

Allied Mechanical Services, Inc. and Plumbers and Pipe Fitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO and Local 7, Sheet Metal Workers International Association, AFL–CIO and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO. Cases 07–CA–041687, 07–CA–041783, and 07–CA–041993

October 25, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

The issue presented in this case¹ is whether the Respondent violated Section 8(a)(1) of the Act by filing and maintaining an unsuccessful lawsuit against the Charging

¹ On February 21, 2001, Administrative Law Judge Jane Vandeventer issued the attached decision finding that the Respondent violated Sec. 8(a)(1) by filing and maintaining its lawsuit against the Unions. The Respondent filed exceptions and a supporting brief, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (the UA) filed an answering brief, and Local 7, Sheet Metal Workers International Association, AFL–CIO (Local 7), and Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Local 357), jointly filed an answering brief. Additionally, the General Counsel, the UA, and, jointly, Local 7 and Local 357 filed cross-exceptions and supporting briefs.

On September 26, 2002, the Board remanded the case to the judge for reconsideration in light of the Supreme Court’s decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

On June 10, 2003, Judge Vandeventer issued a supplemental decision, also attached, again finding that the Respondent had violated Sec. 8(a)(1). The Respondent filed exceptions to the supplemental decision and a supporting brief, and the General Counsel and the UA, and, jointly, Local 7 and Local 357 filed answering briefs. Additionally, the UA, and, jointly, Local 7 and Local 357 reiterated their previously filed cross-exceptions and supporting briefs. The General Counsel, in his answering brief, withdrew his cross-exceptions.

The National Labor Relations Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and, as explained below, has decided to affirm the judge’s rulings, findings, and conclusions, to modify her remedy, and to adopt the recommended Order as modified and set forth in full below.

In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge’s recommended Order by requiring that the legal and other expenses, including attorneys’ fees, incurred by the Charging Party Unions and SMWIA in defending against the Respondent’s lawsuit shall be reimbursed with interest compounded on a daily basis. Additionally, we shall modify the judge’s recommended Order to conform to the violation found and also to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). We also shall provide a new notice.

Party Unions and the Sheet Metal Workers International Association, AFL–CIO (SMWIA). Analyzing the case under the Board’s decision in *BE&K Construction Co.*, 351 NLRB 451 (2007), we find that the Respondent violated the Act as alleged.

I. FACTS

The Respondent fabricates and installs heating, ventilation, and air-conditioning systems in southwest Michigan. Local 7 represents the Respondent’s sheet metal workers, and the Respondent is a party to Local 7’s multi-employer collective-bargaining agreement (the Local 7 Agreement). In 1990, Local 337 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Local 337), began organizing the Respondent’s plumbers and pipe fitters. In 1991, pursuant to a settlement of an unfair labor practice complaint, the Respondent recognized and agreed to bargain with Local 337 (later, Local 357) as the representative of its plumbers and pipe fitters.²

The Respondent and Local 357 engaged in contract negotiations but never reached an agreement. As the Respondent acknowledged, its relationship with Local 357 “could fairly be characterized as tumultuous,” and was marked by the Respondent’s commission of numerous unfair labor practices.

- In 1993, the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate nine striking employees after they made unconditional offers to return to work. *Allied Mechanical Services, Inc.*, 320 NLRB 32 (1995), enfd. 113 F.3d 623 (6th Cir. 1997).
- In 1995–1996, the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes, bypassing Local 337, refusing to furnish information to Local 337, and engaging in overall bad faith bargaining. Additionally, the Respondent violated Section 8(a)(3) and (1) by discharging six striking employees and by refusing to reinstate them after they made unconditional offers to return to work. *Allied Mechanical Services, Inc.*, 332 NLRB 1600 (2001).
- In March 1998, the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate ten striking employees who made unconditional offers to return to work and by refusing

² On March 1, 1998, Local 337 and another local merged to create Local 357. Hereinafter, the term “Local 357” also refers to its predecessor, Local 337.

to consider for employment and to hire four job applicants who were Local 357 members. *Allied Mechanical Services, Inc.*, 341 NLRB 1084 (2004).

- On July 22, 1998, the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from Local 357. The Respondent also violated 8(a)(5) and (1) by failing to provide to Local 357 information that it requested on June 29, 1998, and by unilaterally revising its job application procedure on August 1, 1998.³ *Allied Mechanical Services, Inc.*, 351 NLRB 79 (2007), reconsideration denied, 356 NLRB 2 (2010).

Shortly after its July 22, 1998 withdrawal of recognition from Local 357, the Respondent filed the lawsuit that is the subject of this case. Specifically, on August 4, 1998, the Respondent filed a complaint in Federal district court against Local 357, Local 7, and their respective international unions, the UA and SMWIA. The lawsuit concerned Local 7's refusal, in 1998, to grant to the Respondent job targeting funds relating to three projects—the Kalamazoo Red Cross job, the Kalamazoo Chamber of Commerce job, and the YMCA Sherman Lake project. Job targeting funds are funds that unions collect from their members while the members are working and which the unions, in turn, provide to contractors that are parties to collective-bargaining agreements with the unions. The purpose of job targeting funds is to enable the contractors to make more competitive bids for specific jobs in order to expand union members' job opportunities.

The Respondent's lawsuit included four counts. Counts I, II, and IV of the complaint, brought against Local 357 and the UA, were based on the secondary boycott provisions of the Act. In count I, the complaint alleged that Local 357 and/or the UA "threatened and/or otherwise coerced" Local 7 and/or SMWIA "to ensure that [the Respondent] would not be provided Job Targeting Funds" on the three projects, in violation of Section 8(b)(4)(i) and (ii) of the Act. In count II, the complaint alleged that, by preventing the Respondent from receiving job targeting funds, Local 357 and/or the UA "created a barrier that restrains" the Respondent and potential customers from doing business with each other, in violation of Section 8(b)(4)(ii). In count IV, the complaint alleged that Local 357 and/or the UA "threatened, co-

erced or otherwise restrained the individual plumbing and pipe fitting employees" of the Respondent in the exercise of their Section 7 rights by prohibiting Local 7 and/or SMWIA from providing the Respondent with job targeting funds, in violation of Section 8(b)(4)(i).

In count III, a breach of contract claim brought against Local 7 and SMWIA, the complaint alleged that those unions breached the Local 7 agreement by denying the Respondent job targeting funds. In February 1998, the Respondent had filed a grievance contending that Local 7's refusal to provide job targeting funds to the Respondent on the Kalamazoo Red Cross job constituted a breach of the "most favored nations" clause of the Local 7 Agreement, because Local 7 had provided job targeting funds to other union contractors related to the same job. According to Daniel Huizinga, the Respondent's treasurer and part owner, Local 7 representatives told him in April 1998 that the absence of a collective-bargaining agreement between the Respondent and Local 357 was the reason that Local 7 would not provide job targeting funds to the Respondent. Prior to the Respondent's filing its lawsuit, the Respondent's grievance was denied on June 24, 1998, by the National Joint Adjustment Board (NJAB) at the final step of the grievance-arbitration process.

For each cause of action, the Respondent sought "all actual and compensatory damages, including attorneys fees and costs incurred in bringing this action."

The Unions moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to state a claim upon which relief could be granted. On March 30, 1999, the district court granted the Unions' motions to dismiss.⁴ Regarding the secondary boycott claims, the district court found that the complaint failed to allege that the Unions directed any of their activity against *neutral employers or customers* of the Respondent, a predicate to an 8(b)(4) violation. Rather, the substance of the Respondent's complaint was that Local 7 denied job targeting funds to the Respondent itself—not to a neutral third party—as a result of pressure from Local 357 or the UA. The district court determined that this was lawful primary activity and, therefore, the Respondent failed to state an 8(b)(4) claim against Local 357 or the UA. Additionally, the court found that the Respondent failed to state a cognizable claim against UA because the Respondent did not allege facts indicating that Local 357 or Local 7 acted as an agent of UA.

³ Additionally, in 1997, the General Counsel issued a complaint alleging that the Respondent violated Sec. 8(a)(5) by engaging in unilateral actions and refusing to provide information. The parties entered into an informal settlement agreement on February 5, 1998, under which the Respondent agreed to bargain with Local 337, furnish relevant information, and not make unilateral changes.

⁴ *Allied Mechanical Services v. Plumbers Local 337*, No. 4:98-CV-113 (W.D. Mich. March 30, 1999).

Regarding the Respondent's claim against Local 7 and SMWIA alleging breach of the Local 7 Agreement, the court found that the NJAB decision was rendered pursuant to the grievance and arbitration provisions of that agreement. Therefore, the court determined that NJAB's decision was binding unless it "fail[ed] to derive its essence from the agreement."⁵ The court observed that the NJAB's decision rejected the Respondent's contention that Local 7 violated the contract's "most favored nations" clause by denying the Respondent job targeting funds. The "most favored nations" clause provided, in relevant part: "The Union will not extend or permit . . . any base rates, fringe benefit cost or working conditions more favorable to an Employer than those contained in this Agreement, unless same be granted to members of The Five Cities Association upon their request." The court noted that the clause made no mention of job targeting funds and that the Respondent had failed to identify any other contract provision relating to such funds. Therefore, the court concluded that the NJAB's "decision [did] not, as a matter of law, fail to derive its essence from the parties' agreement."⁶ The court further found that the Respondent had failed to exhaust its contractual remedies regarding the Kalamazoo Chamber of Commerce job and the YMCA Sherman Lake project, because it had not grieved Local 7's denial of job targeting funds as to those jobs. Accordingly, the court dismissed the Respondent's contractual claim against Local 7.

Regarding the contract claim asserted against SMWIA, the district court found that the complaint did not allege that SMWIA negotiated or was a signatory to the Local 7 agreement. Rejecting the Respondent's contention that SMWIA could be held liable for Local 7's alleged contract breach because Local 7 was acting as SMWIA's agent, the court found that the complaint "fail[ed] to allege any affirmative conduct or undertaking by [SMWIA] which would provide a basis for subjecting it to liability for the actions of Local 7."⁷

The Respondent appealed—except as to the dismissal of SMWIA—on April 28, 1999. On August 5, 1999, the UA was dismissed from the appeal pursuant to a stipulation of the parties. On June 26, 2000, the United States Court of Appeals for the Sixth Circuit affirmed the district court's dismissal of the complaint.⁸

In considering the Respondent's appeal, the court of appeals construed the Respondent's complaint in the light most favorable to the Respondent and accepted the

complaint's factual allegations as true. The court also applied the principle that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁹

Regarding the Respondent's secondary boycott claims, the court of appeals rejected the Respondent's allegation that the denial of job targeting funds restrained the Respondent from doing business with neutral customers and restrained such customers from doing business with the Respondent. The court reasoned that, although the Respondent's customers and potential customers were neutral secondary employers, the job targeting funds were withheld from the Respondent itself, not from its customers, and the complaint did not allege that Local 357 made any contact with those customers or induced employees to withhold services from them. The court found that, assuming the denial of job targeting funds affected the Respondent's ability to successfully contract with such customers, this indirect effect was insufficient to state a secondary boycott claim, as unions have a protected right to exert legitimate pressure aimed at an employer with which they have a primary dispute.

The court of appeals likewise rejected the Respondent's allegation that the denial of job targeting funds induced or encouraged sheet metal, plumbing, and pipefitting employees to withhold their services and not do business with the Respondent. While Section 8(b)(4) prohibits inducing employees of *secondary* employers to withhold services, the Respondent was not a secondary employer. Thus, the court found that this allegation failed to state a claim as a matter of law.

The court also rejected the Respondent's allegation that Local 357 violated Section 8(b)(4) by inducing individuals with decision-making authority in Local 7 to withhold job targeting funds from the Respondent or by restraining Local 7 from providing such funds to the Respondent. The court found that this allegation failed to allege conduct prohibited by Section 8(b)(4), for two reasons. First, it did not allege inducement of individuals to refuse to perform employment duties for the purpose of pressuring their *own* employer. Second, the alleged coercion of Local 7 did not have as an object forcing or

⁵ Id., slip op. at 23.

⁶ Id.

⁷ Id., slip op. at 11.

⁸ *Allied Mechanical Services v. Plumbers Local 337*, 221 F.3d 1333, 2000 WL 924594 (6th Cir. 2000) (unpublished, available in Westlaw).

⁹ Id., 2000 WL 924594 at *3, quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (internal quotation marks omitted). The *Conley v. Gibson* no-set-of-facts standard under which the district court and the court of appeals dismissed the Respondent's complaint was more generous to plaintiffs than the currently applicable facial-plausibility standard which the Supreme Court announced in 2007. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); see also *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949–1952 (2009).

requiring Local 7 to cease doing business with the Respondent. The court found that, in the context of representing the Respondent's sheet metal workers, Local 7 could not be said to have been "doing business" with the Respondent.

Regarding the Respondent's allegation that Local 7's denial of job targeting funds breached the "most favored nations" provision of the collective-bargaining agreement, the court of appeals found that, with respect to the Red Cross job, the NJAB denied the Respondent's grievance, which squarely presented this issue. The court indicated that it "would be inclined to view this claim differently than the NJAB," were the court "free to interpret the contract, or review the claims of factual or legal error."¹⁰ Nevertheless, the court found that it was "compelled to agree with the district court"¹¹ that, inasmuch as the "most favored nations" provision lacked any express reference to job targeting funds, the NJAB's denial of the grievance had to be upheld, because "the NJAB's decision did not fail to derive its essence from the agreement."¹² The court concluded: "Giving the final binding resolution of the grievance and the deference it must be afforded, Allied cannot state a claim for breach of contract with respect to the denial of job targeting funds for the Red Cross job."¹³ The court also agreed with the district court that the Respondent had failed to exhaust its contractual remedies with respect to the Kalamazoo Chamber of Commerce job and the YMCA Sherman Lake project.¹⁴

III. JUDGE'S DECISIONS

Administrative Law Judge Vandeventer, in her initial decision, found that the Respondent's lawsuit against the Unions violated Section 8(a)(1). In making that determination, the judge applied the two-part test set forth in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). Under that test, the General Counsel was required to show that (1) the lawsuit was without merit and (2) the lawsuit was filed with a retaliatory motive.

The judge reasoned that the Federal courts' dismissal of the lawsuit established that it was without merit. She also found that the Respondent's lawsuit had a retaliatory

motive. The judge noted that the Respondent had a history of "extreme animus" toward Local 357's organizing efforts and toward employees who engaged in strikes to support Local 357. She found that the Respondent's animus was demonstrated just a few months before the Respondent's filing of the lawsuit when, in March 1998, the Respondent unlawfully failed to reinstate striking employees.¹⁵ Then, the following month, Local 357 filed its unfair labor practice charge concerning the Respondent's failure to reinstate these employees. A different administrative law judge ruled in February 1998 that the Respondent had engaged in violations of Section 8(a)(3) and (5) of the Act in 1996.¹⁶ Judge Vandeventer further noted that the Respondent's Federal court complaint explicitly alleged that Local 357 "has filed numerous unfair labor practice charges and engaged in mini-strikes and other activities in an attempt to disrupt and damage the business operations of [the Respondent]," and that the lawsuit charged Local 7 with breach of the collective-bargaining agreement even though the NJAB had already found no such breach. Finally, the judge cited a statement made in the spring of 1999 by John Huizinga, the Respondent's vice president and part owner, in a conversation with Robert Williams, Local 357's business manager. In that conversation, Huizinga stated that he intended to "get even with you [guys]."¹⁷

The judge concluded that four factors established that the Respondent filed and maintained the suit "out of a desire to retaliate against the unions for engaging in protected concerted activity": (1) the recitation in the Respondent's complaint of Local 357's activities protected by the Act—striking and filing unfair labor practice charges, (2) the filing of the lawsuit on the heels of an unfavorable administrative law judge's decision and Local 357's filing of additional unfair labor practice charges in February through April 1998, (3) the Respondent's deep hostility to employees' and the Unions' protected conduct, which predated 1998 and continued unabated thereafter, as shown by Huizinga's remarks to Williams, and (4) the "obvious lack of merit of the lawsuit."

¹⁵ See *Allied Mechanical Services*, 341 NLRB 1084 (2004).

¹⁶ Specifically, the judge found that the Respondent violated the Act by discharging six striking employees and refusing to reinstate them and by making unilateral changes, bypassing Local 337, refusing to furnish information to Local 337, and engaging in overall bad-faith bargaining. *Allied Mechanical Services*, 332 NLRB 1600, 1605 (2001).

¹⁷ Williams gave uncontroverted testimony that, in the spring of 1999, Huizinga told him that he did not think there would ever be a collective-bargaining agreement between the Respondent and Local 357; that he respected Williams, but had a problem with the ethics of Williams' "two guys to the east of us," who had embarrassed him and his family and cost the Respondent a lot of money; and that some day, "you guys are going to make a mistake" and he intended to "get even."

¹⁰ *Id.*, 2000 WL 924594 at *7.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Moreover, the court found that the result would have been the same even if it accepted the Respondent's argument that pursuit of its contractual remedies with respect to those jobs would have been futile. If the NJAB's denial of the Red Cross grievance established that it also would have denied grievances over denial of job targeting funds for the other two jobs, as the Respondent contended, the court then reasoned that, because the NJAB's decision is entitled to deference, dismissal for failure to state a claim would still be proper.

In her recommended Order, the judge directed the Respondent to cease and desist from filing and prosecuting lawsuits against the Unions with causes of action lacking legal merit and motivated by an intention to retaliate against activity protected by Section 7 of the Act. The recommended Order also required the Respondent to reimburse the Unions for their legal and other expenses incurred in the defense of the Respondent's lawsuit. The judge, however, denied the General Counsel's and the Charging Parties' requests to order the Respondent to reimburse them for their costs in litigating the unfair labor practice case.¹⁸

After the Supreme Court issued its decision in *BE&K Construction v. NLRB*, 536 U.S. 516 (2002), the Board remanded this case to the judge for reconsideration in light of the Supreme Court's decision. On remand, the judge, in her supplemental decision, concluded that under *BE&K Construction*, the mere dismissal of the lawsuit was not enough to establish that it was not reasonably based. But reexamining the record in light of the Court's decision, the judge found that the Respondent's lawsuit lacked a reasonable basis. The Respondent's contract claim against Local 7 lacked a reasonable basis, in the judge's view, because the dispute over the Red Cross project "had been resolved by final and binding arbitration" and the contract claims pertaining to the Kalamazoo Chamber of Commerce job and the YMCA Sherman Lake project "were barred by its failure to exhaust its arbitration remedy." The judge described the contract claim against Local 7 as "impossible," as the Respondent "has advanced no reason, nor did it plead any reason in its lawsuit, for the District Court to vacate or ignore the arbitration decision." The judge further found that there was no basis for the Respondent's contract claims against Local 357, the UA, or SMWIA because the Respondent did not have a contract with any of those organizations.

Respecting the Respondent's secondary boycott allegations, the judge found that they, too, lacked a reasonable basis. The judge found that all the events arose out of a primary dispute between the Respondent and the two unions that represented its employees and that no other employer was involved. The judge rejected the Respondent's contention that because secondary boycott claims are difficult, its claims were reasonable.

The judge also found that the Respondent filed claims of "collusion" between the Unions "with no factual basis whatsoever." She noted that, although Daniel Huizinga testified that he had a "strong belief that the UA was in-

terfering and colluding with the Sheet Metal to deny us target funds [and] that the Sheet Metal people were being influenced by the Piping Union," Huizinga admitted that he had no knowledge of any actions or conversations between Local 357 and Local 7 or of any involvement by the UA.

In sum, the judge found that "[n]o 'reasonable litigant' could realistically expect success on the merits of this lawsuit, filed as it was with no facts ascertained, contract claims clearly precluded by the final and binding arbitration, the obvious primary nature of the disputes, and no evidence whatsoever to connect the two international unions with the events complained of." She added that, although the First Amendment protects the right to file lawsuits, this protection may be exceeded when "a litigant has demonstrated a reckless readiness to use litigation to harry and harm an opponent, [and] to drain its resources, regardless of the fatuousness or frivolity of the claims in litigation."

Regarding the Respondent's motive in filing the lawsuit, the judge, relying on the analysis in her previous decision, reiterated her finding that the Respondent had filed the lawsuit in order "to retaliate against the unions for engaging in protected concerted activity." In support, the judge cited the Respondent's "repeated unfair labor practices over a course of several years, . . . conduct which included acts undertaken against individual employees, not just the unions; the timing of Respondent's lawsuit; Respondent's avowed purpose to 'get even' with the unions; the iteration in its lawsuit's pleadings of employees' and the unions' activity protected by the Act; and the complete lack of a reasonable basis for the lawsuit."¹⁹ The judge noted that the evidence of retaliatory motive here was far different and far stronger than that in *BE&K Construction*.

IV. THE PARTIES' CONTENTIONS

The Respondent excepts to the judge's findings that its lawsuit was objectively baseless and filed with a retaliatory motive. It argues that the judge disregarded *BE&K* by relying upon the dismissal of the lawsuit as evidence that its claims were objectively baseless.

Regarding the contract claims, the Respondent argues that the judge erred in finding that it had asserted a contract claim against Local 357 and the UA. As to Local 7, the Respondent argues that the judge erred in (1) characterizing the contract claim as "impossible," (2) conclud-

¹⁸ We adopt, for the reasons she stated, the judge's denial of that remedy.

¹⁹ In her initial decision, the judge found that John Huizinga's statement to Local 357 Business Manager Robert Williams that he intended to "get even with you" occurred in a conversation in the spring of 1999. In her supplemental decision, the judge stated that this conversation took place in the spring of 2000. The record indicates that the statement was made in the spring of 1999, and we so find.

ing that the Respondent “has advanced no reason, nor did it plead any reason in its lawsuit, for the District Court to vacate or ignore the arbitration decision,” and (3) ignoring the court of appeals’ decision recognizing merit in its interpretation of the contract. The Respondent defends its contract claim against SMWIA on the ground that the claim was based on its belief that “the affiliation” between Local 7 and SMWIA was enough to implicate the latter in Local 7’s breach of contract. The Respondent asserts that it “voluntarily dismissed” the contract claim against the SMWIA “upon determining that the affiliation between the International [and Local 7] was insufficient to implicate the International Union in a breach of contract committed by one of its Locals.”

Regarding the secondary boycott claims, the Respondent argues that the judge erred in (1) concluding that the Respondent “filed claims of collusion between the Unions with no factual basis whatsoever,” and (2) stating that the Respondent’s secondary boycott claims were of “obvious primary nature.” The Respondent further argues that no defendant sought sanctions under Rule 11 of the Federal Rules of Civil Procedure.

Regarding its motive in filing the lawsuit, the Respondent argues that the two principal bases for the judge’s finding of retaliatory motive were bases rejected by the Supreme Court in *BE&K*: (1) the fact that the lawsuit was directed at protected activity and (2) the presence of antiunion animus at the time the suit was filed. According to the Respondent, because an administrative law judge found that the Respondent lawfully withdrew recognition from Local 357 in July 1998, it had no reason to retaliate against that entity thereafter. Moreover, Local 7, the primary target of the lawsuit, was not a party to any of the prior Board cases.

In a joint answering brief, Local 7 and Local 357 argue that the Respondent’s contract claim against Local 7 was “brought without regard to the fact that [the Respondent] had never timely sought to vacate the final and binding [NJAB] panel decision.” Thus, they argue, the contract claim was baseless because the “failure to properly move to vacate the NJAB award made such a claim legally groundless.” Local 7 and Local 357 further argue that the claims brought against Local 357 were baseless because there was no evidence of collusion and the secondary boycott claims failed as a matter of law due to the absence of a secondary employer. These unions also argue there is ample evidence of retaliatory motive, citing the reasons relied upon by the judge.

The UA also filed an answering brief, arguing that it was sued in retaliation for the protected activities undertaken by its affiliate.

In support of their cross-exceptions, Local 7, Local 357, and the UA contend that the judge erred in not awarding reimbursement of all costs and expenses incurred in litigating the unfair labor practice case.

The General Counsel, relying on *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983), argues that “a lawsuit is baseless if it presents unsupportable facts or unsupportable inferences from facts, and if it presents ‘plainly foreclosed’ or ‘frivolous’ legal issues.” Applying this standard, the General Counsel contends that “[t]he bare pleadings alone establish that the lawsuit was baseless.” Specifically, the secondary boycott claims were baseless because the unions’ alleged conduct was directed at the Respondent, not a secondary employer, and because the Respondent “failed to make a reasonable pre-suit inquiry of the Unions regarding their dealings together.” The contract claim was baseless because the Respondent did not have a contract with SMWIA and because the arbitration decision in favor of Local 7 was “final and binding,” as “courts ‘do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.’”²⁰ The General Counsel argues that the Respondent’s baseless lawsuit was brought “in retaliation against the Unions for engaging in protected concerted activity.”

V. DISCUSSION

In considering under what circumstances the filing and maintenance of a lawsuit could be found to constitute an unfair labor practice, the Supreme Court, in *Bill Johnson’s*, supra, distinguished between ongoing lawsuits and completed lawsuits. The Court in *Bill Johnson’s* held that, for the Board to find an *ongoing* lawsuit to be an unfair labor practice, “[r]etaliatory motive and lack of reasonable basis are both essential prerequisites.”²¹ As to *completed* lawsuits, however, the *Bill Johnson’s* Court indicated that if the lawsuit “result[ed] in a judgment adverse to the plaintiff . . . and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief.”²²

Nineteen years later, in *BE&K Construction Co. v. NLRB*,²³ the Court modified the rule governing completed lawsuits. The Board, consistent with *Bill Johnson’s*, had found a violation based on an employer’s filing and prosecution of an unsuccessful, retaliatory lawsuit.²⁴ The Court disagreed. To avoid a potential conflict with the First Amendment right to petition the government for

²⁰ Quoting *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

²¹ 461 U.S. at 748.

²² *Id.* at 749.

²³ 536 U.S. 516 (2002).

²⁴ 329 NLRB 717 (1999).

redress of grievances, the Court adopted a limiting construction of Section 8(a)(1): “Because there is nothing in the statutory text indicating that [Section 8(a)(1)] must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so.”²⁵ Therefore, the Court held the Board’s standard invalid, as it allowed the Board to penalize “all reasonably based but unsuccessful suits filed with a retaliatory purpose.”²⁶

On remand, the Board held that “the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit.” *BE&K Construction Co.*, 351 NLRB 451, 456 (2007) (*BE&K II*). Turning to the determination of reasonable basis, the Board held that “a lawsuit lacks a reasonable basis, or is ‘objectively baseless,’ if ‘no reasonable litigant could realistically expect success on the merits.’”²⁷

In *Ray Angelini, Inc.*,²⁸ a decision issued concurrently with *BE&K II*, the Board stated that it would also be “guided by the Court’s discussion, in *Bill Johnson’s*, of the reasonable-basis inquiry in the context of ongoing suits.”²⁹ In *Bill Johnson’s*, the Court indicated that finding a lawsuit to lack a reasonable basis would be warranted “if the plaintiff’s position is plainly foreclosed as a matter of law or is otherwise frivolous”³⁰ or if it rests on “plainly unsupported [factual] inferences” or “patently erroneous submissions with respect to mixed questions of fact and law.”³¹ Conversely, the Court indicated that a lawsuit could not be held to lack a reasonable basis “if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts”³² or if the lawsuit raises “genuine . . . legal questions”³³ for which there is “any realistic chance that the plaintiff’s legal theory might be adopted.”³⁴ The Court also stated: “In making reasonable-basis determinations, the Board may draw guidance

from the summary judgment and directed verdict jurisprudence.”³⁵

A. Reasonable Basis

Applying the principles set forth in *BE&K II* and *Ray Angelini* to the present case, we find, in agreement with the judge, that the Respondent’s lawsuit lacked a reasonable basis. Both the district court and the court of appeals found that the Respondent’s lawsuit failed to state a claim upon which relief could be granted. The court of appeals expressly applied the stringent standard required for such a dismissal, noting that a “complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”³⁶ Although the district court’s dismissal of the Respondent’s lawsuit and the court of appeals’ affirmance of that dismissal do not necessarily establish that the lawsuit lacked a reasonable basis, the rationale set forth by those courts appropriately bears on that question and militates in favor of such a finding.³⁷ We shall, however, independently analyze whether the lawsuit lacked a reasonable basis.

1. Counts I, II, and IV of the lawsuit

Counts I, II, and IV of the Respondent’s lawsuit turned on allegations that Local 357 and the UA violated Section 8(b)(4) of the Act. Section 8(b)(4), in relevant part, makes it unlawful for a union to “threaten, coerce or restrain” a neutral third party, or induce such a third party’s employees to withhold their services, in order to bring indirect pressure to bear on an employer engaged in a labor dispute with the union. The target of Section 8(b)(4)’s prohibition is the imposition of coercive sanctions “not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it” in order to pressure the third party to cease doing

²⁵ 536 U.S. at 536.

²⁶ Id. The Court specifically refrained from deciding “whether the Board may declare unlawful any unsuccessful but reasonably based suits 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, since the Board’s standard does not confine itself to such suits.” Id. at 536–537.

²⁷ Id. at 457, quoting *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, 60 (1993).

²⁸ 351 NLRB 206 (2007).

²⁹ Id. at 208.

³⁰ 461 U.S. 731, 747.

³¹ Id. at 745 fn. 11.

³² Id. at 745.

³³ Id. at 746.

³⁴ Id. at 747.

³⁵ Id. at 745 fn. 11.

³⁶ See fn. 9, above (emphasis added).

³⁷ As noted above, the Supreme Court in *Bill Johnson’s* suggested that the Board “draw guidance from the summary judgment and directed verdict jurisprudence” in determining whether a lawsuit had a reasonable basis. 461 U.S. at 745 fn. 11. The showing of lack of merit required in order to prevail on a Rule 12(b)(6) motion to dismiss is more demanding than the showing required for summary judgment or a directed verdict in that the allegations of the complaint are assumed to be true for purposes of a motion to dismiss, while a plaintiff must have evidence to support its material allegations in order to survive a motion for summary judgment or directed verdict. We also note that the courts’ holdings that the Respondent had failed to state a claim were based on the more demanding and now superseded *Conley v. Gibson* standard. See *supra* fn. 9. The court’s conclusions thus tend to support our findings concerning the lack of a reasonable basis for the Respondent’s lawsuit.

business with the primary employer.³⁸ Simply put, as a matter of black-letter law, it is impossible to state a secondary-boycott claim without an allegation of coercive conduct directed at a neutral third party. Nevertheless, the Respondent's complaint failed to allege that the Unions directed any of their activities at third parties.

Rather, the substance of the Respondent's complaint was that Local 7 denied the Respondent itself—not a neutral third party—job targeting funds. Although count II of the Respondent's complaint alleged that its customers or potential customers were “restrained,” the complaint specifically alleges that this “restraint” resulted from the denial of job targeting funds to Respondent. The complaint does not allege that any of the Unions coerced any of the Respondent's customers or potential customers or even had any contact with them. As the court of appeals observed: “Allied does not allege that UA Local 337/357 made any contact with those customers, much less threatened, coerced, or restrained them. Nor were any employees induced to withhold their services from those potential customers.”³⁹ Count II lacks the most basic element of a secondary-boycott claim—an allegation of coercion directed against a neutral third party. Thus, count II fails to state a claim and Respondent did not and could not make a good-faith argument for the extension of existing law to reach the alleged conduct.

Similarly baseless was the Respondent's allegation in count IV of its complaint that Local 357 and the UA coerced or restrained the Respondent's plumbing, pipefitting, and sheet metal employees. Again, the complaint specifically alleges that this coercion and restraint resulted from the denial of job targeting funds to Respondent. The complaint does not allege that any of the Unions coerced any of the Respondent's employees in an effort to induce them to cease doing business with the Respondent. Accordingly, this count also failed to state a claim and lacked a reasonable basis in law.

Finally, count I's claim that Local 357 and the UA violated Section 8(b)(4) by pressuring Local 7 to withhold job targeting funds to force Local 7 itself to “cease doing business” with the Respondent is also baseless. This allegation necessarily failed because, as the court of appeals found, Local 7 was not “doing business” with the Respondent within the meaning of Section 8(b)(4).⁴⁰

³⁸ *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667, 672 (1961) (citation omitted).

³⁹ *Allied Mechanical Services v. Local 337*, above, 2000 WL 924594 at *4.

⁴⁰ In our view, Local 7 was plainly not a neutral secondary employer for the purposes of Sec. 8(b)(4). The court of appeals noted this argument but did not appear to rely on it. *Id.* at *5, fn. 6.

Moreover, even if the bargaining relationship between a union and an employer could arguably be considered “doing business” within the meaning of Section 8(b)(4) and denying Respondent job targeting funds could be considered “ceas[ing] doing business,” Respondent was not able at trial before the administrative law judge to identify any factual basis for the conclusory allegation in its complaint that the UA and Local 357 “threatened and/or coerced” Local 7 to deny it such funds. The Respondent's claim against the UA was baseless for an additional reason, because the Respondent failed to allege facts indicating that Local 357 or Local 7 was acting as an agent of the UA.⁴¹

For these reasons, in light of the Respondent's failure to plead facts that might even arguably make out a violation of Section 8(b)(4) and the Respondent's failure to make a good-faith argument for the extension or modification of existing law to reach the alleged conduct, we find, independent of the district court's dismissal of the complaint and the court of appeals' affirmance of that dismissal, that no reasonable litigant could have expected success on the merits of counts I, II, and IV of the lawsuit.⁴²

2. Count III of the lawsuit

Count III of the Respondent's lawsuit alleged that Local 7 and SMWIA breached Local 7's collective-bargaining agreement by denying the Respondent job targeting funds for the Kalamazoo Red Cross job, the Kalamazoo Chamber of Commerce job, and the YMCA Sherman Lake project.⁴³ The Respondent grieved the denial of job targeting funds for the Kalamazoo Red Cross job and pursued the grievance through the last step of the grievance-arbitration procedure, an award by the NJAB. Therefore, to prevail on count III of its lawsuit, the Respondent had to obtain vacatur of this award.⁴⁴

⁴¹ The Respondent itself apparently recognized the infirmity of this allegation, as it declined to pursue the allegation in its appeal to the court of appeals. As noted above, the UA was dismissed from the appeal pursuant to a stipulation of the parties.

⁴² We reject as legally meritless the Respondent's defense that no defendant attempted to obtain sanctions under Rule 11 of the Federal Rules of Civil Procedure. There is no requirement that a party seek such sanctions in order to establish before the Board that a lawsuit lacked a reasonable basis.

⁴³ In her supplemental decision, the judge erroneously indicated that the Respondent's contract claim was filed against all four Unions. The contract claim was filed solely against Local 7 and SMWIA. Consequently, we do not adopt the judge's finding that the Respondent's contract claim was baseless because the Respondent did not have a contract with Local 357 or the UA.

⁴⁴ Although the Respondent's complaint did not expressly seek to vacate the NJAB award, the district court and the court of appeals treated it as doing so.

The Respondent, however, was unable to assert any basis for that form of extraordinary relief.

The NJAB's award was "final and binding" and, under well-established principles, could not be overturned unless it failed to derive its essence from the collective-bargaining agreement.⁴⁵ This is a far stricter standard than mere error. As the court of appeals explained, "an award fails to derive its essence from a CBA when it conflicts with express terms of a CBA; imposes additional requirements not expressly provided for in the CBA; is not rationally supported by or derived from the CBA; or is based upon 'general considerations of fairness and equity,' rather than the exact terms of the CBA."⁴⁶ The Respondent was unable to point to any way in which the NJAB's award met any of these criteria for vacatur. The "most favored nations" clause of the contract, on which the Respondent relied, made no mention of job targeting funds, nor did any other provision of the contract. Thus, the Respondent had no basis on which to claim that the NJAB award conflicted with any express term of the contract. The Respondent thus could and did contend only that the NJAB had interpreted the contract incorrectly. However, as the court of appeals pointed out, quoting the Supreme Court's decision in *Paperworkers v. Misco, Inc.*, courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."⁴⁷ Rather, the Supreme Court has made clear that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."⁴⁸

Indeed, the Respondent's entire argument in its brief on exceptions, states:

[I]n light of the clear violation of the 'most favored nations clause' of the collective bargaining agreement, AMS justifiably believed that the decision of the NJAB did not 'draw its essence' from the agreement, and it was confident of its ability to succeed on the merits.

⁴⁵ *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598–599 (1960).

⁴⁶ *Allied Mechanical Services v. Local 337*, above, 2000 WL 924594 at *6 (citation omitted).

⁴⁷ *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

⁴⁸ *Id.* at 38. The Respondent and our dissenting colleague point to the court of appeals' statement that, had the court been free to interpret the contract, it would have been inclined to view the claim differently than did the NJAB. The court's statement, however, fails to show that count III of the Respondent's lawsuit was reasonably based. In its lawsuit, the Respondent had to show not simply that the arbitration panel's decision was incorrect, but that it "failed to derive its essence from the collective-bargaining agreement," a far more demanding standard.

This is an assertion, but not an argument. It provides us with no basis for rejecting the judge's conclusion that the Respondent's contention in its lawsuit that the NJAB's award did not draw its essence from the agreement was baseless.

Moreover, although count III of the Respondent's lawsuit alleged that Local 7 and SMWIA breached the contract by denying the Respondent job targeting funds for the Kalamazoo Chamber of Commerce job and the YMCA Sherman Lake project, the Respondent failed to grieve the denial of job targeting funds for either job. Thus, the Respondent failed to exhaust its contractual remedies regarding those projects, a necessary predicate for pursuing the alleged contract breach in court. In any case, we agree with the court of appeals that if, as the Respondent contended, the NJAB's denial of the grievance on the Red Cross job showed that it would have ruled the same way on the other two projects, the NJAB award would have precluded the Respondent from prevailing on any of its contract claims, for the reasons discussed above.

Additionally, count III of the Respondent's lawsuit alleged that SMWIA, as well as Local 7, violated the collective-bargaining agreement through Local 7's denial of job targeting funds to the Respondent. However, the complaint did not allege that SMWIA negotiated or was a signatory to the Local 7 agreement and "fail[ed] to allege any affirmative conduct or undertaking by [SMWIA] which would provide a basis for subjecting it to liability for the actions of Local 7."⁴⁹ The facts alleged by the Respondent in the complaint thus did not provide a reasonable basis for a claim against SMWIA, and Respondent pointed to no other facts at trial.

In sum, the Respondent had no reasonable basis for asserting that the NJAB's award met the criteria necessary for overturning an arbitration award with respect to the denial of job targeting funds for the Red Cross job. In addition, the Respondent failed to exhaust its contractual remedies with respect to the denial of job targeting funds for the Chamber of Commerce job and the YMCA project. Further, the Respondent had no basis for including SMWIA as a defendant in its lawsuit. Given these obvious and fatal defects in the Respondent's allegations, we find that no reasonable litigant could realistically have expected success on the merits of count III of the lawsuit.

⁴⁹ *Allied Mechanical Services v. Plumbers Local 337*, No. 4:98-CV-113, slip op. at 11. The district court therefore dismissed the complaint with respect to SMWIA, and the Respondent declined to appeal that ruling.

B. Retaliatory Motive

We also find, in agreement with the judge, that the Respondent filed its lawsuit with a motive to retaliate against the Unions for engaging in union and other concerted activities protected by Section 7 of the Act.

As described above, the Respondent had a tumultuous relationship with Local 357. Initially, the Respondent's 1991 agreement to recognize and bargain with Local 357 resulted from the settlement of an unfair labor practice complaint alleging that the Respondent had committed violations of the Act so serious that a *Gissel* bargaining order was warranted.⁵⁰ Since 1991, the Respondent not only has failed to come to terms on a contract with Local 357 but has repeatedly committed unfair labor practices against Local 357 and the employees it represented. The Respondent unlawfully refused to reinstate 9 striking employees in 1993, 6 striking employees in 1996, and 10 striking employees in 1998. In 1995–1996, the Respondent unlawfully engaged in overall bad-faith bargaining, discharged six striking employees, made unilateral changes, bypassed the Union, and refused to furnish requested information to the Union. In 1998, the Respondent unlawfully refused to hire four job applicants who were Local 357 members, failed to provide information to the Union, withdrew recognition from Local 357, and unilaterally revised its job application procedure. Thus, we agree with the judge that the Respondent's conduct over a period of years demonstrated deep, enduring, and unlawful animus against Local 357, its supporters, and their protected activities.

As the judge discussed, in the months preceding the Respondent's August 1998 lawsuit, a number of events occurred that may well have heightened the Respondent's motivation to retaliate against Local 357 or otherwise demonstrated the Respondent's ill will toward Local 357. An administrative law judge's decision in February 1998 found that the Respondent committed multiple violations of the Act and ordered the Respondent to reinstate striking employees with backpay and to bargain in good faith.⁵¹ In March 1998, the Respondent refused again to reinstate striking employees. In April 1998, Local 357 filed an unfair labor practice charge over this refusal. In July 1998, the Respondent withdrew recogni-

tion from Local 357. The Respondent then filed its lawsuit just 13 days after the withdrawal of recognition.⁵² The Respondent's continuing hostility towards Local 357 during the course of the lawsuit was made plain by Vice President Huizinga's statement in the spring of 1999 to Local 357 Business Manager Williams that he intended to "get even with" Local 357.

Although the Respondent's animus was clearly demonstrated in its relationship with Local 357, that hostility also animated the Respondent's inclusion of the UA, Local 7, and SMWIA as defendants in the lawsuit as well. The UA, as the parent union of Local 357, was involved in Local 357's dealings with the Respondent. And Local 7 cooperated with Local 357 by denying job targeting funds to the Respondent because of the Respondent's failure to reach a contract with Local 357. Thus, Local 7 was clearly connected to Local 357 in the latter's relations with the Respondent. SMWIA was associated with these events as Local 7's parent union. Accordingly, we find that the Respondent had a retaliatory motive in bringing the lawsuit against all four defendants.

Independently, the lawsuit was also retaliatory on its face. It sought an award of money damages from the unions based on their statutorily protected conduct—acting in concert to induce the Respondent via lawful pressure to reach an agreement with Local 357. Our prior decisions make clear that operating a job targeting program is protected activity,⁵³ and the Respondent does not contend otherwise. Absent violation of some law—and, as discussed above, Respondent failed to make even a colorable claim of such a violation—for the four unions to act in concert to use the job targeting funds to assist Local 357 members to obtain a contract with the Respondent is protected activity, and, thus, the lawsuit

⁵⁰ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The complaint resolved by the settlement alleged that a majority of the unit employees had designated Local 357 as their collective-bargaining representative and that the Respondent had committed violations of the Act that were so serious that the possibility of conducting a fair election was slight and the employees' sentiments regarding representation would be better protected by ordering the Respondent to recognize and bargain with Local 357. See *Allied Mechanical Services*, 351 NLRB 79, 80 (2007).

⁵¹ *Allied Mechanical Services*, 332 NLRB 1600, 1605 (2001).

⁵² We find no merit in the Respondent's contention that it had no reason to retaliate against Local 357 after an administrative law judge found lawful its July 1998 withdrawal of recognition from Local 357. The judge's decision in question issued in February 2000, well after the Respondent filed its lawsuit. See *Allied Mechanical Contractors, Inc.*, 341 NLRB 1084, 1089 (2004). Indeed, the Respondent's lawsuit at that point was pending before the court of appeals. Moreover, the General Counsel excepted to the judge's finding that the Respondent's withdrawal of recognition from Local 357 was lawful, so the fate of the Respondent's withdrawal of recognition remained at issue after the judge rendered his decision. Consequently, and contrary to the Respondent's contention, the judge's February 2000 decision did not retroactively extinguish any reason that it might have had to retaliate against Local 357.

⁵³ See *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997); *Associated Builders & Contractors*, 331 NLRB 132 (2000), vacated in part not relevant here pursuant to settlement 333 NLRB 955 (2001).

aimed at sanctioning that conduct was retaliatory on its face.

Additionally, the Respondent's lawsuit specifically alleged that "Local 337 has filed numerous unfair labor practice charges and engaged in mini-strikes and other activities in an attempt to disrupt and damage the business operations of AMS [the Respondent]." Filing of unfair labor practice charges and engaging in strikes are, of course, activities generally protected by Section 7 of the Act. Indeed, the Respondent unlawfully discharged and refused to reinstate the participants in the very "mini-strikes" its complaint referenced. Thus, the Respondent's own complaint by its very terms demonstrated that its lawsuit was motivated by a desire to retaliate against the protected activity of Local 357 and employees it represented.

Finally, we agree with the judge that the lawsuit's obvious lack of merit is further evidence that the Respondent sought to retaliate against the Unions by imposing on them the costs and burdens of the litigation process.

Our dissenting colleague argues that, even if the Respondent's lawsuit was baseless, the Board must have evidence of retaliatory motive beyond the fact that the lawsuit was aimed directly at enjoining protected conduct. Of course, such evidence is present here, as shown above. But, in any event, our colleague's argument is based on a misunderstanding of the context of the language he quotes from both *BE&K* and *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26 (D.C. Cir. 2001).

The limited question before the Court in *BE&K* was whether the Board could hold that a *nonbaseless*, but unsuccessful lawsuit violated the Act, in light of the Court's concerns about the significant constitutional question involved in such a holding. In fact, the Court expressly disclaimed the holding that our colleague attributes to it: "[W]e need not resolve whether objectively baseless litigation requires any 'breathing room' protection, for *what is at issue here are suits that are not baseless in the first place.*"⁵⁴ Thus, the language quoted by our colleague was not part of a discussion of what evidence of retaliatory motive is necessary to hold that a baseless lawsuit violates the Act.⁵⁵ Rather, it was part of

a discussion of whether the retaliatory motive element, as defined by the Board, affected the Court's analysis of whether a *nonbaseless* lawsuit could be held to violate the Act without raising a significant First Amendment question. As the Court explained, "Because the Board confines its penalties to unsuccessful suits brought with a retaliatory motive, . . . we must also consider the significance of that particular limitation."⁵⁶ But, in the present case, the lawsuit was not simply "unsuccessful," it was baseless. The Court's analysis, quoted by our colleague, simply reached the conclusion that the retaliatory motive element did not prevent the Board's then applicable, two-prong test from reaching "a substantial amount of genuine petitioning."⁵⁷ The inapplicability of the quoted analysis to this case is made clear by the last two sentences in the paragraph quoted by our colleague:

Indeed, in this very case, the Board's first basis for finding retaliatory motive was the fact that petitioner's suit related to protected conduct that the petitioner believed was unprotected. *If such a belief is both subjectively genuine and objectively reasonable*, then declaring the resulting suit illegal affects genuine petitioning.

Id. at 533–534 (emphasis added) (citation omitted). Here, as we explained above, the lawsuit was not *objectively reasonable*. *BE&K* therefore does not resolve the question of what evidence of retaliatory motive is required, as suggested in the dissent.

Petrochem, decided before *BE&K*, is inapposite for the same reasons. Moreover, the court's conclusion, as quoted by our colleague, is based on an incorrect assumption: that all of the cases at issue involve "lawsuit[s] seeking to recover damages caused by union activity."⁵⁸ Contrary to that explicit assumption, the universe of suits subject to a charge under *Bill Johnson's* and *BE&K* is not limited to those based expressly on "union activity." For example, employees may attempt to form a union and their employer may, in retaliation, sue them for conversion of property unrelated to the organizing effort. If the conversion action was proved to be baseless and filed in retaliation for protected activity, the filing and prosecution of the action would constitute a violation of the Act notwithstanding that it did not target protected activity on the face of the complaint. Thus, the language quoted in the dissent, that "the Board's directly-in-response-to factor exists in every case,"⁵⁹ is inaccurate. In an unfair

⁵⁴ 536 U.S. at 531 (emphasis added).

⁵⁵ The language quoted by our colleague is the following: "For example, an employer may file suit to stop conduct by a union that he reasonably believes is illegal under federal law, even though the conduct would otherwise be protected under the NLRA. As a practical matter, the filing of the suit may interfere with or deter some employees' exercise of NLRA rights. Yet the employer's motive may still reflect only a subjectively genuine desire to test the legality of the conduct. Indeed, in this very case, the Board's first basis for finding retaliatory motive was the fact that petitioner's suit related to protected conduct that the petitioner believed was unprotected. If such a belief is

both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning." 536 U.S. at 533–534 (citation omitted).

⁵⁶ Id. at 533.

⁵⁷ Id.

⁵⁸ 240 F.3d at 32.

⁵⁹ Id.

labor practice prosecution concerning the hypothetical suit for conversion, extrinsic evidence of retaliatory motive would be required. In this case, evidence of retaliatory motive appears on the face of the complaint.

It should be clear that the implications of our colleague's position are that an employer can initiate an objectively baseless action aimed directly at clearly protected conduct—for example, suing employees for trespass in state court seeking an injunction and damages on the grounds that the employees discussed forming a union during a break in the employees' break room—and the lawsuit would not “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7” absent some additional evidence of retaliatory motive. Such a result is not suggested by either *BE&K* or *Petrochem*, is not required by the First Amendment, and would be jarringly inconsistent with the words and purpose of Section 8(a)(1).

Our colleague's discounting of other evidence of retaliatory motive based on *BE&K* is similarly flawed. Contrary to our colleague, *BE&K* did not rule out use of an employer's animus toward a union as evidence that the employer's lawsuit against the union had a retaliatory motive. Rather, the Court's language quoted by our colleague on this point was again part of the Court's discussion of whether the retaliatory motive element affected its analysis of whether a nonbaseless lawsuit could be held to violate the Act without raising a significant First Amendment question.⁶⁰ Thus, the Court's focus was on whether the retaliatory motive element served to weed out cases in which the disputes were “genuine,” not on whether animus was proper evidence of retaliatory motive. And, again, the Court's sentence at the end of the excerpt quoted by our colleague made clear that its discussion was in the context of nonbaseless lawsuits: “As long as a plaintiff's purpose is to stop conduct he *reasonably believes* is illegal, petitioning is genuine both objectively and subjectively.”⁶¹ Thus, contrary to our colleague, the question of what evidence would suffice to prove retaliatory motive—and, particularly, what evidence would suffice to prove retaliatory motive when an

⁶⁰ The language quoted by our colleague is the following: “The Board also claims to rely on evidence of antiunion animus to infer retaliatory motive. . . . Yet ill will is not uncommon in litigation. Cf. *Professional Real Estate Investors*, 508 U.S. [49], at 69 . . . (Stevens, J., concurring in judgment) (‘We may presume that every litigant intends harm to his adversary’). Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation. But that does not mean such disputes are not genuine. As long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively.” *BE&K*, 536 U.S. at 534.

⁶¹ *Id.* (emphasis added).

action is baseless - was not germane to the Court's analysis in *BE&K*, and the Court did not rule on that issue.

In sum, we find ill-founded our colleague's contentions that *BE&K* bars the Board from relying on both the fact that a baseless lawsuit directly targets protected conduct and the fact that the employer-plaintiff bears animus toward the union-defendant and, even more specifically, toward its protected activity, as evidence of retaliatory motive. Our decision does not, as our colleague would have it, “confine” the Supreme Court's critique of the Board's retaliatory motive analysis to the specific issue presented in *BE&K*. Rather, our decision merely takes at its word the Court's statement that “what is at issue here are suits that are not baseless in the first place.”⁶² Indeed, were our colleague correct that evidence like that introduced in this case cannot prove retaliatory motive, it is difficult to imagine what possible evidence of a lawsuit's retaliatory motive might remain, short of an employer's bald admission that it filed the lawsuit to retaliate against the union's and the employees' statutorily protected conduct. We cannot assume that the *BE&K* Court intended to make it impossible even for baseless lawsuits brought with a retaliatory motive to be found to violate the Act.

Finally, we agree with our colleague that a suit's baselessness alone cannot suffice to demonstrate retaliatory motive. But filing a baseless action nevertheless suggests such a motive, and we will continue to consider it one factor in our analysis.

In sum, for the foregoing reasons, we find that the Respondent's allegations in counts I, II, and IV of its lawsuit, that Local 357 and the UA violated Section 8(b)(4) by inducing Local 7 to withhold job targeting funds from the Respondent, lacked a reasonable basis. The Respondent's allegations in count III of its lawsuit, that Local 7 and SMWIA violated Local 7's collective-bargaining agreement by withholding such funds from the Respondent, also lacked a reasonable basis. We further find that the Respondent initiated and maintained the lawsuit against all four Unions to retaliate against activity protected by Section 7 of the Act. Accordingly, we agree with the judge that the Respondent's filing and maintenance of its lawsuit violated Section 8(a)(1).

ORDER

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, Allied Mechanical Services, Inc., Grand Rapids and Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

⁶² *Id.* at 531.

1. Cease and desist from

(a) Filing and prosecuting lawsuits with causes of action against Local 7, Local 337/357, SMWIA, and the UA that lack a reasonable basis and are motivated by an intent to retaliate against activity protected by Section 7 of the Act.

(b) In any other 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) Reimburse Local 7, Local 337/357, SMWIA, and the UA for all legal and other expenses incurred in the defense of the Respondent's lawsuit in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(b) Within 14 days after service by the Region, post at its Kalamazoo, Michigan facility, copies of the attached notice marked "Appendix."⁶³ Copies of the notice, on forms provided by the Regional Director for Region 7, 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 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 August 4, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 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.

⁶³ 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."

MEMBER HAYES, dissenting.

Sheet Metal Workers Local 7 (Local 7) denied the Respondent job-targeting funds, which were otherwise routinely available to signatory employers such as the Respondent to subsidize bids against nonunion competitors, because the Respondent failed to reach a collective-bargaining agreement with an allied union, Plumbers Local 357 (Local 357). The Respondent filed a grievance, followed by the unsuccessful lawsuit at issue here, which brought several claims against the two local unions and their parent internationals and sought to stop the denial of the job-targeting funds and to recover damages.

My colleagues find that the Respondent's lawsuit violated Section 8(a)(1) of the Act because it lacked a reasonable basis and was retaliatory under the two-part standard adopted by the Board on remand following the Supreme Court's seminal decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). I agree with my colleagues that the Board's post-remand decision in *BE&K*,¹ which effectively implemented principles formulated by the Supreme Court based on its analogous antitrust jurisprudence, is the touchstone for our analysis. I also agree that the Board held in *BE&K* that a lawsuit targeting protected activity may only be found to be an unfair labor practice if it is both objectively baseless and was brought with the requisite kind of subjective retaliatory purpose.² However, I find that an unlawful retaliatory purpose has not been demonstrated in this case; thus, the Board lacks the authority to impose liability on the Respondent for invoking its First Amendment right to petition the courts for redress.³ My colleagues' contrary view makes plain their intent to render meaningless this second prong of the Board's *BE&K* analysis. I accordingly dissent.

The Majority Premises its Retaliatory Purpose Finding on Theories Previously Rejected by Reviewing Courts

1. The fact that the suit was filed in response to protected activity does not establish a retaliatory motive

My colleagues contend that the Respondent's lawsuit was "retaliatory on its face" because it sought damages from the Unions in response to their protected conduct. That premise for liability, however, has been explicitly rejected by reviewing courts, including the Supreme Court in *BE&K*, and cannot support a finding of retaliatory motive. While the *BE&K* Court found it unnecessary to define exactly what constitutes a retaliatory law-

¹ 351 NLRB 451 (2007).

² *Id.* at 458.

³ Given the absence of evidence of a subjective retaliatory purpose, I need not pass on my colleagues' application of the objectively baseless prong of the *BE&K* standard.

suit, the Court did discuss what does *not* suffice to prove a retaliatory purpose.⁴ In that discussion, the Court specifically renounced the Board's holding that the petitioner's lawsuit was retaliatory because it "related to protected conduct," explaining that the Board's view that a retaliatory suit is one "brought with a motive to *interfere* with the exercise of protected [NLRA §] 7 rights . . . broadly covers a substantial amount of genuine petitioning." The Court explained:

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

536 U.S. at 533. Similarly, presaging the Court's *BE&K* decision, the D.C. Circuit in *Petrochem Insulation, Inc. v. NLRB*,⁵ rejected the Board's determination that a retaliatory lawsuit is one filed "in response to" protected activity, observing:

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

In effect, the majority simply seeks to revive the discredited "directly-in-response-to" definition of retaliatory purpose. Because that theory has been definitively foreclosed, it cannot support the majority's imposition of unfair labor practice liability.⁶

⁴ 536 U.S. at 533–534.

⁵ 240 F.3d 26, 32 (D.C. Cir. 2001).

⁶ As my colleagues point out, a plaintiff may also target a union with a retaliatory lawsuit that does not on its face challenge protected activity. That is not the case here, and my colleagues' hypothetical example does nothing to undercut the D.C. Circuit's above analysis. My colleagues' further observation that *Petrochem* was decided before *BE&K*

2. The existence of animus does not an unlawful motive make

My colleagues also rely heavily on the Respondent's animus toward Local 357 to infer retaliatory motive,⁷ citing, for example, a statement by a Respondent official to a union business manager that he intended to "get even with you."⁸ This, too, is a rationale that the *BE&K* Court ruled out:

The Board also claims to rely on evidence of antiunion animus to infer retaliatory motive. . . . Yet ill will is not uncommon in litigation. Cf. *Professional Real Estate Investors*, 508 U.S. at 69 . . . (STEVENS, J., concurring in judgment) ("We may presume that every litigant intends harm to his adversary"). Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation. But that does not mean such disputes are not genuine. As long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively.⁹

Personal animosity, ill-will, and heated exchanges are routine features of labor disputes, as the Board itself has repeatedly observed.¹⁰ Consequently, invoking such evidence adds nothing to the analysis.¹¹ My colleagues

is immaterial as nothing in *BE&K* changed the aspect of the D.C. Circuit's analysis cited above. On the contrary, the *BE&K* Court echoed the D.C. Circuit's reasoning.

⁷ Although my colleagues attempt to distinguish their approach by characterizing the animus in question as "deep, enduring, and unlawful," the *BE&K* Court did not suggest that the degree of animus would or should affect its analysis.

⁸ My colleagues overlook the fact that this statement was made at least 7 months after the filing of the lawsuit and has no clear connection to the lawsuit itself.

⁹ *Id.* at 534.

¹⁰ See, e.g., *Franzia Bros. Winery*, 290 NLRB 927, 932 (1988) (Federal labor policy contemplates intemperate, abusive and insulting language in labor disputes); *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 58 (1966) (observing that both labor and management "often speak bluntly and recklessly" and that the Act manifests a congressional intent to encourage free debate on divisive labor issues).

¹¹ My colleagues would confine the Supreme Court's criticism of the Board's retaliatory motive analysis to the narrow issue presented in *BE&K*, notwithstanding that the overall issue in both *BE&K* and this case is the same: whether the Board's standard provides sufficient breathing room to avoid chilling the First Amendment right to petition. Precisely the same subjective retaliatory motive analysis applies in both contexts. Moreover, my colleagues' interpretation ignores the underlying logic of the Court's holding: namely that ill will is a common feature of litigation, is not unlawful, and is a poor gauge of an unlawful retaliatory intent. The Court's reasoning applies with equal force in either the antitrust or labor arena; in either setting, reliance on ill will to establish retaliatory motive fails to exclude from liability a substantial amount of genuine petitioning. My colleagues also claim that the Court "expressly disclaimed" the holding that I attribute to it, because the

are similarly mistaken in relying on the parties' inability to reach a contract as evidence of a retaliatory motive. The Act does not compel agreement in collective bargaining.

Further, much of the conduct cited by the majority occurred years before the Respondent initiated the lawsuit at issue, and it involved animus directed at Local 357, not Local 7, which has had a long and productive bargaining relationship with the Respondent. My colleagues nevertheless surmise that the Respondent sought to retaliate against Local 7 because of Local 7's "[cooperation] with Local 357" in denying job-targeting funds to the Respondent. In other words, they find that including Local 7 in the suit was retaliatory because it was directed at protected conduct (Local 7's cooperation with Local 357). As above, they erroneously equate the Respondent's genuine desire to test the lawfulness of the manipulation of the job targeting program with an unlawful *retaliatory* purpose.

Simply put, the mere fact that the Respondent may have been found to have committed unrelated unfair labor practices in the past does not establish that its motive for challenging the denial of job targeting funds through the instant litigation was unlawfully retaliatory.

3. The majority erroneously collapses the objective and subjective prongs of the *BE&K* standard

My colleagues further err in their analysis by asserting that "the lawsuit's obvious lack of merit is further evidence" of an impermissible retaliatory motive. In other words, in the majority's view, if a lawsuit is objectively baseless it must have been brought for a retaliatory purpose. Clearly, this reasoning conflates the two prongs of the *BE&K* test and subverts the very purpose of requiring a subjective component—namely to provide constitutionally required breathing space for objectively meritless but subjectively genuine petitioning. See *Petrochem v. NLRB*, supra, 240 F.3d at 32 ("Yet not all meritless suits against unions or employees amount to unfair labor practices. Otherwise, *Bill Johnson's* would not have required the Board to determine whether unmeritorious lawsuits were filed for retaliatory reasons."); *BE&K*, 351 NLRB at 458 fn. 53 ("As the *BE&K* Court noted, the

shield of the First Amendment may well encompass even some litigation that is objectively baseless."').¹²

Moreover, even if we were free to read the subjective component out of the *BE&K* test, which we are not, I disagree that the Respondent's lawsuit was so obviously lacking in merit as to demonstrate, as my colleagues contend, "that the Respondent sought to retaliate against the Unions by imposing on them the costs and burdens of the litigation process."¹³ Indeed, when the Respondent grieved its claim that the denial of the funds violated the Local 7 agreement, the Local Joint Adjustment Board deadlocked on the issue at the second step of the grievance process. Moreover, the Sixth Circuit, reviewing the district court's dismissal of the Respondent's lawsuit, stated "[w]ere we free to interpret the contract, or review the claims of factual or legal error . . . we would be inclined to view this claim differently than the [National Joint Adjustment Board (NJAB)]."¹⁴ Thus, it cannot be said that the Respondent's arguments that the denial of job targeting funds was illegal or that the arbitral decision was wrong were so baseless as to warrant an inference that its lawsuit was simply intended to impose costs

¹² My colleagues contend that my position is that an employer lawsuit directed at protected union activity could never be so patently frivolous on its face to warrant, alone, an inference of an unlawful retaliatory motive. Obviously, the fanciful hypothetical they proffer bears no reasonable relation to the facts presented here. But beyond that, my position is quite different. What I maintain is that both the Supreme Court and Board have said that a lawsuit targeting protected activity may only be found to be an unfair labor practice if it is *both* objectively baseless *and* brought with the requisite retaliatory purpose, and that the evidence they cite to establish the latter in this case is inadequate and contrary to precedent.

¹³ Though I reject the majority's reasoning and conclusion, I agree that the subjective retaliatory motive prong requires a showing that the litigation was subjectively intended to abuse process. In my view, this follows from the *BE&K* Court's decision, which cited with approval the antitrust sham litigation standard in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc. (PRE)*, 508 U.S. 49, 60–61 (1993), as well as the Board's remand decision, which explicitly adopted and applied the *PRE* definition of "objectively baseless." 351 NLRB at 457 ("In determining whether a lawsuit is reasonably based, we will apply the same test as that articulated by the Court in the antitrust context"). See also Justice Scalia's concurring opinion in *BE&K*, ("[T]he implication of our decision today is that, in a future appropriate case, we will construe the National Labor Relations Act (NLRA) in the same way we have already construed the Sherman Act; to prohibit only lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process.") (citing *PRE*, supra, 508 U.S. 60–61) (emphasis in original). The *PRE* subjective prong requires proof that the litigant's subjective motivation "conceals an attempt to interfere *directly* with the business relationships of a competitor . . . through the use [of] the governmental *process*—as opposed to the *outcome* of that process." *BE&K Construction Co. v. NLRB*, supra at 534, citing *PRE*, 508 U.S. at 60–61 (emphasis in original).

¹⁴ *Allied Mechanical Services v. Plumbers Local 337*, 221 F.3d 1333 mem. 2000 WL 924594 7 (6th Cir. 2000).

Court observed that it was not deciding whether objectively baseless litigation required any "breathing room" protection. The Court's acknowledgement that it was exercising prudential restraint in not deciding an issue not before it is no "disclaimer" of its criticism of the Board's retaliatory motive analysis. Further, the Board's determination on remand in *BE&K* that even objectively baseless lawsuits may indeed require such breathing room reinforces the relevance of the Supreme Court's *BE&K* critique to the instant case.

on the Unions.¹⁵ Rather, given the economic impact that the loss of the funds threatened, the timing of the litigation in relation to the denial of the funds, and the colorable nature of the Respondent's claims, the far more reasonable inference is that the Respondent's motive in filing the lawsuit was to compel Local 7 to make job targeting funds available—not to impose the burdens and costs of litigation or to otherwise retaliate against the unions.

In sum, the Supreme Court made clear in *BE&K* that due to the compelling First Amendment interests at stake, the Board's authority to penalize parties for petitioning the courts is narrowly circumscribed. Only where a suit is both objectively baseless and subjectively motivated to abuse process may the Board impose unfair labor practice liability. With respect to the subjective prong, I share the concurring view of Justices Scalia and Thomas in *BE&K* that the threat to First Amendment interests is particularly acute where political appointees, rather than article III courts, are passing judgment on the right of access to courts based upon a standard as ephemeral as subjective motive.¹⁶ Consequently, in applying the *BE&K* standard we must be vigilant in requiring compelling evidence that a lawsuit was subjectively motivated to abuse process through the imposition of litigation costs, rather than a genuine desire to test the lawfulness of particular conduct. Because such evidence is lacking here, and because my colleagues' application of the subjective prong fails in this critical aspect, I respectfully dissent.

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.

¹⁵ Further, contrary to the administrative law judge, it was not "impossible" for the Respondent to pursue its contract claims in court: the Respondent alleged in its district-court complaint that the NJAB decision "represents an infidelity to the essence" of the Local 7 contract, is "not supported in any way" by that agreement, and "unlawfully changes" that agreement. Respondent's contentions are consistent with the standard for reviewing arbitral decisions that the courts applied in this case. *Allied Mechanical Services v. Plumbers Local 337*, above at 6. Respondent's failure to meet these high standards says nothing about its purpose in bringing the lawsuit.

¹⁶ The Board echoed that concern in its *BE&K* remand decision. 351 NLRB at 458 ("Even the most consistent of legal standards and even-handed application cannot guarantee, when motive and intent must be discerned, that some objectively and subjectively reasonable lawsuits will not be found to violate the Act.").

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- 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 file and prosecute lawsuits with causes of action that lack a reasonable basis and are motivated by an intent to retaliate against activity protected by Section 7 of the Act against the Unions (Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; Local 7, Sheet Metal Workers International Association, AFL-CIO; Sheet Metal Workers International Association; and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO).

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

ALLIED MECHANICAL SERVICES, INC.

Thomas Doerr, Esq., for the General Counsel.
David M. Buday and Nathan D. Plantinga, Esqs., of Kalamazoo, Michigan, for the Respondent.
Tinamarie Pappas, Esq., for the Charging Party Local Unions.
Nicholas Femia, Esq., for the Charging Party International Union.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on December 5, 2000, in Grand Rapids, Michigan. The complaint alleges Respondent violated Section 8(a)(1) of the Act by filing a lawsuit against Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Local 357), Local 7, Sheet Metal Workers International Association, AFL-CIO (Local 7), and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the UA). The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the

documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Michigan corporation with an office and place of business in Kalamazoo, Michigan, where it is engaged in the construction industry as a mechanical contractor engaged in the fabrication and installation of commercial heating, ventilation, and air-conditioning systems. During a representative 1-year period, Respondent purchased and received at its Kalamazoo facility goods valued in excess of \$50,000 directly from points outside Michigan. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent employs plumbers and pipefitters as well as sheet metal workers at various locations and construction sites in southwest Michigan. For many years, it has had a collective-bargaining relationship and a collective-bargaining agreement with Local 7. In 1991, pursuant to an informal settlement agreement with the Board, Respondent recognized Local 337 of the UA (Local 337), the predecessor union to Local 357.¹

2. Prior Board cases

Respondent and Local 337 bargained for some years, but the relationship was marked by several strikes and the filing of numerous unfair labor practice charges. Those charges, which were pursued by the Board, resulted in additional settlement agreements as well as three unfair labor practice trials in 1994, 1997, and 1999. The first of these (*Allied I*) was decided by the Board on December 18, 1995,² and was later enforced by the Sixth Circuit Court of Appeals.³ In that case, the Board found Respondent had discriminated against nine employees in violation of Section 8(a)(3) by failing and refusing to reinstate them in June 1994 when work became available after the end of two strikes.

Subsequently, the second of these litigated cases (*Allied II*) was decided on February 9, 1998, by Administrative Law Judge (ALJ) Richard H. Beddow Jr., and affirmed in substantial part by the Board on January 5, 2001. The Board found, inter alia, that Respondent had discharged six employees because they had engaged in a strike, had failed and refused to reinstate employees after the end of a strike, had made unilateral changes in terms and conditions of employment without affording Local 337 notice or an opportunity to bargain over those changes, had

refused timely to furnish Local 337 with information it needed for bargaining, had bypassed Local 337 and dealt directly with employees, and by its overall conduct had failed to bargain in good faith.⁴ The Board issued a broad cease-and-desist order as part of its decision, based on the ALJ's findings that Respondent "has shown a proclivity to violate the Act and has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for employees statutory rights." Some of Respondent's conduct found to be in violation of the Act was its demand that striking employees return to work immediately on pain of being discharged, and its discharge of them when they did not return immediately.

An additional two unfair labor practice charges (*Allied III*) filed by Local 357 were tried in 1999 before Administrative Law Judge David L. Evans. In his decision issued on February 8, 2000, Judge Evans found that Respondent had violated Section 8(a)(3) of the Act by failing and refusing to reinstate 10 strikers, and by refusing to consider for employment or hire eight job applicants because of their union membership, activities, or desires.⁵ Judge Evans dismissed certain 8(a)(5) allegations in the same proceeding. He recommended that a broad Order be issued "because the Respondent has demonstrated a proclivity for violating the Act" and because the serious nature of the violations found "demonstrate a general disregard for employees' fundamental rights." Respondent's exceptions to this decision are currently pending before the Board.

3. Respondent's lawsuit

On August 4, 1998, Respondent filed a lawsuit in Federal district court against Local 7, Local 357, Local 337, the UA, and Sheet Metal Workers International Association, the International union with which Local 7 is affiliated (SMWIA), invoking the jurisdiction of the court under Sections 301 and 303 of the Labor Management Relations Act. The issue involved in the lawsuit was the denial by Local 7 of "job targeting funds" to Respondent in its bids on three different construction projects, a Red Cross building in Kalamazoo, the Kalamazoo Chamber of Commerce, and the YMCA Sherman Lake project during the period February through April 1998. These funds are Local 7 funds which are administered solely by Local 7. They are made available to certain contractors who are signatory to collective-bargaining agreements with Local 7 in an effort to permit these union-signatory contractors to bid competitively with nonunion contractors. It is undisputed that such job targeting funds had been made available to Respondent on certain job projects in the past. In its general allegations, Respondent alleged that Local 337 "has filed numerous unfair labor practice charges and engaged in mini-strikes and other activities in an attempt to disrupt and damage the business operations of [Respondent]." Respondent further alleged that Local 337, Local 357, and/or the UA had "threatened, coerced and/or otherwise restrained" Local 7 and/or SMWIA from providing job targeting funds to Respondent on the three jobs mentioned above, and that this was done because Respondent was not signatory to a collective-bargaining agreement with Local 337 or Local 357.

¹ On March 1, 1998, Local 337 was consolidated by the UA with Local 513 of the UA, and the resulting consolidated local union was designated as Local 357.

² 320 NLRB 32.

³ *Allied Mechanical Services v. NLRB*, 113 F.3d 623 (6th Cir. 1997).

⁴ 332 NLRB 1600 (2001).

⁵ JD-14-00.

Respondent alleged that by these actions all the named unions “collectively and/or individually, acted to coerce, threaten and/or otherwise restrain [Respondent] from doing business with” the builders of the three named job projects.

Respondent alleged four separate counts in its lawsuit. The first count alleged the UA, Local 357, and/or Local 337 violated Section 8(b)(4)(i) and (ii) of the Labor Management Relations Act by threatening or coercing Local 7 to withhold job targeting funds from Respondent. The second count alleged the same three unions violated Section 8(b)(4)(ii) by restraining potential customers at the three named job projects from doing business with Respondent. The third count alleged Local 7 and/or SMWIA had violated and breached the collective-bargaining agreement with Respondent by withholding the job targeting funds. The allegation was essentially based on the “most favored nations” clause of the collective-bargaining agreement. The complaint recounted the facts that Respondent had filed a grievance under the collective-bargaining agreement regarding the Red Cross job, which grievance had been denied at the highest step of the grievance procedure. Respondent further alleged that it did not file grievances with respect to the other two jobs in question, as that would have been futile in light of the decision on the first grievance. The fourth count alleged that the UA, Local 337, and/or Local 357 had violated Section 8(b)(4)(i) by threatening, coercing, or otherwise restraining Respondent’s employees by prohibiting Local 7 and SMWIA from providing Respondent with job targeting funds.

On various dates between January 19 and April 29, 1999, Charging Party Unions filed charges alleging Respondent’s lawsuit described above violated Section 8(a)(1) of the Act.

On March 30, 1999, Federal district court Judge Wendell A. Miles issued his Opinion and Order dismissing the entire lawsuit. Charging Party Unions and SMWIA had filed motions under Federal Rule of Civil Procedure 12(b)(6) to dismiss the lawsuit, and the judge granted these motions. The claims against SMWIA were dismissed on the ground that it was not signatory to any collective-bargaining agreement with Respondent. With respect to the allegations against Local 7, Judge Miles held that Respondent was bound by the result of the “final and binding” grievance procedure with regard to the Red Cross project, and had not exhausted its remedies with respect to the other two job projects. As to the secondary boycott allegations against the other unions, Judge Miles analyzed these claims and rejected Respondent’s theories, finding, *inter alia*, that Respondent was a primary employer, and actions alleged in the complaint were primary in nature. In the course of his analysis of the secondary boycott claims, Judge Miles stated that assuming Respondent’s pleadings to be the facts, and even if Local 337/357 had “threatened or coerced” Local 7 officials to ensure the withholding of job targeting funds from Respondent, “such an attempt to achieve solidarity with another union does not violate Sec. 8(b)(4). Coercion or not, in urging someone with decision-making authority in Local 7 to withhold the funds, the other unions were not attempting to induce or encourage Local 7 workers from performing their job duties.” Judge Miles granted Charging Party Unions’ motions and dismissed all three counts.

Respondent timely appealed Judge Miles’ decision to the Sixth Circuit Court of Appeals. While that appeal was pending, Respondent and the UA, on August 4, 1999, jointly petitioned the court for a dismissal of the lawsuit as to the UA.⁶ The UA was accordingly dismissed from the lawsuit on August 5, 1999. On June 26, 2000, the Sixth Circuit panel upheld the decision of Judge Miles, essentially for the reasons relied on by the district court.

At the trial of the instant matter, Robert E. Williams, currently the business manager of Local 357, testified that in the spring of 1999 he attended a meeting with John Huizinga, Respondent’s vice president and part owner. John Huizinga is the manager of Respondent who is generally responsible for labor relations and direction of Respondent’s plumbing and pipefitting employees. The meeting in question occurred at Kalamazoo Community College, and concerned a training program at the college. In a private conversation with J. Huizinga after the meeting, Williams raised the subject of a collective-bargaining agreement with Local 357, negotiations for which had been ended by Respondent in July 1998. J. Huizinga replied that he did not think there would ever be such an agreement. He went on to say that Local 357 should spend more time on the nonunion contractors which pay lower wages than Respondent, and leave Respondent alone. J. Huizinga continued that he respected Williams, but had a problem with Williams’ “two guys to the east of us,” with their ethics. J. Huizinga said that they had embarrassed him and his family and cost Respondent a lot of money. He concluded by saying that some day “you guys are going to make a mistake,” and that J. Huizinga intended to “get even with you.” John Huizinga did not testify, and therefore Williams’ testimony concerning this conversation is uncontradicted.

Daniel Huizinga, treasurer and part owner of Respondent, testified generally with regard to Respondent’s motive in filing the Federal district court lawsuit. D. Huizinga is the manager with primary responsibility for dealing with Local 7, and for participating in collective-bargaining negotiations within the employer association to which Respondent belongs, the Five Cities Association. Respondent has had a collective-bargaining agreement with Local 7 for many years. According to D. Huizinga, in approximately April 1998, was informed by Richard Fuller and other representatives of Local 7 that job targeting funds would not be available to Respondent for the three job project bids named in the lawsuit, because Respondent did not have a collective-bargaining agreement with Local 357. D. Huizinga testified that Respondent had a “strong belief that the UA was interfering and colluding with the Sheet Metal to deny us target funds . . . that the Sheet Metal people were being influenced by the Piping Union.”⁷ On cross-examination, D. Huizinga elaborated on his views by adding that he believed it to be in both Respondent’s and Local 7’s interest to provide job targeting funds and thereby retain work for Respondent’s Sheet

⁶ The parties’ stipulation requested, “The United Association should therefore be dismissed from the above-captioned appellate proceeding, each side to bear its own costs and fees.”

⁷ The transcript reflects the word “polluting” rather than “colluding,” and is corrected to reflect the correct word.

Metal workers. Also in response to cross-examination, he testified that he had no knowledge of what officials of Local 357 had said to Local 7 officials, that he does not know whether Local 7, by denying job targeting funds to Respondent, was expressing displeasure with Respondent's lower-than collective-bargaining agreement wages for pipefitters, and further, that he did not understand the concept of "solidarity" among unions. D. Huizinga admitted that he had no knowledge of any actual actions or conversations between Local 337/357 and Local 7. He further admitted that he had no knowledge whatever of any involvement the UA had in the situation. Despite Respondent's lack of knowledge of Local 337/357's and the UA's actions, Respondent filed its lawsuit against these Unions.

Respondent believed that the most-favored nations clause of its collective-bargaining agreement with Local 7 was violated by Local 7's denial of job targeting funds to Respondent. D. Huizinga testified that Respondent filed a grievance under the collective-bargaining agreement with respect to this contention, and related the fate of the grievance. After deadlocking at the second step, it was referred to the third and final step, where Respondent's grievance was denied. D. Huizinga testified that this third step was "final and binding" under the collective-bargaining agreement. Despite the denial of its grievance at this final and binding step of the grievance procedure, Respondent filed its lawsuit against Local 7 and its International affiliate.

B. Discussion and Analysis

1. The applicable law

In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Supreme Court set forth a framework for decisions involving lawsuits alleged to be violations of Section 8(a)(1) of the Act. The Court held that two elements must be proven in order to show that a particular lawsuit violates the Act. The lawsuit must be shown to be without merit, and the respondent must be shown to have filed the lawsuit in retaliation for protected concerted activities of the employees or unions being sued. The Board has stated that this case means that "if the plaintiff's lawsuit has been finally adjudicated and the plaintiff has not prevailed, its lawsuit is deemed meritless, and the Board's inquiry, for purposes of resolving the unfair labor practice issue, proceeds to resolving whether the respondent/plaintiff acted with a retaliatory motive in filing the lawsuit." *Operating Engineers Local 520 (Alberici Construction)*, 309 NLRB 1199, 1200 (1992), enf. denied on other grounds 15 F.3d 677 (7th Cir. 1994).

More recently, the Board applied the principles set forth in *Bill Johnson's* in deciding *BE&K Construction Co.*, 329 NLRB 717 (1999). In that case a company sued several unions in Federal district court, and the lawsuit was dismissed pursuant to summary judgment motions. The Board found that the lawsuit was both without merit and filed in retaliation for the unions' protected conduct, and therefore violated Section 8(a)(1) under the rationale enunciated in *Bill Johnson's*. The Board ordered the respondent to reimburse the unions for the legal fees they incurred defending against the Federal district court suit. In that case, the lawsuit was filed pursuant to Section 303 of the

Act, and alleged that the unions had violated Section 8(b)(4)(ii)(A) and (B) by four types of conduct. The suit alleged that the unions had lobbied in favor of a toxic waste measure, picketed and handbilled the respondent's premises, filed a State court suit concerning health and safety violations in bad faith, and filed meritless grievances.

The Board stated that after a lawsuit has been litigated to completion "the plaintiff has had his day in court and the state's interest in providing a forum for its citizens has been vindicated. . . . [I]f judgment has gone against the plaintiff . . . [and] if the Board finds that the suit was filed with retaliatory intent, it may find a violation and order appropriate relief. Moreover, the suit's having been found unmeritorious is a factor that the Board may take into account in determining whether it was filed in retaliation for the exercise of Section 7 rights." 329 NLRB at 718. In rejecting the respondent's contention that *Bill Johnson's* does not apply to unions, but only to individuals, the Board reasoned that it would be a perverse reading of the Act to protect employees only when they acted concertedly, but without a union, and were sued as such, but to withhold such protection when they had joined together in a union in order to act, and the union was thereafter sued. On this point, the Board relied upon *Diamond Walnut Growers*, 312 NLRB 61 (1993), enf. 53 F.3d 1085 (9th Cir. 1995); and *Dahl Fish Co.*, 279 NLRB 1084, 1110-1111 (1986), enf. mem. 813 F.2d 1254 (D.C. Cir. 1987).

2. Merit of Respondent's lawsuit

Respondent's lawsuit was dismissed on the pleadings by the district court, and that determination was upheld by the Sixth Circuit Court of Appeals. Even Respondent does not contend that its lawsuit was successful, and concedes in its brief that the General Counsel has sustained his burden of proving this element of a violation of Section 8(a)(1). In accordance with the precedent cited above, I find that Respondent's lawsuit was without merit.

3. Respondent's motive in filing the lawsuit

While there is no direct evidence concerning Respondent's motive in filing the lawsuit, there is a past history of extreme animus demonstrated by Respondent toward employees who supported Local 337/357 by striking, and towards that local union's organizing efforts at Respondent. This animus was demonstrated as recently as 1998, when Respondent failed to reinstate striking employees in March 1998, as found by Judge Evans in *Allied III*. While Respondent argued at trial that no reliance should be placed upon Judge Evans' findings, as the Board has not yet acted upon its exceptions to his decision, this argument is contrary to Board precedent. It is entirely proper for a judge hearing a subsequent proceeding to rely on the findings of another ALJ who has decided a case involving the same respondent. *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393 fn. 1 (1998) (ALJ relied upon findings of anti-union animus in prior case involving same respondent). I therefore do rely upon Judge Evans' findings that Respondent displayed hostility towards employees who supported the union and its concerted strike activities, and by its conduct evinced a disregard for employees' rights under the Act. I note that the time at which this conduct occurred was the spring of 1998, just a few

months before the instant lawsuit was filed in Federal district court. It is also noteworthy that ALJ Beddow's decision in *Allied II* issued in February 1998.

In April 1998, Local 357 filed the first charge against Respondent which ultimately was the subject of *Allied III* and of Judge Evans' decision. Respondent filed its lawsuit against the unions in August 1998. The initial pleading in that lawsuit complained of the unions' conduct in filing unfair labor practice charges and in striking, both activities protected by the Act. It also charged Local 7 with a collective-bargaining agreement violation despite the fact that the parties' dispute resolution mechanism had already decided that issue contrary to the complaint's allegations.

J. Huizinga's threat to "get even" shows a continuation of the same animus into the spring of 1999, at a time when Respondent's district court lawsuit had been dismissed, but was in the process of being appealed to the Sixth Circuit.

These four factors—the iteration in the lawsuit's pleadings of Local 337/357's protected activities of striking and of filing charges, the timing of the lawsuit, coming on the heels of an unfavorable ALJ decision and additional unfair labor practice charges in February through the spring of 1998, the deep hostility to employees' and the unions' protected conduct which had been found by the Board to have existed prior to 1998, and which continued to exist, as shown by J. Huizinga's remarks to Williams, and the obvious lack of merit of the lawsuit—all show that Respondent acted with a retaliatory motive in filing the suit.

Thus, I find that the Respondent's lawsuit lacked merit, that the unions' conduct which was the target of the suit was protected by Section 7, and that the Respondent filed and maintained its suit out of a desire to retaliate against the unions for engaging in protected concerted activity. I find that the General Counsel has shown the requisite elements and that Respondent, by filing and maintaining its lawsuit against Charging Party Unions, violated Section 8(a)(1) of the Act.

4. Expenses of litigating the instant unfair labor practice

The General Counsel and the Charging Parties have requested, in addition to the usual *Bill Johnson's* remedy of reimbursement of the Charging Parties' costs of defending against Respondent's meritless lawsuit, the extraordinary remedy of reimbursement to the government and the Charging Parties for their costs in litigating the instant unfair labor practice. At the trial, the General Counsel stated on the record that the Government intended to request such a remedy. All parties briefed the issue.

In *Frontier Hotel & Casino*, 318 NLRB 857, 860–864 (1995), the Board engaged in an extensive analysis of the propriety of such a remedy. While in the normal case, the remedy of litigation expenses is not available, the Board had stated in *Tiidee Products*, 194 NLRB 1234 (1972), that a policy of discouraging frivolous litigation was appropriate and important in order to provide "speedy access to uncrowded Board and court dockets," without which there cannot be effective enforcement of the Act. The Board has used this remedy sparingly, finding that in cases where a resolution of credibility is necessary to assess the merits of the government's or a respondent's case,

and where it deems the respondent's defenses "debatable" rather than frivolous, the extraordinary remedy of litigation expenses will not be ordered. The Board will also weigh the presence of a history of "intransigence" on the part of a respondent. Cf. *Autoprod, Inc.*, 265 NLRB 331 (1982). The Board looks as well to the egregious nature of the conduct being litigated; if a respondent is found to have engaged in "flagrant, aggravated, persistent, and pervasive misconduct," such conduct further justifies the extraordinary remedy of litigation expenses. *Frontier Hotel & Casino*, 318 NLRB at 862.

I note that Respondent does possess a history of "intransigence" in its repeated disobedience of the national labor laws. The Board has so found and has issued a broad cease-and-desist order against Respondent. However, in analyzing Respondent's conduct found to have violated the Act in this case, I find that the question of retaliatory intent, while relying on many factors, includes an analysis of the credibility of Respondent's witness, D. Huizinga. In addition, Respondent's conduct consisted of the filing of a lawsuit, conduct which is part of our civil dispute resolution machinery. Legal restrictions upon access to the courts, such as the one enunciated in *Bill Johnson's*, have traditionally been crafted narrowly. The award of unfair labor practice litigation expenses for such conduct would not be consistent with such restraint. Consistent with Board practice and precedent in this area, I do not find Respondent's defenses frivolous, and I decline to award the extraordinary remedy sought by the General Counsel.⁸

However, in view of Respondent's history of repeated violations outlined above, its apparent proclivity to continue to violate the Act, its evincing of a disregard for employees' statutory rights, and of the Board's issuance of a broad cease-and-desist order in *Allied II*, I find that a broad cease-and-desist order is appropriate.

CONCLUSIONS OF LAW

1. By filing and maintaining its Federal district court lawsuit against the Local 7, Local 337/357, SMWIA, and the UA, Respondent has violated Section 8(a)(1) of the Act.

2. The violation set forth above is an unfair labor practice affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall also recommend that Respondent be ordered to reimburse Charging Party Unions and SMWIA for all legal and other expenses, including attorneys' fees, incurred in defending against the Respondent's lawsuit, with interest as computed in accordance with *New Horizons*, 283 NLRB 1173 (1987).

⁸ See generally *Retlaw Broadcasting*, 324 NLRB 1148 (1997); *Dynatron/Bondo Corp.*, 324 NLRB 572, 586 (1997); *SAS Electrical Services*, 323 NLRB 1239, 1255 (1997); *Beverly Farm Foundation*, 323 NLRB 787, 798 (1997); *Park Manor Nursing Home*, 318 NLRB 1085, 1089–1090 (1995).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Allied Mechanical Services, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing and prosecuting lawsuits with causes of action against Local 7, Local 337/357, SMWIA, and the UA that are without legal merit and that are motivated by an intention to retaliate against activity protected by Section 7 of the Act.

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

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

(a) Reimburse Local 7, Local 337/357, SMWIA, and the UA for all legal and other expenses incurred in the defense of the Respondent's lawsuit in the manner set forth in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its Kalamazoo, Michigan location copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, 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 August 4, 1998.

(c) 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.

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 the Federal labor law and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

⁹ 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.

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 Unions (Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local 7, Sheet Metal Workers International Association, AFL-CIO, Sheet Metal Workers International Association, and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO) that are without legal merit and that are motivated by an intention to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

ALLIED MECHANICAL SERVICES, INC.

Thomas Doerr, Esq., for the General Counsel.

David M. Buday and Nathan D. Plantinga, Esqs., for the Respondent.

Tinamarie Pappas, Esq., for the Charging Party Local Unions.

Nicholas Femia, Esq., for the Charging Party International Union.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. I issued a decision in this matter on February 27, 2001, finding that Respondent had violated Section 8(a)(1) of the Act by filing a Federal District Court lawsuit against Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Local 357), Local 7, Sheet Metal Workers International Association, AFL-CIO (Local 7), and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the UA).¹ Several parties filed exceptions to my decision with the National Labor Relations Board (the Board).

On September 26, 2002, the Board remanded the case to me for reconsideration in light of the Supreme Court's Decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 122 S.Ct. 2390 (2002), which issued on June 24, 2002. An Order issued on October 8, 2003, which afforded the parties an opportunity to file briefs and arguments on the issues raised by the remand. All parties filed briefs, which I have read.

¹ JD(ATL)-9-01.

A. Summary of Findings of Fact

The facts are set forth in detail in the recommended Decision referenced above. This summary is intended only to place the legal analysis in context, and does not change the findings of fact set forth in the recommended Decision herein. While Respondent employs members of both the plumbing and pipefitting trade and the sheet metal trade, in recent years it has had a collective-bargaining agreement only with the sheet metal union (Local 7), and not with the plumbers' union (Local 357). In 1991, pursuant to an informal settlement agreement with the Board, Respondent recognized Local 337 of the UA (Local 337), the predecessor union to Local 357.²

Since 1991, Respondent and Local 357³ have been involved in several strikes and numerous unfair labor practice charges. Those charges which were pursued by the Board resulted in additional settlement agreements as well as three unfair labor practice trials in 1994, 1997, and 1999. The first of these (*Allied I*) was decided by the Board on December 18, 1995,⁴ and was later enforced by the Sixth Circuit Court of Appeals.⁵ In that case, the Board found Respondent had discriminated against nine employees in violation of Section 8(a)(3) by failing and refusing to reinstate them in June 1994 when work became available after the end of two strikes.

Subsequently, the second of these litigated cases (*Allied II*) was decided on February 9, 1998, by Administrative Law Judge (ALJ) Richard H. Beddow, Jr., and affirmed in substantial part by the Board on January 5, 2001. The Board found, inter alia, that Respondent had discharged six employees because they had engaged in a strike, had failed and refused to reinstate employees after the end of a strike, had made unilateral changes in terms and conditions of employment without affording Local 337 notice or an opportunity to bargain over those changes, had refused timely to furnish Local 337 with information it needed for bargaining, had bypassed Local 337 and dealt directly with employees, and by its overall conduct had failed to bargain in good faith.⁶ The Board issued a broad cease and desist order as part of its decision, based on the ALJ's findings that Respondent "has shown a proclivity to violate the Act and has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for employees statutory rights." Some of Respondent's conduct found to be in violation of the Act was its demand that striking employees return to work immediately on pain of being discharged, and its discharge of them when they did not return immediately.

An additional two unfair labor practice charges (*Allied III*) filed by Local 357 were tried in 1999 before ALJ David L. Evans. In his decision issued on February 8, 2000, Judge Evans found that Respondent had violated Section 8(a)(3) of the

Act by failing and refusing to reinstate 10 strikers, and by refusing to consider for employment or hire eight job applicants because of their union membership, activities, or desires.⁷ Judge Evans dismissed certain 8(a)(5) allegations in the same proceeding. He recommended that a broad Order be issued "because the Respondent has demonstrated a proclivity for violating the Act" and because the serious nature of the violations found "demonstrate a general disregard for employees' fundamental rights." Respondent's exceptions to this decision are currently pending before the Board.

On August 4, 1998, Respondent filed a Section 301 and 303 lawsuit in Federal District Court against Local 7, Local 357, Local 337, the UA, and Sheet Metal Workers International Association, the international union with which Local 7 is affiliated (SMWIA). The issue involved in the lawsuit was the denial by Local 7 of "job targeting funds" to Respondent in its bids on three different construction projects during the period February through April 1998, a Red Cross building in Kalamazoo, the Kalamazoo Chamber of Commerce and the YMCA Sherman Lake project. In its general allegations, Respondent alleged that Local 337 "has filed numerous unfair labor practice charges and engaged in mini-strikes and other activities in an attempt to disrupt and damage the business operations of [Respondent]." Respondent further alleged that Local 337, Local 357 and/or the UA had "threatened, coerced and/or otherwise restrained" Local 7 and/or SMWIA from providing job targeting funds to Respondent on the three jobs mentioned above, and that this was done because Respondent was not signatory to a collective-bargaining agreement with Local 337 or Local 357. Respondent alleged that by these actions all the named unions "collectively and/or individually, acted to coerce, threaten and/or otherwise restrain [Respondent] from doing business with" the builders of the three named job projects.

Respondent alleged four separate counts in its lawsuit. The first count alleged the UA, Local 357, and/or Local 337 violated Section 8(b)(4)(i) and (ii) of the Labor Management Relations Act by threatening or coercing Local 7 to withhold job targeting funds from Respondent. The second count alleged the same three unions violated Section 8(b)(4)(ii) by restraining potential customers at the three named job projects from doing business with Respondent. The third count alleged Local 7 and/or SMWIA had violated and breached the collective bargaining agreement with Respondent by withholding the job targeting funds. The allegation was essentially based on the "most favored nations" clause of the collective-bargaining agreement. The complaint recounted the facts that Respondent had filed a grievance under the collective-bargaining agreement regarding the Red Cross job, which grievance had been denied at the highest step of the grievance procedure. Respondent further alleged that it did not file grievances with respect to the other two jobs in question, as that would have been futile in light of the decision on the first grievance. The fourth count alleged that the UA, Local 337, and/or Local 357 had violated Section 8(b)(4)(i) by threatening, coercing, or otherwise restraining Respondent's employees by prohibiting Local 7 and SMWIA from providing Respondent with job targeting funds.

² On March 1, 1998, Local 337 was consolidated by the UA with Local 513 of the UA, and the resulting consolidated local union was designated as Local 357.

³ Hereinafter, "Local 357" means the UA Local which represented the plumbing and pipefitting trade employees, whether it was actually Local 337 or the merged local 357 at the time.

⁴ 320 NLRB 32 (1995).

⁵ *Allied Mechanical Services v. NLRB*, 113 F.3d 623 (6th Cir. 1997).

⁶ 332 NLRB 1600 (2001).

⁷ JD1400.

On March 30, 1999, federal district court dismissed the lawsuit pursuant to the Unions' Motions for Summary Judgment. The claims against SMWIA were dismissed on the ground that it was not signatory to any collective-bargaining agreement with Respondent. With respect to the allegations against Local 7, the court found that Respondent was bound by the result of the "final and binding" grievance procedure with regard to the Red Cross project, and had not exhausted its remedies (by filing grievances) with respect to the other two job projects. As to the secondary boycott allegations against the unions, the judge found that all the conduct complained of was primary in nature.

While an appeal was pending, the UA was dismissed from the lawsuit on August 5, 1999, by stipulation of the parties. On June 26, 2000, the Sixth Circuit panel upheld the decision below, essentially for the reasons relied upon by the district court.

At the trial of the instant matter, there was uncontradicted testimony relating to statements made by Respondent's partner, J. Huizinga, in the spring of 2000, to the effect that Respondent intended to "get even" with Local 357. There was also testimony by Daniel Huizinga, treasurer and part owner of Respondent, concerning the filing of the lawsuit. D. Huizinga testified that Respondent had a "strong belief that the UA was interfering and colluding with the Sheet Metal to deny us target funds . . . that the Sheet Metal people were being influenced by the Piping Union." Despite allegations to this effect in the pleadings filed in Respondent's lawsuit, he testified that he had no knowledge of what officials of Local 357 had said to Local 7 officials. He also testified he did not understand the concept of "solidarity" among unions. D. Huizinga admitted that he had no knowledge of any actual actions or conversations between Local 337/357 and Local 7. He further admitted that he had no knowledge whatever of any involvement the UA had in the situation. Despite Respondent's admitted lack of knowledge of local 337/357's and the UA's actions, Respondent filed its lawsuit against these unions.

Respondent took the position that the most favored nations clause of its collective-bargaining agreement with Local 7 was violated by Local 7's denial of job targeting funds to Respondent. D. Huizinga testified that Respondent filed a grievance under the collective-bargaining agreement with respect to this contention, and related the fate of the grievance. After deadlocking at the second step, it was referred to the third and final step, where Respondent's grievance was denied. D. Huizinga testified that he was well aware of the "final and binding" nature of the grievance and arbitration procedure in the collective-bargaining agreement. Despite the denial of its grievance at this final and binding step of the grievance procedure, Respondent filed its lawsuit against Local 7 and its international affiliate.

B. Discussion and Analysis

1. The applicable law

In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Supreme Court set forth a framework for decisions involving lawsuits alleged to be violations of Section 8(a)(1) of the Act. The court held that two elements must be proven in order to show that a particular lawsuit violates the Act. The lawsuit must be shown to be without merit, i.e., to lack a reasonable

basis, and the respondent must be shown to have filed the lawsuit in retaliation for protected concerted activities of the employees or unions being sued. The Board has stated that this case means that "if the plaintiff's lawsuit has been finally adjudicated and the plaintiff has not prevailed, its lawsuit is deemed meritless, and the Board's inquiry, for purposes of resolving the unfair labor practice issue, proceeds to resolving whether the respondent/plaintiff acted with a retaliatory motive in filing the lawsuit." *Teamsters Local 520 (Alberici Construction)*, 309 NLRB 1199, 1200 (1992), enf. denied on other grounds, 15 F.3d 677 (7th Cir. 1994).

2. The Supreme Court's Decision in *BE&K Construction Co. v. NLRB*

In *BE&K*, the Supreme Court held that, in applying the *Bill Johnson's* test to the particular concluded lawsuit, the Board had unduly restricted the respondent's right to file lawsuits. The Board, noting that the lawsuit in *BE&K* had been dismissed on a motion for summary judgment, found that the suit was unsuccessful, and therefore, lacked a reasonable basis. The second prong of the test, that of retaliatory motive, was found to have been met largely based on an inference from the fact that the Respondent had filed the unsuccessful lawsuit, and that it had some animosity toward the unions. The Court found this approach overbroad, and reasoned that it would prohibit many genuine lawsuits.

Regarding the first prong of the test, the Court⁸ held that the lack of success, without more, is not sufficient to show the "lack of a reasonable basis" for the lawsuit. The Court found that the lawsuit was reasonably based, albeit unsuccessful. An enunciation of a standard for determining whether a suit is "reasonably based" appears to be contained in the Court's language to the effect that the lawsuit must be the product of a "subjectively genuine" belief and must be "objectively reasonable." In a concurring opinion of four additional justices, Justice Breyer wrote that the Court's decision applied to the case before it, where the Board had rested 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 unions. The concurring opinion states clearly that its reasoning in *BE&K* does not reach cases where the "evidence of 'retaliation' or antiunion motive might be stronger or different," nor does it reach cases where 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 Section 7 of the NLRA."⁹

3. Positions of the Parties on the Remand

The General Counsel takes the position that the evidence supports a conclusion that the suit is baseless, and therefore is unaffected by the Supreme Court's Decision in *BE&K*. The General Counsel further argues that even if there were to be some reasonable basis discerned for Respondent's lawsuit, that the evidence of retaliatory motive is more extensive in the instant case than the evidence in *BE&K*, and therefore falls into a

⁸ Justice O'Connor, writing for the Court, joined by two other justices.

⁹ 122 S.Ct. at 2403.

different category of cases, those alluded to by Justice Stevens in his concurrence. The General Counsel argues further that the record evidence of Respondent's failure to make even a minimal precomplaint investigation of the facts is an additional factor which should be taken into account in analyzing the first prong of the standard.

The Charging Parties both take positions similar to that of the General Counsel. The UA adds that as to it, Respondent named the UA in its lawsuit, while pleading no facts relating to it, beyond the bare fact that it is the international union with which Local 357 is affiliated. Respondent admitted to no knowledge of any involvement of the UA in the events which were alleged in its lawsuit. The UA argues further that the law is well settled that such affiliation, standing alone, does not implicate the UA in actions undertaken by its affiliated local unions.

Respondent posits that the evidence supports a conclusion that Respondent held a "genuine belief" in its lawsuit, and that this forms a reasonable basis for the lawsuit. Respondent argues that the lawsuit should be found not to be a violation of Section 8(a)(1) of the Act, in light of *BE&K*.

4. Analysis of Reasonableness of Respondent's lawsuit

In this case, as in *BE&K*, there is a concluded lawsuit which was dismissed upon a motion for summary judgment. The Supreme Court's decision therefore requires a more detailed analysis of the first prong of the test enunciated in *Bill Johnson's*, whether the lawsuit was reasonably based. The standard is an objective one, whether a reasonable litigant could realistically expect success on the merits of the claims.¹⁰

Respondent's lawsuit had two claims, one sounding in contract, and one based on secondary boycott allegations. Both claims were dismissed by the District Court on motions for summary judgment. At this stage, the court was obliged to assume that all Respondent's pleading could be proven by evidence.¹¹ This is a standard which gives Respondent the benefit of the doubt, but Respondent's lawsuit could not withstand even this test.

As to the contract claims, the District Court noted that Respondent had no contract with three of the four unions, the two international unions, and the Plumbers local union (Local 337/357), and therefore could have no contract claim against them. As to those three unions, therefore, there is no basis whatsoever for Respondent's contract claims, and any analysis must find that these claims, as to those three unions, were without *any* basis, and certainly without any reasonable basis. As to

¹⁰ Respondent appears to urge that a sincere belief held by it, without more, is sufficient to support its claim that the filing of its lawsuit against the unions met the test for reasonableness. Respondent mistakes the test. The Court's opinion specifically refers to the "objectively reasonable" component of the standard. If Respondent's purely subjective formulation of the standard were applied, the result would be absurd. Under its formulation, any sincerely held belief, no matter how unreasonable, or even idiotic, the belief was, would render a lawsuit "reasonable."

¹¹ Respondent could not have proven the statements pleaded, as shown by D. Huizinga's testimony that Respondent knew of no facts to support its claims of "collusion" among the Unions.

Local 7, the District Court found that one of Respondent's contract claims had been resolved by final and binding arbitration, and that the others were barred by its failure to exhaust its arbitration remedy. Respondent filed its contract claims against Local 7, although it knew full well that it was impossible to pursue them, given the clear facts that they had already been resolved in final and binding arbitration, in which it had participated. Respondent has advanced no reason, nor did it plead any reason in its lawsuit, for the District Court to vacate or ignore the arbitration decision. No "reasonable litigant" could have any expectation of success on the merits in such a situation. I conclude, therefore, that Respondent had no reasonable basis for its lawsuit sounding in contract.

As to its claims based on secondary boycott allegations, Respondent filed claims of collusion between the Unions with no factual basis whatsoever. Respondent's witness, D. Huizinga, admitted that he had *no* knowledge of facts which would support Respondent's claims, nor had he made any inquiry into those facts, normally a duty of any party filing a lawsuit. Respondent thereby demonstrated that it had a complete disregard for whether its pleadings were true or not true.¹² The secondary boycott claims were dismissed by the District Court, as all the events concerned a primary dispute, that of Respondent with the two unions that represented its *own* employees. No other employer was involved, only Respondent. Respondent argues that secondary boycott claims are difficult, and therefore, apparently, that they should always be deemed to have sufficient basis to pass the test of "reasonableness." I find this argument unpersuasive and disingenuous.

No "reasonable litigant" could realistically expect success on the merits of this lawsuit, filed as it was with no facts ascertained, contract claims clearly precluded by the final and binding arbitration, the obvious primary nature of the disputes, and no evidence whatsoever to connect the two international unions with the events complained of.

As was noted by the Court in *BE&K*, the first amendment's protection of the right to file lawsuits is not without limits. Where a litigant has demonstrated a reckless readiness to use litigation to harry and harm an opponent, to drain its resources, regardless of the fatuousness or frivolity of the claims in litigation, the scope of the protection may have been exceeded.

5. Respondent's motive in filing the lawsuit

It is unnecessary to repeat the analysis of motive contained in my earlier decision, but a summary of the facts relied on as evidence of retaliatory motive follows. Respondent's retaliatory motive was shown by Respondent's repeated unfair labor practices over a course of several years, as found by the Board, the Sixth Circuit, and several administrative law judges, conduct which included acts undertaken against individual employees, not just the unions, the timing of Respondent's lawsuit, Respondent's avowed purpose to "get even" with the unions, the iteration of employees' and the unions' protected ac-

¹² Respondent argues that this factor should not be accorded any weight, since the Unions did not seek Rule 11 sanctions against it in the District Court lawsuit. There may be many reasons for a party to refrain from seeking such sanctions. I decline to be foreclosed from considering any relevant factor in this analysis.

tivity in its lawsuit's pleadings, and the complete lack of a reasonable basis for the lawsuit.

Thus, I find that the Respondent's lawsuit lacked a reasonable basis, that the unions' conduct which was the target of the suit was protected by Section 7, and that the Respondent filed and maintained its suit out of a desire to retaliate against the unions for engaging in protected concerted activity. I find that the General Counsel has shown the requisite elements and that Respondent, by filing and maintaining its lawsuit against the Charging Party unions, violated Section 8(a)(1) of the Act.

Even assuming, for argument's sake, that Respondent's claims in its lawsuit met some extremely lenient test for reasonableness, the evidence of retaliatory motive in this case is far different and far stronger than that in *BE&K*. By virtue of its many unfair labor practices found by the Board, the Sixth Circuit, and several administrative law judges, it could fairly be said to be the type of case referred to in Justice Breyer's concurrence, its lawsuit but a part of a "broader course of conduct" against the employees and their unions.

In view of the foregoing analysis, it is unnecessary to repeat the discussion of the remedy included in my earlier recommended decision. My findings and conclusions as to remedies remain the same. However, I have attached a revised Notice to Employees, the language of which conforms to the Board's decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

In view of the foregoing analysis, my recommended Conclusions of Law, Remedy, and Order remain the same as set forth in my earlier decision.

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
- 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 file and prosecute lawsuits with causes of action that are without legal merit and that are motivated by an intention to retaliate against activity protected by Section 7 of the Act against the Unions (Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local 7, Sheet Metal Workers International Association, AFL-CIO, Sheet Metal Workers International Association, and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO).

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

ALLIED MECHANICAL SERVICES