

Dilling Mechanical Contractors, Inc. and Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. Cases 25-CA-025094 and 25-CA-025485

August 19, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On May 12, 2000, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed a statement of exceptions, and the General Counsel and the Union each filed an answering brief.

On September 26, 2002, in an unpublished order, the Board remanded this proceeding to Judge Bogas for further consideration in light of *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). On February 28, 2003, Judge Bogas issued the attached supplemental decision. The Respondent and the General Counsel each filed exceptions and a supporting brief to the supplemental decision, the Union filed an answering brief, and the Respondent filed a reply brief. The American Federation of Labor and Congress of Industrial Organizations filed an amicus brief, and Associated Builders and Contractors, Inc. and LPA, Inc. filed a joint amicus brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges the following violations: (1) that the Respondent violated Section 8(a)(1) of the Act by filing and maintaining a State court lawsuit against the Union and one of its organizers; and (2) that the Respondent violated Section 8(a)(1) of the Act by its discovery requests in its lawsuit seeking the names of the Respondent's employees who joined the Union. The

General Counsel now requests withdrawal of the complaint.³ For the reasons set forth below, we grant the General Counsel's request to withdraw the retaliatory-lawsuit allegation. We deny his request to withdraw the discovery allegation, however, and we find that the Respondent's discovery requests violated Section 8(a)(1).

I. FACTUAL BACKGROUND

The Respondent is a building contractor in Indiana. In 1992, the Union commenced an organizing campaign to represent the Respondent's plumbing and pipefitting employees. The Board found that the Respondent committed numerous unfair labor practices in response to that campaign. See *Dilling Mechanical Contractors*, 318 NLRB 1140 (1995), *enfd.* 107 F.3d 521 (7th Cir. 1997), *cert. denied* 522 U.S. 862 (1997). The Union nevertheless continued its organizing efforts.

In August 1995, Paul Long, the lead organizer for the Union, removed several bags of trash from the Respondent's dumpster, hoping to find information on how to contact the Respondent's employees. On learning of Long's conduct, the Respondent filed a lawsuit in Indiana trial court against Long and the Union in November 1995. The lawsuit alleged that Long and the Union, by taking the Respondent's trash, committed the criminal acts of theft, receiving stolen property, criminal trespass, and burglary under Indiana law. The lawsuit also alleged that the conduct constituted unlawful racketeering under the Indiana corrupt business influence statute.

In March 1997, the Indiana trial court granted the Respondent's motion for summary judgment on all its claims. The trial court reserved for a separate hearing the issue of damages to be awarded to the Respondent. In discovery for that hearing, the Respondent sought, *inter alia*, the identity of "each and every Union member within Dilling" as well as "each and every documents [sic] which identifies any and all union members within Dilling." The trial court granted the Union's motion for a protective order precluding disclosure of that information.⁴

The Court of Appeals of Indiana reversed the trial court's grant of summary judgment in favor of the Respondent. *Long v. Dilling Mechanical Contractors*, 705 N.E.2d 1022 (Ind.App. 1999). The court determined that the Respondent had abandoned its trash, and that the Re-

¹ Member Becker is recused and took no part in the consideration of this case.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ The General Counsel's exceptions brief is devoted to his argument that the retaliatory-lawsuit allegation should be withdrawn. He does not specifically address withdrawal of the discovery allegation. Nevertheless, because the brief contains a general request to withdraw the entire complaint, we treat the request as encompassing the discovery allegation.

⁴ The Union also sought, and was granted, a protective order concerning a number of the Respondent's additional discovery requests.

spondent's property rights were thus not abrogated by Long's taking of the trash. The court accordingly concluded that the Respondent "cannot recover on any of the legal theories it advances," and instructed the trial court to dismiss and/or enter judgment against the Respondent on all of its claims. *Id.* at 1027.⁵

II. LEGALITY OF THE RESPONDENT'S LAWSUIT

The judge in his initial decision found that the Respondent's filing and prosecution of its State court lawsuit violated Section 8(a)(1) of the Act. The General Counsel alleged, and the judge found, that the lawsuit was unlawful under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), because it lacked merit—the Respondent had lost upon final adjudication—and because it was filed with a motive to retaliate against the Union and Organizer Long for engaging in activity protected by Section 7 of the Act. On remand from the Board to consider the Supreme Court's decision in *BE & K*, the judge reaffirmed his finding that the lawsuit was unlawful, this time applying the reasoning set forth in Justice Breyer's concurring opinion.⁶

Reversing his original position, the General Counsel, in his exceptions to the judge's supplemental decision, asserts that under the Supreme Court's intervening *BE & K* decision the Respondent's filing and maintenance of the lawsuit were *not* unlawful, because the lawsuit had a reasonable basis. The General Counsel accordingly requests withdrawal of the complaint allegation that the lawsuit violated the Act.

"Once adjudication of a case has begun, the decision whether to grant the General Counsel's request to dismiss all or part of the complaint is left to the Board's discretion[.]" *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77, 80 (2007), *enfd.* in part sub nom. *Pirlott v. NLRB*, 522 F.3d 423 (D.C. Cir. 2008). In the circumstances presented here, we find it appropriate to grant the General Counsel's request.

At issue before the Supreme Court in *BE & K* was the validity of the Board's standard for declaring a completed lawsuit to be an unfair labor practice. Under that standard, an unsuccessful lawsuit filed to retaliate for the exercise of Section 7 rights violated the Act, even if it was reasonably based. 536 U.S. at 529–530. Adopting a

limiting construction of Section 8(a)(1) to avoid First Amendment issues, the Court invalidated the Board's standard, inasmuch as it allowed the Board to penalize "all reasonably based but unsuccessful suits filed with a retaliatory purpose" as the Board had defined such a purpose ("brought with a motive to interfere with the exercise of protected" Section 7 rights). *Id.* at 536–537.⁷

The Court left open the possibility that the Board could declare unlawful an unsuccessful but reasonably based lawsuit "that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity[.]" *Id.* at 536–537. On remand, however, the Board held "that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of the motive for bringing it." *BE & K*, *supra*, 351 NLRB at 451. Rather, the Board concluded, the Act prohibits only lawsuits that are "both objectively and subjectively baseless." *Id.* at 458.⁸ Under that standard, "a lawsuit that targets conduct protected by the Act can be condemned as an unfair labor practice if it lacks a reasonable basis and was brought with the requisite kind of retaliatory purpose." *Id.* (footnote omitted).

Throughout this protracted proceeding, the General Counsel has never asserted that the Respondent's lawsuit lacked a reasonable basis. Rather, the General Counsel has contended only that the lawsuit was unsuccessful and brought with a retaliatory motive, under the prior Board standard invalidated by the Supreme Court. Thus, the General Counsel has never asserted a theory that the lawsuit is unlawful under the parameters of the Supreme Court's decision or the Board's supplemental decision in *BE & K*. In these circumstances, we grant the General Counsel's request to withdraw the complaint allegation that the Respondent's lawsuit violated Section 8(a)(1).

III. LEGALITY OF THE RESPONDENT'S DISCOVERY REQUESTS

The judge found in his initial decision that the Respondent violated Section 8(a)(1) of the Act by its discovery requests seeking the names of the Respondent's employees who joined the Union. The judge reaffirmed

⁵ The Respondent's petition for rehearing and motion for reconsideration were denied by the Court of Appeals of Indiana. The Respondent's request to transfer the proceeding to the Indiana Supreme Court was denied. 726 N.E.2d 308 (Ind. 1999) (mem.).

⁶ Above, 536 U.S. at 538–544. As discussed below, following the judge's issuance of his supplemental decision and the parties' filing of their exceptions and briefs, the Board, on remand from the Supreme Court, issued its supplemental decision in *BE & K Construction Co.*, 351 NLRB 451 (2007).

⁷ Chairman Liebman and Member Pearce agree with Justice Breyer's concurring opinion in *BE & K*. That opinion convincingly demonstrated that the Court's majority opinion left open the possibility that the Board may impose unfair labor practice liability in circumstances in which, although an unsuccessful lawsuit might be reasonably based, the evidence of retaliation or antiunion motive might be stronger than or different from that in *BE & K*, 536 U.S. at 539.

⁸ Chairman Liebman adheres to her dissent from the Board's supplemental *BE & K* decision, but finds that her views expressed there are not inconsistent with granting the General Counsel's request here. See *BE & K*, *supra*, 351 NLRB at 460–463 (then-Member Liebman and Member Walsh, dissenting).

this finding in his supplemental decision, observing that it was unaffected by the Supreme Court's decision in *BE & K*. As stated, we have decided to affirm the judge's finding.

The General Counsel's theory has throughout been that the Respondent's discovery requests seeking the names of the Respondent's employees who were members of the Union violated the Act because the requests had an illegal objective. As the U.S. Court of Appeals for the District of Columbia Circuit has explained, the Supreme Court's decision in *BE & K* did not alter the Board's authority to find court proceedings that have an illegal objective under federal law to be an unfair labor practice. See *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003).⁹ We accordingly find it appropriate to adjudicate this allegation, and we deny the General Counsel's request to withdraw it. We further find, in agreement with the judge, that the Respondent's discovery requests had an illegal objective and therefore violated Section 8(a)(1).

It is settled Board law that an employer who seeks to obtain the identities of employees who engage in union activities violates the Act. See *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995). "The Board zealously seeks to protect the confidentiality interests of employees because of the possibility of intimidation by employers who obtain the identity of employees engaged in organizing." *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), *enfd.* 200 F.3d 1162 (8th Cir. 2000).¹⁰

Intimidation of employees was more than a mere possibility here. As described, this is not the first time the Respondent has been before the Board. The Board previously found that the Respondent committed some 20 unfair labor practices in response to its employees' organizational efforts in 1992, including physical intimidation, verbal abuse, interrogations, surveillance, and termination of employees. See *Dilling Mechanical Contractors*, *supra*, 318 NLRB 1140. The Seventh Circuit Court of Appeals, in enforcing the Board's Order, described the Respondent's "heavy-handed tactics" against the employees, including its hiring of an ex-Navy SEAL (with no trade work experience) as a supervisor "to intimidate and berate" union supporters. 107 F.3d at 523. The Respondent's discovery requests were made a mere 3 months after the court's enforcement of the Board's

remedial Order, which plainly directed the Respondent, *inter alia*, to cease creating an impression among its employees that their union activities were under surveillance and to cease reprisals against them.¹¹

It is difficult to square the Respondent's attempted discovery of the union members among its employees with the proscriptions contained in the Board's court-enforced Order. It is also apparent that the Respondent's discovery requests were not relevant to its lawsuit, given the trial court's grant of the Union's requested protective order and refusal to enforce the requests. The Respondent accordingly has failed to show any legitimate basis for its discovery requests.

In all of these circumstances, we find that the Respondent's discovery requests seeking to identify its employees who joined the Union had an illegal objective. Accordingly, those requests violated Section 8(a)(1) of the Act. See *Wright Electric, Inc.*, *supra*, 327 NLRB at 1195 (discovery request seeking names of employees who signed authorization cards has an illegal objective); see also *Guess?, Inc.*, 339 NLRB 432, 434 (2003) (deposition questions that have an illegal objective are unlawful under the Act), petition for review dismissed without prejudice 2003 WL 22705744 (D.C. Cir. 2003).¹²

ORDER¹³

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Dilling Mechanical Contractors, Inc., Lo-

¹¹ See 318 NLRB at 1157–1158, *enfd.* 107 F.3d at 526. The Respondent also committed additional unfair labor practices contemporaneous with its state court litigation. See *Dilling Mechanical Contractors*, 348 NLRB 98 (2006).

¹² We reject our dissenting colleague's position that (1) a violation cannot be found in the absence of evidence that employees knew of the discovery requests; and (2) the State court's protective order mooted the need for the Board to address the issue here. It is well established that an employer's actions may violate Sec. 8(a)(1)—because they have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights—even when employees are unaware of what the employer has done. See, e.g., *United States Service Industries*, 324 NLRB 834, 835 (1997). The potential chilling effect of the discovery requests here satisfies this standard. See *National Telephone*, *supra*, 319 NLRB at 421. The need for a Board cease-and-desist order to deter future, similar violations by the Respondent here, a repeated violator of the Act, is not negated by the State court rulings, which were limited to the litigation before it. The Board, of course, has primary authority to enforce the Act.

¹³ We have modified the judge's recommended Order to reflect the violation found, to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), and to correct certain inadvertent errors. We have substituted a new notice to comport with these modifications. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

⁹ Accord: *Manufacturers Woodworking Assn. of Greater New York, Inc.*, 345 NLRB 538, 540 fn. 7 (2005); *Allied Trades Council*, 342 NLRB 1010, 1013 fn. 4 (2004).

¹⁰ See *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 221 (3d Cir. 1977) ("it is entirely plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed").

gansport, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Seeking to identify employees who have joined the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Logansport, Indiana, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HAYES, concurring in part and dissenting in part.

I join my colleagues in granting the General Counsel's motion to withdraw the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by filing and maintaining a state court lawsuit against the Union and one of its organizers. However, I do not join them in dictum suggesting that, after *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the Board may still find that a reasonably based lawsuit is unlawful. In this respect, I

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

adhere to the Board majority holding on remand from the Court that "that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of the motive for bringing it."¹

The General Counsel did not make separate reference in his motion to withdraw to the allegation that the Respondent also violated Section 8(a)(1) by its discovery requests during the damages phase of what was at that time a meritorious trial court lawsuit. I would deem the motion to be comprehensive of both allegations and dismiss the complaint in its entirety. I therefore need not pass on the merits of this allegation or the legal theory by which it should be decided. However, even were I to accept, *arguendo*, the argument that the discovery requests could reasonably have the unlawful objective of chilling employees' Section 7 rights, I would not find a violation in the absence of evidence that these attorney-to-attorney requests were ever communicated to employees.² Finally, I find that, in any event, the State court's action in denying the request and issuing a protective order abated any potential chilling effect and effectively mooted the need for the Board to address this issue.³

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO Form, join, or assist a union

¹ *BE & K Construction*, 351 NLRB 451, 451 (2007). Like the majority in that case, I reject my colleagues' reliance on the concurring opinion of Justice Breyer in the Court's decision and find that the concurring opinion of Justice Scalia is more instructive of the Court's intent in limiting the grounds on which the Board should find lawsuits violative of the Act. *Id.* at 457-458. In the circumstances of the case before us, I find no need to pass on what standard should apply in determining whether a lawsuit is baseless.

² I disagree with the majority that *United States Service Industries*, 324 NLRB 834, 835 (1997), may be so broadly construed as to apply to find a chilling effect in this case. In fact, that case has not since been cited for the proposition relied on here. The majority also cites *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995). In that case, unlike here, the respondent's counsel moved in the presence of an employee witness for the names of employees who attended a the meeting at which authorization cards were signed.

³ I note that the Board recently granted a charging party's motion to withdraw charges in a case pending before it on grounds that state court action had effectively mooted the need for Board action. *Deco-Akal*, Cases 28-CA-21082, 28-CB-6508, unpublished Order dated June 23, 2011.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT seek to identify employees who have joined the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

DILLING MECHANICAL CONTRACTORS, INC.

Joseph P. Sbuttoni III, Esq., for the General Counsel.

Michael L Einterz, Esq. (Einterz & Einterz), of Indianapolis, Indiana, for the Respondent.

William R. Groth, Esq. (Fillenwarth, Dennerline, Groth & Towe), of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on March 20 and 21, 2000. The first of two underlying unfair labor practice charges was filed by the Indiana State Pipe Trades Association on November 29, 1996, and served on the Respondent on December 3, 1996. The Indiana State Pipe Trades Association filed the second charge on July 14, 1997, and served this charge on the Respondent on July 17, 1997. The Regional Director issued a complaint against the Respondent on October 29, 1999. The complaint, as amended on March 2, 2000, alleged that the Respondent had violated Section 8(a)(1) of the National Labor Relations Act (the Act) by filing, maintaining, and prosecuting a State court lawsuit against the Union and Paul Long in retaliation for their union and other protected activities, including filing unfair labor practice charges. The Respondent denied that it had committed any violation of the Act and raised as affirmative defenses that the complaint failed to state a claim upon which relief could be granted and that the Board lacked jurisdiction because the charge was untimely and because the Union and Long were not "employees" protected by the Act.

At the start of the hearing, the Respondent moved to dismiss the complaint on essentially the same bases asserted in its affirmative defenses. The General Counsel and the Charging Party opposed the motion to dismiss, and I reserved ruling. Posthearing briefs were submitted by the General Counsel and the Respondent and have been considered. Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a corporation with an office and place of business in Logansport, Indiana, and is engaged in the construction industry as an electrical, mechanical, and general contrac-

tor. During the 12-month period prior to the issuance of the complaint, the Respondent provided services valued in excess of \$50,000 to enterprises within the State of Indiana which are directly engaged in interstate commerce. The Respondent admits, and I find, that at all times material to the complaint it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material to the complaint the Indiana State Pipe Trades Association and Plumbers and Steamfitters Local No. 166 have been labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a building contractor that constructs factories. The Respondent's plumbing and pipefitting workers are not represented by a union, and since at least 1992, the Pipe Trades Association, and one of its member unions, Local 166 (the Union), have been engaged in a campaign to organize these workers. Paul Long became involved with the efforts to organize the Respondent's work force in 1992, and on February 1, 1995, he was named lead organizer for the Pipe Trades Association. Long has never been employed by, or applied for employment with, the Respondent. In furtherance of the organizing campaign, Long has contacted employees of the Respondent through various means, including onsite visits, phone calls, and mailings. By August 1995, Long had obtained 12 or more signed union authorization cards from the Respondent's employees, and as of late 1996 he had obtained about 50 such cards. The Union has also filed multiple unfair labor practices charges against the Respondent, many of them signed by Long.

Richard L. Dilling, the Respondent's president and owner, became aware of the Union's organizing campaign in the early 1990s. The Respondent subsequently embarked on an aggressive campaign to oppose the unionizing effort. On September 18, 1995, the Board affirmed a decision by Administrative Law Judge Wallace H. Nations, which found that the Respondent had committed multiple unfair labor practices in its campaign against unionization.¹ *Dilling Mechanical Contractors*, 318 NLRB 1140 (1995), *enfd.* 1097 F.3d 521 (7th Cir. 1997), *cert. denied* 522 U.S. 862 (1997). The unfair labor practices established in the prior case are too numerous to recount here, but they included: threatening to discharge employees if they engaged in union and protected concerted activities; constructively discharging, terminating, and otherwise disciplining employees; enforcing rules more strictly or creating new rules because of the union activities; interrogating employees about their union membership and activities; directing strict surveillance, physical intimidation, and verbal abuse at employees because of their union activities; and instructing employees to stop their union and protected concerted activities. In all, 20 unfair labor practices were found. On February 21, 1997, the United States

¹ The case before Administrative Law Judge Nations involved the Electrical Workers union, as well as the Plumber, and Pipe Trades Association.

Court of Appeals for the Seventh Circuit enforced the Board's Order against Dilling Mechanical, and commented on the company's use of "heavy handed tactics" to oppose the organizing campaign and to "intimidate and berate employees who supported" the Electrical Workers union. (GC Exh. 6 at p. 2.)

Despite the Respondent's tactics, the Union's organizing effort continued. In 1995 and 1996 the Union filed 11 unfair labor practice charges against the Respondent, six of which were signed by Long. Union organizers distributed a newsletter to workers and also visited the Respondent's jobsites to meet with employees. When Malcom Zimmer, a union representative, visited one jobsite, an agent of the Respondent accused him of trespassing. (Tr. 89-90.) The police were called, but refused to treat Zimmer's presence as a trespass since the Respondent had not posted a "no trespassing" sign. (Tr. 97.)

In August 1995, Long removed five or six bags of trash from the Respondent's dumpster in hopes of finding documents that would allow him to contact more of the Respondent's employees. The dumpster was on the Respondent's property, but in a location adjacent to a public sidewalk and was unlocked. After examining the contents of the bags, Long concluded that there was nothing useful, and disposed of the trash in a hotel dumpster. Long did not hear anything from the Respondent regarding the removal of the trash until the Respondent filed its complaint in Indiana State court on November 13, 1995, alleging that Long's and the Union's removal and alleged misuse of the trash constituted "criminal acts," including racketeering, trespass, burglary, and receipt of stolen property. The Respondent did not seek injunctive relief, but rather prayed for compensatory, punitive, and treble damages.²

In the winter 1996, Stan Beecher, who was then the Respondent's superintendent and agent, told Jeff Smith, an employee who had been seen talking to union organizers, that it would be a mistake to join the Union since the Respondent had filed a lawsuit that would keep the Union from operating. On another occasion Michael Einterz, who represents the Respondent in labor matters, told Long and Zimmer that the lawsuit against the Union and Long would result in a \$3 million judgment and that the two union organizers would end up working for Dilling. Zimmer stated that while he and the Respondent's attorney had joked in the past, he considered these statements serious.

On February 16, 1999, the Indiana Court of Appeals held that Dilling Mechanical could not recover on any of the legal theories forwarded in its State lawsuit. The court stated that when "trash bags are placed in an unlocked dumpster on the curtilage and readily accessible to others, that trash has been abandoned" and therefore under State law Dilling Mechanical had no property rights in the trash and could not establish criminal trespass, conversion, or any of its other legal claims. The decision of the Indiana Court of Appeals reversed a prior trial court decision granting summary judgment to Dilling Mechanical, and remanded the case with instructions that the trial judge dismiss one of the claims and enter summary judgment in favor

of Long and the Union on all others. Dilling Mechanical petitioned for rehearing and filed a motion for reconsideration, but these were denied by the court of appeals. The Company petitioned to transfer the matter to the Indiana Supreme Court, but on October 14, 1999, the Indiana Supreme Court denied the petition. Thus, the Respondent's lawsuit against Long and the Union ended after nearly 4 years of litigation.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The Union filed an unfair labor practice charge on November 27, 1996, which alleged that the Respondent had violated Section 8(a)(1) of the Act by "filing and continuing to prosecute a legally and factually baseless lawsuit against [the Union] and Paul Long" in "retaliation for Long's organizing activity" and "previous unfair labor practices charges." (GC Exh. 1(a).) The charge also alleged that the Respondent violated Section 8(a)(1) by taking Long's deposition in connection with the lawsuit. *Id.* The Union filed a related charge on July 15, 1997, which alleged that the Respondent engaged in coercive conduct in violation of Section 8(a)(1) by serving written discovery on the Union in the State lawsuit. (GC Exh. 1(c).)

V. ANALYSIS AND DISCUSSION

A. Motion to Dismiss

In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Supreme Court held that an employer's State lawsuit violates the Act if (1) the lawsuit has resulted in a judgment adverse to the plaintiff and (2) the lawsuit was filed in retaliation for protected activity. See also *BE & K Construction*, 329 NLRB 717, 722 (1999); *Braun Electric Co.*, 324 NLRB 1, 2 (1997). The Respondent moved to dismiss the complaint for lack of jurisdiction, arguing that Long and the Union were not its employees and therefore that their activities relating to the removal of trash from the Respondent's dumpster were not protected activities under the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and could not give rise to a *Bill Johnson's* violation. In the alternative, the respondent argued that the Board lacked jurisdiction because the Union filed its charge more than 6 months after the Respondent initiated its lawsuit against Long and the Union, and therefore the notice of charge was received beyond the filing period under Section 10(b). For the reasons discussed below, I reject both arguments.

In *Lechmere*, *supra*, the Court held that it was not an unfair labor practice for the employer to bar nonemployee union organizers from trespassing on its property where, without such access, the employer's workers were accessible to the organizers. The National Labor Relations Board has recently had occasion to consider the ramifications of *Lechmere* in a factual context similar to the one present here. In *BE & K Construction Co.*, *supra*, the General Counsel alleged that an employer had engaged in an unfair labor practice by unlawfully filing and maintaining a lawsuit against unions in retaliation for protected activity. There, as here, the employer argued that since the defendants in the State court action were "nonemployees," the *Lechmere* decision precluded finding that even a retaliatory lawsuit was an unfair labor practice. The Board rejected that argument, holding that "the Respondent's suit [wa]s not im-

² The Respondent apparently discovered that Long had removed the trash when the hotel complained to local law enforcement officials that the Respondent's trash had been placed in a hotel dumpster.

mune from 8(a)(1) liability merely because it was filed against the Unions, rather than against employees.” *Id.* at 720. The Board acknowledged that, in *Lechmere*, the Court stated that “[b]y its plain terms the [National Labor Relations Act] confers rights only on *employees*, not on unions or their nonemployee organizers,” *Id.* at 723 (quoting *Lechmere*, 502 U.S. at 532 (emphasis in original)). However, the Board pointed out that other statements in *Lechmere* “negate[d] any suggestion that the Court intended to hold that union conduct is never protected by the Act,” *Id.* In *Lechmere*, the Court stated that “the employees’ right of self organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others,” and that Section 7 of the Act could therefore “restrict the employer’s right to exclude nonemployee union organizers from its property.” 502 U.S. at 532 (quoting, *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105, 113 (1956)). The Court explicitly recognized that Section 7 protections *did* apply to nonemployees, although they did so “derivatively.” *Id.* at 533.

As the Board noted in *BE & K*, it would be “perverse,” and contrary to the purposes of the Act to interpret Section 7 to mean that “conduct that is protected when engaged in by two or more employees together would lose its protection if engaged in by the employees’ union on their behalf.” 329 NLRB 717 at 723. In *Geske & Sons, Inc.*, 317 NLRB 28 (1995), *enfd.* 103 F.3d 1366 (7th Cir. 1997), *cert. denied* 522 U.S. 808 (1997), and again in *Petrochem Insulation, Inc.*, 330 NLRB 47, 49 (1999),³ the Board rejected the argument that an employer’s lawsuit challenging union conduct could not be unlawful under the Act.

The Board’s view that a lawsuit filed against a union or non-employee union organizer may constitute an unfair labor practice is also supported by post-*Lechmere* Court of Appeals decisions enforcing Board orders in such cases. See *Diamond Walnut Growers*, 312 NLRB 61 (1993), *enfd.* 53 F.3d 1085 (9th Cir. 1995); *Geske & Sons, Inc.*, 317 NLRB 28 (1995), *enfd.* 103 F.3d 1366 (7th Cir. 1997), *cert. denied* 522 U.S. 808 (1997); see also *Dahl Fish Co.*, 279 NLRB 1084, 1110–1111 (1986), *enfd. mem.* 813 F.2d 1254 (D.C. Cir. 1987). In *Diamond Walnut Growers*, the Ninth Circuit explicitly rejected the argument that Section 7 did not confer rights on unions. The court agreed, moreover, with the Board’s argument that an employer, by suing a union, could interfere with the *employees’* exercise of *their* Section 7 rights. 53 F.3d at 1089–1090.

The Respondent does not distinguish, or even mention, any of the clear, post-*Lechmere*, Board and Court of Appeals prece-

³ *BE & K* and *Petrochem*, impose no requirement that a union have acted on behalf of even a single one of the respondent’s employees. As the Board explained in *BE & K*, “the employees whose concerted activities may be protected under Section 7 are defined by Section 2(3) to include *any* employees, not just those of any particular employer.” 329 NLRB 717, 724 (emphasis in original); see also *O’Neil’s Markets v. United Food*, 95 F.3d 733 (8th Cir. 1996). Moreover, at the time Long removed the trash bags, he had secured approximately 12 signed union authorization cards from the Respondent’s employees. Thus, he was acting not only on behalf of union members who worked for other employers, but also, to a degree, on behalf of the Respondent’s own employees.

dent discussed above. Rather, the Respondent argues that since, as in *Lechmere*, the nonemployee activity in this case involved a trespass, which is not a protected activity, the lawsuit opposing that activity cannot give rise to an unfair labor practice violation. This argument is, at best, disingenuous. To begin with, as the Respondent surely knows, the Indiana Court of Appeals rejected the claim that Long’s actions were a trespass,⁴ and the Indiana State Supreme Court upheld that decision by denying review. (GC Exh. 3.) The Indiana Court Appeals stated that the dumpster was “open to public access” and “unlocked” and that the Respondent’s property rights had not been abrogated by Long’s taking of the trash, since that trash had been abandoned. (GC Exh. 3.) (Indiana Court of Appeals Decision at 10–12). *Lechmere* “did not change the rule that a property right can be asserted only by the party who possesses that right.” *Great American*, 322 NLRB 17 (1996); see also *Loehmann’s Plaza*, 316 NLRB 109, 113 fn. 12 (1995). Thus, the Respondent’s argument that Long’s or the Union’s activities were not protected because they were “?prepassory? is without merit.

Even if one assumes, for purposes of discussion, that the Respondent is correct in its assertion that, under *Lechmere*, Long was not engaging in protected activity when he took bags of trash from Dilling’s dumpster, that would not preclude a finding that the State lawsuit was an unfair labor practice. Under the relevant precedent, an unfair labor practice is shown if the State proceedings result in a judgment adverse to the plaintiff, and the lawsuit was filed in retaliation for protected activities. *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 749 (1983). There is no requirement that the activity that was the putative subject of Dilling’s State lawsuit be the protected activity, as long as it is shown that the motive of the lawsuit was retaliation for activities that *were* protected. *BE & K*, 329 NLRB 717. The evidence here shows that the Respondent’s State Court lawsuit was directed at union activities far beyond Long’s supposed trespass. The Respondent’s complaint in

⁴ In its posthearing brief, the Respondent contends that the Indiana Court of Appeals’ Opinion “never addresses the Trial Court’s determination of trespass” and asserts that Dilling Mechanical, therefore, somehow prevailed on its trespass claim. Respondent’s posthearing br. at 4. This contention is utterly lacking in merit. The Court of Appeals opinion states that Dilling “cannot recover on *any* of the legal theories it advances,” and directs the trial court to “dismiss Dilling’s corrupt business influence claim, and . . . enter summary judgment on Dilling’s other claims in favor of the Defendant.” GC Exh. 3 (Indiana Court of Appeals decision at 11) (emphasis added). The opinion finds that the dumpster was “open to public access,” *Id.* at 2, “readily accessible to others,” and specifically holds that Long did not commit “criminal trespass.” *Id.* at 11. The meaning of this is clear. The State trial judge had no trouble understanding it, and issued an order stating that the “claim for corrupt business influence is dismissed and summary judgment on *all of Plaintiff’s remaining claims* is . . . granted in favor of the Defendants.” GC Exh. 3 (Order of Julian L. Ridlen, J.) (emphasis added). In a petition for review by the Indiana Supreme Court the Respondent argued that the Court of Appeals had erroneously failed to rule on the claim of trespass, GC Exh. 3 (Respondent’s Petition to the Indiana Supreme Court, at pp. 3–4), but the Supreme Court denied the petition. The Respondent’s contention that this all adds up to a victory on its claim of trespass is fantasy.

State Court made allegations—including union racketeering and efforts to “put[] Dilling out of business”—that the complaint putatively links to the alleged trespass, but which go well beyond that narrow issue. (GC Exh. 3 (complaint).) Moreover, when it took Long’s deposition as part of the State Court litigation, the Respondent sought information about a wide range of matters regarding the Union, including the identities and duties of union officials, the typical duration of organizing efforts, the filing of unfair labor practice charges, and the possibility of “salting” and “job targeting” by the Union. C.P. Exh. 1 at 4–25, 42, 50. The Respondent also served interrogatories asking the Union and Long to identify each and every union member working for the Respondent, and a request for production that directed the Union to provide, inter alia, “[e]ach and every document which identifies the strategy and strategies presently and/or previously being used to organize Dilling.” (CP Exh. 3.) Based on the evidence, I conclude that the purpose of the lawsuit went well beyond Long’s alleged “trespass” to encompass aspects of the Union’s organizing activities that were clearly protected.

Furthermore, the *Lechmere* decision left undisturbed the Court’s holding, in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), that an employer acts unlawfully when it discriminatorily denies unions access to its property while permitting others access for similar activities. *BE & K*, 329 NLRB 717 at 723; *New Jersey Bell Telephone Co.*, 308 NLRB 277, 281 (1992); *Davis Supermarkets, Inc.*, 306 NLRB 426 (1992). In *Lechmere*, the Court found that the employer could lawfully exclude union organizers from its property in part because that employer had an established policy prohibiting all non-employees (including, the Court noted, girl scouts and the salvation army) from soliciting and distributing literature on its premises. *Lechmere*, 502 U.S. at 530 fn. 1. The instant case is distinguishable from *Lechmere* not only because the union activity that the Respondent attacked in its State lawsuit was not “trespassory”, but also because there is evidence that the Respondent enforced its supposed policy against trespass in a discriminatory manner to deny only union organizers access to its property. The Respondent in this case introduced no evidence of a generally applicable policy prohibiting non-employees from engaging in the types of allegedly trespassory activities that Long and the Union pursued and which were the subject of the State lawsuit. As noted by the Indiana Court of Appeals, the Respondent’s dumpster was “open to public access” (GC Exh. 3) (Indiana Court of Appeals opinion at p. 2), and the Respondent did not even take minimal steps to retain control over the trash in that dumpster, id. at 11.

The Respondent’s president and owner, Richard Dilling, conceded that the lawsuit against Long and the Union was the only case where the company filed a trespass action against someone for “stealing” garbage. However, on at least one other occasion, the Respondent had attempted to thwart union organizing efforts by invoking a “no trespassing” rule against a union representative. On that occasion, the Respondent accused Zimmer, a union organizer, of trespass after he attempted to discuss the organizing effort with some of the Respondent’s employees at a worksite. However, when the Respondent called a police officer to the scene, the officer refused to treat

Zimmer’s activities as a trespass because the Respondent had no posted policy against trespassing. Thus, the Respondent’s argument based on *Lechmere* fails not only because the union activity that the Respondent was attempting to prevent was not trespassory?, but also because the Respondent’s opposition to the union activity smacks of discrimination.

Equally unavailing is the Respondent’s argument that the Board lacks jurisdiction because the Union’s unfair labor practices charge was filed more than 6 months after initiation of the Respondent’s State lawsuit, and therefore is untimely under Section 10(b). This argument raises two questions. First, must the General Counsel’s complaint be dismissed in its entirety since the State lawsuit was initiated more than 6 months prior to the filing of the charge regarding it? And, second, if the entire complaint is not barred, is a remedy confined to the period beginning 6 months prior to the filing of the charge? For the reasons discussed below, I answer the former question in the negative and the latter in the affirmative.⁵

Section 10(b) of the Act states that, “no complaint shall issue based on an unfair labor practice occurring more than six months prior to the filing of the charges.” However, a complaint allegation is not barred by Section 10(b) when the challenged conduct involves a continuing practice that causes separate and recurring injuries that persist into the charge-filing period. *Sevako v. Anchor Motor Freight*, 792 F.2d 570 (6th Cir. 1986); *Taylor Warehouse Corp.*, 314 NLRB 516, 526 (1994). I conclude that the complaint allegation that *maintenance and prosecution* of the State lawsuit was an unfair labor practice, is an allegation of a continuing violation that persisted into the charge filing period and that the General Counsel’s complaint is not barred by Section 10(b). See *Geske & Sons*, 317 NLRB at 32 (although the unfair labor practice charge was filed more than 6 months after the employer filed its allegedly unlawful State lawsuit against the union, that charge would “timely encompass” the employer’s conduct in maintaining and prosecuting the lawsuit in question). The alleged injury was not simply the result of the filing of the Respondent’s State lawsuit, but also of the Respondent’s maintenance and continued prosecution of that lawsuit through discovery requests, deposition, motions, appeal and other concomitants of litigation. (See GC Exh. 3.) The Respondent continued to press its allegedly retaliatory lawsuit all the way to the Indiana Supreme Court, and most of the 4 years of litigation took place after the start of the charge-filing period.

My conclusion is consistent with Board precedent stating that violations which are continuing in nature are not barred even if the violation began before the charge-filing period. In *MBC Headwear, Inc.*, 315 NLRB 424, 428 (1994), the Board affirmed the administrative law judge’s ruling that Section 10(b) did not bar an allegation that the employer failed to remit union dues and fees to the union as required by the collective-

⁵ Even though Sec. 10(b) precludes a remedy for the period more than 6 months before the filing of the charge, consideration of evidence regarding that earlier period as “background” is proper where, as here, occurrences within the 6-month period in and of themselves may constitute unfair labor practices. *Local 1424 v. NLRB*, 362 U.S. 411, 416–417 (1960).

bargaining agreement, even though the union was aware of such failure long before the charge was served on the employer. In *Teamsters Local 293*, 311 NLRB 538, 539 (1993), the Board held that “Section 10(b) does not preclude the Board from finding that the provision [in a collective-bargaining agreement] is unlawful more than 6 months after the execution of the contract because of the continuing nature of the violation.” Similarly, in *Auto Workers Local 148 (McDonnell-Douglas)*, 296 NLRB 970, 977 (1989), the administrative law judge concluded that Section 10(b) did not bar a complaint alleging that a provision in a union constitution was unlawful, even though that provision was adopted 39 years earlier, since the maintenance of that provision was itself a continuing violation. The Board affirmed the administrative law judge’s conclusion that maintenance of the provision was an unfair labor practice.

The Board has declined to apply the continuing violation theory in the narrow context of cases involving clear and total contract repudiation and has found that charges filed more than 6 months after such repudiation are untimely. In *A&L Underground*, 302 NLRB 467, 468–469 (1991), the Board stated that applying the continuing violation theory in the context of clear and total contract repudiation would be contrary to the goal of stabilizing existing bargaining relationships (since it would leave the status of the agreement open for a longer period of time), and would not serve the interests of the adjudication process since it would allow the necessary evidence to become stale.

The reasoning of *A&L Underground* is inapplicable here. First, the filing of the State complaint did not constitute clear notice of a violation. Under applicable Board precedent, the question of whether the State lawsuit is an unfair labor practice is tied to the merits of that lawsuit, and to the State court system’s final disposition of that action.⁶ At a minimum, some period of discovery in the State lawsuit will generally be necessary before the defendant can reasonably be expected to determine whether an unfair labor practice has occurred. “While the victims of an unfair labor practice should be encouraged to file a charge with the NLRB as soon as possible, individuals should not be forced to file anticipatory or premature charges.” *Es-mark v. NLRB*, 887 F.2d 739, 746 (7th Cir. 1989); see also *NLRB v. Public Service Electric & Gas Co.*, 157 F.3d 222, 228 (3d Cir. 1998). In the instant case, the Union’s first unfair labor practice charge regarding the Respondent’s State lawsuit was served on December 3, 1996, well before a final disposition adverse to the Respondent in State court on October 14, 1999, and within 6 months of when the parties filed their dispositive motions. Under these circumstances, I conclude that the Union did not unreasonably delay filing. Furthermore, concern about evidence becoming stale is minimal in the instant case since much of the evidence relevant to the charge was necessarily preserved as part of the record of the State court action. Indeed, it is hard to imagine any meaningful prejudice to the Respondent from the timing of the charge. Lastly, since this case

⁶ A State lawsuit that has a reasonable basis, even if it is retaliatory, cannot be found to be an unfair labor practice until the State court rules that the action lacks merit. See *Iron Workers (Southwestern Materials)*, 328 NLRB 934, 943 (1999).

does not involve a unionized employer, the timing of the charge will have no effect on the stability of bargaining relationships. For these reasons, I conclude that it would be improvident to extend the reasoning of *A&L Underground* to the facts of this case.

The limitations period under Section 10(b) is an affirmative defense and the Respondent has the burden of showing that the charge was untimely under Section 10(b). *NLRB v. Public Service Electric & Gas Co.*, 157 F.3d 222, 228 (3d Cir. 1998). For the reasons discussed above, I find that the Respondent has not met that burden, and therefore I reject the timeliness defense. I conclude that the Respondent’s motion to dismiss should be denied.

Although I find that the complaint is not untimely, I do limit the remedy to the period beginning on June 3, 1996, which is 6 months prior to service of the first charge by the Union alleging that the State lawsuit was an unfair labor practice.⁷ The Board has limited a remedy in continuing violation cases to acts occurring during the period beginning 6 months before the filing of the charge. See, e.g., *Iron Workers*, above at 934; *MBC Headwear, Inc.*, 315 NLRB 424, 428 (1994). I conclude that this case does not present facts warranting deviation from that practice.

B. Lack of Merit and Retaliatory Motive

In order to establish that a lawsuit filed by an employer against a union is an unfair labor practice the evidence must show: (1) that the suit lacked merit and (2) that it was filed in retaliation for protected activity. *BE & K*, 329 NLRB at 722. In this case, the Indiana Court of Appeals held that the Respondent could not recover under any of its legal theories, and remanded the case to the trial judge with instructions to dismiss or grant summary judgment for the defendants on all claims. The Indiana Supreme Court declined review. Under the applicable standard, this establishes that the Respondent’s State court lawsuit lacked merit and that the first prong of the violation standard is met. *NLRB v. Operating Engineers Local 520*, 15 F.3d 677 (7th Cir. 1994); *BE & K*, above at 719; *Braun Electric Co.*, 324 NLRB 1, 2 (1997); *Phoenix Newspapers, Inc.*, 294 NLRB 47, 49 (1989). Indeed, the Indiana Court of Appeals determined that not one of the Respondent’s claims was even strong enough to get to a jury. Thus to characterize the State lawsuit as “lacking in merit” is, if anything, perhaps too charitable.

The Respondent argues that its lawsuit against Long and the Union did not lack merit because even though the action was decided unfavorably to it in the Court of Appeals, the trial court initially granted summary judgment in the Respondent’s favor. Essentially, the Respondent appears to be arguing that its lawsuit, while ultimately unsuccessful, had a reasonable basis and therefore does not meet the first prong of the test for a viola-

⁷ On December 3, 1996, the Respondent was served with notice of charge Case 25–CA–25094, which alleged that the employer violated Sec. 8(a)(1) of the Act by filing and continuing to prosecute its State lawsuit, and by taking Long’s deposition. GC Exh. 1. On July 15, 1997, the Union filed a charge alleging that the Respondent had violated the Act by serving written discovery in the State lawsuit. GC Exh. 1.

tion. This argument is not persuasive. First, Board decisions make clear that it is the outcome of the employer's lawsuit that determines the merits of that suit. Here, the Court of Appeals determined that every one of the employer's causes of action should be rejected on dispositive motion. This establishes that the State court action lacked merit. See *BE & K*, above at 719; *Braun Electric*, 324 NLRB at 2; *Phoenix Newspapers, Inc.*, 294 NLRB at 49. The fact that the Indiana Court of Appeals had to correct a mistake made by the trial judge does not alter this conclusion.

Even if one were to assume that the employer's State lawsuit had a reasonable basis, the Respondent's argument fails under the applicable legal standards. In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 749 (1983), the Supreme Court stated that while a showing that an employer's lawsuit lacked a reasonable basis is necessary before the Board can properly issue an order enjoining that lawsuit, once the lawsuit is over it is proper to find a violation if the litigation results in a judgment adverse to the employer and the evidence establishes that the suit was filed with retaliatory intent. As the Board has noted, a violation exists even if the employer had a "reasonable basis" for the suit, as long as the suit was unsuccessful and was brought to retaliate for union activities. *BE & K*, above at 721. The employer's argument to the contrary at first has some surface appeal since it might seem unfair to find an employer guilty of a violation for a lawsuit that it brought unsuccessfully, but innocently. In this regard, it is important to view the first prong of the test for a violation in the context of the second prong. Under the two-prong test, even a lawsuit that lacks merit will not give rise to a violation unless the employer filed it *in retaliation for union activity*.

Since the Indiana Court of Appeals decision establishes that the State lawsuit lacked merit, I turn to the question of whether the Respondent had a retaliatory motive. Whether the lawsuit was retaliatory is a question of fact. *Operating Engineers Local 520*, 15 F.3d 677. In determining whether a suit had retaliatory motive it is appropriate to weigh such factors as timing, threats, demeanor, credibility, and past antiunion acts. *Control Services, Inc.*, 315 NLRB 431, 455-456 (1994). Based on these factors, I conclude that the Respondent maintained and prosecuted its lawsuit with a retaliatory motive.

Richard Dilling, the Respondent's founder and President, denied that the lawsuit was retaliatory, and testified that he simply asked his attorney what to do next once he had discovered that Long had stolen his trash. I did not find Dilling a credible witness. His testimony was self-serving, and his demeanor was defensive and evasive. In addition, the legal actions taken by Dilling through his attorney were not those of one legitimately concerned with the taking of trash, but rather those of one seeking to exploit a perceived misstep by a union official to hobble an organizing effort. When the Respondent discovered that Long had removed trash from its dumpster, it did not approach Long to inform him of a policy against non-employees taking trash or anything else from its property. Nor did it make a pre-suit demand that Long agree to refrain from such activity, or return any materials. Instead, Long heard nothing of the matter until the employer filed its State lawsuit alleging "criminal acts" that included racketeering, burglary,

and trespass. The State lawsuit did not seek an injunction prohibiting trespasses by Long and the Union, but rather sought compensatory, punitive, and treble damages, which its attorney told Long and Zimmer would reach \$3 million.

In *Bill Johnson's*, 461 U.S. at 741, the Court recognized that "the chilling effect of a State lawsuit on an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief. The Board has held that an employer's request for punitive damages in a suit against a union can itself be evidence of retaliatory motive. *Diamond Walnut Growers*, 312 NLRB 61; see also *Summitville Tiles, Inc.*, 300 NLRB 64, 66 (1990); *H. W. Barsz Co.*, 296 NLRB 1286, 1287 (1989); *Phoenix Newspapers*, 294 NLRB at 49-50.

In addition, as noted above, during discovery the Respondent's attorney sought the identities of all union members working for the Respondent, as well as information about a wide range of union activities. I find that the Respondent's conduct suggests that its lawsuit was designed to punish, and, to the extent possible, intimidate and debilitate, Long and the Union, not to address the supposed trespass or theft.

A prior Board decision involving the Respondent provides evidence of antiunion animus on the part of the Respondent. The decision, issued in September 1995, ruled that the Respondent had committed 20 unfair labor practice violations in opposing the campaign to organize its work force. *Detroit Mechanical Contractors*, supra. As noted above, the United States Court of Appeals for the Seventh Circuit Court enforced the Board's Order against the Respondent and commented on the Respondent's use of "heavy handed tactics" and intimidation to squelch organizing efforts. (GC Exh. 6 at p. 2.) I may rely on the findings and evidence in the earlier case against the same employer as background in this case. *Stark Electric*, 327 NLRB 518, 518 fn. 1 (1999). Antiunion animus has been seen by the Board as a factor in determining whether an employer's lawsuit is retaliatory. *Summitville Tiles, Inc.*, 300 NLRB at 66. The prior decision provides evidence of anti-union bias that further supports the conclusion that the Respondent's State lawsuit was retaliatory.⁸

Moreover, as noted in the posthearing brief filed on behalf of the Charging Party, the Respondent filed its State lawsuit on November 13, 1995, only 2 months after the issuance of the prior adverse decision by the Board, and on the heels of charges filed against it by the Union on November 2 and August 22, 1995. The timing of the lawsuit, shortly after the adverse decision and charge filings provides another basis for inferring retaliatory motive.

The conclusion that the Respondent's lawsuit was retaliatory is further buttressed by the threatening statements made by both

⁸ For this reason, the Respondent's reliance on *Rondout Electric, Inc.*, 329 NLRB 957 (1999), is entirely misplaced. Respondent's Posthearing Br. at 5-6. In *Rondout Electric*, the Board found that the employer's filing of trespass-related criminal charges against two union representatives was not retaliatory since the employer had demonstrated a clear toleration of workplace organizing. The situation is starkly different here, where the Respondent has zealously, and often unlawfully, opposed the effort to organize its work force.

the Respondent's superintendent and its attorney. Stan Beecher, the Respondent's superintendent and agent, approached Jeff Smith, an employee, after Smith was seen talking to a union organizer. Beecher told Smith that it would be a bad idea to support the Union because the Respondent had filed a lawsuit that would prevent the Union from functioning. I conclude that Beecher was attempting to use the State lawsuit to chill union activity, and that his statements are evidence that the lawsuit was intended to punish and debilitate the Union.

Long and Zimmer testified to an exchange with the Respondent's attorney, Michael Einterz, in 1998 or 1999. Einterz, who represented the Respondent in the State court lawsuit, and also represents the Respondent in the instant proceeding, told Long and Zimmer that the State lawsuit would result in a \$3 million judgment and that Long and Zimmer would end up working for Dick Dilling. In its posthearing brief, the Respondent characterizes the discussion as "lighthearted." Respondent's Posthearing Brief at p. 9. However, there was no testimony or other evidence that this discussion was "lighthearted." The only evidence about its tenor was Zimmer's statement that he considered it "serious." (Tr. 104.) I view the statements as not only serious, but also threatening and intimidating, especially with respect to Long who was a named defendant in the lawsuit that the Respondent's lawyer was asserting would result in a multimillion dollar adverse judgment.⁹

I conclude that the statements of Beecher and Einterz are evidence that the Respondent's lawsuit was meant to punish and debilitate Long and the Union. I am mindful that neither Beecher nor Einterz appear to be in a position to decide whether the Respondent would authorize or maintain a lawsuit. However, Beecher was the Respondent's superintendent and agent, and Einterz was the Respondent's representative for purposes of the State court litigation. Although I do not give their statements great weight, I believe that those statements provide some evidence of the purposes of the lawsuit.

Taken together, the timing of the Respondent's State court lawsuit, the failure of the employer to attempt a voluntary resolution or seek injunctive relief, the nature of the allegations in the meritless State complaint, the request for compensatory, punitive, and treble damages, the employer's recent history of numerous unlawful antiunion practices, the threatening statements, and the other evidence and testimony, lead me to the conclusion that the Respondent filed the lawsuit with a retaliatory motive. A finding that the Respondent violated Section

⁹ The Respondent asserts in its posthearing brief that this conversation took place in 1999, and, therefore, after the lawsuit had been resolved by the Indiana Court of Appeals, and at a time, presumably, when the counsel's statements could not have been seen as intimidating. However, the testimony was that the conversation took place in 1998 or 1999. Tr. 93-94. Even if the conversation occurred in 1999, that would not establish that the decision of the Indiana Court of Appeals was already known to the parties to the conversation since that decision was not issued until February 16, 1999. Moreover, the Respondent does not even assert that the conversation took place after its request for review by the Indiana Supreme Court was denied on October 14, 1999. Thus, it appears that judgment against Long and the Union was still a possibility at the time that counsel made his comments to Long and Zimmer.

8(a)(1) is proper under the standards announced in *Bill Johnson's* and its progeny.

CONCLUSION OF LAW

For the reasons discussed above, I find that the Respondent's lawsuit against Long and the Union lacked merit, and that the Respondent maintained and prosecuted its suit out of a desire to retaliate against Long and the Union for engaging in protected activity. I therefore find that the suit violated Section 8(a)(1) of the Act. I further find that the complaint is not barred by Section 10(b) and that this matter is properly before the Board.

THE REMEDY

I will recommend that the Respondent be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. In particular, I will recommend that the Respondent be ordered to reimburse Long and the Union for all legal and other expenses including attorney's fees, incurred in defending against the Respondent's State lawsuit during the period commencing on July 3, 1996 (6 months prior to the date that the employer received notice of charge Case 25-CA-025094), including any and all appeals therefrom. I also recommend that the Respondent be required to pay the Union interest as computed in *New Horizons*, 283 NLRB 1173 (1987), and *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835-836 fn. 10 (1991), enf'd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Dilling Mechanical Contractors, Inc., Logansport, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Filing and prosecuting lawsuits with causes of actions against Long and/or the Union that are without legal merit and are motivated by a desire to retaliate against activity protected by Section 7 of the Act.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Reimburse the Union for all legal and other expenses incurred beginning June 3, 1996, in the defense of the Respondent's lawsuit (Cass County Circuit Court No. 09C01-9511-CP-00090), including all appeals therefrom, in the manner set forth in the remedy section.
 - (b) Within 14 days after service by the Region, post at its facilities in Logansport, Indiana, copies of the attached notice

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the respondent at any time since June 3, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of responsible official on a form provided by the Region attesting to the steps that the Respondent had taken to comply.

The Respondent's motion to dismiss is denied.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT file and prosecute lawsuits with causes of action against the Union or union officials that are without legal merit and that are motivated to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse the Union for all legal and other expenses incurred in the defense of our lawsuit, with interest.

DILLING MECHANICAL CONTRACTORS, INC.

Michael T. Beck, Esq., for the General Counsel.
Ronald J. Hein Jr. and Jeremy C. Moritz, Esq. (Franczek Sullivan P.C.), of Chicago, Illinois, for the Respondent.
William R. Groth, Esq. (Fillenwarth, Dennerline, Groth & Towe), of Indianapolis, Indiana, for the Charging Party.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case is before me on remand from the Board. On May 12, 2000, I issued my decision finding that Dilling Mechanical Contractors, Inc. (the Respondent) had violated Section 8(a)(1) of the National Labor Relations Act (the Act) by filing, maintaining, and prosecuting a meritless and retaliatory State court lawsuit against union organizer Paul Long, and the Indiana State Pipe Trades Association, United Association of Plumbers and Pipefitters, AFL-CIO, and Plumbers and Steamfitters Local Union No. 166, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the Union), and by propounding discovery in the lawsuit that sought the names of employees who had joined the Union. Long had removed a number of trash bags from the Respondent's dumpster in hopes of finding information that would help him contact the Respondent's employees. In its lawsuit, filed in Indiana State court, the Respondent alleged that the removal of this trash constituted "criminal acts," including racketeering, trespass, burglary and receipt of stolen property. The Respondent did not seek injunctive relief or attempt a voluntary resolution, but rather prayed for compensatory, punitive, and treble damages, which it told Long would come to \$3 million. The Indiana Court of Appeals rejected all of the Respondent's legal theories, stating that when "trash bags are placed in an unlocked dumpster on the curtilage and readily accessible to others, that trash has been abandoned." I concluded that the Respondent's unsuccessful State court lawsuit had an unlawful purpose based, inter alia, on the fact that the Respondent had already been found to have initiated an unlawful antiunion campaign that included terminations, constructive discharges, physical intimidation, verbal abuse, strict surveillance, and other acts designed to interfere with union and protected concerted activity. See *Dilling Mechanical Contractors*, 318 NLRB 1140 (1995), *enfd.* 107 F.3d 521 (7th Cir. 1997), *cert. denied* 522 U.S. 862 (1997). Moreover, the Respondent had never raised the issue of trespass except in response to the efforts of union organizers, and did not lock the dumpster, place the dumpster in an area where it was not readily accessible to others, guard the dumpster, shred sensitive documents placed in the dumpster, or otherwise take steps to protect the trash from removal. I also found that the manner in which the Respondent conducted the litigation showed that it was "not . . . legitimately concerned with the taking of trash, but rather . . . [sought] to exploit a perceived misstep by a union official to hobble an organizing effort." The record showed that the Respondent's lawsuit "was designed to punish, and to the extent possible, intimidate and debilitate Long and the Union, not to address the supposed trespass or theft."

The Respondent filed exceptions to my decision. While the matter was pending before the Board, the Supreme Court issued its decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), which invalidated the Board standard under which "all reasonably based but unsuccessful suits filed [by an employer against a union] with a retaliatory purpose" may be found unlawful. On September 26, 2002, the Board remanded this mat-

ter to me “for further consideration in light of *BE & K Construction*, including, if necessary, reopening the record to obtain further evidence.” All parties informed me that they did not believe further evidentiary proceedings were necessary, and I agreed. The General Counsel, the Respondent, and the Charging Party Union filed supplemental briefs on the subject presented by the remand order. After reviewing the Board’s remand order, the briefs of the parties, and the record as a whole, I have determined that application of the Supreme Court’s decision in *BE & K Construction*, does not affect my finding that the Respondent’s State court lawsuit violated the Act.

Discussion

1. The *BE & K Construction* case

In *BE & K Construction Co.*, the Board found that the employer had violated Section 8(a)(1) by filing a meritless Federal lawsuit against various unions in retaliation for protected activity. 329 NLRB 717 (1999). The lawsuit filed by *BE & K* lacked merit, the Board concluded, because all the claims were either decided against the plaintiffs or were voluntarily dismissed with prejudice by them. Id. at 722–723. The Board stated that the lawsuit had been retaliatory because it was “directed at protected conduct,” and “necessarily tended to discourage similar protected activity.” Id. at 726. The Board also found evidence of retaliatory motive in the fact that the plaintiffs had named certain unions as defendants in the federal lawsuit who were not involved in the complained of activities. Id. at 727. According to the Board, it was also proper to take into account the fact that the suit was unmeritorious in determining whether it was filed for retaliatory reasons. Id. at 721. The Board stated that under the Supreme Court’s decision in *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983), “even if an employer had a ‘reasonable basis’ for bringing the suit, the suit may still be found unlawful if the employer withdraws the suit or loses on the merits and the Board finds that it brought the suit out of a desire to retaliate against protected activity.” 329 NLRB at 721. The Board stated that it “may not enjoin the prosecution of a pending State court suit alleged to have been filed with a retaliatory motive unless the suit lacks a reasonable basis in fact and law,” but that “suits that have been litigated to completion” are “[o]n an entirely different footing” because “the plaintiff has had his day in court and the State’s interest in providing a forum for its citizens has been vindicated.” Id.

The United States Court of Appeals for the Sixth Circuit affirmed the Board’s decision, 246 F.3d 619 (6th Cir. 2001), but the Supreme Court granted certiorari and reversed. The Supreme Court noted that the First Amendment protects the “right of the people . . . to petition the Government for redress of grievances,” and that this right has been interpreted to apply to the use of courts to advocate causes. 536 U.S. at 524. The Court stated, however, that the protection of the First Amendment did not “extend to ‘illegal and reprehensible practice[s] which may corrupt the . . . judicial proces[s]’” Id. (citation omitted). The Court stated that the decision in *Bill Johnson’s* left open the question of “whether the Board may declare that an unsuccessful retaliatory lawsuit violates the NLRA even if *reasonably* based.” Id. at 527–528 (emphasis added). If so, the

Court stated, it would mean that the Board could impose burdens—including a fee award, reputational harm, and the legal consequences of a declaration of illegality—on reasonably based, but unsuccessful, petitioning. Id. at 528.

The Court considered the fact that the Board confines its penalties to unsuccessful suits brought *with a retaliatory motive*, but concluded that this limitation, at least as it had been applied by the Board, did not alleviate the First Amendment concerns. The Court stated that the Board defined a retaliatory suit as one brought with a motive to interfere with the exercise of Section 7 rights. Id. at 532. The Court concluded that given that definition, the retaliatory motive requirement “fails to exclude a substantial amount of petitioning that is objectively and subjectively genuine.” Id. at 534. In the case before it, the Court said, there was evidence of antiunion animus, but such animus does not mean that petitioning is not genuine “[a]s long as a plaintiff’s *purpose* is to stop conduct he reasonably believes is illegal.” Id. at 534 (emphasis in original).

The “final question” identified by the Court was “whether, in light of the important goals of the NLRA, the Board may nevertheless burden an unsuccessful but reasonably based suit when it concludes that the suit was brought with a retaliatory purpose.” Id. at 534. The Court declined to answer that “difficult constitutional question.” Instead, the Court indicated that to the extent the Board’s standard interpreting Section 8(a)(1) of the NLRA raised the question, it was not an interpretation that was not compelled by the statute. Rather than decide the difficult question, the Court chose to invalidate the Board interpretation that raised it. Id. at 534–536. The Court did not define a new standard,¹ and explicitly left open the possibility that a reasonably based, but unsuccessful, lawsuit could violate the NLRA if the suit “would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity.” The Court reversed the decision of the Sixth Circuit and remanded the matter for further proceedings consistent with its opinion. The Sixth Cir-

¹ The Court stated that it had previously held that for a suit to violate antitrust law the suit must be a “sham,” meaning that it must be objectively baseless such that no reasonable litigant could realistically expect success on the merits, and that the litigant’s subjective motivation must conceal an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process as an anticompetitive weapon. Id. at 534 (discussing *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993)). The Court did not state that this standard was applicable to cases that, like the one before it, allege that a suit violates the NLRA, but did note that the latter type of case “raises the same underlying issue of when litigation may be found to violate federal law.” 536 U.S. at 524. The Court noted that the Board had identified differences between antitrust litigation and litigation under the NLRA—in particular, that NLRA litigation cannot be launched solely by private action but only when the Board’s general counsel issues a complaint, that the Board has no authority to order punitive remedies, and that prehearing discovery is limited in Board proceedings. The Court stated, however, that those factors “[a]t most . . . demonstrate that the threat of an antitrust suit may pose a greater burden on petitioning than the threat of an NLRA adjudication,” and “do[] not mean the burdens posed by the NLRA raise no First Amendment concerns.” Id. at 528 (emphasis in original).

cuit then remanded the matter to the Board, which has yet to rule.

Two concurring opinions were filed, which offer differing interpretations of the majority opinion. Justice Scalia, in a concurring opinion joined by Justice Thomas, stated that while the Court had avoided defining a new standard to replace the Board standard being invalidated, “the implication of our decision today is that . . . we will construe the [NLRA] in the same way we have already construed the Sherman [Antitrust] Act to prohibit only lawsuits that are *both* objectively *and* subjectively intended to abuse process.” Justice Scalia stated that he disagreed with the view that the “differences between the NLRA and the Sherman [Antitrust] Act . . . suggest . . . that a complainant enjoys greater First Amendment rights to file a lawsuit in the face of the latter than the former.” Justice Scalia argued that the more significant difference was that in the antitrust context “the entity making the factual determination whether the objectively reasonable suit was brought with an unlawful motive would have been an Article III court,” whereas in the NLRA context an executive agency was being given the power to punish a reasonably based suit filed in an article III court. 536 U.S. at 536–538. Therefore, he suggested, the standard for finding that a retaliatory antiunion lawsuit violates the Act should be at least as stringent as that for finding that an anti-competitive lawsuit violates the Sherman Act.

Justice Breyer filed an opinion concurring in part, and concurring in the judgment, in which Justice Stevens, Justice Souter, and Justice Ginsburg joined. Justice Breyer read the Court’s opinion to mean only that the Board could not declare an employer’s lawsuit to be a violation of the Act “*in the circumstances present here*, which is to say, in the kind of case in which the Board rests its finding of ‘retaliatory motive’ almost exclusively upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union.” 536 U.S. at 538 (emphasis in original). The Court left open the possibility, Justice Breyer said, that a violation could be established where “the evidence of ‘retaliation’ or antiunion motive might be stronger or different, showing, for example, an employer, indifferent to outcome, who intends the reasonably based but unsuccessful lawsuit simply to impose litigation costs on the union,” or showing that the lawsuit was brought “as part of a broader course of conduct aimed at harming the unions and interfering with employees’ exercise of their rights under [the NLRA].” *Id.* Justice Breyer rejected the view that the implication of the Court’s decision was that the standard for determining whether a lawsuit violates antitrust law should be applied to determine the legality of a lawsuit alleged to violate the Act. He stated that “antitrust and labor law differ significantly in respect to their consequences, administration, scope, history, and purposes.” *Id.* at 539. In particular, he observed that the threat of antitrust litigation is more likely than NLRA litigation to discourage legitimate lawsuits because: the remedies under antitrust law are more burdensome than those that would be available under the Act; antitrust litigation typically involves far higher court costs than NLRA litigation; and, NLRA litigation cannot be launched solely by private action but only when the Board’s General Counsel issues a complaint. Justice Breyer also pointed out that suppression of antiunion

lawsuits is far more central to the purposes of the NLRA, than the suppression of anticompetitively motivated lawsuits is to antitrust law. *Id.* at 541–543.

I adopt the interpretation of the *BE & K* majority opinion suggested by Justice Breyer. In *BE & K*, the Supreme Court invalidated the Board’s standard for finding unsuccessful, but reasonably based, retaliatory State lawsuits unlawful, but declined to articulate a new standard to guide consideration of future cases. The implication of what the Court does say is susceptible to more than one reasonable construction, as demonstrated by the reasonable, but contrary, constructions given it by Justice Scalia (joined by Justice Thomas) and Justice Breyer (joined by Justice Stevens, Justice Souter, and Justice Ginsburg), neither of which construction is explicitly embraced or rejected by a majority of the Court. For its part, the Board has yet to articulate a new standard in light of the Supreme Court’s ruling. It is well established that administrative law judges are bound to follow Board precedent unless and until reversed by the Board or the Supreme Court. *Butterworth Mortuary*, 270 NLRB 1014, 1020 (1984); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616–617 (1963). In the circumstances of the instant case, I believe this rule warrants my choosing, from among reasonable interpretations of a Supreme Court decision, that interpretation which leaves intact a greater measure of the Board’s precedent. See *Longshoremen Local 799*, 257 NLRB 1075 (1981) (Board rejects administrative law judge’s interpretation of Supreme Court decisions that was unnecessarily expansive, and adopts narrower interpretation that is more consistent with Board precedent), *enfd. mem.* 702 F.2d 1205 (D.C. Cir. 1983). Here, the view expressed by Justice Breyer is more in keeping with Board precedent since it only invalidates the Board’s standard for what constitutes a sufficient retaliatory motive to warrant finding a violation, whereas Justice Scalia’s view would invalidate both the Board’s standard for what is sufficiently retaliatory and also its standard for what is sufficiently lacking in merit.

Justice Breyer’s view is also, I think, the better one. First, it preserves one of the most attractive attributes of the Board’s standard. Under the Board’s standard, the decision about whether the concluded State court lawsuit lacked merit is based entirely on the determination reached in the State court regarding that lawsuit. Thus the Board is not forced to immerse itself in State law in order to determine whether a lawsuit was objectively baseless. Justice Scalia’s view would necessarily draw the Board into that unfamiliar territory in order to make its own determination about whether an unsuccessful State court lawsuit was objectively baseless under State law. Second, I agree with Justice Breyer’s views about the differences between NLRA litigation and antitrust litigation, and, in particular, am persuaded that the lower litigation costs, milder remedies, and agency screening process in the NLRA context mean that the threat of NLRA litigation imposes substantially less of a burden on genuine petitioning than does the threat of antitrust litigation attacking lawsuits filed for anticompetitive purposes.

I am troubled by Justice Scalia’s view that a violation of the NLRA could not be shown unless the retaliatory lawsuit was baseless both objectively and subjectively since that standard would appear to protect all retaliatory lawsuits for which a

reasonable basis in fact and law could be articulated, even if the employer was not motivated by the complained of conduct, but solely by a desire to use the judicial process to retaliate against a union for engaging in protected activities. That would be contrary to the view stated in the majority opinion that a lawsuit is “genuine petitioning” when its purpose is “to stop conduct [the plaintiff] reasonably believes is illegal.” 536 U.S. at 534.

Justice Scalia states that the differences between antitrust law and labor law that are discussed by Justice Breyer are all outweighed because in the NLRA context the Board (an agency headed by an entity composed of members appointed by the President with the advice and consent of the Senate, 29 U.S.C. Section 153(a)) is the entity making the factual determination whereas in Sherman Act litigation the factual determination is made by an article III court. Justice Scalia does not, however, explain why he believes the threat of factfinding by an entity such as the Board represents so much greater a burden on petitioning than does the threat of factfinding by an article III court, and it is not self-evident to me. Rather, as I indicate above, I agree with Justice Breyer that the lower litigation costs, more limited remedies, and agency screening, in the case of litigation before the Board mean that the threat of such litigation is less of a burden. To the extent that Justice Scalia does explain his concern with the Board’s factual determinations he observes that executive agencies do not share the independence of article III courts and he questions “whether an *executive agency* can be given the power to punish a reasonably based suit filed in an Article III court.” 536 U.S. at 538 (emphasis in original). As stated, Justice Scalia’s concern is addressed to suits that, like *BE & K*’s, are filed in an article III court, and would not necessarily be raised by a lawsuit that, like *Dilling Mechanical*’s, was filed in State court, and might be viewed differently under the supremacy clause in article VI of the Constitution and considerations of federalism. At any rate, it is worth noting that the factual determinations in NLRA cases alleging violations of Section 8(a)(1) are in the main made by Federal administrative law judges who are guaranteed a substantial level of independence and conduct a wide range of due-process adjudications, often involving remedies significantly more onerous than any likely to be imposed for retaliatory lawsuits found unlawful under the NLRA. The Supreme Court itself has recognized this independence, stating that “the process of agency adjudication is currently structured so as to assure that the [administrative law judge] exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency” and “insulated from political influence.” *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 745 (2002), quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978).

For the reasons discussed above, I interpret the Supreme Court’s decision in *BE & K* as invalidating the Board’s standard only to the extent suggested by Justice Breyer—i.e., to the extent that the standard permitted a violation of the NLRA to be found based on a “retaliatory motive” that rests “almost exclusively upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union.” 536 U.S. at 538 (concurring opinion of Justice

Breyer).² A violation may still be found where the lawsuit is unsuccessful and the evidence of retaliation is stronger; for example, where the employer’s purpose is not “to stop conduct he reasonably believes is illegal,” *Id.* at 534, but rather to misuse the judicial process itself to punish a union for protected activities, or where the employer’s lawsuit is “part of a broader course of conduct aimed at harming the unions and interfering with employees’ exercise of their rights under Section 7(a) of the NLRA.” *Id.* at 538 (concurring opinion of Justice Breyer).

2. *Dilling Mechanical*’s State court lawsuit

Considering the instant case in light of *BE & K*, I conclude that the record still warrants finding that the Respondent’s unsuccessful State court lawsuit violated Section 8(a)(1). The evidence of retaliation and antiunion motive in this case is both “stronger and different” than that present in *BE & K*. As discussed in my original decision, the record here did not merely show that the Respondent filed an unsuccessful lawsuit and did not like the union. Rather it showed that the purpose of the Respondent’s State court lawsuit was “to punish, and to the extent possible, intimidate and debilitate Long and the Union, not to address the supposed trespass and theft.” Given this purpose, the Respondent’s lawsuit did not fall within the bounds of what the Supreme Court called “genuine petitioning” designed “to stop conduct [it] reasonably believe [d] [wa]s illegal,” but rather was an attempt to misuse the State court as a weapon for punishing, harming, and interfering with Long’s and the Union’s organizing efforts. Nothing in the briefs of the parties leads me to reconsider the factual findings that establish a violation of Section 8(a)(1) under *BE & K*. As is discussed fully in my original decision,³ my factual finding regarding the Respondent’s motivation is supported by: the suspicious timing of the State court lawsuit;⁴ the failure of the Respondent to seek a

² In its supplemental brief, the General Counsel takes a different view of the *BE & K* decision, stating that that the Supreme Court indicated that in determining whether a retaliatory lawsuit violates the NLRA, “the Board could no longer rely on the fact that the lawsuit was ultimately meritless, but must determine whether the lawsuit, regardless of its outcome on the merits, was reasonably based.” GC Br. at 6. The General Counsel states the record did not show that the suit was without a reasonable basis, and therefore asks that I find that the Respondent did not violate the NLRA. *Id.* at 7–8. The General Counsel also opines that “[t]he evidence reveals that Respondent was motivated, at least in part, by a desire to protect its legitimate privacy rights.” *Id.* at 8. The General Counsel does not identify what credible evidence “reveals” this legitimate motivation and I reject the General Counsel’s assessment. For the reasons discussed in my original decision, including my assessment of the demeanor and testimony of the witnesses, and in particular that of Richard Dilling, I conclude that a desire to stop the conduct that was the putative target of the state court lawsuit played no significant part in Respondent’s filing and maintenance of that lawsuit, which, instead, was motivated by a desire “to punish, and to the extent possible, intimidate and debilitate Long and the Union.”

³ Rather than repeat portions of my original decision, I hereby incorporate, by reference, into this supplemental decision the factual findings and related discussions from my decision of May 12, 2000.

⁴ The Respondent filed its State lawsuit on November 13, 1995, only 2 months after the issuance of the prior adverse decision by the Board and on the heels of additional unfair labor practices charges filed against it by the Union on November 2 and August 22, 1995.

voluntary resolution or injunctive relief; the nature of the allegations in the unsuccessful State court action; the Respondent's request for compensatory, punitive, and treble damages to remedy the removal of trash; the fact that the Respondent had only ever raised the trespass issue in response to union organizing; the failure of the Respondent to take steps to protect its trash from others; the unlawful attempt by the Respondent to use the State court lawsuit to discover the names of union supporters on its work force; the Respondent's recent history of repeated unlawful antiunion practices; the intimidating statements that the Respondent's agents made about the lawsuit to union officials and employees; and the other evidence and testimony.

The record also leads me to conclude that the State court lawsuit was, to use Justice Breyer's words, "part of a broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under Section 7(a) of the NLRA." The Respondent filed its State court lawsuit only 2 months after the Board issued a decision finding that the Respondent had committed 20 unfair labor practices, including a number of hallmark violations, against two unions. That decision found that the Respondent's unlawful acts during the period from December 1992 to August 1994 included: terminating, constructively discharging, and disciplining employees who engaged in union or protected concerted activity; unlawfully refusing to permit former strikers to return to work after those individuals made an unconditional offer to return to work; physically intimidating, verbally abusing, and strictly surveilling employees because of their union activities; threatening

employees with discharge if they engaged in union and protected concerted activities; enforcing rules more strictly or creating new rules because of the union activities; interrogating employees about their union membership and activities; and instructing employees to stop their union and protected concerted activities. The Respondent, to put it bluntly, is not an employer that merely "didn't like" unions, but one that repeatedly demonstrated a willingness to vent its dislike through unlawful and unusually aggressive antiunion actions. In upholding the Board's decision, the United State Court of Appeals for the Seventh Circuit commented on the Company's use of "heavy-handed tactics" to oppose the organizing campaign and to "intimidate and berate employees who supported" the Electrical Workers union.⁵ *Dilling Mechanical Contractors v. NLRB*, 107 F.3d 521, 523 (7th Cir. 1997), cert. denied 522 U.S. 862 (1997). The record here leaves no real doubt that the Respondent's unsuccessful State court lawsuit was a continuation of its heavy handed, antiunion, tactics, and part of its "broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under Section 7(a) of the NLRA." The Respondent's lawsuit amounted to a corruption of the judicial process, not genuine petitioning.

[Recommended Order omitted from publication.]

⁵ The prior case involved the Electrical Workers union, as well as the Union involved in this case.