

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ALLIED MECHANICAL SERVICES, INC.

Respondent

and

CASE 7-CA-41687

PLUMBERS AND PIPE FITTERS LOCAL 357, UNITED  
ASSOCIATION OF JOURNEYMEN AND APPRENTICES  
OF THE PLUMBING AND PIPEFITTING INDUSTRY  
OF THE UNITED STATES AND CANADA, AFL-CIO

Charging Party

and

CASE 7-CA-41783

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

Charging Party

and

CASE 7-CA-41993

UNITED ASSOCIATION OF JOURNEYMEN AND  
APPRENTICES OF THE PLUMBING AND PIPEFITTING  
INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

Charging Party

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**CHARGING PARTY UA LOCAL 357'S AND SMWIA LOCAL 7'S RESPONSE IN  
OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION  
OF THE BOARD'S OCTOBER 25, 2011 DECISION AND ORDER (357 NLRB NO. 101)**

**AND**

**REQUEST FOR EXPEDITED DECISION BY THE BOARD**

**INTRODUCTION**

On October 25, 2011, the Board issued its Decision and Order in these matters against Respondent Allied Mechanical Services, Inc. ("AMS"), in which it found that AMS had violated Section 8(a)(1) of the Act by filing and prosecuting a retaliatory lawsuit against Charging Parties

Plumbers and Pipe Fitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (“Local 357”), Local 7, Sheet Metal Workers International Association, AFL-CIO (“Local 7”), United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (“UA”), and against Sheet Metal Workers International Association (“SMWIA”). As remedial relief for the 8(a)(1) violation, the Board ordered AMS to reimburse the Charging Parties and SMWIA for all legal and other expenses incurred in the defense of AMS’ lawsuit, with daily compounding of interest in accordance with its decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), and further ordered AMS to post notices both physically, as well as electronically if AMS customarily communicates with employees by such means.

On November 21, 2011, AMS filed a Motion for Reconsideration of the Board’s Decision and Order pursuant to Section 102.48(d) of the Board’s Rules and Regulations, which requires that such a motion be based on “extraordinary circumstances” and “material error”. In support of its Motion, AMS makes the following assertions:

- The Board erred both in applying *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) retroactively, and by requiring the daily compounding of interest on attorneys’ fees to be reimbursed by AMS;
- The Board erred in ordering the electronic posting of notices to employees;
- The Board erroneously concluded that AMS’ lawsuit lacked a reasonable basis and was retaliatory.

As will be shown below, AMS has failed to meet the requisite standard of demonstrating the existence of either “extraordinary circumstances” or “material error” sufficient to privilege even the filing of a motion for reconsideration, let alone the reversal by the Board of its Decision and Order. Even assuming, *arguendo*, that the grounds cited by AMS were facially sufficient to

meet the required standard, AMS has failed to support its claims with one iota of either fact or law. As reviewed in detail by the Board in its Decision, AMS is a recidivist violator of the Act who has repeatedly trampled on the Section 7 rights of its employees with impunity. The instant motion is a transparent delay tactic designed to further stall the effectuation of a remedy for yet another set of unfair labor practices perpetrated by AMS. AMS' baseless and retaliatory lawsuit against the Charging Parties and SMWIA was filed over 13 years ago. The time has long since passed for AMS to make the Charging Parties and SMWIA whole for the losses each sustained as a result of AMS' unlawful conduct. Accordingly, Local 357 and Local 7 (for itself and on behalf of SMWIA), respectfully request the Board expedite its decision on AMS' motion.

**I. THE BOARD PROPERLY APPLIED *KENTUCKY RIVER* IN AWARDING DAILY COMPOUNDED INTEREST**

AMS first claims that the *Kentucky River* decision limited an award of daily compounded interest to only back pay awards, rather than other monetary awards. Contrary to AMS' assertions, the Board in *Kentucky River* never limited its new rule for daily compounding of interest to back pay awards. Indeed, at the outset of its decision, the Board framed the issue as one involving the propriety of ordering "compound interest on backpay *and other monetary awards*, and if so, what the standard period for compounding should be". *Kentucky River*, 356 NLRB No. 8, slip op. at 1 (2010). There would have been no need for the Board to specifically identify "other monetary awards" if indeed the daily compounding of interest was to be limited to only awards of back pay for employees.

The reasons articulated by the Board for awarding the daily compounding of interest included, *inter alia*, the belief that "enhanced monetary remedies. . .serve to deter the commission of unfair labor practices and to encourage compliance with Board orders". *Id.* slip op. at 4. In the instant case, the Board's justification for this modestly enhanced remedy is

particularly applicable to AMS, given its proclivity to repeatedly violate the Act, and its history of dilatory appeals and refusal to abide by Board orders.

AMS next argues that the Board's retroactive application of the *Kentucky River* daily interest compounding standard in this case was "manifestly unjust", and, therefore, erroneous. Again, however, AMS' argument in opposition of retroactive application is entirely baseless for the simple reason that the Board in *Kentucky River* specifically and preemptively addressed and rejected any notion of "manifest injustice, ruling that it would "apply this policy retroactively in this case and in all pending cases in whatever stage, *given the absence of any 'manifest injustice' in doing so.*" *Id*<sup>1</sup>.

AMS' assertion that the Charging Parties are somehow to blame for the 11 year delay in these proceedings (and associated interest on attorneys' fees) because they chose to vindicate their rights under the Act, rather than to petition the federal district for an award of attorneys fees following dismissal of AMS' suit, is nothing short of astonishing. Obviously, AMS could have significantly reduced the period of asserted "delay" by simply complying with the original ALJ decision in these matters which issued *more than 10 years ago*. Not surprisingly, AMS fails to offer any explanation for its own delay and habitual failure to comply with the ALJ and Board Orders issued against it, and instead, consistent with its history of anti-union animus and unlawful conduct, berates the victims of its unfair labor practices for asserting rights protected by the Act.

The Board's award of daily compounded interest in this case fully comports with extant Board law, and AMS' motion is wholly without support and should be denied.

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<sup>1</sup> In ordering retroactive application, the Board noted, *inter alia*, that it was deciding a remedial issue, not one involving a new standard for the determination of the legality of conduct, nor was this a situation where a party had belatedly invoked a new Board rule to raise a new issue in the proceedings. The Board further emphasized that retroactive application "significantly promotes the purposes of the Act, by improving a basic statutory remedy."

## **II. THE BOARD PROPERLY ORDERED THE ELECTRONIC POSTING OF NOTICES TO EMPLOYEES**

In arguing that the Board improperly ordered the electronic posting of Notices to Employees, AMS cites solely to the dissenting opinion of Board Member Hayes in the Board's decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010). Conspicuously absent from its motion is a single cite to any *majority* Board precedent in support of its position that electronic posting is either an "extraordinary" remedy, or that some peculiar facts of the instant case warrant exclusion from the imposition of this remedy. The Board in *J. Picini Flooring* unequivocally ruled that it was modifying "the Board's current notice-posting language. . .to expressly encompass electronic communication formats". *Id.*, slip op. at 1. In exact conformity with the limited requirement of *J. Picini Flooring*, the Board's order in the instant case requires only that "in addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or by other electronic means, if the Respondent customarily communicates with its employees by such means." Accordingly, AMS' claim of error is lacking in any basis whatsoever, and its motion should be denied.

## **III. THE BOARD PROPERLY FOUND THAT AMS' LAWSUIT AGAINST LOCAL 357, LOCAL 7, AND SMWIA LACKED A REASONABLE BASIS AND WAS RETALIATORY.**

AMS asserts that the Board failed to correctly apply the standard enunciated by the U.S. Supreme Court in *BE&K Construction v. NLRB*, 536 U.S. 516 (2002), and erroneously concluded that AMS' suit was baseless. As discussed below, AMS has again failed to offer any factual or legal support for its motion requesting reconsideration of the Board's ruling on these issues.

In *BE&K*, the Supreme Court overturned prior Board precedent and ruled that only a suit which was both lacking in reasonable basis and retaliatory would violate Section 8(a)(1) of the Act. In doing so, the Supreme Court rejected the Board's prior standard applied under cases

following the Supreme Court's earlier decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), in which the Board had found a violation of the Act even where reasonably based suits were filed with a retaliatory motive. On remand following the Supreme Court's decision in *BE&K*, the Board reversed its prior precedent and held that the "filing and maintenance of a reasonably based lawsuit does not violate the Act. . . regardless of the motive for initiating the lawsuit. *BE&K Construction Co.*, 351 NLRB 451, 456 (2007)(*BE&K II*).

As noted by the Board in the instant case, the *BE&K II* Board ruled that a suit was lacking in a reasonable basis, "if no reasonable litigant could realistically expect success on the merits". *Id.* at 457. The Board here also noted that in the *BE&K II* companion case of *Ray Angelini, Inc.*, 351 NLRB 206 (2007), the Board referred back to the factors outlined in *Bill Johnson's* to analyze whether a suit was lacking in reasonable basis, specifically noting that such a determination was appropriate "if the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous", or if it rests on "plainly unsupportable [factual] inferences" or "patently erroneous submissions with respect to mixed questions of fact and law." *Id.* at 209. Conversely, the Board noted that the Court in *Bill Johnson's* held that a suit could not be found to lack a reasonable basis "if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, 'or if the lawsuit raises "genuine. . . legal questions" for which there is 'any realistic chance that the plaintiff's legal theory might be adopted.'"

**A. The Board Properly Found AMS' Lawsuit Lacking in Any Reasonable Basis.**

The thrust of AMS' argument is that the Board erroneously relied solely upon the dismissal by the District Court under Fed. R. Civ. Proc. 12(b)(6) to support a finding that the lawsuit lacked a reasonable basis. That assertion, however, completely ignores the detailed analysis undertaken by the Board in these cases in evaluating the "reasonableness" of AMS'

claims. Contrary to AMS' contention, the Board here, not only cited to the district court's dismissal of claims for "failure to state a claim upon which relief could be granted", but also analyzed and explained in great detail, its basis for finding that AMS' lawsuit lacked a reasonable basis in either law or fact. (See, e.g. pages 8-10 of Board's Decision and Order).

More specifically, with regard to AMS' Section 303 "secondary boycott" claims, the Board found such claims to lack any reasonable basis, not because the district court dismissed the claims, but, rather, because there was absolutely no pleading filed by AMS suggesting that any of Local 357's alleged activity was directed at either a secondary employer, an otherwise "neutral entity", or a third party's employees, one or more of which are the necessary components to sustain such a claim. The Board likewise found the claim that Local 357 "pressured Local 7 to withhold job targeting funds to force Local 7 to "cease doing business" with AMS to be baseless, because there was no facts pled or legal support justifying a conclusion that the two unions were "doing business" with one another.

With respect to the claims against Local 7 and SMWIA, AMS, in a feeble attempt to divert the Board's focus from the real issue, argues that the suit did have a reasonable basis because: (1) The Local Joint Adjustment Board "deadlocked" on the issue of whether the denial of job targeting funds by Local 7 violated the collective bargaining agreement's "most favored nations clause", and; (2) The Sixth Circuit, in dicta, stated that it "would be inclined to view this claim differently".

The fatal flaw in AMS' assertion, is that the lack of reasonable basis for the lawsuit was grounded neither on whether the NJAB's decision was necessarily irrefutable, nor on whether another arbiter or decision maker would have ruled differently. Rather, the suit was lacking in any reasonable basis because, having failed to seek to vacate the NJAB's final and binding arbitration award within the requisite statute of limitations for vacatur, AMS was permanently

foreclosed from setting aside the award, no matter how craftily it attempted to sidestep that issue by filing suit claiming a Section 301 “breach of contract”. AMS’ breach of contract claim was fatally flawed based on long-standing extant precedent requiring deferral to final and binding arbitration awards, and the arbitration award was indisputably insulated from attack based upon AMS’ failure to seek vacatur. Regardless of the propriety of the NJAB’s award, it could not be overturned absent an appropriately filed action to vacate.<sup>2</sup> Under these circumstances, “no reasonable litigant could realistically expect success on the merits”.<sup>3</sup>

**B. The Board Properly Analyzed and Found AMS’ Lawsuit Retaliatory.**

AMS erroneously argues that by considering the lack of a reasonable basis for the suit as merely one factor in its analysis, the Board improperly analyzed the issue of whether the lawsuit was retaliatory. Contrary to AMS’ assertions, the Supreme Court in *BE&K* was concerned only about “reasonably based” suits being found illegal due to retaliatory motive, not about the same finding being made with regard to baseless lawsuits. The Supreme Court did not overturn the Board’s prior precedent concerning the illegality of retaliatory lawsuits which were lacking in any reasonable basis, nor did it rule that the lack of reasonable basis could not factor into an analysis of retaliatory motive. Here, the Board, properly concluded that, in light of a wealth of evidence of retaliatory motive, the lawsuit was indeed retaliatory, and, therefore, violated Section 8(a)(1).

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<sup>2</sup> The supporting case law on these issues was extensively briefed by Local 357 and Local 7 in their original briefs to the Board. Furthermore, the Board cited to this same supporting case law in the instant decision. Accordingly, the case law will not be needlessly repeated. The suit against SMWIA was even further removed from any realm of “reasonableness” as SMWIA was not a party to any CBA with AMS, nor did AMS plead any basis upon which SMWIA could be found as having any control over the Local Union’s job targeting funds, or any role in the decisions made regarding the use of such funds.

<sup>3</sup> AMS’ claims with regard to two of the other jobs on which job targeting funds were denied are likewise baseless, because, as the Board found, AMS failed to file a grievance over these denials. Absent a determination by the “final and binding” authority vested by the parties to contractually decide alleged contract violations, no reasonable litigant could expect success on a lawsuit attempting to circumvent the mandates of the CBA.

By way of example, the Board considered the following facts supporting AMS' retaliatory motive against Local 357: (1) The undeniable history of animus by AMS against UA Local 357 and its members evidenced in the findings of the Sixth Circuit in *Allied Mechanical Services, Inc.*, 113 F.3d 623 (1997) as well as the subsequent Board decisions against AMS, all of which were cited by the Board in the instant decision; (2) The fact that the timing of the lawsuit came in fairly close proximity to the issuance of the General Counsel's Complaint against AMS in Case No. GR-7-CA-40907, as well as AMS' July 1998 withdrawal of recognition; (3) AMS' request for monetary relief in the district court lawsuit based on the unions' statutorily protected job targeting activities; (4) AMS assertions in its district court complaint that its lawsuit was based in part on the fact that "Local [357] ha[d] filed numerous unfair labor practice charges and engaged in mini-strikes and other activities in an attempt to disrupt and damage the business operations of AMS", which activities are indisputably protected under the Act, and; (5) the statements by AMS President John Huizinga to Local 357 in the spring of 1999 that the Union had "cost him a lot of money" and had "embarrassed him" and "his family", and that "someday, you guys are going to make a mistake over there and I'm going to get even with you."

With regard to retaliatory motive toward Local 7, the Board properly concluded that AMS' suit against Local 7 was directed at a perceived cooperative effort by Local 7 and Local 357 with regard to the granting or denial of statutorily protected job targeting funds. The Board determined that the fact that AMS based its suit on a belief that Local 7 had collaborated with Local 357, and that Local 7 had denied job targeting funds to AMS because of AMS' lack of a contract with Local 357, demonstrated retaliatory motive for activities and/or perceived activities by one labor organization lending support and solidarity to another, which are, again, activities protected by the Act.

As discussed above, there was more than ample basis for the Board's finding that AMS' suit was both baseless and retaliatory. Indeed the facts of this case surpass even the standard articulated by the U.S. Supreme Court for a finding of retaliatory motive with regard to a *reasonably based suit*, let alone one lacking in any reasonable basis. AMS has offered nothing more than a reassertion of the same arguments made originally before the Board in these matters, and has certainly not demonstrated the existence of "extraordinary circumstances" and "material error" in the Board's Decision and Order required to sustain a motion for reconsideration.

### **CONCLUSION**

For all of the above-stated reasons, as well as those articulated in Local 357 and Local 7's prior briefs to the Board in these matters, Charging Parties Local 357 and Local 7 respectfully request that the Board deny AMS' Motion for Reconsideration, and, additionally, that the Board expedite its decision in that regard.

s/Tinamarie Pappas  
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Dated: December 5, 2011

CERTIFICATE OF ELECTRONIC SERVICE

TINAMARIE PAPPAS states that on December 5, 2011, she served the foregoing document on counsel for all parties to this proceeding, by electronic delivery to the individuals at the email addresses set forth below:

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The above statements are true and correct to the best of my knowledge, information, and belief.

s/Tinamarie Pappas  
TINAMARIE PAPPAS