UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLIED MECHANICAL SERVICES, INC.,

Respondent,

and

CASE NO. GR-7-CA-41687

PLUMBERS AND PIPE FITTERS LOCAL 357, UNITED ASSOCIATION OF JOURNEY-MEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

and

CASE NO. GR-7-CA-41783

LOCAL 7, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO,

and

CASE NO. GR-7-CA-41993

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO.
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RESPONDENT ALLIED MECHANICAL SERVICES, INC.'S MOTION FOR RECONSIDERATION OF THE BOARD'S OCTOBER 25, 2011 DECISION AND ORDER AND BRIEF IN SUPPORT

Respondent Allied Mechanical Services, Inc. ("AMS"), pursuant to Section 102.48(d) of the Board's Rules and Regulations, requests that the Board reconsider its "Decision and Order" ("Decision") dated October 25, 2011, reported at 357 NLRB No. 101 (2011). Section 102.48(d) permits any party to move for reconsideration, rehearing, or reopening of the record after a Board decision based on extraordinary circumstances or material error. AMS respectfully submits that the Board's Decision suffers from several material errors:

1) The Board ordered AMS to reimburse the Charging Parties for attorneys' fees with daily compounding interest under *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). *Kentucky River* does not apply to attorney fee awards, therefore the Board erroneously required AMS to pay daily compounding interest on attorney fees;

2) The Board erroneously applied *Kentucky River* retroactively to this case;

3) The Board erroneously ordered AMS to post the required notice electronically;

4) The Board erroneously found that AMS's suit against the Charging Parties lacked a reasonable basis; and

5) The Board erroneously found that AMS had a retaliatory motive for filing suit against the Charging Parties.

I. THE BOARD ERRONEOUSLY APPLIED THE *KENTUCKY RIVER* INTEREST CALCUALTION TO THIS CASE BECAUSE *KENTUCKY RIVER* DOES NOT APPLY TO ATTORNEY FEE AWARDS

The Board's Decision amended the administrative law judge's recommended order to require AMS to pay interest compounded on a daily basis under *Kentucky River*. However, *Kentucky River* does not apply to attorneys' fees. First, *Kentucky River*'s express holding applied narrowly to back pay awards. In *Kentucky River*, the Board explicitly stated that its intent was to "adopt a policy under which interest on backpay will be compounded on a daily basis, using the established methods for computing backpay and for determining the applicable rate of interest." *Kentucky River*, at *1 (emphasis added). The Decision's application of *Kentucky River* to an attorneys' fee award therefore falls outside its express, narrow application to back pay awards.

Second, the Decision's interest award falls outside *Kentucky River*'s intended purpose. The *Kentucky River* decision noted that the Board's "primary purpose" in awarding such interest was "making employees whole." *Id.* at * 3. The Board cited *F.W. Woolworth*, 90 NLRB 289 (1950), to support its rationale, noting:

> Unemployment or employment at lesser wages may have resulted in the exhaustion of the employee's savings, his incurrence of debts, and even deprivation of the necessities of life.

Kentucky River, at *3 quoting .*W. Woolworth*, 90 NLRB at 292. These concerns are simply non-existent in a case awarding only attorneys' fees.

In this case, AMS's suit addressed the denial of job targeting funds by the charging party unions. No employee experienced monetary loss because AMS filed its lawsuit. No employee was laid off, terminated, or suffered a reduction in his or her wages or benefits. No employee incurred debt, exhausted savings, or was deprived of the necessities of life. The Board's conclusion that daily compounded interest would therefore "come closest to achieving the make-whole purpose of the remedy" does not apply in cases like the present one when the only monetary award is for attorneys' fees. Attorneys' fee awards therefore fall outside *Kentucky River's* purpose, and should not be subject to daily compounding interest. Indeed, prior to this case, the Board has limited its application of *Kentucky River* to back pay and benefit reimbursement awards.

Both the express language and underlying purpose of *Kentucky River* indicate the Board intended its holding to apply only to back pay awards. The Board therefore misapplied its own precedent when it decided to *sua sponte* apply *Kentucky River* to the Decision's attorneys' fee award.

II. THE BOARD ERRONEOUSLY RETROACTIVELY APPLIED *KENTUCKY RIVER* TO THIS CASE

The lawsuit predicating this case, and for which the Decision awarded attorneys' fees, ended in 1999 -- more than 11 years before the Board issued *Kentucky River* in October 2010. Similarly, the Charging Parties filed their subsequent unfair labor practice charge with

the Board in 2000, ten years before the *Kentucky River* decision. The Board's Decision erroneously retroactively applied *Kentucky River* to this decade-old case.

The Board will not apply a decision retroactively if such application would work a "manifest injustice" against pending cases. *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005). In determining whether retroactivity would be unjust, the Board considers "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *Id.* Applying *Kentucky River* to this case would be manifestly unjust under the *SNE Enterprises* test.

First, AMS appropriately relied on prior Board precedent regarding interest on attorneys' fee awards. AMS had no notice that it would suddenly be subject to compounded interest on an attorneys' fee award under a Board decision dealing with interest calculations on back pay awards. Had AMS been on notice that such interest might apply to these fees, it may have settled the issue with the Charging Parties at the time the fees were final, namely at the close of the litigation. Further, unlike *Kentucky River*, AMS was not able to take potential compounded interest into account when deciding whether to contest the case, as the General Counsel's complaint did not put AMS on notice that it would be seeking compounded interest on an attorneys' fee award. *See Kentucky River*, at *5.

Second, the Decision's interest award fails to accomplish the purposes of the Act. As noted above, the *Kentucky River* decision applies to back pay awards, not attorneys' fees. The Board believed that *Kentucky River* would accomplish the purposes of the Act by addressing its "primary focus" of making employees whole. Applying *Kentucky River* retroactively to an attorneys' fee award fails to accomplish *Kentucky River*'s stated purpose, which was to make employees whole, and therefore fails to accomplish any articulated purposes of the Act.

Third, the facts of this case make retroactive application of *Kentucky River* particularly unjust. The underlying lawsuit for which the Decision awarded attorneys' fees with daily compounded interest concluded more than 11 years ago. Instead of petitioning the court for fees at that time, the Charging Parties instead decided to file an unfair labor practice charge with the Board, leading to ten years of proceedings. Forcing AMS to pay ten years of daily compounded interest on attorneys' fees because Charging Parties chose a lengthier route to obtain them works an injustice against AMS.

III. THE BOARD ERRONEOUSLY REQUIRED AMS TO POST NOTICE ELECTRONICALLY

The Decision modified the administrative law judge's recommended order to provide for the posting of notice electronically in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). As noted by Member Hayes in his dissent to *J. Picini Flooring*, and for the reasons contained in that dissent, requiring electronic posting "transform[s] what has heretofore been an extraordinary remedy into a routine remedy." *J. Picini Flooring*, at *8. Electronic posting is an extraordinary remedy that should be compelled only in cases involving egregious unfair labor practices or recidivist violators of the Act. The Decision did not expressly hold, nor is there convincing evidence, that this case involves the kind of egregious activity warranting the "extraordinary" remedy of electronic notice posting. The Board therefore erroneously amended the administrative law judge's order to require electronic notice posting.

IV. THE BOARD ERRONEOUSLY FOUND THAT AMS'S SUIT AGAINST THE CHARGING PARTIES LACKED A REASONABLE BASIS

The Board has long held that an employer commits an unfair labor practice in violation of Section 8(a)(1) of the Act when it files a lawsuit without merit with a retaliatory motivation. The Supreme Court, in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), clarified that a lawsuit is not "without merit" or "objectively baseless" solely because it is

dismissed by a federal court. The Act, according to the Supreme Court, only prohibits lawsuits that are both objectively and subjectively baseless; that is, lawsuits where no reasonable litigant could realistically expect success on the merits. The General Counsel bears the burden of establishing that the evidence in the record meets this standard. In this case, the Board erroneously found that AMS's lawsuit against the Charging Parties lacked a reasonable basis.

A. The Board Erroneously Held That the Entire Lawsuit Lacked a Reasonable Basis Because the U.S. District Court Granted the Charging Parties' Motion to Dismiss

The Board disregarded the Supreme Court's holdings in *BE&K Construction* that the Board can no longer rely on a trial court's dismissal of a lawsuit to conclude that it was "without merit" or "lacked a reasonable basis." In fact, the Board did what the Supreme Court expressly held was inappropriate, and relied on the Charging Parties' successful Motion to Dismiss to find that AMS's lawsuit lacked a reasonable basis:

> Both the district court and the court of appeals found that the Respondent's lawsuit failed to state a claim for which relief can be granted. The court of appeals expressly applied the stringent standard required for such a dismissal, noting that a 'complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'

(Dec. at 7.)

The Board's continued reliance on the fact that the court granted the Motion to Dismiss is incompatible with *BE&K Construction*. The Board therefore erroneously relied on the successful Motion to Dismiss to find that AMS's lawsuit lacked a reasonable basis.

B. The Board Erroneously Held That AMS's Secondary Boycott Claims Lacked a Reasonable Basis

The Decision concluded that AMS's secondary boycott claim against the Charging Parties lacked a reasonable basis. The Board's Decision, however, merely restated

what it characterized as "black letter law" and AMS's inability to state a valid cause of action against the Charging Parties (Dec. at 8). By doing so, the Board continued to apply the standard the Supreme Court rejected in *BE&K Construction*. As noted above, the inability to survive a Motion to Dismiss does not require a finding that the Respondent acted without a reasonable basis. The Board must, and did not in this case, point to more than simply the legal insufficiency of the Respondent's claim.

C. The Board Erroneously Held That AMS's Breach of Contract Claim Lacked a Reasonable Basis

The Decision found that AMS's breach of contract claim lacked a reasonable basis because AMS could not meet the criteria necessary to overturn a labor arbitration decision. (Dec. at 9.) The Board again did exactly what the Supreme Court in *BE&K Construction* warned against – it equated AMS's failure to meet the legal standard to survive a motion to dismiss with a finding of bad faith. The Board concluded that because AMS could not meet the very high standard required to overturn a labor arbitration that the claim must have been brought in bad faith and therefore lacked a reasonable basis.

The Decision ignored two key facts demonstrating that AMS did have a reasonable factual basis supporting its legal position. First, the National Joint Adjustment Board issued a decision in the case only after the local joint adjustment board was deadlocked. Therefore, an equal number of members of the local joint adjustment board agreed with AMS's contractual interpretation as disagreed with it. Furthermore, the Sixth Circuit expressly stated that it "would be inclined to review this claim differently[.]" In light of the fact that half the local joint board and the Sixth Circuit agreed with AMS's interpretation of the collective bargaining agreement, it cannot be said that the Company did not have a reasonable basis for asserting its breach of contract claim.

Again, the Board cannot simply rely on the reasoning of the district court and the court of appeals in order to demonstrate that AMS's claims lacked a reasonable basis. The General Counsel must demonstrate that AMS's claims were objectively baseless, and the Board must base its decision on specific facts in the record that demonstrates that no reasonable litigant could realistically expect success on the merits. Instead of relying on such facts, the Board continued to equate the dismissal of a lawsuit with the finding that the lawsuit must have lacked a reasonable basis, and this finding constitutes material error.

V. THE BOARD ERRONEOUSLY FOUND THAT AMS HAD A RETALIATORY MOTIVE FOR FILING SUIT AGAINST THE CHARGING PARTIES

The Decision erroneously concluded that AMS filed its lawsuit with a retaliatory motive because 1) AMS's lawsuit was directed at activity found by the Board to be protected; 2) the Board found anti-union animus at the time AMS filed its lawsuit; and 3) the Board found the lawsuit to be without merit. However, the courts expressly reject the Decision's first two reasons for finding retaliatory motive. Further, the Board's third reason attempts to eviscerate the need to find the independent retaliatory motive required by *BE&K Construction*.

The Board's first reason for finding retaliatory motive was the fact that AMS's suit related to protected conduct. (Dec. at 10.) However, the Supreme Court rejected an identical argument made by the Board in *BE&K Construction*, noting that:

> . . . an employer may file suit to stop conduct by a union that he reasonably believes is illegal under federal law, even though the conduct would otherwise be protected under the NLRA. As a practical matter, the filing of the suit may interfere with or deter some employees' exercise of NLRA rights. Yet the employer's motive may still reflect only a subjectively genuine desire to test the legality of the conduct. Indeed, in this very case, the Board's first basis for finding retaliatory motive was the fact that petitioner's suit related to protected conduct that petitioner believed was unprotected. If such a belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning.

BE&K Construction, 536 U.S. at 533-34 (citations omitted). Even before *BE&K Construction*, the D.C. Circuit similarly rejected the Board's determination that any lawsuit filed in response to protected activity is *de facto* retaliatory, noting:

> Every lawsuit seeking to recover damages caused by union activity is, by definition, filed "in direct response" to that activity. Yet not all meritless suits against unions or employees amount to unfair labor practices. Otherwise, *Bill Johnson*'s would not have required the Board to determine whether unmeritorious lawsuits were filed for retaliatory reasons. Because the Board's directly-in-response-to factor exists in every case, it cannot help distinguish those suits that amount to unfair labor practices from those that do not.

Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26, 33 (D.C. Cir. 2001). The Board's continued reliance on this factor is therefore erroneous.

The Board's second reason for finding retaliatory motive was the presence of anti-union animus at the time the lawsuit was filed. (Dec. at 10.) Once again, however, this argument was expressly rejected by the Supreme Court, which declared such evidence not only insufficient, but potentially irrelevant:

> The Board also claims to rely on evidence of antiunion animus to infer retaliatory motive. Brief for Respondent NLRB 47. Yet ill will is not uncommon in litigation. Cf. *Professional Real Estate Investors*, 508 U.S., at 69, 113 S.Ct. 1920 (STEVENS, J., concurring in judgment) ("We may presume that every litigant intends harm to his adversary"). Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation. But that does not mean that such disputes are not genuine. As long as a plaintiff's purpose is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively.

BE&K Construction, 536 U.S. at 534. The Board therefore may not rely on the animus inherently assumed to be part of all adversarial proceedings to find retaliatory motive.

The Board also relied on past unfair labor practice charges occurring years before the lawsuit at issue to find anti-union animus. However, to find anti-union animus, it is not

enough to note that a subsequent case involves the same respondent. The Board must also find that the subsequent case involved the same protected activity. *See, e.g., Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 395 (1998), (noting that "the evidence shows, that the Respondent's conduct was directed at the very same union activity that was involved in the prior case"); *Opelika Welding*, 305 NLRB 561, 566 (1991) (finding that "the animus established in the last proceeding was against Martin's union activities – precisely the same activities in which her colleagues, Tate and Morris, were engaged in this proceeding"); *Southern Maryland Hospital*, 293 NLRB 1209 n.1 (1989) (stating that the findings in the prior decision relied upon as background evidence "specifically concerned" the same individuals and the same activities).

Finally, the Board erroneously found that "the lawsuit's obvious lack of merit is further evidence that the Respondent sought to retaliate" against Charging Parties. (Dec. at 11.) This reasoning eviscerates *BE&K Construction*'s two-part test requiring the Board to find that a lawsuit is both objectively unreasonable and retaliatory. Although *BE&K Construction*'s holding involved a lawsuit that was not deemed objectively baseless, the Board itself admits that the *BE&K Construction* decision implies that "the shield of the First Amendment may well encompass even some litigation that is objectively baseless." *BE&K Construction*, 351 NLRB 451, 458 n.53. The fact that the required two-prong test in *BE&K Construction* was made in the context of a lawsuit that was not deemed objectively baseless does not mean that the Court intended to allow the Board to collapse the two prongs in cases where the Board finds the lawsuit meets the first prong of the test. It simply means that the Court applied the test to the case before it. The Decision therefore reaches too far by finding that a violation of the first prong entails a *de facto* violation of the second.

VI. CONCLUSION

For the Reasons stated above, AMS requests that the Board:

1) reconsider and revise its finding that Charging Parties' legal expenses must be reimbursed with interest compounded on a daily basis; and

2) modify its order to eliminate any obligation for AMS to distribute the notice electronically;

3) reconsider and reverse its decision that AMS committed an unfair labor practice in violation of Section 8(a)(1).

Respectfully submitted,

Dated: November 21, 2011

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CERTIFICATE OF SERVICE

Sherri L. Bono states that on November 21, 2011, she served a copy of Respondent Allied Mechanical Services, Inc.'s Motion for Reconsideration of the Board's October 25, 2011 Decision and Order and Brief in Support upon the following:

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