UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLIED MECHANICAL SERVICES, INC.
Respondent
and Case 7-CA-41687

PLUMBERS AND PIPEFITTERS LOCAL 357,
UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPE FITTING INDUSTRY OF UNITED STATES
AND CANADA, AFL-CIO
Charging Union
and Case 7-CA-41783

LOCAL 7, SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION, AFL-CIO
Charging Union
and Case 7-CA-41993

UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPE FITTING INDUSTRY OF UNITED STATES
AND CANADA, AFL-CIO
Charging Union

COUNSEL FOR THE ACTING GENERAL COUNSEL'S STATEMENT IN OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION

On November 22, 2011, the Respondent filed a Motion for Reconsideration of the Board's October 25, 2011, Decision and Order.[1] In its Motion, Respondent seeks to have the Board eliminate the remedial requirement that it reimburse the Charging Unions' legal expenses *with* daily, compound interest.[2] It also urges the Board to modify its Order to eliminate any requirement that Respondent distribute the notice electronically. Further,

[1] *Allied Mechanical Services, Inc.*, 357 NLRB No. 101 (October 25, 2011)(cited herein as "Decision at p_")
[2] The Board modified the ALJ's recommended order by requiring that legal and other expenses, including attorney's fees incurred by the Charging Unions and the SMWIA in defending Respondent's lawsuit be reimbursed with interest on a daily basis. Decision at p. 1, fn 1.

it requests the Board to reverse its decision that Respondent committed an unfair labor practice in violation of Section 8(a)(1) by filing and prosecuting a lawsuit in retaliation for the Charging Unions' protected concerted activities. Respondent has failed to demonstrate, as required under Section 102.48(d) of the Board's Rules and Regulations, that there are extraordinary circumstances warranting such reconsideration by the Board of its Decision and Order, and Respondent has failed to demonstrate that the Board committed material error.

First, the Board did not, as Respondent's asserts, commit material error by ordering that the reimbursement of litigation expenses include daily, compound interest in accordance with the Board's decision in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Board correctly applied the *Kentucky River* precedent to instant case. Ordering Respondent to pay daily, compound interest on the litigation expense reimbursements is consistent with the broad language of the Board's decision in *Kentucky River* and the Board has traditionally applied the same interest formula to back pay and litigation cost reimbursement remedies. *Brisben Development, Inc.,* 344 NLRB 400, 401-402 (2005); *Allied Trades Council,* 342 NLRB 1010, 1013 (2004)*; Numark Security, Inc.,* 340 NRB 1317, 1318 (2003). Further, the Board in *Kentucky River* decided that it would not be manifestly unjust to apply this remedial change to all pending cases (*Id.* at p. 8), and Respondent has not shown that it will cause a particular injustice to retroactively apply the daily, compound interest requirement to the instant case. The suggestion of Respondent, a recidivist violator, may have changed its course of conduct, and settled the case had it known that it would be required to pay daily, compound interest, is self-serving and unconvincing. *Id.* at p. 5.

Respondent's claim that the Board committed material error by requiring that notices be posted electronically is equally fallacious. In ordering that Respondent post the notice to employees electronically to the extent that it communicates with its employees electronically, the Board was following its decision in *J. Picini Flooring,* 356 NLRB No. 9 (2010), in which the Board recognized that in remedying unfair labor practices and posting notices an employer must use the means it ordinarily uses to communicate with employees. The Board in *J.Picini*, as Respondent implicitly concedes, did not limit electronic posting to cases calling for extraordinary remedies.

Finally, when Respondent asserts in its Motion that the Board should reverse its finding that Respondent violated Section 8(a)(1) by filing and prosecuting a baseless lawsuit in relation for activities protected by Section 7 of the Act, it is attempting to re-litigate the issues that already have been fully argued and carefully considered by the Board.

In concluding that the lawsuit lacked a reasonable basis, the Board did not, as Respondent claims, simply rest on the fact that the Sixth Circuit Court of Appeals upheld the District Court's dismissal of the lawsuit.[3] While the Board noted that the court's dismissal of the lawsuit for failing to state a claim upon which relief can be granted militated in favor of such a finding, the Board explicitly stated that it would independently analyze whether the lawsuit had a reasonable basis. The Board then carefully reviewed each count of the lawsuit before reaching its conclusion that the lawsuit was baseless. Decision at p. 7-10.

[3] *Allied Mechanical Services, Inc. v. Local 337 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 221 F. 3d 133, 2000 WL 924594 (6th Cir. 2000)(unpublished opinion, full text in Westlaw).

Specifically, Respondent asserts that in deciding that Count II[4] in the lawsuit (which alleged that Unions violated Section 8(b)(4) of the Act) was baseless, the Board relied on nothing more than "what it characterized as 'black-letter law'" and Respondent's inability to state a valid cause of action. What the Board relied on was that Respondent did not allege in this count of the lawsuit that the Unions had unlawfully coerced a neutral third party with an object of having them cease doing business with Respondent, the employer with whom they had a dispute. The Respondent's secondary boycott claim was so frivolous that it did not allege a basic element of establishing an unlawful secondary boycott. Thus, the Board stated, "Simply put, as matter of black-letter law, it is impossible to state a secondary-boycott claim without an allegation of coercive conduct directed at a neutral third party." Decision at p. 8. The Board noted that Respondent did not allege in this count of the lawsuit that the Unions coerced any of Respondent's customers or potential customers or even had contact with them. The Board, therefore, concluded that this allegation was baseless because it lacked the most basic element of a secondary boycott claim -- an allegation of coercion directed at a third party. The Board noted that Respondent "did not and could not make a good faith argument for the extension of law to the existing conduct." Decision at p. 8. Hence, as the Board found, Count II was factually and legally baseless. The Respondent it its Motion offered neither a factual nor legal basis to support its claim that the Board's findings in this regard were manifestly erroneous.

Equally frivolous is Respondent's claim that the Board committed material error by finding that its breach of contract claim in the lawsuit lacked a reasonable basis. The

[4] Respondent did not specifically challenge the Board's analysis or findings with respect to Counts I and IV of the lawsuit which also alleged 8(b)(4) violations, but the Board's analysis was correct and there was no manifest error.

Board did not, as Respondent implies, simply rest its conclusion that the Section 301 claim alleging a breach of a collective bargaining agreement lacked a reasonable basis on the Court's dismissal of the complaint allegation. The Board analyzed the factual and legal allegations that Local 7's and Sheet Metal Workers International Association's failure to award Respondent job targeting funds breached their collective bargaining agreement. In deciding that this count of the lawsuit was baseless, the Board relied on Respondent having filed a grievance on this issue under the grievance-arbitration procedure in the collective bargaining agreement, and that the arbitration panel, whose decision was final and binding, dismissed the claim. This was a relevant consideration because in order to have a realistic basis to proceed in the lawsuit and overturn this award, Respondent would have to establish that the award did not derive its essence from the collective bargaining agreement. In this case, the Respondent had no reasonable basis for pursing this count of the lawsuit; it based its contractual claim on its "most favored nation clause," which did not refer to job targeting funds. Respondent never made any argument relying on any other provision of the collective bargaining agreement.[5]

[5] Respondent argues that this count had a reasonable basis because the Sixth Circuit Court of Appeals, after affirming the dismissal by the District Court, suggested in dicta, "Were we free to review the contract, or review the claims for factual or legal error, however, we would be inclined to review this claim differently." (2000 WL 924594 at p. 6-8) However, the reality, as the Court of Appeals acknowledged, was that under the law it was not free to vacate the decision of the arbitration panel, unless it could be shown that the award failed to derive its essence from the collective bargaining agreement, and Respondent was unable make this showing. *Id.* Thus, under the facts of case, which included a most favored nations provision on which Respondent relied that made no reference to targeting funds, and under the law Respondent never had a realistic expectation that it could possibly prevail with this claim; the Board properly so found. Respondent also points out that at the local grievance board, an earlier step of the same grievance procedure, representatives deadlocked on the grievance. Presumably the management representatives and the union representatives disagreed. In any event, what matters is that the grievance panel that was charged with having final and binding authority to decide this contractual claim found that it lacked merit, and Respondent had no reasonable basis for asserting that the award should be vacated and that the Court should rule in its favor on the contract claim. *Id.*

Decision at p. 8-10. In its brief to the Board, Respondent did nothing more than make the empty assertion that "[I]n light of the clear violation of the 'most favored nations clause' of the collective bargaining agreement, AMS justifiably believed that decision of the NJAB did not "draw its essence" from the agreement..." It did not provide the Court or the Board with even an arguable basis for establishing that the arbitration panel's award should be vacated. Decision at p. 9-10.

Contrary to Respondent's assertion, the Board also properly concluded that its baseless lawsuit had a retaliatory motive. In reaching this conclusion, the Board relied on a number of factors, including that: the lawsuit concerned the protected concerted activities of the Unions; the lawsuit was objectively baseless and sought to impose costs and burden on the Unions; the lawsuit was filed shortly after additional unfair labor practices were filed and shortly after Respondent unlawfully refused to reinstate strikers; the complaint in the lawsuit specifically referred to the unfair labor practices filed by Local 357 and its strike activities; Respondent had a long and continuing history of animus towards Local 357, as evidenced by its prior unfair practices, which were unremedied and continuing up until the filing of the lawsuit; and, one of Respondent's owners stated that he was going to "get even" with Local 357. Decision at p. 10-12.

Respondent in its Motion asserts incorrectly that the analysis used by the Board to find that lawsuit was unlawfully motivated was rejected by the Supreme Court in *BE &K Construction Co. v. NLRB,* 536 U.S. 516 (2002). Specifically, Respondent argues that the Supreme Court's decision bars the Board from relying on the baseless nature of the lawsuit, on the undisputed fact that the Unions' protected concerted activities were the

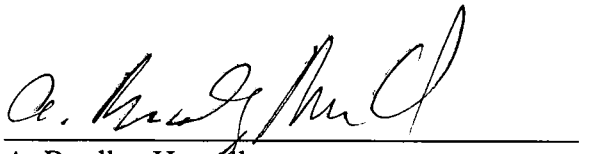
subject of the lawsuit, or on Respondent's animus towards the Charged Unions in making such a finding of unlawful motivation.

The Board has already considered these arguments in its Decision, and properly rejected them. In its Decision, the Board found that Respondent's lawsuit was baseless; it was a suit that "no reasonable litigant" could have realistically expected win on the merits. On the other hand, the lawsuit at issue in *BE & K,* was reasonably based, but was ultimately unsuccessful. The Supreme Court in *BE &K* was concerned with the employer's First Amendment right to seek redress in court and with granting parties "breathing room" under the Act to assert such a constitutional right. As a result, the Court interpreted Section 8(a)(1) to avoid this First Amendment question, by finding that the prosecution of a genuine, reasonably based, but unsuccessful lawsuit did not violate the Act simply because the lawsuit related to protected concerned activities or the employer filing the suit harbored anti-union animus. Decision at p. 10-12.

Because the instant case involves a baseless lawsuit, as opposed to a reasonably based but unsuccessful lawsuit, the Board properly found that the Supreme Court's analysis in *BE & K* to be inapposite. Decision at p. 11. That the lawsuit at issue here lacked a reasonable basis was a critical distinction, because in *BE&K* the Court was only concerned with avoiding the First Amendment right to litigate a genuine, reasonably based claim. The Board correctly concluded that the Supreme Court did not intend to rule on what was necessary to establish unlawful motivation when the lawsuit was without a reasonable basis. Decision at p. 10-12.

For the reasons set forth above, Counsel for the Acting General Counsel respectfully requests that Respondent's Motion be denied.

Respectfully submitted this 16th day of December 2011



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the *Counsel for the Acting General Counsel's Statement in Opposition to Respondent's Motion for Reconsideration* was served upon the following parties in the manner indicated on this 16th day of December 2011:

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