Nos. 12-1235, 12-1351

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL 357 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY; AND LOCAL 7 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION

Intervenors

v.

ALLIED MECHANICAL SERVICES, INC.

Respondent/Cross-Petitioner

ON APPLICATION FOR ENFORCEMENT, AND CROSS-PETITION FOR REVIEW, OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board for enforcement, and the cross-petition of Allied Mechanical Services, Inc. ("the Company") for review, of a Board Order against the Company. The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended ("the Act," 29 U.S.C. §§ 151, et seq.). The Decision and Order, issued on October 25, 2011, and reported at 357 NLRB No. 101 (A 33-57, D&O 1-25),[1] is final with respect to all parties under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f).

The Board applied for enforcement of its Order on March 2, 2012, and the Company cross-petitioned for review on March 26. The Court has jurisdiction over the application and cross-petition pursuant to Section 10(e) and (f) of the Act because the unfair labor practices occurred in Michigan. The appeals were timely filed, as the Act imposes no time limit for such filings.

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[1] "A" refers to the Joint Appendix, filed with the Company's brief. This brief will cite directly to the Board's Decision and Order, located at A 33-57, as "D&O." Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

ORAL ARGUMENT STATEMENT

The Board believes that oral argument would assist the Court in evaluating the issues presented.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board reasonably interpreted Section 8(a)(1) of the Act as barring employers from filing objectively baseless lawsuits against unions in retaliation for protected activities, and determined that the Company's lawsuit was baseless and retaliatory, and therefore unlawful.

2. Whether the Board acted within its discretion in ordering that the Company reimburse the Unions for attorneys' fees and expenses, with interest on the award to be compounded on a daily basis.

STATEMENT OF THE CASE

This case came before the Board on a consolidated complaint issued by the General Counsel, pursuant to charges filed by Local 7 of the Sheet Metal Workers International Association, AFL-CIO ("Local 7"), the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO ("UA"), and Local 357 of the UA ("Local 357")[2] (collectively, "the Unions"). (D&O 17; A 65, 69, 73, 78-81.) On February

[2] This brief uses the term "Local 357" to refer to both Local 357 and its predecessor, Local 337 of the UA, which merged with another UA local to form Local 357 on March 1, 1998. (D&O 1 n.2, 17 n.1; A 91, 131.)

21, 2001, following a hearing, an administrative law judge issued a decision applying extant law to find that the Company had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by filing and maintaining a lawsuit against the Unions and Local 7's international union, the Sheet Metal Workers International Association, AFL-CIO ("SMWIA").[3] (D&O 1 n.1, 21.) The Company filed exceptions with the Board, and the General Counsel and the charging party unions cross excepted. (D&O 1 n.1.)

On June 24, 2002, the Supreme Court issued *BE&K Construction Co. v. NLRB*,[4] modifying the legal standard for evaluating whether completed lawsuits violate the Act, and the Board remanded the case to the judge for reconsideration in light of *BE&K*. (D&O 1 n.1.) The judge issued a Supplemental Decision on June 10, 2003, again finding the Company's lawsuit to be an unfair labor practice, and the Company and the charging party unions excepted and cross-excepted to that decision. (D&O 1 n.1.)

On October 25, 2011, the Board (Chairman Pearce and Member Becker; Member Hayes, dissenting) affirmed the judge's finding that the lawsuit violated Section 8(a)(1), modifying the remedy to conform to its current practices. (D&O 1

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[3] SMWIA was not a charging party in this case, but is one of the unions the Company sued in its unlawful lawsuit. The term "the Unions" in this brief thus includes the SMWIA.

[4] 536 U.S. 516 (2002).

& n.1.) The Company moved for reconsideration on November 21, and the Acting General Counsel and charging party unions opposed. On December 29, the Board (Chairman Pearce and Member Becker; Member Hayes, concurring) ruled that the Company's motion did not present "extraordinary circumstances" warranting reconsideration, and rejected specific challenges to the remedy and to the Board's application of *BE&K*. (A 58-63.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company Punctuates Its Bargaining Relationship with Local 357 with Unfair Labor Practices, then Unlawfully Withdraws Recognition from Local 357

The Company makes and installs heating, ventilation, and air-conditioning systems in Michigan, employing sheet-metal and pipe-fitting employees. (D&O 1, 17; A 90.) Local 357 began organizing the Company's plumbers and pipe fitters and, pursuant to an unfair-labor-practice-complaint settlement in 1991, the Company agreed to recognize and bargain with the union as their representative. (D&O 1, 17, 22; A 91, 333-34.) The Company and Local 357 had a tumultuous relationship. They engaged in contract negotiations but never reached an agreement. Meanwhile, the Company committed a series of adjudicated unfair labor practices, described below, culminating in an unlawful withdrawal of recognition from Local 357.

In 1993, the Company violated the Act by refusing to reinstate nine striking employees after they offered unconditionally to return to work. This Court enforced the Board Order finding that violation. *Allied Mech. Servs., Inc.*, 320 NLRB 32 (1995), *enforced*, 113 F.3d 623 (6th Cir. 1997) (*Allied I*). (D&O 1.)

In 1995-96, the Company violated the Act by bypassing Local 357 to deal directly with employees, refusing to furnish information to Local 357, unilaterally changing terms and conditions of employment, and failing to bargain in good faith. The Board found those violations in *Allied Mech. Servs., Inc.*, 332 NLRB 1600 (2001) (*Allied II*), *on appeal*, D.C. Cir. Nos. 08-1244, 08-1254. (D&O 1.)

In March 1998, the Company violated the Act by refusing to reinstate ten strikers who made unconditional offers to return to work, and by refusing to consider and to hire four members of Local 357 when they applied for employment with the Company. (D&O 1-2.) The District of Columbia Circuit Court enforced the Board Order finding those violations. *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758 (D.C. Cir. 2012), *enforcing* 341 NLRB 1084 (2004) (*Allied III*).

Finally, the Company violated the Act by withdrawing recognition from Local 357 on July 22, 1998. Around the same time, it committed a further violation by failing to provide information Local 357 had requested, and by unilaterally revising its job-application procedures. (D&O 2.) The District of

Columbia Circuit also enforced the Board Order finding those unfair labor practices. *Allied Mech.*, 668 F.3d 758, *enforcing* 351 NLRB 79 (2007) (*Allied IV*).

In early 1999, Local 357's business manager, Robert E. Williams, attended a meeting regarding a training program. John Huizinga, the Company's part-owner and president, and its manager responsible for labor relations and direction of the Company's plumbing and pipe-fitting employees, was also in attendance. (D&O 5 n.19, 18; A 314-15, 334.) The two men spoke privately after the meeting, and Williams asked what it would take to get the Company to sign a collective-bargaining agreement with Local 357. John Huizinga stated that he did not think the Company ever would, and advised Williams that Local 357 should focus instead on contractors paying less than the Company. He further declared that he had a problem with the ethics of Williams' "two guys to the east of us," who had embarrassed him and his family, and had cost the Company a lot of money. Williams understood "two guys" as a reference to a union organizer and the business manager of another UA local. (D&O 18; A 315-16, 323.) John Huizinga concluded with a warning: "[s]omeday, you guys are going to make a mistake over there and I'm going to get even with you." (D&O 18; A 316-17.)

B. Local 7, Representative of the Company's Sheet-Metal Workers, Denies the Company Job-Targeting Funds; the Company Loses Final-and-Binding Arbitration Respecting that Denial

Local 7 has represented the Company's sheet-metal workers for years, and the Company was a signatory to Local 7's multi-employer collective-bargaining agreement ("the CBA") during the relevant period. (D&O 1, 17; A 91, 247-85, 327-28, 331.) Separate from – and not mentioned in – the CBA, Local 7 also maintains a job-targeting program, funded by monies the local collects from its members when they are working. At its discretion, Local 7 provides job-targeting funds to contractors that are CBA signatories, to enable them to bid more competitively against non-union contractors on particular jobs, with the ultimate goal of expanding union members' job opportunities. (D&O 2, 18; A 92, 109-10, 355-57.) Local 7 has provided such funds to the Company for certain projects in the past. (D&O 18; A 92.)

In 1998, Local 7 refused the Company job-targeting funds for three projects, the Red Cross, Chamber of Commerce, and YMCA jobs. (D&O 2; A 93-94.) The Company filed grievances regarding the Red Cross and YMCA (but not the Chamber of Commerce) jobs, asserting that the denial of funds violated the "most favored nations" clause of the CBA, because Local 7 had provided job-targeting funds to other signatory contractors for that project. (D&O 2; A 92, 97-98, 143, 328, 332, 356.) That clause (Addendum 16G) provides that Local 7 will not give

better "base rates, fringe benefit cost or working conditions" to any employer in its jurisdiction than its grants to signatory employers. (D&O 2, 17, 19; A 278, 327.)

The Red Cross grievance deadlocked at the second step, before the Local Joint Adjustment Board ("LJAB"). It then proceeded to the third and last stage of the parties' contractual grievance-arbitration process, "final and binding" arbitration before the National Joint Adjustment Board ("NJAB"). (D&O 2, 19; A 97, 329, 334-35.) On June 24, 1998, the NJAB denied the Company's grievance. At that point, the Company dropped the YMCA grievance. (D&O 2; A 97-98, 143.)

Meanwhile, Daniel Huizinga, the Company's treasurer and part-owner, and its manager primarily responsible for dealing with Local 7, learned from Local 7 representatives that the reason Local 7 would not give the Company job-targeting funds was because the Company had no contract with Local 357. (D&O 2, 19; A 326, 330, 333-34, 336-37, 361.) Considering the denial of job-targeting funds to be contrary to the interests of Local 7 and its members, Daniel Huizinga "assumed" that Local 357 and/or the UA must be interfering or colluding with Local 7, and decided to sue the Unions. (D&O 19; A 327, 334, 339-40, 348-49, 352-53.) He never discussed the issue of why Local 7 denied the funds with any representative of either Local 357 or the UA, and had no direct knowledge of

conversations about job-targeting funds between Local 7 and the SMWIA, Local 357 and/or the UA. (D&O 19; A 333.)

C. The Company Files a Federal Lawsuit Against Local 357, the UA, Local 7, and the SMWIA, which the District and Circuit Courts Dismiss

On August 4, 1998, the Company sued the Unions in federal district court, seeking damages pursuant to Sections 301 and 303 of the Labor Management Relations Act, 29 U.S.C. §§ 185 & 187. Section 303 creates a private right of action for parties injured by violations of the Act's secondary-boycott prohibition,[5] discussed in detail below, which makes it unlawful for unions to coerce neutral "secondary" parties or neutrals' employees in order to apply indirect pressure on a "primary" employer with whom the unions have a dispute.[6] Section 301 confers jurisdiction on federal courts to enforce collective-bargaining agreements.[7] The Complaint contained three counts alleging that Local 357 and/or the UA had violated the Act's secondary-boycott prohibition, and one asserting a breach-of-contract claim against Local 7 and the SMWIA. (D&O 2, 17-18; A 88-99, 293.)

Specifically, Count I of the Complaint alleged that Local 357 and/or the UA "threatened and/or otherwise coerced" Local 7 and/or the SMWIA "to ensure that

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[5] Section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4).

[6] *Allied Mech. Servs. v. UA Local 337*, 221 F.3d 1333, 2000 WL 924594, *3 (6th Cir. 2000) (per curiam) (unpubl'd) (*Allied V*) (reproduced at A 130-44).

[7] *Id.* at *6.

[the Company] would not be provided Job Targeting Funds," with the object of preventing the Company from "doing business" with Local 7, the SMWIA, and potential customers, in violation of Section 8(b)(4)(i) and (ii) of the Act (29 U.S.C. § 158(b)(4)(i) and (ii)). (D&O 2, 18; A 94-95.) Count II alleged that Local 357 and/or the UA, by preventing the Company from receiving job-targeting funds, had "created a barrier that restrains [the Company] from doing business with potential customers," and those potential customers from doing business with the Company, in violation of Section 8(b)(4)(ii). (D&O 2, 18; A 95-96.) And Count IV alleged that one or both of those unions had "threatened, coerced or otherwise restrained the individual plumbing and pipe fitting employees of [the Company] in the exercise of their rights" under Section 7 of the Act (29 U.S.C. § 157) by barring Local 7 and/or the SMWIA from granting the Company job-targeting funds, in violation of Section 8(b)(4)(i). (D&O 2, 18; A 99.) Finally, Count III, a contract claim against Local 7 and the SMWIA, alleged that those two unions had breached the CBA by denying job-targeting funds to the Company. (D&O 2, 18; A 96-98.) For each of the four counts, the Company sought "all actual and compensatory damages, including attorneys fees and costs incurred in bringing" the lawsuit. (D&O 2; A 95-96, 98-99.)

The defendant Unions moved to dismiss the Complaint for failure to state a claim upon which relief could be granted, pursuant to Federal Rule of Civil

Procedure 12(b)(6), and the district court granted those motions on March 30, 1999. (D&O 2 & n.4, 18; A 100-01, 124, 294.) In dismissing the secondary-boycott allegations, the court found that they were missing an essential element. The court explained that the Complaint explicitly challenged conduct (the denial of job-targeting funds) that was directed at a *primary* employer (the Company), rather than a secondary or *neutral* entity or its employees, as required for a Section 8(b)(4) violation. (D&O 2; A 112-18.) The court further held that the Company's secondary-boycott claims against the UA were doubly deficient, in that the Complaint alleged no facts indicating that either local union acted as the UA's agent. (D&O 2-3; A 118-19 n.11.)

With respect to the contract claim, the court held that the Company had not shown that the NJAB decision – which rejected the argument that the denial of funds breached the "most favored nations" clause of the CBA – did not "derive its essence" from the parties' contract, as required to vacate the decision and address the contract-interpretation issue *de novo*. The court noted that the nowhere in the CBA, much less in the "most favored nations" clause, was there any mention of Local 7's job-targeting program. (D&O 3; A 121-23.) The court further found that the Company had failed to exhaust its contractual remedies regarding the Chamber of Commerce and YMCA jobs before filing the lawsuit, and determined that the Complaint did not allege any facts supporting imposition of contract

liability on the SMWIA, which did not sign the CBA. (D&O 2-3, 18; A 107-11, 124.)

On April 28, 1999, the Company appealed the dismissal with respect to Local 7, Local 357, and the UA to this Court, but did not appeal the dismissal of its claims against the SMWIA. (D&O 3, 18; A 125-26, 131 n.1, 294-95.) On August 5, the parties stipulated to dismiss the appeal with respect to the UA. (D&O 3, 18; A 127-29, 131, n.1, 295.) This Court affirmed the dismissal of the lawsuit on June 26, 2000. (D&O 3; A 130-44.)[8] Construing the Complaint in the light most favorable to the Company, and accepting its factual allegations as true, the Court applied the principle 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." (D&O 3; A 135.)

In evaluating the Company's three secondary-boycott claims, the Court explained Section 8(b)(4)'s focus on activity directed at neutrals and their employees, and inapplicability to activity aimed at a primary employer directly implicated in the underlying dispute with the union. The Court noted that each of the Company's secondary-boycott claims depended on the allegation that actions were taken to ensure that Local 7 deny job-targeting funds to the Company directly and alleged, at most, indirect effects on neutrals from that primary activity. The

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[8] *Allied V*, *supra* note 6.

Court further pointed out that the Complaint failed to allege that the Unions directly contacted, much less coerced, any neutral customers, or that they induced any employees to refuse services to their employer. Accordingly, the Court held that the Company had failed to state secondary-boycott claims upon which relief could be granted. (D&O 3-4; A 135-40.) It also determined that Local 7, in representing its members and assisting signatory employers compete with non-signatory employers, was not "doing business with" the Company within the meaning of Section 8(b)(4). (D&O 4; A 140.)

The Court also rejected the Company's breach-of-contract claim, holding that it was "compelled to agree with the district court" that "the NJAB's decision did not fail to derive its essence from the agreement," given that the CBA, including the "most favored nations" clause, did not expressly reference job-targeting funds. In other words, while the Court stated that it "would be inclined to view th[e breach-of-contract] claim differently than the NJAB," it held that it was not "free to interpret the contract, or review the claims of factual or legal error" because the Company had not made the showing required to vacate the NJAB's final and binding award. (D&O 4; A 141-43.) The Court also agreed with the district court that the Company had failed to exhaust its administrative remedies with respect to the YMCA and Chamber of Commerce denials. (D&O 4; A 143-44.)

Meanwhile, between January and April, 1999, the charging party unions filed charges with the Board, alleging that the Company's lawsuit violated Section 8(a)(1) of the Act. (D&O 18; A 65, 69, 73.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found (D&O 1, 12) that the Company violated Section 8(a)(1) of the Act by filing and maintaining a lawsuit against the Unions. To remedy that unfair labor practice, the Board's Order requires the Company to cease and desist from filing and prosecuting lawsuits with causes of action against the Unions that both lack a reasonable basis and are motivated by an intent to retaliate against activity protected by Section 7 of the Act, 29 U.S.C. § 157, and from interfering with, restraining, or coercing employees in any other manner in the exercise of their Section 7 rights. (D&O 12-13.) Affirmatively, the Order requires the Company to reimburse the Unions for all legal and other expenses incurred defending the unlawful lawsuit, with interest compounded on a daily basis, and to post a remedial notice, electronically if appropriate. (D&O 1 & n.1, 13.)

SUMMARY OF ARGUMENT

The Board has determined that a lawsuit violates Section 8(a)(1) of the Act if it is: (1) objectively baseless, which the Board has defined by reference to the Supreme Court's past discussions of that factor, and also (2) subjectively baseless

or, in the labor context, initiated with the intent to retaliate against a union or employee for activity protected under Section 7 of the Act. That definition of an unlawful lawsuit is reasonable, and consistent with both the Act and relevant Supreme Court precedent.

The Board reasonably applied its 2-part test to find that the Company's lawsuit violated the Act. First, the Board independently determined, in agreement with both the district court and this Court, that each count of the lawsuit lacked any conceivable basis in law or fact, even accepting the truth of every allegation as pled. Second, substantial evidence indicating the Company's animus and targeting of protected activity, combined with the utter lack of any reasonable expectation of success, supports the Board's determination that the Company sued in order to retaliate against the Unions for their protected activity rather than with a sincere hope of prevailing on the merits.

In challenging the Board's determination, the Company misconstrues the Supreme Court's discussion of the interplay between Section 8(a)(1)'s sanction of retaliatory lawsuits and the First Amendment right to petition, and misapprehends the Board's application of the legal principles to the facts of this case. With respect to objective basis, the Company's strains in vain to construct secondary-boycott claims in the absence of the requisite targeting of a neutral employer or employees, and downplays the dispositive arbitration award barring its breach-of-

contract claim. In discussing subjective basis, the Company overlooks the limitations of the Supreme Court's *BE&K* decision, and asks this Court to disregard decades of Board expertise, as well as the Board's well-established prerogative, in making motive determinations.

Having found that the Company's retaliatory lawsuit violated the Act, the Board's decision to award associated attorneys' fees and expenses to the Unions, with interest compounded daily, was well within its remedial discretion. That award, intended to compensate the Unions for money spent defending the Company's unlawful suit, is entirely consistent with the remedial policies the Act authorizes the Board to effectuate. The Company fails to show that the Board abused its broad discretion to make whole parties injured by unfair labor practices.

STANDARD OF REVIEW

This Court will enforce a Board decision when "the record viewed as a whole provides sufficient evidence for a reasonable factfinder to reach the conclusions the Board has reached."[9] More specifically, the Board's findings of fact and applications of law to facts – including its motive determinations – are conclusive if supported by substantial evidence in the record considered as a whole, or "such relevant evidence as a reasonable mind might accept as adequate

[9] *NLRB v. Galicks, Inc.*, 671 F.3d 602, 607 (6th Cir. 2012) (internal quotation omitted); *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000).

to support a conclusion."[10] This Court may not displace the Board's reasonable inferences, even where it "would conclude differently under *de novo* review."[11] And, finally, "the Board's interpretation of the [Act] must be upheld if reasonably defensible."[12]

ARGUMENT

I. The Board Reasonably Found that the Company's Lawsuit Violated Section 8(a)(1) of the Act

A. Filing and maintaining an objectively and subjectively baseless lawsuit constitutes an unfair labor practice

Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. Section 7 of the Act, in turn, confers on employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities . . . ." Accordingly,

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[10] *Main St.*, 218 F.3d at 537 (quotation omitted). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Galicks*, 671 F.3d at 607. *See also Main St.*, 218 F.3d at 541 ("An employer's motivation is a factual question, and the Board's determination in this regard must therefore be upheld if supported by substantial evidence.").

[11] *Galicks*, 671 F.3d at 607 (quotation omitted). *See also Main St.*, 218 F.3d at 537.

[12] *Main St.*, 218 F.3d at 537. *See also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) ("For the Board to prevail, it need not show that its construction [of the Act] is the *best* way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one.").

the filing and maintenance of a lawsuit in retaliation for Section 7 protected activity may violate Section 8(a)(1).[13] But the Supreme Court has made clear that the standard for establishing such a violation must be tailored to protect the fundamental First Amendment right to petition the government for redress of grievances (including through litigation).[14]

In *Bill Johnson's Restaurants, Inc. v. NLRB*,[15] the Supreme Court considered the contours of the retaliatory-lawsuit unfair labor practice in the context of an ongoing lawsuit, holding that the Board could enjoin such lawsuits only if it found both a "[r]etaliatory motive and lack of reasonable basis."[16] The Court detailed the standard for finding objective baselessness at some length but suggested that, in the case of a completed, unsuccessful lawsuit, the Board could find a violation based solely on a determination of retaliatory intent.[17] Based on that suggestion, the

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[13] *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983).

[14] *See BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524-29 (2002); *Bill Johnson's*, 461 U.S. at 741-43.

[15] 461 U.S. 731 (1983).

[16] *Id.* at 748.

[17] *See id.* at 744-47, 749.

Board subsequently found the filing of retaliatory lawsuits unlawful if they were either baseless or completed and unsuccessful.[18]

The Supreme Court reviewed and rejected the Board's unfair-labor-practice standard for completed lawsuits in *BE&K Construction Co. v. NLRB.*[19] That 2002 decision dealt with "the class of reasonably based but unsuccessful lawsuits."[20] In *BE&K*, the Court characterized as *dicta* the suggestion in *Bill Johnson's* that retaliatory intent alone suffices to sanction a completed, unsuccessful lawsuit.[21] It then evaluated the potential burdens of an unfair-labor-practice finding on the right to petition, taking into account the established need for "breathing space" effectively to protect First Amendment rights and discussing the development of the sham-litigation standard for antitrust liability.[22] That standard, announced in *Professional Real Estate Investors v. Columbia Pictures Industries (PREI)*, requires both objective baselessness and subjectively unlawful (anti-competitive) motivation to sanction a lawsuit under antitrust law.[23]

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[18] *See, e.g., Machinists Lodge 91 (United Technologies Corp.)*, 298 NLRB 325, 326 (1990), *enforced*, 934 F.2d 1288 (2d Cir. 1991).

[19] 536 U.S. 516, 524 (2002).

[20] *BE&K*, 536 U.S. at 531.

[21] *See id.* at 527-28.

[22] *See BE&K*, 536 U.S. at 525-34.

[23] 508 U.S. 49, 60-61 (1993), discussed in *BE&K*, 536 U.S. at 526.

Because *BE&K* addressed the issue of lawsuits that are *not* objectively baseless, the Court did not explicitly decide whether the Board must apply the *PREI* sham-litigation test to define Section 8(a)(1) violations based on lawsuits.[24] But it did reject the Board's broad interpretation of Section 8(a)(1) to reach "all reasonably based but unsuccessful suits filed with a retaliatory purpose," having concluded that "a substantial portion of" the category of petitioning so defined is "subjectively *and* objectively genuine," and thus constitutionally protected.[25]

On remand, the Board – in *BE&K Construction Co. (BE&K II)* and a concurrent case, *Ray Angelini, Inc.* – promulgated a new test for retaliatory lawsuits in violation of Section 8(a)(1).[26] Determining that "the same weighty First Amendment considerations catalogued by the Court in *Bill Johnson's* with respect to ongoing lawsuits apply with equal force to completed lawsuits," the Board held in *BE&K II* that "the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit."[27] The Board concluded that "it is necessary to construe the Act to prohibit only lawsuits that are

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[24] *See id.* at 536-37.

[25] *Id.* at 535-36 (emphasis in original).

[26] *BE&K II*, 351 NLRB 451 (2007); *Ray Angelini*, 351 NLRB 206 (2007).

[27] *BE&K II*, 351 NLRB at 456-57.

both objectively and subjectively baseless, in order to avoid chilling the fundamental First Amendment right to petition."[28] In other words, a lawsuit violates Section 8(a)(1) only if it: (1) "lacks a reasonable basis," and (2) "was brought with the requisite kind of retaliatory purpose."[29]

1. Objective baselessness (no realistic chance of success)

To define objective baselessness, the Board, in *BE&K II*, explicitly adopted the standard articulated by the Supreme Court in *PREI*, holding that "a lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits.'"[30] In *Ray Angelini*, the Board further announced that it would be guided, in assessing objective baselessness, by the Court's discussion of the reasonable-basis inquiry as applied to ongoing litigation in *Bill Johnson's*.[31]

As the Board described in *Ray Angelini* and in the instant case,[32] the Court in *Bill Johnson's* indicated that a lawsuit lacks reasonable basis when "the plaintiff's position is plainly foreclosed as a matter of law or is otherwise

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[28] *Id.* at 458.

[29] *Id.*

[30] *BE&K II*, 351 NLRB at 457 (quoting *PREI*, 508 U.S. at 60).

[31] *Ray Angelini*, 351 NLRB at 208.

[32] *Id.* at 208-09; D&O 7.

frivolous," or rests on either "plainly unsupportable [factual] inferences" or "patently erroneous submissions with respect to mixed questions of fact and law."[33] Conversely, the Court explained that a lawsuit cannot be characterized as objectively baseless if it raises "genuine . . . legal questions" as to which there is "any realistic chance that the plaintiff's legal theory might be adopted."[34] Likewise, if the lawsuit presents "a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts," it is not objectively baseless.[35]

2. Subjective baselessness (retaliatory motive)

The Supreme Court has not yet had occasion to define the precise contours of subjective baselessness in the context of employer-filed lawsuits under the Act.[36] But it did state generally, in *Bill Johnson's*, that the Board could find

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[33] *Bill Johnson's*, 461 U.S. at 745 n.11, 747.

[34] *Id.* at 746-47. *See also BE&K*, 536 U.S. at 532 (noting that unsuccessful but reasonably based lawsuits "promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around").

[35] *Bill Johnson's*, 461 U.S. at 745 & n.11 (advising that, "[i]n making reasonable-basis determinations, the Board may draw guidance from the summary judgment and directed verdict jurisprudence").

[36] *See BE&K*, 536 U.S. at 528, 533, 537. In the antitrust context, the Court described subjective baselessness as the intent to accomplish anti-competitive goals "through the use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anti-competitive weapon." *Id.* at 526 (quoting *PREI*, 508 U.S. at 60-61) (emphasis in original).

unlawful, and enjoin, an objectively baseless lawsuit prosecuted "with the intent of retaliating against an employee for the exercise of rights protected by" Section 7.[37] Later, in *BE&K*, the Court considered the Board's definition of such retaliatory intent as "brought with a motive to *interfere* with the exercise of" Section 7 rights."[38] The Court held that, when limited only by a requirement that the lawsuit be unsuccessful, as opposed to objectively baseless – as was true under extant Board law – that definition encompassed "a substantial amount of genuine petitioning."[39] The Court explained that "[a]s long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively."[40]

In other words, the Court in *BE&K* held that when a company sues with the subjective intent to stop conduct that it has an *objective basis* for believing illegal under federal law, the lawsuit does not violate the Act, even if the targeted conduct is otherwise protected by Section 7.[41] As the Board noted (D&O 11-12), however, that holding does *not* dictate the Board's definition of retaliatory intent – or

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[37] *Bill Johnson's*, 461 U.S. at 744, 749. *Accord BE&K*, 536 U.S. at 533.

[38] *BE&K*, 536 U.S. at 533 (emphasis in original).

[39] *Id.*

[40] *Id.* at 534 (emphasis in original).

[41] *See id.* at 531, 533-34, 536.

subjective baselessness – when the lawsuit in question lacks any objective basis.[42] *BE&K* does not disturb the Board's duty to interpret the Act, or lessen the deference courts must accord the Board's motive determinations.[43] The Board, of course, is accustomed to assessing motives in adjudicating various unfair labor practices, considering both direct evidence and circumstantial factors such as timing, general animus, and pretext or the absence of another reasonable explanation for the conduct at issue.[44] Accordingly, in the case of employer lawsuits, the Board has in the past, with court approval, considered direct and circumstantial evidence of retaliatory motive, including whether the lawsuit is

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[42] *See id.* at 531 ("[W]e need not resolve whether objectively baseless litigation requires any 'breathing room' protection."); *id.* at 537 ("[W]e need not decide what our dicta in *Bill Johnson's* may have meant by 'retaliation.'").

[43] *See supra* notes 10 & 12.

[44] *See FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 777-78 (6th Cir. 2002) (Board may infer anti-union motivation from circumstantial evidence, including hostility towards unionization and proximity in time between protected activities and adverse action); *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 541 (6th Cir. 2000) ("[C]ircumstantial evidence alone may be sufficient to support a finding of unlawful motivation."); *NLRB v. Galicks, Inc.*, 671 F.3d 602, 608-09 (6th Cir. 2012) (animus, hostility, pretext). *See also Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 549 (D.C. Cir. 2006) (animus, timing); *U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (pretext, animus, timing), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007).

directed at protected activity and whether the employer harbors animus towards a union or protected activities.[45]

Applying its new interpretation of the Act, promulgated in response to the Supreme Court's *BE&K* decision, the Board reasonably found that the Company's lawsuit violated Section 8(a)(1) because it was both objectively and subjectively baseless. As detailed below (Parts B & C), the Board examined the Company's allegations and found, as had the district court and this Court, that the Company failed to state either a secondary-boycott or a contract claim as a matter of law. The Board further held that the Company's allegations were so fundamentally deficient that the Company had no hope of achieving a change in the law, or any other reasonable basis for the Complaint. With respect to motive, ample evidence supports the Board's determination that both the Company's animus towards the

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[45] *See, e.g.*, *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 32-34 (D.C. Cir. 2001) (approving Board's reliance on lawsuit's utter lack of merit, rather than mere lack of success, as evidence of retaliatory motive, as well as employer's decision to seek punitive, rather than just compensatory, damages); *Geske & Sons, Inc.*, 317 NLRB 28, 30, 58 (1995) (finding lawsuit retaliatory based on facts that principal subject matter of complaint was protected picketing, employer sought to misuse court order to stop picketing order did not bar, and general employer animus against union and picketing), *enforced*, 103 F.3d 1366 (7th Cir. 1997). *Cf. Sheet Metal Workers Local 355 v. NLRB*, 716 F.2d 1249, 1261-62 (9th Cir. 1983) (finding union lawsuit retaliatory based on temporal proximity to employee's protected activity and fact that it sought monetary compensation for unspecified injury when only conduct alleged in suit was protected; also absence of evidence supporting claim of non-retaliatory objective).

Unions and the content of its Complaint established retaliatory purpose. Accordingly, the Board reasonably concluded that the lawsuit violated the Act.

B. The Company's lawsuit was objectively baseless

1. The secondary-boycott claims (counts I, II, and IV)

As the Board held (D&O 7-8), and as both the district court and this Court independently recognized (A 114-18, 136-40), all three of the secondary-boycott claims in the Company's lawsuit lacked so much as an allegation that, if true, would satisfy the key element of any unlawful secondary boycott: coercive conduct directed at a *neutral* party doing business with the primary, or inducement of the *neutral's employees to withhold services* from their employer. In the absence of such a targeted secondary, no "reasonable litigant" could plausibly hope to prevail on those claims, or to construct a non-frivolous argument for a logical extension or modification of secondary-boycott law. Further, as the Board also detailed (D&O 8), the secondary-boycott claims had additional flaws, notably the Company's failure to detail or substantiate in any way its facially inadequate, conclusory allegations. The Board thus reasonably held that counts I, II, and IV of the lawsuit were objectively baseless.

a. The requisite targeting of neutral employers or employees is absent from the Complaint

The Board and the Courts have acknowledged the breadth of Section 8(b)(4)'s secondary-boycott prohibition.[46] But, in doing so, they have consistently emphasized one core requirement for violations of that ban: the direct targeting of neutrals to achieve primary objectives indirectly.

Section 8(b)(4) makes it unlawful for a union to threaten, coerce, or restrain a neutral party, or to induce a neutral's employees to withhold their services, in order to create indirect pressure on the employer with whom the union has a primary dispute. That prohibition was intended to protect – and is limited to protecting – neutrals from secondary activities, or conduct "whose sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it."[47] Congress instituted such protection partly

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[46] *See Longshoremen ILA v. Allied Int'l, Inc. (ILA)*, 456 U.S. 212, 222-23 & n.19 (1982) (holding ban applies to political, as well as labor, disputes because it was intended to protect neutral employers; finding activity secondary when union did "not seek any labor objective from the[neutral] employers" but rather "to satisfy union objectives elsewhere") (quotations omitted); *Teamsters Local 70 (Military Traffic Mgmt. Command*), 288 NLRB 1224, 1225 (1988) (holding provision applies in cases involving independent contractors rather than statutory employees, but finding no violation when no dispute other than with the employer, no primary objective "elsewhere").

[47] *Elec. Workers Local 761 v. NLRB*, 366 U.S. 667, 672 (1961) (quotations omitted). *Accord Prod. Workers Union of Chicago & Vicinity, Local 707 v. N.L.R.B.*, 793 F.2d 323, 327, 329-31 (D.C. Cir. 1986) (discussing requirement of a neutral for a secondary-boycott violation, and noting there must be "two employers

because "neutrals [a]re often powerless to comply with the union's demands," as distinct from primary employers, who are directly implicated in the underlying disputes and have the authority to change challenged conditions.[48] Accordingly, as the Board held (D&O 8), "it is impossible to state a secondary-boycott claim without an allegation of coercive conduct directed at a neutral third party."

In light of those key principles, the Board reasonably found Counts I, II, and IV objectively baseless. Even accepting its factual allegations as true, the Company's Complaint does not contain the requisite direct targeting of any third party, much less establish the neutral status of such target. The core factual

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in every secondary boycott resulting from a labor dispute"). *See also Chipman Freight Servs., Inc. v. N.L.R.B.*, 843 F.2d 1224, 1227 (9th Cir. 1988) ("We concur with [*Prod. Worker's*] conclusion that the core distinction between primary and secondary activities is the neutrality of the entity against which the disputed activity is directed."), *enforcing Local 70 (Chipman Freight)*, 283 NLRB 343, 349-50 (1987) (noting that, on remand from *Prod. Workers*, "the Board agreed with the D.C. Circuit that Section 8(b)(4) of the Act prohibits only picketing against neutral parties, those 'wholly unconcerned in the disagreement'"); *Military Traffic Mgmt.*, 288 NLRB at 1225 (noting need for "cognizable primary disputants, albeit not always 'labor' disputants," to find illegal secondary activity).

[48] *SEIU Local 525 (Gen. Maint. Svc. Co.)*, 329 NLRB 638, 639-40 (1999) (noting, in rejecting argument that secondaries had forfeited neutrality through joint venture with primary, a principal factor in determining neutrality is whether "the targeted entity exercises substantial, actual, and active control over the working conditions of the primary's employees"), *enforced*, 52 F. App'x 357 (9th Cir. 2002) (unpubl'd). *See also Elevator Constructors Local 91 (Otis Elevator Co., Inc.)*, 345 NLRB 925, 929 (2005) (holding union had no primary dispute with employer where employer did not control disputed work).

allegation underlying each of the secondary-boycott claims is the withholding of job-targeting funds *from the Company*. But the Company is engaged in a *primary* dispute with Local 357, and Local 7 directly represents the Company's sheet-metal workers, so the Company is not a neutral, and any effect on neutrals (such as potential customers) could thus only have been *indirect*, or secondary. As just described, the Act sanctions only the direct targeting of neutrals. Primary disputes often have indirect effects on neutrals, but the secondary-boycott ban is not intended to remedy such effects.[49] In other words, the Company's position, with respect to its secondary-boycott claims was "plainly foreclosed as a matter of law," and there was no "realistic chance that [its] legal theory might be adopted." More specifically, each of the Company's secondary-boycott claims is baseless for the following reasons.

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[49] *See ILA*, 456 U.S. at 223 n.20 ("The Court frequently has described the purpose of the secondary boycott provisions as twofold: the preservation of the right of labor organizations to place pressure on employers with whom there is a primary dispute as well as the protection of neutral employers and employees from the labor disputes of others."); *accord Sheet Metal Workers Local 27 (Thomas Roofing & Sheet Metal Co.)*, 321 NLRB 540, 547 (1996). *See also Steelworkers v. NLRB (Carrier Corp.*), 376 U.S. 492, 499 (1964) (explaining Congress added proviso to Section 8(b)(4) explicitly to protect primary strikes and picketing); *Otis Elevator*, 345 NLRB at 928 (explaining that "the normal work stoppage targeted at employer A by a union representing its own employees" is primary even though even though it "would, *by definition*, cause some degree of business cessation between that employer and its suppliers and customers").

i. Count I

Count I failed to state a claim upon which relief may be granted because it did not allege direct coercion of a neutral. In it, the Company asserts that Local 357 and/or the UA "coerced an individual(s) with decision-making ability . . . in [Local 7 or SMWIA]" to deny the Company job-targeting funds. But, as the Board held (D&O 8 & n.40), in agreement with this Court (A 140 & n.6), Local 7 was not a neutral employer "doing business" with the Company within the meaning of Section 8(b)(4). Local 7's relationship with the Company was in service of its duties as the exclusive bargaining representative of a unit of the Company's employees. It defies common sense to conclude that a union representing the primary employer's employees qualifies as a neutral employer – i.e., uninterested in labor disputes involving the primary – much less "does business with" the primary within the meaning of Section 8(b)(4) in fulfilling its representational duties. The Company has provided no authority supporting such a counterintuitive conclusion.

In any event, even assuming counterfactually that Local 7 could qualify either as a neutral or as "doing business" with the Company, the Complaint offers nothing but "information and belief" to substantiate its non-specific allegation of coercion. (A 94.) It fails to allege any actual contacts between either Local 357 or the UA and Local 7 respecting the job-targeting program, or to specify what

manner of threat Local 357 or the UA might have held over Local 7. Nor, as the Board noted (D&O 8), did the Company identify any facts substantiating its theory at the hearing before the administrative law judge.

To the contrary, despite his vague recollection that there were "hints" from unnamed individuals – in a phone conversation that he heard about second hand – of undefined "pressures" on Local 7, Daniel Huizinga explicitly testified that the only explanation Local 7 ever gave him for the denial of funds was that the Company did not have a contract with Local 357. (A 330, 337, 340, 352-53.) He also acknowledged that he never had any communications with either Local 357 or the UA regarding the denial of funds. (A 333.) Instead, based on Local 7's explanation, he had a "strong belief that the UA was interfering . . . with the Sheet Metal [Workers]," "assumed there had to be some pressure" to cause Local 7 to risk loss of sheet-metal work, and "strongly felt that . . . the Sheet Metal people were being influenced by the Piping Union." (A 330, 339, 350-51.) Those assumptions, unsupported by any personal knowledge, are insufficient to create a genuine issue of fact as to whether Local 357 or the UA coerced Local 7.

ii. Count II

Count II fails as a matter of law because it also "lacks," as the Board found (D&O 8), "the most basic element of a secondary-boycott claim—an allegation of coercion directed against a neutral third party." Count II asserts that Local 357

and/or the UA "restrained potential customers . . . from doing business with" the Company. But, again, the mechanism it alleges is the denial of job-targeting funds *to the Company*, which *directly* affected the primary employer (the Company) and could only have affected neutral potential customers indirectly, if at all. Crucially, as the Board noted (D&O 8) (quoting this Court at A 138), the Company does not even allege that any of the Unions made contact with – much less coerced – any of the Company's potential customers, or induced any potential customers' employees to withhold services from their employers.

iii. Count IV

Count IV is baseless for essentially the same reasons as the first two, simply restating once again the undisputed fact that Local 7 withheld job-targeting funds directly from the Company, a non-neutral employer directly involved in the underlying labor dispute. Count IV specifically asserts that Local 357 and/or the UA "coerced . . . the individual plumbing and pipe fitting employees of [the Company] in the exercise of their [Section 7] rights . . . by prohibiting Local 7 . . . and/or the [SMWIA] from providing" job-targeting funds. (A 99.) As the Board (D&O 8) and this Court (A 139-40) both noted, the Company does not allege that any of the Unions coerced, or otherwise communicated with, the Company's employees to induce them to "cease doing business with," or withhold services from, the Company. Nor, in any event, is the Company a neutral employer in the

underlying dispute, which involves the terms and conditions of its own employees, the very same employees Count IV alleges as the targets of secondary coercion.

b. The Company had no reasonable basis to sue the UA

Finally, with respect to all three secondary-boycott claims, the Complaint lacks any factual allegation indicating that the UA, whom the Company named as a defendant in Counts I, II, and IV, was involved in any way in the allegedly unlawful denial of funds. Nor does the Complaint allege that either Local 357 or Local 7 was acting as the UA's agent for any relevant purposes. Indeed, consistent with that deficiency, Daniel Huizinga testified that he had no knowledge either that the UA actually participated in, authorized, or knew about, any of the conduct alleged in the Complaint, or regarding the precise nature of the relationship between the UA and Local 357. (A 352-54.) In apparent acknowledgment that they were not reasonably based, the Company declined to appeal the district court's dismissal of its allegations against the UA to this Court. (A 68.)

2. The contract claims (Count III)

Like its secondary-boycott claims, the Company's breach-of-contract claims were objectively baseless. Count III of the Company's Complaint alleges that Local 7 and/or the SMWIA breached the CBA's "most favored nations" clause by refusing to provide the Company with job-targeting funds. It proceeds to acknowledge the Company's pursuit of the Red Cross claim through the parties'

mandatory contractual grievance-and-arbitration process, culminating in a final arbitration before the NJAB, which the Company lost when the panel rejected that precise argument. The Complaint asserts that the NJAB's decision "represents an infidelity to the essence of the [CBA], is not supported in any way by [the CBA] and unlawfully changes [the CBA]." (A 98.) But it does not explain how the NJAB's award is unfaithful to the parties' agreement. The Company could not realistically expect to prevail on Count III because, as the Board (D&O 9), district court (A 107-10, 121-24), and this Court (A 141-44) each held, and as shown below: the Company made no showing even arguably sufficient to vacate a final, binding contractual-arbitration award; it failed to exhaust the contractual remedies for two of the three alleged contract violations cited in the Complaint; and, in any event, it did not allege facts indicating that the SMWIA was a party to the CBA (and ultimately abandoned its appeal with respect to the SMWIA, A 131 n.1).

As the Board explained, the Company cannot prevail on its contract claims so long as the NJAB award stands. And, as the Supreme Court explained in *Steelworkers v. Enterprise Wheel & Car Corp.*,[50] parties to a collective-bargaining agreement bargain for an arbitrator's construction of their contract when they agree to an arbitral process, so "the courts have no business overruling [the arbitrator]

[50] 363 U.S. 593, 599 (1960). *Accord Monroe Auto Equip. Co. v. Auto Workers Local 878*, 981 F.2d 261, 265 (6th Cir. 1992).

because their interpretation of the contract is different from his." Consequently, the standard for overturning the contract interpretation of an arbitrator (or arbitral panel) authorized to undertake such interpretation by the parties' contract is extremely difficult to satisfy, as the Court reaffirmed and clarified in *United Paperworkers International Union v. Misco*.[51]

In *Misco*, the Court specified that a reviewing court may not "reconsider the merits of an award even though the parties may allege that the award rests on . . . misinterpretation of the contract."[52] The Court reiterated its *Enterprise Wheel* holding that "[a]s long as the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate."[53] While an arbitrator may not "ignore the plain language of the contract," the Court admonished that a reviewing court "should not reject an award on the ground that the arbitrator misread the contract."[54] The Court concluded that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced

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[51] 484 U.S. 29, 36-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept.").

[52] *Id.* at 36.

[53] *Id*. (quoting *Enterprise Wheel*, 363 U.S. at 597).

[54] *Misco*, 484 U.S. at 38.

he committed serious error does not suffice to overturn his decision."[55] This Court, in turn, has interpreted the Supreme Court's essence-of-the-contract test to invalidate arbitral awards only if the award: (1) "conflicts with express terms of the agreement"; (2) "imposes additional requirements not expressly provided for in the agreement"; (3) "is not rationally supported by or derived from the agreement"; or (4) "is based on general considerations of fairness and equity instead of the exact terms of the agreement."[56]

The Board reasonably found (D&O 9) that Count III of the Company's Complaint – which does not, and cannot, satisfy any of the four criteria for setting aside the NJAB award – is objectively baseless. With respect to the allegation that Local 7 breached the CBA in denying the Company targeting funds for the Red Cross project, Count III of the Complaint does not provide any details to substantiate its bare assertion that the NJAB decision does not draw from the essence of the parties' CBA. Notably, the "most favored nations" clause of the CBA refers to "base rates, fringe benefit cost or working conditions" but does not mention Local 7's job-targeting program. And no other provision of the CBA references that program which, as Daniel Huizinga testified "is not covered in the

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[55] *Id. Accord Allied V*, 2000 WL 924594, *6; *Monroe*, 981 F.2d at 266.

[56] *Monroe*, 981 F.2d at 268 (quotations omitted). *Accord Allied V*, 2000 WL 924594, *6 (citing *Monroe*).

[CBA]." (A 355.) Nor is there any other agreement between Local 7 and the multi-employer association regarding the program. (A 356-57.) Given those indisputable facts, the Company's argument (Br. 37, 39) that the NJAB award conflicts with an express CBA term is untenable and its allegation concerning the Red Cross job lacks any reasonable basis.

Indeed, as the Company admits (Br. 37, 39), the conflict it claims is really between the NJAB award and the Company's (or Daniel Huizinga's) *interpretation* of the "most favored nations" clause. But, as described above, disagreement with an arbitrator's interpretation of a collective-bargaining agreement is distinct from demonstrating an express contractual conflict, and is not a basis for vacating an arbital award.[57] With respect to the other three possible grounds for vacating an award, there is no evidence suggesting – nor does the Company argue – that they are met with respect to the NJAB decision.

Because vacating the NJAB award is a legal impossibility, Count III fails to state a claim upon which relief can be granted, as both the district court and this Court ruled in dismissing the Company's lawsuit. No court can review the merits of the Company's contract-interpretation argument, so the question of whether or not that construction is factually or legally well-founded is, contrary to the Company's assertions (Br. 37-38), immaterial for purposes of assessing whether

[57] *See supra* pages 35-36 & n.51.

Count III's allegations are objectively baseless. So too are the deadlock at the intermediate stage of the Red Cross grievance proceedings (before the LJAB) and this Court's inclination to view the CBA differently from the NJAB "were [it] free to interpret the contract, or review the claims of factual or legal error." (A 143.)[58]

The Company's brief does not even argue that the allegations in Count III against the SMWIA, or relating to the YMCA and Chamber of Commerce jobs, had any reasonable basis. And, as the Board held (D&O 9), they do not. The claim against the SMWIA failed to allege or demonstrate that the SMWIA negotiated or signed the CBA, or took any other action that would subject it to liability for Local 7's actions. The YMCA and Chamber of Commerce allegations cannot be presented to any court because the Company undisputedly failed to exhaust the mandatory grievance-and-arbitration process under the CBA, as this Court explained in affirming the district court's dismissal of the Company's lawsuit. (A 143-44.) As the Supreme Court has made clear, when a collective-bargaining agreement provides for grievance and arbitration, and those procedures

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[58] *See Monroe*, 981 F.2d at 263-65, 267-68 (finding "room for disagreement" with arbitrator's decision, but declining to review merits of award because "[w]hether correct or not," arbitrator had interpreted disputed rule in light of parties' contract, and had "not exceed[ed] his authority or impose[d] his own brand of industrial justice").

have not been exhausted, "courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute."[59]

3. The Company's Challenges to the Board's Finding of Objective Baselessness Are Unavailing

As just demonstrated, ample evidence supports the Board's reasonable conclusion that each of the four counts of the Company's lawsuit against the Unions was objectively baseless – that no reasonable litigant could realistically expect success on the merits of the Complaint, or an extension of existing law. The Company's arguments to the contrary are unavailing.

As an initial matter, the Company appears to misapprehend the applicable legal standard. In *BE&K II*, the Board held that a lawsuit must be both (1) objectively baseless and (2) subjectively baseless, or retaliatory, to constitute an unfair labor practice under the Act. As described above, that interpretation of the Act is both reasonable and consistent with the Supreme Court's holdings in *BE&K* and *Bill Johnson's*. The Company errs (Br. 6-7, 19) to the extent it would add a subjective component to the first, objective prong of the analysis. The subjective component of the *BE&K II* test is its retaliation prong, discussed below (Part C).

Moreover, despite repeated references (Br. 7-8, 19, 27, 32) to the possibility that a lawsuit may have a reasonable basis if it could plausibly contribute to

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[59] *Misco*, 484 U.S. at 37.

evolution of the law, the Company's brief fails to set forth any modification of the law that its lawsuit sought, much less articulate any reasonable basis it may have had for seeking or expecting such change when it sued the Unions.[60] To the contrary, it contends that each count of its Complaint had a reasonable basis in existing law.

In particular, the Company asserts (Br. 35-36) that its secondary-boycott allegations fit the mold established by the Supreme Court in *International Longshoremen's Association, AFL-CIO v. Allied International (ILA)*.[61] But, unlike here, the union in that case *directly* targeted neutral employers who were uninvolved in its primary dispute, which was with the Soviet Union. To protest that country's invasion of Afghanistan, the union induced employees to withhold their services loading and unloading cargo bound for, or coming from, the Soviet Union.[62] The Court found the boycott illegal because the shipping and import-export companies directly affected by the employees' refusal to handle those

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[60] *Compare Children's Hosp. Oakland*, 351 NLRB 569, 571-72 (2007) (finding reasonable basis where employer argued for modification of standard, relying on cases whose relevance "was at least colorable," standard was subject of circuit split, and employers had won factually similar cases under prevailing standard); *BE&K II*, 351 NLRB at 459-60 (holding employer "raised a reasonable argument for the extension of existing law" when "much of the applicable law was uncertain when the suit was filed," employer's theory paralleled General Counsel's in another case, and appellate court "created new law" in deciding case).

[61] 456 U.S. 212 (1982).

[62] *See id.* at 214-15.

goods, including their employers, were neutrals who had "nothing to do with" the dispute, and the union "d[id] not seek any labor objective from" the companies – "[i]ts sole complaint [w]as with the foreign and military policy of the Soviet Union."[63] The Court then held that even though the union's intent was to "free[] employees from handling goods from an objectionable source," it was responsible for the "foreseeable consequences" of the boycott on the neutrals when it "brought direct economic pressure" on them.[64]

Here, as already noted, any such "foreseeable consequences" to neutrals (potential customers) from the Unions' actions were indirect effects of Local 7 withholding funds *from the Company*.[65] And the Company, of course, was the *primary* employer involved in the underlying dispute, with the power to effect the change the Unions sought by signing a contract with Local 357. In other words, while *ILA* is unusual because it involves a political, rather than labor-related, primary dispute, it does not alter the fundamental legal requirement – which the Complaint fails to satisfy – that a secondary boycott directly target a *neutral* employer or its employees.[66]

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[63] *Id.* at 215, 222-23.

[64] *Id.* at 223-24.

[65] As also discussed above, neither Local 7 nor the Company's employees qualify as neutrals.

[66] *See id.* at 224-26.

Finally, the Company misreads the Board's analysis. Contrary to the Company's repeated assertion (Br. 7, 9, 19, 21-22, 30, 33, 36, 50), the Board did not rest its objective-baselessness determination on the lawsuit's lack of success. Rather, the Board expressly held (D&O 7), and reiterated in denying the Company's motion for rehearing (A 62), that the courts' rulings did "not necessarily establish that the lawsuit lacks a reasonable basis," consistent with *BE&K II*. Then, as detailed at length above, the Board independently reached the conclusion that the lawsuit was objectively baseless by evaluating the Complaint's allegations. Nonetheless, as the Board properly recognized (D&O 7 & n.37), the rationales of the courts' decisions bolster that conclusion.

C. The Company's lawsuit was retaliatory

1. The Company filed the lawsuit with a retaliatory motive

Substantial evidence supports the Board's determination (D&O 10-11) that the Company filed its baseless lawsuit with an unlawful, retaliatory purpose – that "deep, enduring, and unlawful animus against Local 357, its supporters, and their protected activities" animated the Company's decision to sue. The Company's animus against Local 357, particularly during the time period surrounding the Complaint, is manifest in the record, as is the fact that it associated the other defendant Unions with Local 357. The substance of the Complaint – its direct targeting of some protected union activities and gratuitous references to others, and

its utter lack of any objective factual or legal basis – confirms that the Company sued the Unions in retaliation for their protected activities, in violation of Section 8(a)(1) of the Act.

As the Board described (D&O 10), and the Company acknowledges (Br. 11), the Company's relationship with Local 357 has been "tumultuous" for a decade. The Company agreed to recognize Local 357 in 1991 as part of a settlement of serious unfair-labor-practice charges, and then proceeded to commit a series of additional violations against the union and its members over several years. Among those violations – all now adjudicated by the Board, and many court enforced – were refusal to reinstate strikers on multiple occasions or to hire Local 357 members, as well as refusal to furnish information to, bypassing, and bad-faith bargaining with, Local 357. On July 22, 1998, the Company's unlawful conduct towards Local 357 culminated in its unlawful withdrawal of recognition from the union.[67] Those violations amply support the Board's finding (D&O 10) that the Company harbors animus against Local 357.

Moreover, as the Board also explained (D&O 10), the timing of the August 1998 lawsuit – proximate to a number of potentially precipitating events or incidents confirming the Company's animus – tends to show that it was motivated

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[67] *See supra* pages 6-7 (describing violations found in *Allied I*, *Allied II*, *Allied III*, and *Allied IV*).

by that hostility. Specifically, an administrative law judge found, in February 1998, that the Company had committed several violations, and ordered the Company to reinstate several strikers, make them whole, and bargain with Local 357. The following month, the Company again refused to reinstate strikers and consequently, in April 1998, Local 357 filed unfair-labor-practice charges. In July 1998, just a few weeks before filing its Complaint, the Company withdrew recognition from Local 357. Finally, during the pendency of the lawsuit, John Huizinga declared that he planned to "get even" with Local 357. (A 316-17.)

While the above-described incidents patently illustrate hostility towards Local 357, the record also supports the Board's finding that such animus also drove the Company's decision to sue Local 7, the SMWIA, and the UA. As Daniel Huizinga testified, the Company sued the UA exclusively because of suspected involvement in Local 357's activities (A 352-53), and assumed that Local 7 and/or the SMWIA took the actions targeted in the lawsuit because of Local 357 (A 330). Factually, as the Board noted (D&O 10), the UA and SMWIA were associated with their locals, and the two locals were connected by Local 7's decision to deny job-targeting funds based on the Company's refusal to contract with Local 357. In other words, the animus the Company harbored towards Local 357 motivated it to sue all of the Unions.

The substance of the lawsuit further bolsters the Board's finding of retaliatory intent, both because it is facially retaliatory and because it is devoid of merit. The Complaint itself indicates that animus against Local 357 played a role in the Company's decision to sue: paragraph 11 of its general allegations recites Local 357's protected activities, such as filing unfair-labor-practice charges and engaging in "mini-strikes." (A 91.) As the Board held (D&O 11), the decision to include that allegation – which has no clear connection to either the secondary-boycott or breach-of-contract claims – indicates that the Company considered Local 357's protected activities relevant to its lawsuit and further supports the Board's finding that the Company sued the Unions in retaliation for just such protected conduct.

More generally, as the Board also found (D&O 10-11), the Complaint aims to recover money from the Unions based on their protected conduct. The lawsuit targeted the Unions' use of Local 7's job-targeting program – whose lawfulness the Company does not contest[68] – to assist Local 357's efforts to contract with the Company. And it does so based on frivolous legal theories, as detailed above.

Indeed, as the Board explained (D&O 11), the obvious baselessness of the Complaint confirms the retaliatory intent already evident from both the Company's

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[68] In any event, the job-targeting program is clearly protected, as the Board held (D&O 11 & n.53 (and cases cited therein)).

animus towards the Unions and the lawsuit's targeting of their protected concerted activities. Common sense dictates that because the Company could have no realistic expectation of prevailing on the merits of its lawsuit, it must have filed the lawsuit for some other reason. That inference is, moreover, consistent with longstanding Board and court precedent holding that an employer's inability to establish a legitimate motive supports an inference that its actual motive is unlawful.[69] In sum, ample evidence supports the Board's reasonable determination that the Company filed its baseless lawsuit to impose the burden of litigation on the Unions in retaliation for their protected activities, in violation of Section 8(a)(1).

2. The Company's arguments do not undermine the Board's finding of retaliatory motive

Despite its acknowledgement (Br. 8, 42) that *BE&K* did not specifically define retaliatory intent, the Company asserts (Br. 9, 20-21, 27-28) that the Supreme Court rejected the Board's extant definition of a retaliatory lawsuit, strictly limiting the types of evidence the Board may consider to infer such intent. That reading of *BE&K* is contrary, as the Board explained (D&O 11), to the Court's express limitation of its analysis to cases involving "the class of reasonably

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[69] *See Petrochem Insulation*, 330 NLRB 47, 50 (1999) (Lawsuit's complete lack of merit "undermine[d the employer's] claim that it filed the suit to defend its legally protectable interests and demonstrates instead its retaliatory purpose.") (internal quotation omitted), *enforced*, 240 F.3d 26 (D.C. Cir. 2001). *See also* cases, *supra* notes 44 & 45.

based but unsuccessful lawsuits."[70] It is also inconsistent with longstanding precedent allowing the Board leeway to evaluate all sorts of direct and circumstantial evidence to determine motives in unfair-labor-practice proceedings.[71]

In finding the Company's lawsuit retaliatory, the Board (D&O 10-11), as described above, reasonably relied on ample and varied evidence of general animus, the targeting of protected activities, and sheer baselessness. The Board did not find any one of those factors dispositive, instead inferring retaliatory intent from them all together. Nor, as demonstrated below, was the Board's consideration of any of those factors inappropriate.

The Company incorrectly argues (Br. 44-45) that any reliance on the lawsuit's lack of merit – under the first prong of *BE&K II* – in evaluating the second, subjective prong of the test unreasonably collapses the two considerations into one. But, as just noted, lack of reasonable basis was only one factor the Board considered. More importantly, while the two prongs are distinct, they are not unrelated, as the Court's discussion of retaliatory motive in *BE&K* demonstrates. That discussion closely links subjectively based petitioning to objectively based

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[70] 536 U.S. at 531.

[71] *See supra* notes 10, 44, 45 & 69.

petitioning, repeatedly describing genuine petitioning as characterized by a petitioner's sincere intent to stop conduct he "reasonably believes" is illegal.[72]

Conversely, as discussed above, a complete lack of any reasonable basis to expect success – as opposed to lack of success despite a reasonable basis – is undeniably relevant to motive. The fact that a litigant could not reasonably hope for – i.e., should have known he had no realistic chance of – success on the merits of his lawsuit necessarily undermines any argument that he sincerely sought relief through that lawsuit.[73] While evidence of total lack of objective basis alone may not warrant an inference of the requisite *retaliatory* intent – as opposed to some other unreasonable, but not necessarily unlawful, motive – it does support the inference of retaliation in a case such as this one, where other evidence also supports it. The Board therefore reasonably considers objective baselessness, among other factors, when assessing motive.

The Board also reasonably considered the Company's animus, and the Complaint's targeting of protected activity, in determining motive. The Supreme Court in *BE&K* did not, as the Company contends (Br. 9, 20-21, 28, 40-43), preclude the Board from considering either one. Instead, the Court held that the Board's extant definition of retaliation – including reliance on such factors – was

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[72] *BE&K*, 536 U.S. at 533-34.

[73] *See Petrochem*, *supra* note 69.

insufficient to exclude all constitutionally protected petitioning *from the class of reasonably based, but unsuccessful lawsuits*.[74] As just discussed, the calculus is different when applied, as here, to a *baseless* lawsuit. The import of animus and targeting protected conduct is greater when a lawsuit's clear lack of objective basis precludes finding that the motive for filing was a sincere intent to prevail on the merits.

Nor is it true, as the Company claims (Br. 21, 41), that targeting is irrelevant because "[e]very lawsuit seeking to recover damages caused by union activity is, by definition, filed 'in direct response' to that activity," but "not all meritless suits against unions or employees amount to unfair labor practices."[75] As the Board explained (D&O 11-12), an employer may sue employees actively engaged in a union-organizing campaign for conversion of company property unrelated to their campaign. If that lawsuit were objectively baseless and filed in retaliation for the organizing, it would violate Section 8(a)(1), but the factor of targeting protected conduct would not, in such a case, support an inference of retaliatory motive.

Finally, the Company's factual assertions do not undermine the Board's retaliatory-intent determination. The weight of the evidence demonstrating that the Company's animus towards Local 357 motivated its lawsuit is not significantly

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[74] *See BE&K*, 536 U.S. at 533-34.

[75] *Petrochem*, 240 F.3d at 32.

undermined by the Company's "long and productive bargaining relationship with Local 7." (Br. 42.) The lawsuit stemmed from a dispute unrelated to that established bargaining relationship, i.e., from the Company's objection to Local 7's support of Local 357's effort to obtain a collective-bargaining agreement. As demonstrated above, the Company's animus, the Complaint's targeting of, and references to, protected activities, and the lawsuit's utter lack of reasonable basis combine to provide the requisite evidentiary support for the Board's conclusion that the Company's motive for suing the Unions was retaliatory.

II. The Board's Order Is Well Within Its Broad Remedial Discretion

The Board did not abuse its discretion in ordering (D&O 13) the Company to reimburse the Unions for their legal and other expenses incurred in defending its unlawful lawsuit. Nor did it do so in requiring (D&O 1 n.1) that monetary awards be calculated with interest compounded on a daily basis, or in applying that new interest policy retroactively in this case.

A. Attorneys' Fees and Expenses Are an Appropriate Remedy for the Company's Unlawful Lawsuit

The Company's cursory challenge (Br. 45) to the Board's award of attorneys' fees to the Unions, devoid of any authority, is unavailing. Courts have approved Board awards of attorneys' fees – which are consistent with the make-whole remedial scheme of the Act and with the American Rule – in comparable

circumstances.[76] And to the extent the Company suggests (Br. 45-46) that unfair labor practices against unions should not be remediated, such a construction of Section 10(c), 29 U.S.C. § 160(c), would eviscerate the Act's protections.[77]

B. Daily compounding of the interest on monetary awards most accurately compensates the injured party

Section 10(c) provides that the Board shall, when it finds an unfair labor practice, issue a remedial order with "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." The Board's decision to compound interest on the monetary award in this case daily is consistent with its broad authority to make whole those

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[76] *See, e.g.*, *BE&K Constr. Co. v. NLRB*, 246 F.3d 619, 632 (6th Cir. 2001) (upholding fee award intended to correct effects of company's unfair labor practice), *rev'd on other grounds*, 536 U.S. 516 (2002); *Petrochem*, 240 F.3d at 34-35 (finding no conflict with American Rule because award "responds not to the company's loss of its suit but to the fact that the suit itself amounted to an illegal act") (internal quotation omitted); *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1378-79 (7th Cir. 1997) (holding fee award effectuates Act's policies by compensating injured party union that represents employees, and noting litigation against union can impact employees' rights).

[77] *See Petrochem*, 240 F.3d at 29 ("[I]t would be a 'curious and myopic' reading of the Act's core provisions 'to hold that, although employees are free to join unions and to work through unions . . . , the conduct of the unions they form and join for those purposes is not protected by the Act.'") (quotation omitted). *Cf. BE&K*, 246 F.3d at 632 ("[T]he [fee] award replenishing union coffers serves the laudable goal of benefitting a broad range of laborers whose dues dollars initially financed the defense of the federal court action [that constituted the unfair labor practice] . . .").

injured by unfair labor practices.[78] That remedial power is "peculiarly a matter for administrative competence," and the Board's remedies "will not be disturbed unless it can be shown that the[y are] a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[79]

As the Board explained when it announced its new daily-compounding policy in *Kentucky River Medical Center*,[80] and as many courts have recognized,[81] that policy more accurately makes the injured party whole than simple interest

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[78] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (describing Board's responsibility to effectuate "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination"). *See also NLRB v. Seven-Up Bottling Co., Inc.*, 344 U.S. 344, 346 (1953) (discussing Board's power to "fashion[] remedies to undo the effects of violations of the Act"); *accord Nat'l Bus. Forms, Inc. v. NLRB*, 457 F.2d 737, 741 (6th Cir. 1972).

[79] *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (quotations omitted) (holding Board was empowered, under Section 10(c), to order resumption of maintenance operations, and reinstatement with backpay). *Accord NLRB v. Kentucky River Med. Ctr.*, 669 F.3d 784, 787 (6th Cir. 2012).

[80] 356 NLRB No. 8, 2010 WL 4318371, *3-4 (2010).

[81] *See, e.g., Price v. Stevedoring Servs. of Amer., Inc.*, __ F.3d __, 2012 WL 3799775, *18-20 (9th Cir. 2012) (describing "modern recognition that compound interest fosters fairness and efficiency," and concluding that "courts have increasingly recognized that compound interest generally more fully compensates") (en banc) (quotations omitted); *Amer. Nat'l Fire Ins. Co. v. Yellow Freight Sys., Inc.*, 325 F.3d 924, 938 (7th Cir. 2003) (explaining "[c]ompound interest generally more fully compensates a plaintiff [than simple interest]," and directing district court to "either award compound interest or explain why a deviation from the norm is appropriate."); *EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1097-98 (6th Cir. 1996) (rejecting argument that compound interest overcompensates, holding it is generally required to achieve goal of making claimants whole).

because it better accounts for the time value of money. The Internal Revenue Code, which the Board follows in setting interest rates on its awards, specifies daily compounding,[82] as does the law governing backpay awards to federal employees under certain circumstances,[83] and daily compounded interest calculations are also the norm in private lending.[84]

Unsurprisingly, the Company does not challenge the proposition that daily compounding more accurately "compensate[s] the [injured party] for the loss of use of his or her money."[85] Instead, it focuses (Br. 46-47) on the fact that *Kentucky River* announced the switch to daily compounding in the context of a backpay award. But that circumstance does not restrict the policy's application to backpay. The Board in this case specifically disavowed (A 59-60) any such interpretation of

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[82] 26 U.S.C. § 6622(a).

[83] 29 U.S.C. § 5596(b)(2)(B)(iii).

[84] *See Price*, 2012 WL 3799775, *18 ("Anyone with a savings account, credit card, mortgage, or student loan knows that the modern financial world employs compound interest as a general rule."); *Manley, Bennett, McDonald & Co. v. St. Paul Fire & Marine Ins. Co.*, 821 F.Supp. 1225, 1228 (E.D. Mich. 1993) ("In the modern business world, compound interest is commonplace."), *aff'd*, 33 F.3d 55 (6th Cir. 1994) (per curiam) (unpubl'd).

[85] *Kentucky River*, 2010 WL 4318371, *3 (quoting *Florida Steel Corp.*, 231 NLRB 651, 651 (1977) (adopting interest rate used by IRS on under- and overpayment of federal taxes as the Board's interest rate), *enforcement denied on other grounds*, 586 F.2d 436 (5th Cir. 1978)).

Kentucky River, and has applied the policy to other monetary awards.[86] More importantly, as discussed above, daily compounding more accurately reflects the time value of money, and the Company offers no rationale to explain why make-whole compensation should be less accurate when backpay is not involved. Like backpay, the award in this case "is a reparation order designed to vindicate the public policy of the [Act] by making [the Unions] whole for losses suffered on account of an unfair labor practice," and "not a fine or a penalty imposed on the [Company] by the Board."[87]

C. The Board reasonably applied its daily-compounding policy retroactively in this case

Finally, the Board's decision to apply its daily-compounding policy in this case was appropriate. As the Company acknowledges (Br. 48), the Board applies new rules retroactively so long as that application does not result in a "manifest injustice."[88] To evaluate the likelihood of such injustice, "the Board will consider

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[86] *See, e.g.*, *New York New York Hotel & Casino*, 356 NLRB No.119, 2011 WL 1113038, *2 n.8, *27 (2011) (applying *Kentucky River* policy that interest on "monetary awards" be compounded daily to reimbursement of legal and other expenses incurred defending trespass citations), *enforced*, 676 F.3d 193 (D.C. Cir. 2012), *petition for cert. filed*, 12-451 (October 4, 2012).

[87] *Kentucky River*, 2010 WL 4318371, *3 & n.24 (quotations and citations omitted).

[88] *SNE Enters., Inc.*, 344 NLRB 673, 673 (2005).

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."[89]

When it announced its daily-compounding policy in *Kentucky River*, the Board evaluated the relevant considerations and held that the rule should be applied retroactively in all pending cases.[90] As the Board explained, the policy does not affect the standards for lawful conduct, only the calculation of the remedy, so no respondent "can fairly be said to have relied on the Board's prior rule of awarding only simple interest on backpay awards in deciding to take the unlawful action on which their liability is based."[91] The Board further held that retroactive application "significantly promotes the purposes of the Act, by improving a basic statutory remedy."[92] Specifically, as just discussed, daily compounding is more accurately compensatory.

The Company's argument (Br. 48-49) that it relied on the Board's prior interest policy in deciding not to settle is unpersuasive. First, as the Board explained (A 60-61 n.2), the General Counsel has been advocating compounded

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[89] *Id.*

[90] 2010 WL 4318371, *5.

[91] *Id.*; A 60 (citing *Kentucky River*).

[92] *Kentucky River*, 2010 WL 4318371, *5.

interest for years, and the Board has indicated that it was taking that position under advisement, so the Company had notice that the Board might revise its policy.[93] Second, the Company does not assert, much less show, that the amount of money added to its award by daily compounding would have affected its decision to pursue this case. It does not contend, for example, that the additional interest would outweigh the costs of this appeal, or deny that it could have earned compound interest on the monies owed while contesting this case.

Finally, the Company fails to demonstrate (Br. 49-50) any particular injustice stemming from retroactive daily compounding in this case. The Unions filed the underlying charges between January and April 1999, the district court dismissed the Company's unlawful lawsuit in March 1999, and this Court affirmed that dismissal in June 2000. The Company thus knew even before the courts rejected its case that the Unions would pursue Board remedies, and cannot therefore claim surprise or prejudice. Nothing about those circumstances worked a particular injustice against the Company or undermines the policy of compensating the Unions as fully as possible for their injuries. Moreover, as discussed above,

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[93] *See, e.g.*, *Alaska Pulp Corp.*, 300 NLRB 232, 232 n.4 (1990) (declining General Counsel's request for daily compounding of interest on monetary awards, but taking the matter under advisement), *enforced*, 944 F.2d 909 (9th Cir. 1991) (unpubl'd) and other cases discussed in *Kentucky River*, 2010 WL 4318371, *1 n.6.

daily compounding is compensatory not punitive, and the Company had the use of the money during the intervening years.[94]

In sum, the Board's award of attorneys' fees, and order that they be calculated with interest compounded daily, fall well within the scope of the Board's broad remedial discretion. In particular, they effectuate the policies of the Act by more fully and accurately making whole the parties injured by the Company's unfair labor practice.

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[94] *Cf. New York New York*, 2011 WL 1113038, *2-3 & n.8 (applying *Kentucky River* in case that had been pending before Board for 13 years).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing in full the Board's Order in this matter, and denying the Company's cross-petition for review.

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November 2012
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 12-1235,
	*	12-1351
and	*	
	*	Board Case No.
UNITED ASSOCIATION OF JOURYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL 357 OF THE UNITED ASSOCIATION OF JOURYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY; AND LOCAL 7 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION	*	7-CA-41687
	*	
Intervenors	*	
	*	
v.	*	
	*	
ALLIED MECHANICAL SERVICES, INC.	*	
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,640 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 1st day of November, 2012

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APPRENTICES OF THE PLUMBING AND PIPE	*	
FITTING INDUSTRY OF THE UNITED STATES	*	
AND CANADA, AFL-CIO; LOCAL 357 OF THE	*	
UNITED ASSOCIATION OF JOURYMEN AND	*	
APPRENTICES OF THE PLUMBING AND PIPE	*	
FITTING INDUSTRY; AND LOCAL 7 OF THE	*	
SHEET METAL WORKERS' INTERNATIONAL	*	
ASSOCIATION	*	
	*	
Intervenors	*	
	*	
v.	*	
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ALLIED MECHANICAL SERVICES, INC.	*	
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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