decisions in those cases were premised upon a state lawsuit filed in retaliation for the exercise of Section 7 rights; only in those circumstances must the Board weigh the litigating party's First Amendment right to petition the courts against employees' Section 7 rights.<sup>8</sup>

#### The Union's Alleged Threat

The Union's alleged tortious conduct was, if substantiated, actually prohibited by the Act because it violated Section 8(b)(4)(ii)(B). The Employer's lawsuit alleges that the Union tortiously interfered with a contract by threatening to withhold MRP funds from MD Mechanical unless MD Mechanical cancelled its subcontract with the Employer. A denial of MRP funds or similar economic relief from contractual wage and benefit terms constitutes Section 8(b)(4)(ii) coercion.<sup>9</sup> And economic

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<sup>5</sup> Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 138 (1995) (no violation of Section 8(b)(1)(A) where union's preempted lawsuit against the Board and the employer did not restrain or coerce employees).

<sup>6</sup> Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

<sup>7</sup> BE&K Construction Co. v. NLRB, 536 U.S. 516 (2002).

<sup>8</sup> See Bill Johnson's, 461 U.S. at 734-737 (lawsuit based on picketing and handbilling filed in retaliation for the filing of unfair labor practice charges); BE&K, 536 U.S. at 507-508 (lawsuit based on union's lobbying of local authorities, picketing and handbilling, and filing of contractual grievances).

<sup>9</sup> Sheet Metal Workers Local 91 (Schebler Co.), 294 NLRB 766, 775 (1989), enfd. in part 905 F.2d 417 (D.C. Cir. 1990) (Union violated Section 8(b)(4)(ii)(A) by denying economic relief to contractors who refused to sign a Section 8(e) agreement); Sheet Metal Workers Local 9 (United McGill Corp.), Cases 27-CC-846 & 27-CE-39, Advice Memorandum dated October 15, 1997 at 9 (Union violated Section 8(b)(4)(ii)(A) by disqualifying employer from MRP

coercion to force a neutral employer to cease doing business with a nonunion company clearly violates Section 8(b)(4)(ii)(B).<sup>10</sup> In addition, the Union violated Section 8(b)(4)(ii)(B) even if, as MD Mechanical maintains, the Union merely threatened to honor another union's picket line on the jobsite, since the object of that conduct was to induce MD Mechanical to cease doing business with the Employer.<sup>11</sup> Thus, the Employer's lawsuit is based on Union conduct that was prohibited rather than protected by the Act.

Although the lawsuit's focus on conduct actually prohibited by the Act renders it preempted under Garmon,<sup>12</sup> a preempted lawsuit that does not restrain or coerce employees in the exercise of their Section 7 rights does not constitute an unfair labor practice.<sup>13</sup> The lawsuit here does not impinge upon any group of employees' Section 7 rights and thus, does not violate Section 8(a)(1).

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and seeking refund of monies granted in order to coerce employer to comply with a Section 8(e) agreement).

<sup>10</sup> E.g., United Scenic Artists Local 829, 267 NLRB 858, 863 (1983) (threatening to fine employer for using props sculpted by nonunion employees), revd. on other grounds 762 F.2d 1027 (D.C. Cir. 1985); Operating Engineers Local 12, 204 NLRB 742, 756-757 (1973), enfd. in part 511 F.2d 848 (9<sup>th</sup> Cir. 1975) (fining signatory contractors for using nonunion construction vehicle repairmen).

<sup>11</sup> See, e.g., Teamsters Local 247 (Rymco), 332 NLRB 1230 fn.1, 1232-1233 (2000) (threat to strike general contractor if nonunion subcontractor allowed on the project); Operating Engineers Local 3 (Westar Marine Services), 340 NLRB 1053, 1057 (2003) (threat of strike at the general contractor's jobsite in order to pressure subcontractor to sign union contract); Elevator Constructors Local 91 (Otis Elevator Co.), 345 NLRB 925, fn.1, 929 (2005) (threat of work stoppage and actual work stoppage in order to force neutral employer to cease doing business with general contractor who used nonunion subcontractor).

<sup>12</sup> 359 U.S. at 245.

<sup>13</sup> See Stroehmann Bakeries, 320 NLRB at 138.

The Union's Market Recovery Program

The Employer's lawsuit also attacks the Union's MRP, but it attacks only the application of the MRP to publicly-funded projects. Union market recovery or job targeting programs that enable union contractors to competitively bid against nonunion contractors are generally protected under Section 7.<sup>14</sup> On the other hand, the Board has held that the collection of dues owing from employment on Davis-Bacon projects for MRPs is "'inimical to public policy.'"<sup>15</sup> In Kingston Constructors, the Board deferred to Department of Labor ("DOL") and court decisions holding that the collection of dues on federal-funded projects and the granting of MRP funds to contractors on such projects violate Davis-Bacon.<sup>16</sup>

Seeking to reconcile these two lines of cases, in Can-Am Plumbing the Board held that a job targeting program where "at most only 2 to 3 percent of the funds ... came from Federal or State prevailing wages jobs" constituted protected activity.<sup>17</sup> Accordingly, a state court lawsuit "which broadly attack[ed] the entire job targeting program" was preempted, was not therefore subject to First Amendment

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<sup>14</sup> See Manno Electric, 321 NLRB 278, 298 (1996), affd. mem. 127 F.3d 34 (5<sup>th</sup> Cir. 1997) (state court lawsuit based on job targeting program was therefore preempted and violated Section 8(a)(1)); Associated Builders & Contractors, 331 NLRB 132, fn.1 (2000), vacated in part not relevant here pursuant to a settlement, 333 NLRB 955 (2001) (same).

<sup>15</sup> Electrical Workers Local 48 (Kingston Constructors), 332 NLRB 1492, 1501-1502 (2000), modified as to remedy 333 NLRB 963 (2001), enf. 345 F.3d 1049 (9<sup>th</sup> Cir. 2003) (holding that union violated Section 8(b)(1)(A) by threatening employees with discharge for failing to pay MRP dues based on Davis-Bacon projects).

<sup>16</sup> Ibid., citing Building & Construction Trades Department v. Reich, 40 F.3d 1275, 1280 (D.C. Cir. 1994); Electrical Workers Local 357 v. Brock, 68 F.3d 1194, 1200-1202 (9<sup>th</sup> Cir. 1995).

<sup>17</sup> Can-Am Plumbing, 335 NLRB 1217, 1217 (2001), enf. denied 321 F.3d 145 (D.C. Cir. 2003), reaffirmed on remand 350 NLRB 947 (2007).

protection under Bill Johnson's,<sup>18</sup> and violated Section 8(a)(1).<sup>19</sup>

Here, the narrow injunctive relief the Employer seeks in state court does not interfere with protected activity. The Employer has not mounted a broad legal challenge to the entire operation of the Union's MRP but, rather, seeks to enjoin only the MRP's application to publicly-funded projects. The injunction sought would restrain the collection of dues on publicly-funded projects and the grant of funds to contractors on such projects. With respect to dues collection, the Board found in Kingston Constructors that the collection of dues from publicly-funded projects is contrary to public policy and presumably unprotected.<sup>20</sup> With respect to MRP grants, this Union does not provide money to contractors working on publicly-funded projects, so there is no activity to be enjoined.<sup>21</sup>

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<sup>18</sup> See 461 U.S. at 738, fn.5.

<sup>19</sup> Can-Am Plumbing, 335 NLRB at 1217. An Administrative Law Judge reached a different result in a case involving a lawsuit that was narrowly tailored to challenge only the application of a job targeting program to two state-funded projects and left the program "intact" with respect to private projects. J.A. Croson Co., Case 9-CA-35263, JD-69-03 (Giannasi), dated June 27, 2003 at 9-11. The Judge concluded that the lawsuit "narrowly addressed" conduct that was only arguably protected under Section 7 and, since the lawsuit was concluded before the General Counsel issued complaint, the Judge dismissed the complaint. Id. at 9, 12.

<sup>20</sup> See Electrical Workers Local 48 (Kingston Constructors), 332 NLRB at 1501-1502.

<sup>21</sup> Moreover, in light of DOL and court cases finding MRP grants violative of Davis-Bacon, it is unlikely that the Board would find grants on such projects protected. See id. at 1501 (noting that the DOL and the courts "emphasized" that MRPs violate Davis-Bacon "by returning a portion of employees' wages to contractors").

Since the Employer's lawsuit here is not based upon protected activity, a Bill Johnson's analysis is not required. Given the absence of any interference with protected activity, there is no Section 8(a)(1) violation. Accordingly, absent withdrawal, the Region should dismiss the instant charge.

B.J.K.