The Region submitted this case for advice on whether the Employer violated Section 8(a)(1) of the Act by filing an unsuccessful state lawsuit aimed at the Union’s strike and consumer boycott activities, which alleged defamation, tortious interference with business relationships, and intentional infliction of emotional distress. We conclude that the lawsuit was baseless and retaliatory and, thus, violated Section 8(a)(1). We also conclude that, because the Employer failed to demonstrate a basis for proving actual malice and other elements required under state and federal law, the Act preempted its lawsuit, which violated Section 8(a)(1) by interfering with the exercise of Section 7 rights. Thus, the Region should issue complaint, absent settlement.

FACTS

Steven Trudell d/b/a Trudell Entertainment LLC, Trudell and Associates LLC, and Your Generation In Concert LLC (collectively “the Employer”) employs musicians to perform at music venues, often as orchestra musicians for headlining entertainers. is the Employer’s American Federation of Musicians (“the Union”) and its local affiliates represents musicians across the country and has attempted for many years to enter into a labor contract with the Employer. In 2018, the Union placed the Employer on its Unfair List and informed its members that they would be subject to Union discipline and fines if they accepted any work from the Employer or its subcontractors. Thereafter, the Employer filed numerous charges against the Union claiming that it had violated Section 8(b)(4) by threatening its own members and neutral third parties to force them to cease doing business with and for
the Employer. The Region dismissed the majority of those charges, concluding that the Union had engaged in a lawful work stoppage campaign against the Employer, a primary employer, and its subcontractors who are allies of the Employer, and did not threaten or coerce any neutrals or third-parties. The Region concluded that the Union was also privileged to warn its members of potential fines and Union discipline if they worked for the Employer. In one isolated case, the Region found partial merit to a charge that an unenforced provision of the Union's bylaws was unlawfully overbroad. The Union settled the charge and the case was closed in compliance.

On January 24, 2019, the Employer filed a complaint in federal district court primarily alleging RICO violations by the Union, its local affiliates, and Union officers, as well as defamation and other torts arising under Michigan law. The Union notified Employer's counsel that it believed the lawsuit was frivolous and that it intended to file for Rule 11 sanctions. On March 25, 2019, before the court had ruled on any preliminary motions, the Employer voluntarily withdrew the lawsuit.

On June 5, 2019, the [6][7] wrote an unaddressed letter stating the Employer had recently contracted to provide orchestral musicians for an upcoming tour with musician [6][7]. The letter stated that the Employer "engages musicians (including students and immigrants without valid work visas) at substandard rates of pay and under conditions deemed unfair and unacceptable in the industry," including without reimbursement of travel expenses or per diem, and that musicians working for the Employer do not receive "even the minimum social welfare benefits statutorily prescribed by state and federal laws." The letter also described an incident where [6][7] allegedly "confronted" a Union member "in a physically menacing manner because [6][7] sought to enforce the terms of the contract" and claimed that, on other occasions, [6][7] had witnessed [6][7] using "racial epithets and otherwise offensive language." The letter stated that the Employer's name was placed on the Union's unfair list at the request of 26 local Union affiliates and, in response, the Employer had filed numerous unfair labor practice charges, all of which were dismissed by the NLRB. In closing, the letter claimed that [6][7] "may not be able to acquire the services of professional musicians of the caliber that it seeks and to which it is accustomed" and warned that the Union will continue to publicize its dispute with the Employer through leafleting and other lawful means.

The Union sent the June 5 letter to a local Union affiliate, which shared the letter with the Boston Symphony Orchestra in advance of a July 2019 [6][7] performance. According to the Union, the performance proceeded as planned with

1 According to the Employer's January 2020 state lawsuit, described infra, the Union also allegedly sent this letter to other, unnamed Employer business associates and potential customers.
orchestra musicians hired by the Employer or subcontractor; the Boston Symphony Orchestra subsidized the payment of area standard wages and benefits to the musicians.

On January 29, 2020, the Employer filed a complaint in Michigan Circuit Court, Oakland County claiming defamation, tortious interference with business relationships, and intentional infliction of emotional distress. The majority of the state complaint referred to the same alleged facts underlying the Employer’s dismissed Section 8(b)(4) charges, including the Union placing the Employer on its Unfair List, sending correspondence to its local affiliates regarding the Employer’s placement on the list, threatening the Employer’s subcontractors, and threatening Union members with fines and other internal Union discipline if they worked for the Employer. The complaint also alleged that the Union’s June 5, 2019 letter contained defamatory statements published with actual malice. The lawsuit further alleged that the Employer lost contracts with long-standing clients and that personally suffered emotional distress based on the Union’s actions.

In response to the Employer’s complaint, the Union filed a notice for removal to the U.S. District Court. The Union argued that, to the extent the Employer’s lawsuit presented any viable claims, those claims arose under LMRA Section 303, which provides a private right of action for damages resulting from a violation of Section 8(b)(4) of the Act. The Employer opposed the removal on the basis that its lawsuit was not seeking relief under federal law. The District Court agreed with the Employer, stating that the Union was free to raise its preemption arguments in its defense, and remanded the case to the state court.

Following the remand to state court, the Union moved for summary disposition under Michigan law. On October 22, 2020, the court granted the Union’s request and dismissed the case in its entirety. The state court judge found that, despite the Employer’s claims that the controversy arose under state law, the case was preempted by federal law, citing San Diego Building Trades Council v. Garmon. First, the judge found that all of the Employer’s allegations were based on the Union’s efforts to encourage the Employer to pay Union-scale wages and benefits and publicize the Employer’s refusal to enter into an agreement with the Union, all of which was at least arguably protected by the NLRA. Second, the judge concluded that none of the Employer’s allegations fell within the recognized state law exceptions to Garmon. Specifically, the judge found that the Employer’s tortious interference

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3 The state court also cited to Henry v. Laborers’ Local 1191, 848 N.W.2d 130 (Mich. 2014), where the Michigan Supreme Court found state whistleblower protection allegations–filed by a union’s employees who reported improper wages and an unsafe

claims were based on the Union’s activities to address wages and benefits, which were not of peripheral concern to the Act but rather fell “squarely within” the activities protected by the Act. Third, regarding the Employer’s allegations of defamation and intentional infliction of emotional distress, the judge found that the Union’s conduct in sending letters publicizing its labor dispute did not “touch interests so deeply rooted in local feeling and responsibility that the State should intrude,” noting that the Union did not violate any criminal or state law by conducting its letter-writing and publicity campaign. Next, concluding that the court lacked subject matter jurisdiction, the judge found it was not necessary to consider other grounds for summary disposition, such as failure to state a claim upon which relief could be granted. Finally, observing that the Employer had crafted its complaint in an attempt to meet the recognized exceptions to federal preemption, the judge declined the Union’s request for sanctions.

The Employer did not appeal the Oakland County Circuit Court’s dismissal and the period for an appeal has expired.

**ACTION**

We conclude that the lawsuit was baseless and retaliatory and, thus, violated Section 8(a)(1). We also conclude that because the Employer failed to demonstrate a basis for proving actual malice and other elements required under state and federal law, the Act preempted its lawsuit, which violated Section 8(a)(1) by interfering with the exercise of Section 7 rights.

1. **The Employer Violated Section 8(a)(1) by Filing and Maintaining a State Lawsuit Against the Union that Lacked a Reasonable Basis and Retaliated Against Section 7 Activities**

To safeguard the First Amendment right to petition the government for the redress of grievances, the Supreme Court held in *Bill Johnson’s* that the Board could not find a legal proceeding to be an unfair labor practice unless it both lacked a reasonable basis in fact or law and had been brought with a motive to retaliate against the exercise of Section 7 rights. The Board subsequently articulated that “a working conditions to the U.S. Department of Labor— to be preempted by the NLRA because the employees’ underlying conduct was arguably protected by Section 7 and the union-employer’s response was arguably prohibited by Section 8. *Id.* at 145-46.

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lawsuit lacks a reasonable basis, or is ‘objectively baseless,’ if ‘no reasonable litigant could realistically expect success on the merits.’”

Where a lawsuit or major part of a lawsuit has been litigated to completion, the Board will evaluate the actual arguments and evidence presented by the respondent to determine whether it had reasonable grounds for seeking relief. The General Counsel’s burden is to prove that the respondent did not have—or could not reasonably have believed it could acquire through discovery or any other means—evidence needed to prove the essential elements of its causes of action. The Board cannot make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge but, at the same time, the Board’s inquiry need not be limited to the bare pleadings. Applying these principles, we conclude that each cause of action in the Employer’s state lawsuit lacked a reasonable basis.

a. The Employer’s Defamation Claim was Baseless

In Linn v. Plant Guard Workers Local 114, the Supreme Court held that defamation lawsuits emanating from labor disputes—and involving the malicious publication of defamatory statements that might injure a person’s reputation—are of peripheral concern to national labor policy because such speech “does not in and of itself constitute an unfair labor practice.” To avoid possible interference with national labor policy, however, a plaintiff pursuing a state law defamation claim predicated on a statement made during a labor dispute generally “must prove (1) that the allegedly defamatory statement asserts a fact or impl[ied] an assertion of objective fact, (2) that the factual assertion is false, (3) and that the speaker published the challenged statement with actual malice.”

5 BE&K Construction Co., 351 NLRB at 457 (quoting Professional Real Estate Investors v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1993)).


7 Id.

8 Bill Johnson’s, 461 U.S. at 744-46.


10 Steam Press Holdings, Inc. v. Hawaii Teamsters and Allied Workers Union, Local 996, 302 F.3d 998, 1004 (9th Cir. 2002) (citations omitted). Under Michigan law, defamation claims require proof of a 1) false and defamatory statement concerning the plaintiff, 2) an unprivileged communication to a third party, 3) fault amounting to
“Federal labor law protects false and even defamatory statements unless such statements are made with actual malice – i.e. knowledge of falsity or with reckless disregard for the truth.”\textsuperscript{11} Moreover, the courts and the Board have recognized that statements in hotly contested labor disputes are often statements of opinion or figurative expression, “rhetorical hyperbole,” incapable of being proved true or false in any objective sense.\textsuperscript{12} It is not uncommon for parties to disseminate acrimonious literature, which may contain “unfounded rumors, vituperations, personal accusations, misrepresentations and distortions.”\textsuperscript{13} Such intemperate statements, however, are protected by the NLRA and distinct from malicious, actionable falsehoods.\textsuperscript{14}

Here, no reasonable litigant could have expected to succeed on the merits of the Employer’s defamation allegation due to the absence of evidence satisfying one or more of the foregoing elements, and the Employer failed to show it had reason to believe it would uncover such evidence in discovery. The Employer’s lawsuit alleges that the Union’s June 5, 2019 letter falsely accused the Employer of “mistreating and underpaying musicians and refusing to pay pensions and health or welfare benefits,” and included statements published with actual malice. As set forth in more detail below, many of the statements that are arguably the most controversial were merely opinion or “rhetorical hyperbole” rather than statements of objective fact. Second, to the extent that any of those statements could be interpreted as assertions of fact, the Employer has not refuted any of the Union’s claims and shown that the statements were false. Indeed, the Union presented evidence to support its claims. Thus, there is no evidence to suggest that any statements were knowingly false or made with reckless disregard for truth.

\textsuperscript{11} Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 883 (9th Cir. 2002). See also Linn v. Plant Guard Workers Local 114, 383 U.S. at 64-65.

\textsuperscript{12} Steam Press Holdings, 302 F.3d at 1006.

\textsuperscript{13} Machinists v. Winship Green Nursing Center, 103 F.3d 196, 203 (1st Cir. 1996) (citing Linn v. Plant Guard Workers, 383 U.S. at 58).

\textsuperscript{14} See Linn v. Plant Guard Workers, 383 U.S. at 58. See also Steam Press Holdings, (observing that in volatile labor disputes, “even seemingly ‘factual’ statements take on an appearance more closely representing opinion than objective fact.”) (citing Underwager v. Channel 9 Australia, 69 F.3d 361, 367 (9th Cir. 1995).
First, the June 5 letter stated that the Employer “engages musicians (including students and immigrants without valid work visas) at substandard rates of pay and under conditions deemed unfair and unacceptable in the industry.” The terms substandard, unfair, and unacceptable are expressions of opinion, rather than objective fact. Next, the statement that the Employer employs “students and immigrants without valid work visas” would likely be interpreted as rumor or distortion. However, even if this statement were interpreted as an assertion of objective fact, the Union provided the Region with a letter it sent to a university wherein it named two students lacking valid work visas whom the Employer had hired as musicians. The Union also asserted to the Region that discovered that one of these students was deported. The Employer did not submit any evidence refuting the claim that it hired students without valid work visas, let alone shown that the claim was knowingly false or made with reckless disregard for the truth. Thus, the Employer did not and could not demonstrate that this statement was made with actual malice.

Next, the June 5 letter stated that musicians hired by the Employer do not receive “even the minimum social welfare benefits statutorily prescribed by state and federal laws.” Exaggerated claims regarding employer compensation are prototypical “rhetorical hyperbole,” in a volatile labor dispute. Even if this statement were viewed as an assertion of objective fact, however, the Union provided the Region with correspondence from Union members stating that the Employer’s subcontractors paid them in cash as independent contractors, and thus did not deduct social security benefits or other federal or state deductions. The Employer has never refuted the assertion that, at least on some occasions, it or its subcontractors paid musicians cash for their services or hired musicians as independent contractors rather than

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15 See, e.g., Joliff v. NLRB, 513 F.3d 600, 611-12 (6th Cir. 2008) (observing that courts will consider a number of factors to determine whether a statement is capable of carrying a defamatory meaning or whether it is rhetorical hyperbole, including “the degree to which the statements are verifiable, whether the statement is objectively capable of proof or disproof”).


17 See, e.g., Steam Press Holdings, 302 F.3d at 1005-09 (finding union claims that employer was “making money” and “hiding money” were statements of opinion in context of heated labor dispute and reversing lower court’s defamation judgment).
employees. Thus, the Employer did not and could not demonstrate that the Union’s claim that the Employer failed to pay “statutorily required” social welfare benefits was made with actual malice.

The June 5 letter also stated that musicians are required to travel to performances without per diem or reimbursement for fuel, which the Employer refutes by stating that it has “always paid Union benefits” at every show at a Union venue. It is a fact, however, that the Employer has not signed a collective-bargaining agreement and has no obligation to pay Union wages and benefits at non-Union venues. Indeed, the Employer’s response admits as much. Furthermore, the Union has received complaints from its members that a subcontractor of the Employer failed to pay per diem or travel expenses even where it promised employees it would pay those benefits. Therefore, given that the Union’s claims were based on the Employer’s non-union status, and first-hand accounts from Union members, the Employer did not and could not show that this claim was made with actual malice.

Finally, other statements in the June 5 letter, such as the description of an incident where [b] (6), [b] (7), (C) allegedly “confronted” a Union member “in a physically menacing manner because [b] sought to enforce the terms of [b] contract” and that [b] (6), (b) (7), (C) has “witnessed” [b] using “racial epithets and otherwise offensive language” are based on first-hand accounts by a Union member and [b] (6), (b) (7), (C). Each claim contains witnesses’ expression of opinion or personal characterization of the events rather than objective facts. Furthermore, the Employer has not denied that these incidents took place, nor has it refuted the Union’s accounts. Thus, the Employer has not shown and could not show that these statements were made with actual malice.

In sum, the Union’s allegedly defamatory statements are typical “rhetorical hyperbole” rather than statements of fact. And, to the extent that any of the statements might be interpreted as objective facts, the Union has presented evidence to support its statements and the Employer, by contrast, presented no evidence that the statements were knowingly false or made with reckless disregard, or that it had reason to believe it would uncover such evidence in discovery.18 Indeed, the Employer has failed to present anything other than bare assertions of malice and it could not reasonably expect success on the merits of its defamation claim.

b. The Employer’s Claims of Tortious Interference were Baseless

18 Given that the Employer did not appeal the state court’s dismissal, any argument that the Employer could have discovered evidence to support its defamation claim if it had been permitted to proceed to discovery is meritless. See Ashford TRS Nickel, LLC, 366 NLRB No. 6, slip. op. at 6 n.16 (2018).
Under Michigan law, a plaintiff must establish the following to prevail on a claim of tortious interference with a business relationship or expectancy: (1) the existence of a valid business relationship or expectancy; (2) defendant’s knowledge of the relationship or expectancy; and (3) intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy and (4) resulting damage to the party whose relationship or expectancy was disrupted.\(^{19}\) When a claim of tortious interference is based on activity protected by the NLRA, the claim is subject to the same actual malice requirement that governs actions for defamation that arise out of labor disputes.\(^{20}\) Moreover, “Federal courts have held that tortious interference claims arising out of a labor dispute are wholly preempted or, at least, preempted absent outrageous or violent conduct.”\(^{21}\)

In *Ashford TRS Nickel, LLC*, the employer filed a lawsuit in federal district court alleging tortious interference under Alaska law based on a union’s consumer boycott campaign.\(^{22}\) Although the employer pled actual malice in its third-amended complaint, the Board concluded, in agreement with the court, that the complaint “utterly failed to articulate any ground for finding the [union] acted with actual malice.”\(^{23}\) The Board observed that, by failing to assert facts that, if proven, would have established actual malice, an essential element of the lawsuit was lacking and therefore the employer’s claims were baseless under *Bill Johnson’s*.\(^{24}\)

Here, as in *Ashford TRS*, the Employer’s claims for tortious interference are based on protected activity. The Board and the courts have long held that a union may ask its own members to withhold their services from an employer and its

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\(^{20}\) See *Milum Textile Services*, 357 NLRB at 2049-50 (citing *Beverly Hills Foodland, Inc. v. UFCW Local 655*, 35 F.3d 191, 196 (8th Cir. 1994) (district court properly dismissed Foodland’s tortious interference claim because Foodland had not alleged actual malice)); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (where a cause of action for defamation cannot be established because of the absence of evidence of actual malice, the same statements on which the defamation claim is predicated cannot form the basis of relief under another tort cause of action).

\(^{21}\) See *Milum Textile Services*, 357 NLRB at 2049-50.

\(^{22}\) 366 NLRB No. 6, slip op. at 4-6.

\(^{23}\) *Id.*, slip op. at 5.

\(^{24}\) *Id.*, slip op. at 6.
subcontractors or allegedly ask potential clients to boycott an employer.\textsuperscript{25} Section 7 also protects peaceful union activity with the object of forcing the primary employer to meet the union’s demands, even when such conduct “may seriously affect neutral third parties.”\textsuperscript{26} In the instant matter, the Region concluded that all of the Union’s activities aimed at publicizing its dispute with the Employer were protected work stoppage activities. And regarding the June 5 letter, as discussed above, the Employer neither produced any evidence that the Union’s statements were made with actual malice nor articulated a basis to discover such evidence. Indeed, the state court judge dismissed the Employer’s claim for tortious interference because he found that the Union’s activities fell “squarely within” the activities protected by the NLRA and did not involve any concerns peripheral to the Act that a state would seek to regulate.

In sum, the Employer has presented no evidence that any statements allegedly made to its business associates were knowingly false or made with reckless disregard for the truth, or that it had reason to believe it would uncover such evidence in discovery. Indeed, the Employer has failed to present anything other than bare assertions of malice and it could not reasonably expect success on the merits of its defamation claim.

c. The Employer’s Claim of Intentional Infliction of Emotional Distress was Baseless

\textsuperscript{25} See, e.g., \textit{NLRB v. Denver Bldg. & Const. Trades Council}, 341 U.S. 675, 692 (1951) (recognizing that the Board and the courts must strike a balance between the dual congressional objectives of “preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures and controversies not their own.”); \textit{American Federation of Musicians, Local 433, Musicians Union of Las Vegas Local 369}, Case 28-CC-1009, Advice Memorandum dated Aug. 7, 2006 (where union had placed employer on its unfair list, local union’s sympathy strike against employer’s subcontractor was a lawful work stoppage aimed at a recognized ally of the employer); \textit{see Int. Alliance of Theatrical Stage Employees (The LookAlike, LLC)}, Advice Memorandum dated March 18, 2013 (concluding that union’s instruction to its members to withhold services from primary employer’s subcontractors was protected and not coercive of any neutral employees).

\textsuperscript{26} See, e.g., \textit{Service Employees Int’l Union Local 87 v. NLRB}, 995 F.3d 1032, 1038, 1039-40 (9th Cir. 2021) (reversing Board and finding peaceful union picketing to be protected primary picketing that did not violate Section 8(b)(4)(ii)(B)) (citing \textit{NLRB v. Operating Engineers Local 825 (Burns & Roe)}, 400 U.S. 297, 303 (1971)), denying enforcement to \textit{Preferred Building Services}, 366 NLRB No. 59 (2018).
In order to prevail on a claim of intentional infliction of emotional distress under Michigan law, a plaintiff must demonstrate that “the defendant’s conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” The elements required under Michigan law are: 1) extreme and outrageous conduct, 2) intent or recklessness, 3) causation and 4) severe emotional distress. A defendant is not liable for “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” Where a defendant has “done no more than to insist upon their legal rights in a permissible way, even though they are well aware that such insistence is certain to cause emotional distress,” the defendant is subject to a qualified privilege and will not be found liable for intentional infliction of emotional distress.

Here, the employer’s claim of intentional infliction of emotional distress is baseless under Michigan law. The Union, by engaging in NLRA-protected conduct, merely exercised its legal rights in a permissible way, so that it was subject to a qualified privilege, no matter the emotional distress allegedly suffered by the Employer. The Union did no more than ask its own members to withhold their services from the Employer and its subcontractors and allegedly ask potential clients

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28 Id.

29 Id.

30 Gonyea v. Motor Parts Fed. Credit Union, 480 N.W.2d 297, 301 (Mich. Ct. App. 1991) (citations omitted) (upholding summary disposition of lawsuit brought by former employee alleging defamation and intentional infliction of emotional distress where employer had a qualified privilege to divulge information regarding the former employee to a prospective employer); see also Apostle v. Booth Newspapers, Inc., 572 F. Supp. 897, 908–09 (W.D. Mich. 1983) (noting that Michigan courts recognize a qualified privilege to extreme and outrageous conduct, including where defendant has done no more than insist on his legal rights in a permissible way, in accordance with comment (g) to § 46 Restatement (2d) Torts).

31 See Gonyea v. Motor Parts Fed. Credit Union, 480 N.W.2d at 300-01 (upholding dismissal of former employee’s lawsuit alleging defamation and intentional infliction of emotional distress where employer had a qualified privilege to divulge information regarding a former employee to a prospective employer); see also Clayton v. Gold Bond Bldg. Products, 679 F. Supp. 637, 641 (E.D. Mich. 1987) (concluding resolution of emotional distress claim under Michigan law would depend on whether employer had a legal right to discharge employees for conduct during strike).
to boycott the Employer. By merely engaging in lawful activity, the Union is not liable for the Employer’s alleged emotional distress.\textsuperscript{32} Indeed, the state court judge concluded that the Employer’s claim of intentional infliction of emotional distress was preempted by the NLRA precisely because the Union’s conduct was typical to a labor dispute.

Moreover, the bar for proving a claim of intentional infliction of emotional distress under Michigan law is high. The Employer has not presented any evidence to demonstrate that the Union’s acts were “atrocious or utterly intolerable,” as opposed to “mere insults” or “annoyances,” or that it had reason to believe it would uncover such evidence in discovery.\textsuperscript{33} As a result, the Employer could not reasonably expect success on the merits of its intentional infliction of emotional distress claim.

\textbf{2. The Employer filed the Lawsuit with a Retaliatory Motive}

Evidence that a party filed a lawsuit with a retaliatory motive includes: the fact that the lawsuit targeted protected conduct, a request for damages in excess of actual damages, and prior animus towards the defendant in the lawsuit.\textsuperscript{34} And while baselessness alone is insufficient to establish a retaliatory motive, the Board will consider it as one factor in its analysis of motive.\textsuperscript{35}

Here, many of these factors are present. First, the lawsuit was directly aimed at the Union’s protected conduct of asking its own members to withhold services from the Employer and its subcontractors and allegedly asking potential clients to boycott the Employer. Indeed, the Employer was well-aware that such activity was protected given that the Region had dismissed numerous charges filed by the Employer regarding the same or similar Union activity and its appeals were sustained by the Office of Appeals.

\textsuperscript{32} See Gonyea, 480 N.W.2d at 300-01.

\textsuperscript{33} See, \textit{e.g.}, \textit{Cole v. Knoll}, 984 F. Supp. 1117, 1135 (W.D. Mich. 1997) (observing that the threshold for showing extreme and outrageous conduct is high, and a workplace setting “rarely, if ever, gives rise to such actionable conduct” and would require more than a wrongful or even malicious termination) (citations omitted).

\textsuperscript{34} See, \textit{e.g.}, \textit{Atelier Condominium & Cooper Square Realty}, 361 NLRB 966, 970 (2014), enforced, 653 Fed. Appx. 52 (2d Cir. 2016) (unpublished); \textit{Milum Textile Services Co.}, 357 NLRB at 2051-52.

\textsuperscript{35} \textit{Allied Mechanical Services}, 357 NLRB 1223, 1233-34 (2011), \textit{enforcement denied}, 734 F.3d 486 (6th Cir. 2013).
Next, the Employer has demonstrated animus against the Union. It is undisputed that the parties have a hostile relationship because the Employer is non-union, continues to operate in the Union’s territory, and regularly attempts to hire musicians represented by the Union. The Union has added the Employer to its unfair list and publicized this fact, to which the Employer has responded by filing numerous unfair labor practice charges. When it became clear that the NLRB would not interfere because the Region determined that the Union was engaged in lawful, protected activity, the Employer resorted to the courts to protest the same activity. The Employer first filed its RICO lawsuit in federal court and then voluntarily dismissed the suit after the Union threatened to file for sanctions. Only then did the Employer file the instant, baseless lawsuit, alleging once again that the Union’s campaign was unlawful, albeit in the guise of a state tort claim. Thus, it is clear that the Employer is hostile to the Union’s protected activity.

Finally, the baselessness of the Employer’s lawsuit supports a finding of retaliatory motive. The lawsuit made only the barest claims of actual malice, unsupported by any evidence or claims that it could discover such evidence in discovery, thereby defeating an essential element of the claims for defamation and tortious interference. As for the third claim of intentional infliction of emotional distress, as discussed, supra, the protected nature of the Union’s activity acts as a qualified privilege. Indeed, the state court judge dismissed the lawsuit as preempted because none of alleged activities warranted state interference.

Accordingly, we conclude that the Employer’s baseless lawsuit was motivated by a desire to retaliate against the Union’s protected activity and thus violated the Act. Therefore, the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by filing a lawsuit that was baseless and retaliatory.

3. The Employer’s Lawsuit was Preempted by the NLRA and Violated Section 8(a)(1)

In footnote 5 of Bill Johnson’s the Court made clear that it did not intend to preclude the Board from enjoining as unfair labor practices legal proceedings that either have “an objective that is illegal under federal law” or are preempted by the Board’s jurisdiction. Since the Board may enjoin lawsuits that are preempted, a preempted lawsuit that tends to interfere with Section 7 rights will violate Section 8(a)(1), regardless of motive.

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36 Bill Johnson’s Restaurants, 461 U.S. at 737, n.5.

The principles set forth in *San Diego Bldg. Trades Council v. Garmon* apply in determining whether the current lawsuit is preempted. In *Garmon*, the Supreme Court held that a presumption of preemption applies even when the activity that the State seeks to regulate is only “arguably” protected by the Act. In such circumstances, the court “must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.” The Court noted in a later case that the critical inquiry in deciding whether a state claim is preempted is whether the controversy presented to the state court is identical to or different from that which could have been presented to the Board. Accordingly, *Garmon* preemption is designed to prevent judicial interference with the Board's interpretation and enforcement of the integrated scheme of regulation established by the Act.

The Board has held that *Linn* and *Bill Johnson’s Restaurants* govern whenever a defamation lawsuit is preempted. To determine if the filing and maintenance of a defamation lawsuit constitutes an unfair labor practice because it is preempted, the Board examines whether the plaintiff pleads and proves actual malice and

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*Food & Commercial Workers Local 880, 74 F.3d 292 (D.C. Cir. 1996), cert. denied sub nom. Teamsters Local 243 v. NLRB, 519 U.S. 809 (1996).*

38 The Board also applies the principles from *Brown v. Hotel Employees*, 468 U.S. 491 (1984), to assess whether a state lawsuit is preempted by the Act. In *Brown*, the Supreme Court held that if conduct is actually protected by Section 7, state law that purports to regulate that activity is preempted as a matter of substantive right, without exception. *Id.* at 502-03. Because the current case deals with conduct by the Union that is protected by the Act only if it lacked various extreme qualities, such as actual malice or outrageous and violent activity, it involves arguably protected conduct, and *Brown* does not apply.

39 359 U.S. at 245.

40 *Id.*


43 *See Beverly Health & Rehabilitation Services*, 336 NLRB at 333, denying reconsideration of 331 NLRB at 962-63.
Likewise, claims of tortious interference claims arising from labor disputes are preempted unless the plaintiff has plead and proven actual malice and damages.45

State claims for intentional infliction of emotional distress may also be preempted where the claim arises from a dispute regulated by federal labor law.46 In Farmer v. Carpenters,47 the Court declined to preempt a dissident union member’s claim of intentional infliction of emotional distress against his union for “frequent public ridicule,” “incessant verbal abuse,” and refusing to refer him to jobs according to hiring hall rules.48 Observing that the plaintiff alleged “grievous mental and emotional distress as well as great physical damage,” the Court held that an action for damages under state law to redress injuries proven by the plaintiff would not result in state interference with federal labor laws, which do not provide protection from “outrageous” conduct.49 However, the Court limited its holding to cases where the alleged tort is “either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished. . . ”50 Applying Farmer, the courts have found claims for intentional infliction of emotional distress preempted where plaintiffs have failed to articulate either a factual basis for

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44 Id.

45 See Milum Textile Services, 357 NLRB at 2049-50 (citing Beverly Hills Foodland v. Food & Commercial Workers Local 655, 35 F.3d at 196). The Board and the courts have also held that tortious interference claims arising out of a labor dispute are preempted absent outrageous or violent conduct. See, e.g., Ashford TRS, 366 NLRB slip op. at 5-6 (finding employer’s tortious interference claim preempted because allegation that union threatened violence by telling hotel customers they would face a vigorous picket line was not so outrageous or threatening to lose protection of the Act). Here, the Employer neither presented nor suggested that it could obtain evidence of outrageous conduct or threats of violence that would have rendered the Union’s Section 7 activity unprotected.


48 430 U.S at 293, 304-306.

49 Id. at 302, 304.

50 Id. at 305.
their claims apart from a labor dispute or that the claim was distinguished by truly “outrageous” conduct.\footnote{See, e.g., Carter v. Sheet Metal Workers’, 724 F.2d at 1477-78 (finding ousted union member’s claim that union refused to reinstate membership for non-payment of dues preempted by NLRA); Clayton v. Gold Bond Bldg. Products, 679 F. Supp. 637, 641 (E.D. Mich. 1987) (concluding employees’ emotional distress claim arising from discharge for strike-related misconduct preempted by the Act); Choate v. Louisville and Nashville R. Co., 715 F.2d 369, 371-72 (7th Cir. 1983) (finding claim based on plaintiff’s termination by railroad employer preempted by Railway Labor Act because alleged cause of action arose directly from labor dispute covered by RLA).}

Applying the foregoing principles, we conclude that each count of the Employer’s lawsuit was preempted. To begin, all of the Union’s activities were, at the very least, arguably protected under Garmon. Nearly all the alleged facts underlying employer’s lawsuit were investigated by the Region and dismissed as without merit, and sustained by the Office of Appeals, because the Region concluded that the Union’s conduct connected with placing the Employer on its unfair list and publicizing this dispute was protected. And those allegations which were not presented to the Region—writing and disseminating the June 5 letter to publicize its dispute with the Employer—are at least arguably protected by Section 7 and could have been presented to the Board. Indeed, as found by the state court, the Employer’s claim was based on conduct subject to regulation by the NLRA and raised none of the recognized exceptions to Garmon preemption.

Next, the Employer’s claims of defamation and tortious interference with business relationships are preempted because the Employer has failed to satisfy the element of actual malice required to prove either of these claims in the context of a labor dispute. The Employer’s defamation and tortious interference claims rests on the Union’s conduct in writing the June 5 letter and distributing it to the Boston Symphony Orchestra and allegedly other Employer clients and potential customers. However, the Employer has made bare claims of malice without any attempt to articulate how it would have proved that the Union’s claims were knowingly false or made with reckless disregard for the truth. Moreover, as discussed in the previous section, the Union submitted evidence to the Region showing that its claims were not false. Therefore, given its failure to meet the burden of demonstrating actual malice, the Employer’s defamation and tortious interference claims are preempted.\footnote{See, e.g., Ashford TRS, 366 NLRB No. 6, slip op. at 4-6 (finding employer’s claim of tortious interference arising from union’s consumer boycott campaign preempted where union’s activities were protected by the Act and lawsuit failed to articulate any ground for finding actual malice or that the union engaged in violent or outrageous conduct).} Because

\footnote{See, e.g., Carter v. Sheet Metal Workers’, 724 F.2d at 1477-78 (finding ousted union member’s claim that union refused to reinstate membership for non-payment of dues preempted by NLRA); Clayton v. Gold Bond Bldg. Products, 679 F. Supp. 637, 641 (E.D. Mich. 1987) (concluding employees’ emotional distress claim arising from discharge for strike-related misconduct preempted by the Act); Choate v. Louisville and Nashville R. Co., 715 F.2d 369, 371-72 (7th Cir. 1983) (finding claim based on plaintiff’s termination by railroad employer preempted by Railway Labor Act because alleged cause of action arose directly from labor dispute covered by RLA).}
they had a tendency to interfere with conduct protected by Section 7, the Employer violated Section 8(a)(1) by filing and maintaining them.\footnote{Id., slip op. at 6.}

Finally, applying \textit{Farmer v. Carpenters}, the Employer's claim for intentional infliction of emotional distress is preempted because the claim arises solely from the labor dispute and there is no evidence of outrageous conduct. Here, the Employer has failed to articulate a factual basis for its claims separate from its labor dispute with the Union: the lawsuit alleged that alleged emotional distress was entirely caused by the Union requesting that its own members withhold their services from the Employer and its subcontractors and allegedly asking potential clients to boycott the Employer. And given that the campaign consisted of no more than adding the Employer to its unfair list, writing letters regarding its dispute and publicizing it, there is no evidence of truly "outrageous" or "abusive" conduct that would fall within the narrow confines of claims permitted to proceed under \textit{Farmer}.\footnote{\textit{Cf.} \textit{Clayton v. Gold Bond Bldg. Products}, 679 F. Supp. at 641 (concluding tort action for intentional infliction of emotional distress under Michigan law would require inquiry into whether employer had legal right to discharge employees for strike-related conduct and thus was clearly related to the underlying NLRA claim).} Thus, the Employer's emotional distress claim is preempted by the Act. Again, because this claim would interfere with conduct protected by Section 7, the Employer violated Section 8(a)(1) by filing and maintaining it.\footnote{\textit{See Ashford TRS}, 366 NLRB No. 6, slip op. at 6.}

Therefore, the Region should issue complaint, absent settlement, alleging that he Employer violated Section 8(a)(1) of the Act by filing and maintaining a baseless and retaliatory lawsuit, and also violated Section 8(a)(1) by filing and maintain a lawsuit that was preempted by the Act.

\textit{/s/}

R.A.B.