J.A. Croson Company *and* J.A. Guy, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 189, AFL–CIO. Cases 09–CA–035163 and 09–CA–035163

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES, GRIFFIN, AND BLOCK

The issue presented is whether the Respondent, J.A. Croson Company, violated Section 8(a)(1) of the National Labor Relations Act by pursuing a State-court lawsuit against Charging Party J.A. Guy, Inc. The lawsuit alleged that the Union's[1] job targeting program, in which Guy participated, violated the State of Ohio's prevailing wage law. The administrative law judge found that Croson's maintenance of the lawsuit did not violate the Act and dismissed the complaint. We reverse.

Contrary to the judge, we find that union job targeting programs, including those funded in part by voluntary deductions from the wages of union members employed on State-funded public works projects, are *clearly* protected under Section 7 of the Act. We therefore find that Croson's State-court lawsuit challenging the Union's job targeting program was preempted by the National Labor Relations Act. We further conclude that preempted lawsuits do not implicate the First Amendment analysis of *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), and that Croson's lawsuit violated Section 8(a)(1) of the Act by seeking to interfere with the Union's job targeting program. We address each of these issues and the appropriate remedy below, after setting forth the factual and procedural history of this protracted proceeding.[2]

[1] United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 189, AFL–CIO.

[2] On June 27, 2003, Administrative Law Judge Robert A. Giannasi issued the attached decision. The General Counsel and Croson each filed exceptions and a supporting brief. Croson filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, briefs, and supplemental briefs (as referenced, infra) and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. FACTUAL BACKGROUND AND STATE COURT PROCEEDINGS

A. The Union's Job Targeting Program

The Union was signatory to a collective-bargaining agreement with the Mechanical Contractors Association of Central Ohio, effective from June 1, 1989, to May 31, 1992. The agreement contained a dues-checkoff provision requiring member employers, who were bound by the collective-bargaining agreement, to deduct and remit to the Union, pursuant to voluntary authorizations signed by unit employees, dues in the amount of 1.75 percent of employees' gross wages. The agreement further provided for the deduction and remittance, also pursuant to voluntary employee authorization, of an additional 2 percent of employees' gross wages as a "Market Recovery Assessment." The Union used the money collected via that assessment to fund its job targeting program, termed an "Industry Advancement Program." All assessments for the job targeting program were voluntarily contributed by union members.[3]

Job targeting is a strategy utilized by construction unions, with the cooperation of unionized contractors, to aid those contractors in bidding successfully on construction projects so that the jobs on those projects will go to union-represented workers. "Typically, unions carry out their job targeting programs by selecting projects to target and guaranteeing subsidies to union contractors that submit successful bids. The result is to lower union contractors' overall costs to complete targeted projects, enabling union contractors to submit competitive bids."[4]

The Union's job targeting program here operates as follows: If the Union decides to target a particular construction project, it announces that it will give the successful bidder, if that bidder is a signatory contractor (one bound by the collective-bargaining agreement between the Union and the Association), a grant from the job targeting fund based on a specified dollar amount per hour worked by union members on the project. Signatory contractors decide for themselves whether to bid on particular projects, but in formulating bids on targeted jobs, they factor in the job-targeting grant. A signatory contractor that successfully bids on a targeted project is required to pay wages and benefits as set forth in the

[3] See *J.A. Croson Co. v. J.A. Guy, Inc*., 81 Ohio St.3d 346, 349 (1998), cert. denied 525 U.S. 871 (1990). The Ohio Supreme Court found that the assessments were voluntarily contributed, and Croson does not assert otherwise. Nor is there any evidence in the record that the Union ever attempted to enforce the collective-bargaining agreement's union-security clause against employees who did not contribute. The dissent's contention that the contributions were involuntary is wrong as a matter of fact.

[4] Id., 81 Ohio St.3d at 348–349.

collective-bargaining agreement with the Union, but the Union reimburses the contractor, from the job targeting fund, the preestablished hourly amount. The Union unilaterally makes the decision whether to target a job and how much to pay in grants.

Charging Party Guy was a signatory employer and participated in the Union's job targeting program. Croson, another mechanical contractor, does not have a collective-bargaining relationship with the Union and did not participate in the program.

In February 1990, Guy and Croson submitted bids for the construction of a new county jail for Pickaway County, Ohio. The Union had targeted the project; Guy had calculated its bid accordingly, and it was awarded the contract. In November 1991, Guy and Croson each submitted bids for the construction of a new water softening system for Pickaway County. That contract was also awarded to Guy. That project was not targeted by the Union, but Guy deducted the 2-percent Market Recovery Assessment from the wages of consenting union members employed on the project and remitted that money to the Union for placement in the job targeting fund.

B. Croson Commences Litigation Challenging the Job Targeting Program

On January 30, 1992, Croson filed charges with the Ohio Department of Industrial Relations, alleging that Guy's deduction of the job targeting assessment from the wages of employees who worked on the county jail and water softening projects violated the Ohio prevailing wage statute.[5] On March 11, 1993, the Ohio Department of Industrial Relations issued a determination that Guy had violated that statute.

On June 15, 1993, Croson filed a complaint in the Court of Common Pleas in Pickaway County, Ohio, alleging that Guy's deduction of the job targeting assessment from employees' wages on the jail and water softening projects violated both the antikickback provision of Ohio's prevailing wage statute and an Ohio regulation adopted pursuant to that statute, which permit some deductions from employees' wages on State-funded construction jobs pursuant to a collective-bargaining agreement but prohibit deduction of special assessments.[6] In response to the complaint, Guy filed a third-party complaint seeking to make the Union a party to the suit. Croson moved to strike the third-party complaint, but the trial court denied the motion. Thereafter, each of the parties, including the Union, filed a Motion for Summary Judgment. On March 27, 1995, the trial court granted summary judgment for Guy and the Union, finding that the NLRA preempted Croson's State-law claims.

Croson filed an appeal with the Court of Appeals for the Fourth Appellate District, Pickaway County. On October 4, 1996, that court reversed the trial court, finding that Croson's lawsuit was not preempted by the NLRA.

C. The Ohio Supreme Court Determines that Croson's Lawsuit Is Preempted by the National Labor Relations Act

The Ohio Supreme Court accepted discretionary appeals filed by Guy and the Union to resolve the following issue:

> Whether federal labor law preempts a claim that a union employer's deduction of union dues for a union "Industry Advancement" or "job targeting" fund violates Ohio's Prevailing Wage Law, R.C. 4115.01 *et seq.*, and state regulations adopted thereunder.

On April 8, 1998, the Ohio Supreme Court, in a unanimous decision, reversed the court of appeals. The Supreme Court held that Section 7 of the NLRA preempts the Ohio prevailing wage law and regulations issued thereunder "to the ex-

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[5] Ohio Rev. Code 4115.01 et seq. According to the Ohio Supreme Court, Ohio's prevailing wage law "require[s] contractors and subcontractors for public improvement projects to pay laborers and mechanics the so-called prevailing wage in the locality where the project is to be performed. The primary purpose of the prevailing wage law is to support the integrity of the collective-bargaining process by preventing the undercutting of employee wages in the private construction sector." *J.A. Croson Co.*, supra, 81 Ohio St.3d at 349 (citation omitted).

[6] The statutory antikickback provision provides:

> Where persons are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for self or any other person, shall request, demand, or receive, either before or after the person is engaged, that the person so engaged pay back, return, donate, contribute, or give any part or all of the person's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent the procuring or retaining of employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This provision does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

Ohio Rev. Code 4115.10(D). The regulation provides:

> (B) The following deductions from wages may be made only if, prior to commencement of work by the employee on any project, employers procure and maintain, in writing, proof of voluntary deductions signed by the employee:
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> . . . .
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> (6) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments, provided that a collective bargaining agreement between the employer and representative of its employees permits such deductions and such deductions are not otherwise prohibited by law.

Ohio Adm.Code 4101:9-4-07(B)(6) (adopted by the Administrator of the Bureau of Employment Services pursuant to Ohio Rev. Code 4115.12).

tent that those provisions could be construed to restrain or inhibit the federally protected use of job targeting programs."[7]

The Ohio Supreme Court applied the preemption principles articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959): "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act . . . due regard for the federal enactment requires that state jurisdiction must yield." Id. at 244. The Ohio Supreme Court explained that if the National Labor Relations Board has decided, subject to appropriate federal judicial review, that conduct is protected by Section 7, "the matter is at an end and states are ousted of all jurisdiction." 81 Ohio St.3d at 352, citing *Garmon*, supra at 245. Observing that the Board had held in *Manno Electric*[8] that the establishment and operation of job targeting programs constitutes protected conduct under Section 7 of the Act, the court concluded:

> Whether characterized as an impermissible wage reduction or an illegal subsidy to union contractors, the prohibitions that J.A. Croson seeks to enforce under Ohio law cannot peacefully coexist with the [B]oard's classification of job targeting as "concerted activity" protected by Section 7 of the NLRA. Distilled to their elemental purpose, J.A. Croson's claims seek to invoke Ohio law to thwart [the Union's] use of its job targeting program. . . . Because the NLRB has held that job targeting is *actually* protected by the NLRA, there is no room for state regulation infringing that conduct. [Emphasis in original.]

Croson filed a petition for a writ of certiorari with the United States Supreme Court seeking review of the decision. On October 5, 1998, the petition was denied. *J.A. Croson v. J.A. Guy*, 525 U.S. 871 (1998).

II. PROCEDURAL HISTORY BEFORE THE BOARD

On January 12, 1999, the General Counsel issued a complaint against Croson alleging that it violated Section 8(a)(1) by maintaining the by then completed lawsuit. The General Counsel contended that the lawsuit was unlawful both because it was preempted by federal law and because it was unsuccessful and retaliatory. On June 16, 1999, Croson, the General Counsel, the Union, and Charging Party Guy filed with the Board a Motion to Transfer Cases to the Board and Stipulation of Facts. On March 2, 2000, the Board's Executive Secretary, by direction of the Board, issued an order granting the motion. All parties thereafter filed briefs.

On May 10, 2001, the Executive Secretary, by direction of the Board, issued a Notice and Invitation to File Briefs addressing the impact on this proceeding, if any, of the Board's decision in *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492 (2000), enfd. 345 F.3d 1049 (9th Cir. 2003). All parties thereafter filed supplemental briefs.[9]

On September 26, 2002, the Executive Secretary, by direction of the Board, rescinded approval of the parties' stipulation of the facts and remanded the proceeding for a hearing before an administrative law judge, in light of the Supreme Court's intervening decision in *BE & K*, supra, 536 U.S. 516. At issue before the Supreme Court in *BE & K* was the validity of the Board's standard for declaring the filing and maintenance of an ultimately unsuccessful lawsuit to be an unfair labor practice. Under that standard, a lawsuit that was unsuccessful would violate the Act if the suit was filed to retaliate for the exercise of Section 7 rights. 536 U.S. at 529–530. The Court invalidated the Board's standard, concluding that an unsuccessful but "genuine" and "reasonably based" lawsuit implicates constitutional considerations under the First Amendment's Petition Clause. Id. at 530–532.

Following the Court's decision in *BE & K*, the General Counsel narrowed his theory of the complaint, contending only that Croson's State-court lawsuit was unlawful because it was preempted by the NLRA.[10]

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[7] *J.A. Croson Co. v. J.A. Guy, Inc.*, supra, 81 Ohio St.3d at 358.

[8] 321 NLRB 278, 298 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997).

[9] *Kingston Constructors*, discussed infra, concerned the involuntary collection from employees of job targeting assessments on construction projects subject to the Davis-Bacon Act, the federal statute that requires contractors on federally funded construction projects to pay prevailing wage rates without deductions or rebates. 40 U.S.C. § 276a et seq. In *Kingston Constructors,* deferring to a construction of the Davis-Bacon Act adopted by the Department of Labor and accepted by two Federal appeals courts, the Board concluded that a union commits an unfair labor practice by attempting, without individualized consent, to collect job targeting assessments from employees' wages earned on Davis-Bacon projects. See *Electrical Workers Local 357 v. Brock,* 68 F.3d 1194, 1199 (9th Cir. 1995).

[10] On December 23, 2003, the Executive Secretary, by direction of the Board, issued a Notice and Invitation To File Amicus Briefs concerning the issues raised in this proceeding and in *Can-Am Plumbing*, 335 NLRB 1217 (2001), revd. and remanded 321 F.3d 145 (D.C. Cir. 2003), reaffd. 350 NLRB 947 (2007). Briefs were filed by: (1) Minnesota State Building and Construction Trades Council, AFL–CIO; (2) National Electrical Contractors Association and the International Brotherhood of Electrical Workers, AFL–CIO; (3) Associated Builders and Contractors, Inc.; (4) Sierra Nevada Chapter of Associated Builders & Contractors and Electro-Tech, Inc. (with a request, which we grant, that the Board take judicial notice of IBEW Local 401's LM-2 report); and (5) National Right to Work Legal Defense Foundation. The General Counsel, the Union, and Croson filed response briefs to the amicus briefs. We have considered all briefs filed in this proceeding

III. THE JUDGE'S DECISION

The administrative law judge rejected the General Counsel's contention that Croson's lawsuit was preempted and he dismissed the complaint. The judge acknowledged that the Board had held in *Manno Electric*[11] and subsequent cases that the operation of a job targeting program constitutes protected activity. The judge reasoned, however, that those cases involved privately funded construction projects, and that the Board had not specifically determined whether job targeting programs targeting publicly funded projects were also protected. The judge therefore found that the utilization of the job targeting program by the Union and Guy on State public works projects constituted conduct that was only "arguably," rather than clearly, protected by the NLRA. Applying the rule of *Loehmann's Plaza*[12]—that where activity is only arguably protected, conduct interfering with that activity is not preempted ab initio, but only after the General Counsel issues complaint—the judge observed that the General Counsel issued his complaint in this proceeding only after Croson's lawsuit was completed, and the judge therefore dismissed the complaint.[13]

IV. DISCUSSION

A. The Union's Job Targeting Program is Protected by Section 7 of the Act

1. The Board's decisions in *Manno Electric* and *Associated Builders & Contractors*

As the Ohio Supreme Court recognized, the Board has squarely held that job targeting programs are protected by Section 7 of the Act. In *Manno Electric*, supra, 321 NLRB at 298, the judge held that:

> Section 7 provides that employees shall have the right "to engage in other concerted activities for the purpose of . . . other mutual aid or protection." The objectives of the "job targeting program" are to protect employee's jobs and wage scales. These objectives are protected by Section 7.

The Board adopted the judge's holding in full.[14] The Board did not make any distinction based on whether the job targeting programs operate on publicly or privately funded projects, thus finding protection for job targeting programs generally.

The Board's subsequent case law confirms that, as of the issuance of *Manno*, job targeting programs constituted clearly protected activity on both privately funded projects and—as in this case—State-funded projects. In *Associated Builders & Contractors*,[15] the respondent-employer sued several unions in California State court alleging, inter alia, that the unions' job targeting programs violated the California Business and Professions Code. See 331 NLRB at 133.[16] The lawsuit sought to preclude the unions' use of job targeting funds on State-funded projects. The Board adopted the judge's finding that the employer's State-court lawsuit violated the NLRA because of the protection afforded job targeting programs under *Manno*. The Board explained:

> In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining a lawsuit against the [unions], we do so solely on the ground that the [unions'] job targeting program is concerted, protected activity and that, under *Manno* . . . Respondent's maintenance of its lawsuit constitutes an interference with conduct that is *actually protected* by Sec. 7.

331 NLRB at 132 fn. 1 (emphasis supplied.) The Board further adopted the judge's express rejection of the employer's argument that *Manno* was inapplicable because it "did not involve a public works project" subject to California State law, finding that the employer's attempt to distinguish *Manno* on that basis was unavailing. 331 NLRB at 138. Similarly, in *Can-Am Plumbing*,[17] the Board found that the respondent's State-court lawsuit challenging the union's job targeting program under California's prevailing wage statute was unlawful, because the Board's decision in *Manno* had made clear that such programs constituted actually protected conduct.

Based on *Manno Electric*, *Associated Builders & Contractors*, and *Can-Am Plumbing*, we find that the Union's utilization of its job targeting program on State-funded public works projects was clearly protected by Section 7 of the Act. We further find that such protection attached as of the issuance of the Board's *Manno* decision.[18]

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[11] Supra, 321 NLRB at 298.

[12] 305 NLRB 663, 669 (1991), revd. on other grounds 316 NLRB 109 (1995).

[13] The judge found it unnecessary to determine whether the Board's decision in *Kingston Constructors*, supra, making it unlawful for unions to collect involuntary assessments from employees for job targeting programs targeting projects covered by the Davis-Bacon Act, was applicable in the context of State-funded public works projects.

[14] When the Board adopts the administrative law judge's decision, the judge's findings and reasoning are its own. See *Providence Hospital v. NLRB*, 93 F.3d 1012, 1016 and fn. 4 (1st Cir. 1996).

[15] 331 NLRB 132 (2000), vacated in part not relevant here pursuant to settlement 333 NLRB 955 (2001).

[16] The Respondent also invoked California's prevailing wage law. 331 NLRB at 138.

[17] Supra, 335 NLRB at 1217.

[18] The Ohio Supreme Court, too, found that *Manno* was dispositive on this issue, after considering and rejecting the argument, now advanced by our dissenting colleague, that the job targeting program was only arguably protected:

> J.A. Croson's assertion that *Manno* is distinguishable because it did not involve a challenge brought under a state's prevailing wage law is

Indeed, we take this opportunity to reaffirm that the objectives of job targeting programs fall squarely within the ambit of Section 7 of the Act. Section 7 protects concerted employee activities engaged in "for the purpose of collective bargaining or other mutual aid or protection." It is settled that these protections encompass employee attempts "to improve terms and conditions of employment" with their employer as well as attempts to otherwise "improve their lot . . . through channels outside the immediate employee-employer relationship." See *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565–566 (1978).

The job targeting program is effectively a union's agreement with an employer to accept a pay cut in order to avoid layoffs or expand job opportunities for represented employees—a bargain that surely lies at the heart of activity protected by Section 7 of the Act. But in the construction industry, an employer often cannot guarantee that it can comply with its end of such a bargain because it must ordinarily bid for work through a competitive process. A union might agree to a pay cut on some jobs in order to secure its members employment on others only to have the employer fail to obtain the work. The job targeting program solves that unique problem by allowing the union to hold the wages donated by employees specifically for this purpose until the employer secures the additional work. The strategy of job targeting to preserve and expand employment opportunities for represented employees thus plainly seeks to further legitimate goals under Section 7. The Supreme Court has made clear that unions "may seek to increase the work of union subcontractors at the expense of nonunion subcontractors." See *Connell Construction Co. v. Plumbers Local 100,* 421 U.S. 616, 625 (1975). "[T]he parties to this [job targeting] agreement undoubtedly wanted the union subcontractors to increase their work at the expense of nonunion subcontractors. That of course is a legitimate goal of the union and its workers." *Phoenix Electrical Co. v. National Electrical Contractors Assn.*, 81 F.3d 858, 863 (9th Cir. 1996). Because job targeting constitutes protected activity, collective-bargaining agreements permitting voluntary deductions from wages to support job targeting, and employer and union conduct pursuant to those agreements, are likewise protected by Section 7.

2. The Board's Decision in *Kingston Constructors*

The Board's decision in *Kingston Constructors,* supra, 332 NLRB 1492, confirmed that the job targeting program at issue here is protected under the Act. In that case, the Board considered whether the respondent union violated the Act by attempting to collect job targeting assessments from wages earned by employees on construction projects covered by the Davis-Bacon Act and those not covered. Looking first at job targeting assessments on wages at non-Davis-Bacon projects, the Board specifically reaffirmed the holdings in *Manno Electric* and *Associated Builders & Contractors* that job targeting programs "are affirmatively protected by Section 7." Id. at 1492.

Turning to job targeting assessments from wages on construction projects subject to the Davis-Bacon Act, the Board in *Kingston Constructors* observed that the U.S. Department of Labor (DOL) had construed the Davis-Bacon Act to prohibit deductions for job targeting programs from wages earned on federally funded public works projects subject to that statute, and that two Fed-

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not persuasive. See *Associated Builders & Contractors, Inc.* (July 1, 1997), 1997 NLRB LEXIS 535. Nothing in the *Manno* decision indicates that the NLRB would limit the NLRA's protection of job targeting to the facts of the case before it.

81 Ohio St.3d at 355. Our dissenting colleague nevertheless asserts, after much discussion, that "it is inconceivable that *Manno* preempted [Croson's] lawsuit and stripped the Respondent of a forum in which to lawfully raise the . . . questions" implicated in its lawsuit. The Ohio Supreme Court's unanimous decision agreeing with the majority here strongly suggests otherwise.

Because the job targeting program was clearly protected, it is unnecessary to pass on the dissent's argument that the Respondent's lawsuit fell within the exception to federal preemption carved out in the Supreme Court's decision in *Sears Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978), and the Board's later decision in *Loehmann's Plaza*, supra, for State regulation of "arguably" protected conduct where the Board's jurisdiction has not been invoked.

Chairman Pearce agrees that the job targeting program was clearly protected and he finds it unnecessary to decide when the protection attached. He also finds it unnecessary to decide whether the Respondent's lawsuit was preempted from its inception or from the issuance of the Board's decision in *Manno*.

Chairman Pearce notes his disagreement with the dissent's characterization of the scope of the exception to federal preemption as invariably precluding the preemption of state court actions involving "arguably" protected conduct until after the General Counsel has issued a complaint. In *Sears*, the Court held that the arguably protected character of trespassory picketing is insufficient to deprive a state court of jurisdiction in the absence of Board involvement in the matter. The Court explained that to permit State courts to exercise jurisdiction in such cases "does not create an unacceptable risk of interference with conduct which the Board . . . would find protected," because "experience under the Act teaches" that trespassory union activity is "rare[ly]" protected and "is far more likely to be unprotected than protected." Id. at 205. The Court was careful to point out, however, that where there is a strong argument that Sec. 7 does protect disputed activity, the risk of interference with federally protected conduct may require that a State yield its jurisdiction, even if the aggrieved party has no adequate means of obtaining a Board ruling on the question of whether the activity is federally protected. "[T]he acceptability of 'arguable protection' as a justification for pre-emption" in such cases, the Court explained, is "at least in part, a function of the strength of the argument that Section 7 does in fact protect the disputed conduct." Id. at 203. Where the argument for protection is strong, "it might be reasonable to infer that Congress preferred the costs inherent in a jurisdictional hiatus to the frustration of national labor policy which might accompany the exercise of state jurisdiction." Id.

eral courts of appeals had deferred to the DOL's construction as a reasonable interpretation of Davis-Bacon.[19] The Board reasoned that, with respect to Davis-Bacon projects, it was bound to defer to the construction of the executive branch department with statutory authority to enforce it. 332 NLRB at 1500 ("The Labor Department and the courts, not the Board, have the responsibility to enforce the Davis-Bacon Act."), supra at 1501. The Board therefore concluded, in light of its obligation to defer to the Department's construction, that it was constrained to find that compulsory deduction of job targeting assessments as a condition of employment on Davis-Bacon projects is inimical to public policy, and that the union committed an unfair labor practice by attempting to collect job targeting assessments from employees working on construction projects covered by Davis-Bacon. 332 NLRB at 1500. The Board, importantly, did not in any manner revisit or retreat from its analysis that job targeting programs amount to concerted employee activity engaged in for the purpose of collective bargaining or other mutual aid or protection.[20] In short, as the United States Court of Appeals for the District of Columbia Circuit subsequently characterized the law in *Can-Am Plumbing*, supra, "ordinarily a JTP [job targeting program] is clearly protected under section 7, notwithstanding state policy to the contrary, unless it violates *federal* policy." 321 F.3d at 152 (emphasis added).

In the present case, it is undisputed that the county jail and water softening projects at issue were funded by state monies and were not covered by the Davis-Bacon Act. Further, there is no evidence that any of the funds collected by the Union for its job targeting program from employees of Charging Party Guy, or from any other participating employer, were derived from wages earned on projects subject to the Davis-Bacon Act. Thus, uniform precedent holding job targeting programs protected, except for projects covered by the Davis-Bacon Act, compels our conclusion that the program at issue here was clearly protected under the NLRA.

[19] U. S. Department of Labor, Wage Appeals Board, *In the Matter of Building and Construction Trades Unions Job Targeting Programs*, WAB Case No. 90-02 (June 13, 1991), 1991 WL 494718 (WAB); *Building & Construction Trades Department v. Reich,* 40 F.3d 1275 (D.C. Cir. 1994); *Electrical Workers Local 357 v. Brock*, supra, 68 F.3d 1194.

[20] We are not confronted here, as we were in *Kingston Constructors*, with the decision of a coequal agency or department of the Federal Government under a separate federal statute that elements of the job targeting program at issue are unlawful. Nor, as shown, has the state court interpreted its own law in a manner that conflicts with the Board's interpretation of the NLRA.

B. Croson's State-Court Lawsuit was Preempted by the NLRA

In the absence of an express preemption provision in the NLRA, the Supreme Court has articulated two distinct lines of doctrine addressing the preemptive effect of the Act. The *Garmon* doctrine, applied by the Ohio Supreme Court, "protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA." *Metropolitan Life Ins. Co. v. Massachusetts*, supra, 471 U.S. at 748–749. A second preemption doctrine, articulated in *Int'l Assoc. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140–141 (1976), prohibits a state from regulating conduct neither prohibited nor protected under the NLRA if Congress intended that the conduct be unregulated and left to the free play of economic forces. Thus, "the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see *Machinists,* or for NLRB jurisdiction, see *Garmon*." *Building Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.,* 507 U.S. 218, 227 (1993).

As did the Ohio Supreme Court, we find *Garmon* preemption principles controlling here. *Garmon* "forbids state and local regulation of activities that are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." *Building Trades Council*, supra at 225, quoting *Garmon,* supra at 244. Preemption jurisprudence in this area has accordingly "focused on the nature of the activities which the States have sought to regulate . . . . When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." *Garmon*, supra, 359 U.S. at 243; see also *Brown v. Hotel & Restaurant Employees Local Union 54*, 468 U.S. 491, 503 (1984) ("If the state law regulates conduct that is actually protected by federal law . . . pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right.").

As we have explained, Croson's State-court lawsuit, which claimed that Guy's participation in the job targeting program violated Ohio's prevailing wage law and regulations, created an actual conflict with rights protected by the NLRA: as applied to job targeting assessments, the State regulatory regime directly conflicts with Section 7 rights we have reaffirmed today. We accordingly find, as did the Ohio Supreme Court, that Croson's lawsuit was preempted by the NLRA under *Garmon*. See *Manno Electric*, supra, 321 NLRB at 298 (State law-

suit challenging job targeting program preempted); *Associated Builders*, supra, 331 NLRB at 142 (same).[21]

C. Croson's Preempted Lawsuit Violates Section 8(a)(1) of the Act

Croson argues that even if its lawsuit was preempted, it constituted genuine petitioning activity and is thus insulated from legal sanction by the Supreme Court's decision in *BE & K Construction Co.,* supra, 536 U.S. 516. That argument, however, has been squarely and, in our view, correctly rejected by the D.C. Circuit. In *Can-Am Plumbing v. NLRB*, supra, 321 F.3d at 151, the court considered whether a State-court lawsuit challenging a job targeting program under California's prevailing wage statute violated Section 8(a)(1). The court held that the First Amendment concerns expressed in *BE & K* and an earlier decision, *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), were "not relevant" because the State-court lawsuit was wholly preempted by federal law. Id.

In *Bill Johnson's*, the Supreme Court held that the Board may not order a party to cease and desist from prosecuting a pending State-court lawsuit unless two conditions are met: (1) the lawsuit lacks a reasonable basis in fact or law, and (2) the lawsuit was filed with a retaliatory motive. But, the Court further stated that, when a completed lawsuit has resulted in a judgment adverse to the plaintiff, the Board may consider whether the lawsuit was filed with retaliatory intent, and if such intent is present, may find a violation of the NLRA and order appropriate relief whether or not the lawsuit was baseless. Id. at 747–749. In *BE & K*, the Court deemed the latter statement dicta and rejected it.

In *Bill Johnson's*, however, the Supreme Court had carved out an exception to its holding, and the *BE & K* Court left that exception undisturbed. The exception, contained in footnote 5 of the *Bill Johnson's* decision, states:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits . . . and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-empts the field." *NLRB v. Nash-Finch Co.,* 404 U.S. 138, 144 (1971). [461 U.S. at 737 fn. 5.]

The footnote is consistent with the legitimate interests the Court sought to protect in *Bill Johnson's*. The Court explained, "Just as the Board must refrain from deciding genuinely disputed material factual issues with respect to a state suit, it likewise must not deprive a litigant of his right to have genuine State-law legal questions decided by the state judiciary." Id. at 746. But when, as here, federal labor law preempts that state-law claim, the Board is the sole and proper venue for the adjudication of rights. In such cases, as the Court explained in footnote 5, the Board can proceed to adjudicate the charge that the maintenance of the action under state law constitutes an unfair labor practice and, if it so finds, order the respondent to cease and desist.[22]

Consistent with those principles, the Board and reviewing courts have consistently held that a preempted lawsuit enjoys no special protection under *Bill Johnson's*. See, e.g., *Bakery Workers Local 6 (Stroehmann Bakeries*), 320 NLRB 133, 139 (1995); *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993). As the Third Circuit stated, "[t]he basic holding of *Bill Johnson's* was subject to a large exception, for the Court indicated that it was not dealing with a suit beyond

[21] We also agree with the Ohio Supreme Court that the clearly protected nature of the conduct at issue in this case renders *Machinists* preemption jurisprudence inapposite. See 81 Ohio St.3d at 357-358. Under *Machinists*, States are left free to establish minimum employment standards that are not inconsistent with the NLRA's general legislative goals and do not trench upon the choice of terms in collective-bargaining agreements that Congress intended to be left to the free play of economic forces. See *Fort Halifax Packing v. Coyne*, 482 U.S. 1 (1987) (NLRA did not preempt State law requiring minimum severance payments when a factory closes); *Metropolitan Life Ins. Co. v. Mass.*, supra, 471 U.S. at 749 (NLRA did not preempt State law requiring minimum mental health care benefits to be included in general insurance policies issued to state residents). Those cases make clear, however, that the state statutes at issue did not seek to or effectively regulate NLRA-protected activity, and thus did not conflict with the NLRA under *Garmon*. See *Fort Halifax Packing*, supra, 482 U.S. at 22 fn. 16 (finding no *Garmon* preemption "since the [state] statute does not purport to regulate any conduct subject to regulation by the [NLRB]"); *Metropolitan Life*, 471 U.S. at 748–749 ("The *Machinists* doctrine was designed . . . to govern pre-emption questions that arose concerning activity that was neither arguably protected against employer interference by Sec. 7 . . . nor arguably prohibited . . . .").

[22] Justice Brennan emphasized this point in his concurring opinion in *Bill Johnson's*: "[T]he Board may enjoin prosecution of a state lawsuit if, in addition to whatever other findings are required to decide that an unfair labor practice has been committed, it determines that controlling federal law bars the plaintiff's right to relief, that clear state law makes the case frivolous, or that no reasonable jury could make the findings of fact in favor of the plaintiff that are necessary under applicable law." Id. at 754–755. But, he continued, "[t]he Board may not enjoin prosecution of an *unpreempted* state lawsuit unless it finds that the suit has no reasonable basis." Id. at 755–756 (emphasis added). See also *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) ("there is . . . an implied authority of the Board . . . to enjoin state [court] action where its federal power preempts the field").

a state court's jurisdiction because of federal preemption or 'a suit that has an object that is illegal under federal law.'" 973 F.2d at 235–236, quoting *Bill Johnson's,* 461 U.S at 737 fn. 5.

It is clear from *Can-Am Plumbing*, supra, that the *Bill Johnson's* exception for preempted lawsuits remains intact after *BE & K*. In *Can-Am Plumbing*, the D.C. circuit stated, "*BE&K* did not affect the footnote 5 exemption in *Bill Johnson's*," and "the jurisdictional question of preemption is, as *Bill Johnson's* acknowledged in footnote 5 (and *BE & K* did not disturb), a different matter" than the question of whether a lawsuit can be held unlawful as retaliatory. *Can-Am Plumbing*, supra, 321 F.2d at 151. Thus, *BE & K* does not shield preempted state lawsuits. Rather, footnote 5 of *Bill Johnson's* "places preempted lawsuits outside of the First Amendment analysis." Id.[23]

Accordingly, under *Bill Johnson's*, the Board has the authority to determine if a lawsuit brought under state law is preempted by the NLRA. If it is, and if it otherwise violates the NLRA, the Board may hold that the filing and maintenance of the lawsuit is an unfair labor practice without regard to whether it is objectively baseless, and, if the lawsuit is still pending, issue a cease-and–desist order barring further prosecution of the lawsuit. See, e.g., *Can-Am Plumbing,* supra, 335 NLRB at 1217; *Associated Builders & Contractors,* supra, 331 NLRB at 132 fn. 1.

Croson's maintenance of its lawsuit plainly interfered with conduct protected by Section 7 of the Act, namely the Union's operation of the job targeting program. Indeed, Croson's lawsuit challenged the collectively bargained mechanism through which the Union's job targeting program was funded and sought to enjoin Guy's compliance with the agreed-upon provision. We therefore find that Croson violated Section 8(a)(1) of the Act by maintaining its State-court lawsuit. See, e.g., *Webco Industries*, 337 NLRB 361, 363 (2001) ("[I]f a suit is preempted, it violates Section 8(a)(1) if it tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.").

We reject Croson's defense that its lawsuit did not infringe upon Section 7 rights because it named as a defendant only Charging Party Guy, an employer (and therefore not a person protected by Sec. 7). It is well established that one employer may violate the Act by interfering with the exercise of Section 7 rights of employees of another employer.[24] Here, Croson's lawsuit, which claimed that Guy's deduction of dues for the job targeting program was unlawful, constituted an interference with the exercise of the Section 7 rights of Guy's employees, who had bargained for the challenged provision through their duly selected union representative and who voluntarily authorized deductions for use in the job targeting program pursuant to the bargained provision. If Croson had prevailed in the state courts, the result would have been to curtail that program. As the Ohio Supreme Court declared, "Distilled to their elemental purpose, J.A. Croson's claims seek to invoke Ohio law to thwart Local 189's use of its job targeting program."[25] The interference with employees' Section 7 rights is accordingly not excused or mitigated by the fact that Croson named only Guy as a defendant in its lawsuit.

REMEDY[26]

Devising the proper remedy in this case is not a simple task. We are guided by certain basic principles, grounded in Section 10(c) of the Act, as explained by the Supreme Court:

> Under §10(c), the Board's authority to remedy unfair labor practices is expressly limited by the requirement that its orders "effectuate the policies of the Act." Although this rather vague statutory command obviously permits the Board broad discretion, at a minimum it encompasses the requirement that a proposed remedy be tailored to the unfair labor practice it is intended to redress.

[23] In light of *Can-Am Plumbing* and the absence of any indication that the Supreme Court has repudiated or limited the scope of fn. 5 of *Bill Johnson's*, we decline to join our dissenting colleague in expanding the reach of *BE & K* to preempted lawsuits. He dismisses the language in *Can-Am Plumbing* as dicta, because the D.C. Circuit remanded the case to the Board on other grounds. Although our colleague is correct regarding the remand, he misses the larger point: the court did not reach the remanded issue—whether the job-targeting fund included monies earned on jobs subject to Davis-Bacon or the state equivalent—until after it rejected what "Can-Am principally contended," i.e., that *BE & K* "extended the analytical framework of *Bill Johnson's* . . . to preempted lawsuits." 321 F.3d at 147, 148, 150–151. The court concluded, as a matter of law, that fn. 5, which "*BE&K* did not disturb" (id. at 151), "places preempted lawsuits outside of the First Amendment analysis." Id. More recently, the Ninth Circuit expressed its agreement with the position of the D.C. Circuit and the Board. See *Small v. Plasterers Local 200*, 611 F.3d. 483, 492 (9th Cir. 2010), quoting *Can-Am*, supra at 151 ("'*BE&K* did not affect the footnote 5 exemption in *Bill Johnson's*.'").

[24] See, e.g., *International Shipping Assn.,* 297 NLRB 1059 (1990); *Dews Construction Corp.*, 231 NLRB 182 fn. 4 (1977), enfd. mem. 578 F.2d 1374 (3d Cir 1978).

[25] 81 Ohio St.3d at 355.

[26] Chairman Pearce does not join in the remedy portion of the decision. He would require the Respondent to reimburse the Charging Parties for the legal fees and expenses incurred in defending themselves in the State court litigation. He recognizes that the Board has broad discretionary authority under Sec. 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act and that compelling policy considerations may warrant the Board's denial, in the exercise of its remedial discretion, of a make-whole remedy. However, in Chairman Pearce's view, there are no such considerations here.

Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 900 (1984). The Board has recognized its "duty and 'broad discretionary' authority under Section 10(c) to tailor its remedies to the varying circumstances on a case by case basis, in order to ensure that its remedies are congruent with the facts of each case." *Diamond Walnut Growers, Inc.*, 340 NLRB 1129, 1132 (2003). The unusual circumstances of this lengthy, complicated proceeding in an evolving area of labor law particularly call for a tailored remedy, one which will require Croson, in the words of Section 10(c), to "cease and desist from" the unfair labor practice we have found and to "take such affirmative action . . . as will effectuate the policies of th[e] Act." 29 U.S.C. § 160(c).

Croson violated Section 8(a)(1) by *maintaining* a preempted lawsuit. But as we have explained, that lawsuit was *not* unlawful when it was initiated; rather, it became unlawful when the Board later issued its decision in *Manno*, supra. Because unfair labor practice charges were not filed immediately, any Board remedy could (at most) reach only a portion of the period during which Croson's lawsuit was unlawfully maintained: beginning 6 months before charges were filed, in line with the 6-month statute of limitations established by Section 10(b) of the Act. See *Can-Am Plumbing*, supra, 335 NLRB at 1223. A brief recapitulation of the chronology is helpful:

> *June 15, 1993*: Croson brings suit in the Ohio trial court.
>
> *March 27, 1995*: The Ohio trial court, finding Croson's suit preempted by the NLRA, grants summary judgment for Guy and the Union.
>
> *May 22, 1996*: The Board issues *Manno*, the predicate for our own preemption finding.
>
> *October 4, 1996*: The Ohio intermediate appellate court reverses the trial court, finding no NLRA preemption and entering judgment for Croson.
>
> *July 30, 1997*: The Union and Guy file unfair labor practice charges with the Board.
>
> *April 8, 1998*: The Ohio Supreme Court, reversing the appellate court, finds preemption.
>
> *January 12, 1999*: The General Counsel issues a complaint.

As indicated, Guy and the Union filed unfair labor practice charges more than 6 months (indeed, more than a year) after the Board issued *Manno*, the triggering event that made Croson's lawsuit unlawful. Nevertheless, Croson's suit was still being pursued when unfair labor practice charges were filed, and it is Croson's maintenance of its lawsuit during the 10(b) period that constitutes the violation.[27]

All this said, we believe that the policy reflected in Section 10(b)—the desirability of quickly bringing unfair labor practice charges to the Board's attention, so that they can be promptly addressed and potentially disruptive labor disputes resolved, see *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 426–429 (1960)—is implicated here, at least with respect to tailoring an appropriate remedy. In the context of cases like this one, that policy is buttressed by the policy embodied in NLRA preemption doctrine. State lawsuits that are preempted by the NLRA threaten the primacy of Federal labor law from their inception. They necessarily can lead to conflict between State courts, on one hand, and the Board and the federal courts, on the other. Quick action by the Board, which has the authority to uphold the primacy of Federal labor law and so may enjoin an ongoing State lawsuit, would seem to be especially important. Cf. *Can-Am Plumbing*, supra, 335 NLRB at 1217 (ordering respondent to take affirmative action within 7 days to dismiss preempted State court lawsuit, in order to "speedily terminate an otherwise continuing violation of Section 7 rights and also to minimize the possibility of State court action that might have additional coercive impact on employees' protected activities").

In this case, it cannot be said that the parties harmed by Croson's unfair labor practice acted with any speed to involve the Board, despite their demonstrable awareness of the NLRA preemption issue. Although they (successfully) raised an NLRA preemption defense in the Ohio trial court, Guy and the Union did not file unfair labor practice charges until after they had lost in the Ohio appellate court. Even if the preemption defense had been of debatable merit before *Manno*, it was clearly meritorious when that decision issued, but more than a year passed before Guy and the Union turned to the Board.[28]

We have no difficulty in concluding that, given our finding that Croson violated Section 8(a)(1) of the Act by maintaining a preempted lawsuit, an order requiring Croson to cease and desist and to post a remedial notice is appropriate. The harder question is whether additional relief is necessary in the unusual circumstances here. In

[27] See, e.g., *Associated Builders & Contractors*, supra, 331 NLRB at 134.

[28] From Croson's perspective, it had no reason to recognize that it was exposed to liability under the NLRA at least until unfair labor practice charges were filed. At that point, Croson had prevailed in the Ohio appellate court and presumably was not inclined to withdraw its suit, not least because the General Counsel had not issued a complaint—a step that was taken only *after* Croson's suit was completed, when Croson could do nothing to avoid unfair labor practice liability.

cases involving the maintenance of an unlawful lawsuit, the Board has, with court approval, usually exercised its remedial discretion to require the respondent to reimburse opposing parties for the legal fees and expenses incurred in defending themselves.[29] We reaffirm today that this remedy is presumptively appropriate. Nevertheless, the Board has declined to award legal expenses when warranted by particular circumstances. Notably, in *Manno* itself, the Board adopted that part of the administrative law judge's remedial recommendation that did not award legal expenses for the defense of the preempted portion of the lawsuit at issue there. 321 NLRB 278, 282–283, 299 (1996). We conclude that in this case an award of legal fees and expenses is not necessary to effectuate the policies of the Act.

As explained, such an award would compensate the Charging Parties for their defense of a lawsuit that was not preempted at its inception, and that they challenged before the Board only long after there were grounds for doing so. Under the particular circumstances here, an award of legal fees and expenses is not necessary to discourage parties from instituting or maintaining preempted lawsuits against conduct protected from the Act. It is true that by declining to award legal expenses, we fail to make Guy and the Union whole for the monetary harm they have suffered as a result of Croson's violation of the Act. However, by issuing an order requiring Croson to cease and desist (subject to contempt proceedings) and to post a remedial notice, we have "imposed other significant sanctions," which, in the unusual context of this case, are sufficient. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002).

We hasten to add that the situation presented by this case is unlikely to repeat itself, because the Board definitively clarified the law during the pendency of the underlying State-court litigation. Since the 1996 issuance of *Manno*, State-court lawsuits attacking job-targeting programs in connection with State-funded projects have been clearly preempted. It is reasonable, then, to expect that unions and employers whose job-targeting programs are attacked by third parties in clearly preempted lawsuits will, going forward, invoke the Board's remedies at the earliest opportunity.

For all of these reasons, we have decided as a matter of the Board's broad discretion—in this case, on these facts—not to award litigation fees and expenses to the Charging Parties.

ORDER

The National Labor Relations Board orders that the Respondent, J.A. Croson Company, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a preempted lawsuit that interferes with activity protected by Section 7 of the Act.

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

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

(a) Within 14 days after service by the Region, post at its facilities in Columbus, Ohio, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 31, 1997.

(b) Sign and return to the Regional Director sufficient copies of the attached notice for posting by J.A. Guy, Inc., and for posting by the Union, if they are willing, at all locations where notices to employees of J.A. Guy are customarily posted and at all locations of the Union where notices to members are customarily posted.

(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 at-

[29] E.g., *Can-Am Plumbing*, supra (awarding legal fees and expenses in addition to ordering respondent to take affirmative steps to dismiss ongoing preempted lawsuit) ; *Geske & Sons, Inc*., 317 NLRB 28, 30, 58–59 (1995), enfd.103 F.3d 1366 (7th Cir. 1997), cert. denied 522 U.S. 808 (1997); *Service Employees Local 32B-32J (Nevins Realty)*, 313 NLRB 392, 403 (1993), enfd. in pert. part 68 F.3d 490 (D.C. Cir. 1995). *BE & K* did not disturb these rulings, as there the Court was not required to "decide whether the Board otherwise has authority to award attorney's fees when a suit is found to violate the NLRA." *BE & K*, supra at 530.

[30] 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."

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I disagree with my colleagues that the lawsuit filed by Respondent J.A. Croson nearly 20 years ago was preempted because at some point during the lawsuit's pendency it allegedly became clear under Board law[1] that union job targeting programs on state public projects constitute protected concerted activity under Section 7 of the Act. I further disagree that, even if preempted, it is appropriate to find that the lawsuit violated Section 8(a)(1) of the Act. My colleagues' analysis, and their rejection of reasonable alternative grounds for affirming the judge's dismissal of the complaint, unnecessarily risk infringement of the First Amendment right to petition for redress of grievances and cannot be reconciled with the rationale underlying the Supreme Court's decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). Accordingly I dissent.

I. THE INSTANT LAWSUIT WAS NOT PREEMPTED, BECAUSE *MANNO ELECTRIC* DID NOT ADDRESS THE ISSUES PRESENTED, AND THE GENERAL COUNSEL DID NOT ISSUE A COMPLAINT DURING THE TIME THE RESPONDENT'S ACTION WAS PENDING

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), the Supreme Court held that when a state purports to regulate conduct that is clearly protected by the Act, State jurisdiction must yield. When the activity that the State purports to regulate is only "arguably" protected—that is, it is not clear whether it is governed by Section 7 or Section 8 of the Act or is outside both these sections, "the States as well as the federal courts 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." Id. at 245. In *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 202–203 (1978), the Court clarified that "when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so," State regulation may be permitted if it would not "create a significant risk of misinterpretation of federal law and the consequent prohibition of protected conduct." Relying on *Sears*, the Board in *Loehmann's Plaza*, 305 NLRB 663 (1991), held that (1) where arguably protected activity is involved, preemption does not occur in the absence of Board involvement in the matter, and (2) only upon the Board's involvement is a lawsuit directed at arguably protected activity preempted by federal labor law. Id. at 671. Thus, a State-court lawsuit challenging "arguably" protected activity is not preempted if the General Counsel does not issue a complaint.

My colleagues agree that the lawsuit was not preempted ab initio. Rather, they say that the Union's job targeting program became "clearly protected" after the Board issued its decision in *Manno Electric* and thus preempted the lawsuit. I disagree, because *Manno* did not resolve or even address the specific issues raised in the Respondent's lawsuit. The *Manno* Board—actually the judge affirmed without comment by the Board—held in general terms that job targeting programs are Section 7 protected, but the case was apparently limited to private projects.[2] The lawsuit there had rather ham-handedly contended that the Union's job targeting program, as a whole, was an attempt to injure and restrain the trade of the respondent. The judge fairly summarily found the lawsuit preempted. *Manno* said nothing about job targeting programs on State public works projects, and nothing in that decision casts light on the lawfulness of job targeting assessments to the limited extent that they reduce pay below prevailing wages established pursuant to a state "little Davis-Bacon" Act.[3] Nor does anything in *Manno* makes it "clear" how the Board would decide the question of whether State public works projects should be treated the same as their federal counterparts, on which job targeting programs are illegal.

[1] *Manno Electric,* 321 NLRB 278 (1996).

[2] I question whether *Manno,* any subsequent case, or my colleagues have adequately explained why *any* union job targeting program, even if limited to private projects, should be deemed activity protected by Sec. 7. However, it is not necessary for me to address that matter in this opinion.

[3] Further, neither the judge nor the Board in *Manno* appeared even to contemplate that the wage supplements that the union provided signatory contractors were derived from assessments against worker pay, which is the issue at the crux of the instant complaint. *Manno*, above at 298.

The Board did not address job targeting programs on State public works projects until the Board issued its decision in *Associated Builders & Contractors,* 331 NLRB 132 (2000),[4] which extended the *Manno* holding to public projects. That case issued 7 years after the instant lawsuit was filed and 2 years after it was dismissed. Then, in *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1500–1501 (2000), enfd. 345 F.3d 1049 (9th Cir. 2003), the Board held that job targeting programs operating on Federal public works projects subject to the Federal Davis-Bacon Act[5] are illegal and "inimical to public policy," deferring to Department of Labor interpretations of that statute. *Kingston* therefore confirmed that job targeting programs do not enjoy blanket protection, casting doubt on the majority's absolutist interpretation of *Manno*'s scope. *Kingston* also left serious questions about whether similar programs operating on State public works projects governed by State "little Davis-Bacon" Acts should be treated like their federal counterparts. As the administrative law judge in the instant case wisely recognized, several factors favor like treatment for Federal and State prevailing wage laws. Not the least of these is that the States have traditionally regulated wages paid on their public projects, and that the goals of job-targeting programs to protect wage scales is largely also achieved where the State statute guarantees the same prevailing wage for all.[6] The administrative law judge also observed that the Respondent's action was narrowly tailored to allege that the job targeting program was unlawful only insofar as the deductions effectively reduced employee pay below State minimums on jobs subject to the state prevailing wage statute. This is in stark contrast to *Manno*'s broad challenge to the entirety of the job targeting program in that case.

My colleagues' sweeping interpretation of *Manno* is primarily informed by hindsight derived from the subsequent decisions in *Associate Builders* and *Kingston Constructors*, above. Their contention that *Manno* preempted the instant lawsuit reflects an effort to inflate *Manno* with meaning that is just not there. Given the myriad issues surrounding the interplay of job targeting assessments on public works projects and the federalism issues raised by the State's interest in regulating wages on its projects, it is inconceivable that *Manno* preempted the instant lawsuit and stripped the Respondent of a forum in which to lawfully raise the above questions.[7] If anything is clear, it is that the Respondent's lawsuit targeted only "arguably" protected activity during the time that it was pending. The judge correctly dismissed the complaint.

II. EVEN ASSUMING ARGUENDO THE RESPONDENT'S LAWSUIT WAS PREEMPTED, IT CONSTITUTED GENUINE PETITIONING AND WAS NOT UNLAWFUL

Regardless of the preemption question, I would dismiss the complaint. As the Supreme Court emphasized in *BE & K*, the right to petition the Government is "one of the most precious liberties safeguarded by the Bill of Rights."[8] Consistent with that principle, the *BE & K* Court invalidated the Board's standard for imposing unfair labor practice liability on "unsuccessful but reasonably based" lawsuits brought with a retaliatory purpose.[9] Because the class of "unsuccessful but reasonably based" lawsuits included suits that involve genuine grievances, the Board's standard was overbroad and impermissibly burdened the First Amendment right to petition. The Court observed that reasonably based lawsuits that prove unsuccessful nevertheless advance First Amendment interests because, inter alia, they allow the public airing of disputed facts, raise matters of public concern, and promote the evolution of the law.[10] Plainly, the First Amendment interests protected by the Supreme Court's holding in *BE & K Construction* exist whether a reasonably based, state court lawsuit is unsuccessful under State law, because of a failure of proof, or because it is preempted by federal labor law. Nothing in the *BE & K* Court's decision or the Board's decision on remand sin-

[4] Vacated in part not relevant here pursuant to settlement 333 NLRB 955 (2001).

[5] 40 U.S.C. § 276(a) et seq.

[6] Further, job targeting has been found to artificially increase a local prevailing wage rate and distort prevailing wages generally. *Kingston*, above, 1499–1500. This is clearly not in the public interest nor contemplated by a State enacting a prevailing wage statute.

[7] I note that my colleagues also mischaracterize both the scope of the Respondent's lawsuit and the nature of the dues obligations in this case. Unlike the broad-based attack on job targeting programs in *Manno*, the Respondent contended only that union signatory employer Guy's deduction of job-targeting assessments on two public works projects violated Ohio's prevailing-wage law. Further, the dues were deducted for employees subject to a union-security provision in a collective-bargaining agreement. Paying dues by means of checkoff may have been voluntary, but the obligation to pay was not. The parties' collective-bargaining agreement provided for a market recovery assessment of "2% of Gross Wages in addition to 1¾% regular check-off dues. Total dues check-off will be 3¾%." Thus, signatory employers were to "check off"—deduct—job targeting dues right along with "regular" dues. My colleagues may call the deductions voluntary, but an employee could be discharged at the Union's request for failing to make payments. Although the record does not show that any employee tested the dues obligation, this does not make the deductions voluntary. Thus, it is not an error of "fact" to observe that the deductions were not voluntary, as the majority states. They were the same "forced exaction" as the dues addressed in *Kingston*, 332 NLRB at 1502.

[8] Id. at 524–525 (internal quotations omitted).

[9] Id. at 536.

[10] Id. at 532.

gles out preempted lawsuits as lacking First Amendment protection.

My colleagues find that the instant lawsuit receives no First Amendment protection because it was preempted by the Act, and that the failure to withdraw the lawsuit after *Manno* issued was unlawful under the traditional 8(a)(1) analysis. Citing the D.C. Circuit's decision in *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003), they assert that footnote 5 of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983), places preempted lawsuits "outside of the First Amendment analysis," and that *BE & K Construction* "did not affect" footnote 5. Thus they condemn the entire class of preempted lawsuits as falling outside of the petition clause, despite that many such suits present genuine grievances and are brought with a reasonable belief that the courts in which they are filed properly have jurisdiction. This sweeping standard is as overbroad and flawed as the one the Court rejected in *BE & K*, above. Further, the reliance on footnote 5 of *Bill Johnson's* is misplaced. In *Bill Johnson's*, the Supreme Court found that the right to petition the courts prohibited the Board from enjoining an ongoing, well-founded lawsuit, regardless of the plaintiff's motives for filing it. Footnote 5, inter alia, clarified that those requirements did not affect the Board's well-established authority under *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971), to seek a Federal court injunction against an ongoing State action that it deemed preempted, despite the petition clause interests involved. It does not place preempted lawsuits outside of the First Amendment or address the standard for assessing unfair labor practice liability.[11]

Further, the majority injects unpredictability into First Amendment law by failing to protect preempted lawsuits in which a respondent had a reasonable belief that the state court had jurisdiction. Given the broad spectrum of possibilities implicated when a party considers legitimate petitioning activity, there is a substantial risk that the threat of liability under the Act for maintaining such lawsuits will unreasonably deter their constitutional right to do so. As the Seventh Circuit opined in the context of construing the fraud exception in antitrust litigation, the potential for chilling petitioning activity is "particularly great when it is unclear whether the law actually forbids the contemplated activity."[12] To paraphrase the court's admonition about the Sherman Act in that case, "it is critical that we do not transform the [NLRA] into a means by which to chill vital conduct protected under the First Amendment." Regrettably, uncertainty over whether the Board will conclude that a particular lawsuit is or is not preempted will do exactly that.

Accordingly, if a lawsuit is found preempted, but the respondent had a reasonable belief that the state court had jurisdiction, the standard the Board established on remand in *BE & K* applies. Thus, "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."[13] Applied here, the Respondent reasonably believed that the State court had jurisdiction to hear its complaint because the Board had not ruled on job targeting programs when the Respondent filed its suit, the action fell squarely within a State statute, and the General Counsel failed to seek an injunction or issue a complaint while the action was pending. As no party contends that the lawsuit was baseless or retaliatory, the complaint should be dismissed regardless of whether it was preempted.

Finally, my colleagues would avoid the constitutional problems that they create here had they asserted their finding regarding the Union's job targeting program while properly dismissing the 8(a)(1) allegation. *Ampersand Publishing*, *LLC.,* 357 NLRB No. 51 (2011) (noting duty to construe the Act, when possible, to avoid raising "serious questions" of constitutionality), citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council,* 485 U.S. 568, 575 (1988).

For the above reasons, I respectfully dissent.

Dated, Washington, D.C. September 28, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

[11] As for *Can-Am Plumbing,* that case did not involve a State court action aimed at arguably protected conduct. Further, the D.C. Circuit's pronouncement on fn. 5 is of doubtful precedential value because the court ultimately granted the petition for review and remanded the case to the Board on other grounds. See 321 F.3d at 151–153. Also in that case, the respondent did not dispute the General Counsel's assertion on brief that fn. 5 "stated" that preempted lawsuits "may be found unlawful irrespective of motivation." Thus the court may have merely accepted that characterization of fn. 5 absent any counterargument from the respondent. Further, the Board on remand did not pass on the D.C. Circuit's statement, but the Board has found that lawsuits brought with an illegal object lack Petition Clause protection. See 350 NLRB 947, 947 fn. 10 (2007). Such cases are qualitatively different from preempted lawsuits, which, unlike illegal objective cases, may be reasonable and filed in good faith. *Small v. Plasterers Local 200*, 611 F.3d. 483, 492 (9th Cir. 2010), also cited by my colleagues, involved a case brought with an illegal objective. The court stated that the preemption issue was not before it. Id. at fn. 4.

[12] See discussion in *Mercatus Group, LLC v. Lake Forest Hospital*, 641 F.3d 834, 847–848 (7th Cir. 2011).

[13] 351 NLRB 451, 456 (2007).

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 maintain preempted lawsuits which interfere with activity protected by Section 7 of the Act.

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

J.A. CROSON COMPANY

Earl L. Ledford, Esq., for the General Counsel.
Ronald L. Mason, Esq. (Mason Law Firm LPA), of Dublin, Ohio, for Respondent J.A. Croson Company.
Felix C. Wade, Esq. (Schottenstein, Zox and Dunn), of Columbus, Ohio, for Charging Party J.A. Guy, Inc.
N. Victor Goodman, Esq. (Benesch, Friedlander, Coplan & Arnoff), of Columbus, Ohio, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case is before me on a stipulation by all parties that waives a hearing and asks for a decision by a judge under Section 102.35(a)(9) of the Board's Rules and Regulations. On May 16, 2003, I granted the General Counsel's motion, on behalf of all parties, to accept the stipulation, which provides that the stipulation, attached exhibits, charges, complaints, and answers constitute the entire record. The General Counsel's consolidated complaint alleges that, by filing and pursuing state administrative charges and a lawsuit relating to the Charging Party Union's job targeting program, Respondent violated Section 8(a)(1) of National Labor Relations Act (the Act). The Respondent answered, denying the essential allegations in the complaint. The parties subsequently entered into a stipulation and, on June 16, 1999, filed a motion to transfer the case to the Board. On March 2, 2000, the Board granted the motion and accepted the stipulation. On September 26, 2002, however, the Board, noting what it considered a relevant intervening Supreme Court decision, *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002), issued an order rescinding its prior acceptance of the stipulation and remanding the case for a hearing before an administrative law judge. The parties then submitted the case to me, as mentioned above, and, on June 19, 2003, I received briefs from the General Counsel and the Respondent. Based on my consideration of the briefs, the stipulation, exhibits, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a mechanical contractor in the construction industry, is located in Columbus, Ohio. At all material times, it was and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

During the period June 1, 1989, through May 31, 1992, the Charging Party Union was signatory to a collective-bargaining agreement with the Mechanical Contractors Association of Central Ohio, Inc. (the Association). At all material times, Charging Party Guy was an employer member of the Association. Under the dues-checkoff provision of that agreement, Guy was required to withhold 2 percent from the gross wages of its employees as a "Market Recovery Assessment" for placement in the Union's Industry Advancement Fund or job targeting program.[1] The Union uses the money collected under that program to subsidize member employers who bid on jobs in competition with nonunion employers, enabling union contractors to submit competitive bids.

In February 1990, Respondent and Guy submitted bids for the construction of a new county jail for Pickaway County, Ohio. The contract for the construction of the jail was awarded to Guy. In November 1991, Respondent and Guy submitted bids for the construction of a new water softening system for Pickaway County. That contract was also awarded to Guy. Prior to the bidding on the jail project, the Union agreed to "target" the job. As a result, the Union informed union contractors bidding on the job that it would pay the successful bidder $9-per-employee-hour worked by union members on the project. Guy's low bid on the jail project was accomplished by use of the subsidy provided by the Union's job targeting program. The water softening project was not targeted by the Union and therefore Guy did not receive a subsidy for that job. It is uncontested, however, that, in accordance with the relevant provisions of the Association agreement, Guy deducted the 2-percent Market Recovery Assessment from the gross wages of all of its employees who worked on both jobs.[2]

On January 30, 1992, Respondent filed charges with the Ohio Department of Industrial Relations (the Department),

[1] The 2-percentMarket Recovery Assessment deduction is "in addition to [the] 1-3/4% regular check-off dues." Exh. A, p. 42.

[2] The above description of the job targeting program and its operation is taken from the exhibits submitted along with the stipulation of the parties, including, in particular, the decision of the Ohio Supreme Court, which is discussed more fully below.

alleging that the contractually required deduction by Guy for the Union's job targeting program from employees who worked on the jail and water softening system violated Ohio's prevailing wage statute and applicable regulations. On March 11, 1993, the Department issued a determination that Guy had violated the prevailing wage law.

On June 15, 1993, Respondent filed a complaint in the Pickaway County, Ohio, Court of Common Pleas (Case 93CI-94), alleging that Guy unlawfully deducted money from employees' wages on the public projects mentioned above, in order to fund the Union's job targeting program, in violation of Ohio's prevailing wage statute and an Ohio regulation prohibiting "special assessments." More specifically, the complaint alleged that since the publicly funded projects were prevailing wage jobs, under the Ohio statute and applicable regulations, Guy was required to make full payment of the prevailing wage to employees, and was prohibited from making any deductions for the Union's job targeting program. Utilizing the applicable remedial provisions of the statute and its regulations, the Respondent sought an injunction prohibiting the unlawful deductions and a reimbursement to Guy's employees of twice the difference between the prevailing wage and the amounts paid to the employees.

On July 21, 1993, Guy filed a third-party complaint in Case 93CI-94, over Respondent's objection, naming the Union a party to the lawsuit. Respondent thereafter filed a motion to strike the third-party complaint and the Union and Guy filed oppositions to the Respondent's motion. On November 5, 1993, the common pleas court denied the motion to strike.

Thereafter, Guy and the Union filed motions for summary judgment, asserting that the Respondent's lawsuit was preempted by Federal labor laws. Respondent filed an opposition to those motions as well as its own cross-motion for summary judgment. On March 27, 1995, the common pleas court denied Respondent's motion for summary judgment and granted the motions filed by Guy and the Union, finding that the lawsuit was preempted by the National Labor Relations Act.[3] After a timely filed appeal, on October 4, 1996, the Court of Appeals of Ohio, Fourth Appellate District of Pickaway County, issued a decision reversing the lower court, finding, inter alia, that the lawsuit was not preempted.

On January 29, 1998, the Ohio Supreme Court accepted discretionary appeals by Guy and the Union, and, on April 8, 1998, the Ohio Supreme Court reversed the court of appeals, finding that the Respondent's lawsuit was preempted by the National Act, under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Citing *Manno Electric*, 321 NLRB 278 (1996), enfd. mem., 127 F.3d 34 (5th Cir. 1997), the Court concluded: "Because the NLRB has held that job targeting is *actually* protected by the NLRA, there is no room for state regulation infringing that conduct." The Court rejected as "unpersuasive" the assertion that "*Manno* is distinguishable because it did not involve a challenge brought under a state's prevailing wage law," citing a decision of an NLRB administrative law judge,[4] and commenting that, in *Manno*, the Board "did not limit its holding to the facts of the case before it." J.A. *Croson Co. v. J.A. Guy, Inc.,* 81 Ohio St.3d 346, 355 (1998), cert. denied 525 U.S. 871 (1998).

Based on separate charges filed by Guy and the Union on July 30, 1997, the General Counsel issued an initial consolidated complaint against the Respondent on January 12, 1999. An amended consolidated complaint was issued on April 2, 1999, and a further amendment correcting an erroneous date was issued 3 days later.[5] The complaint alleged that the Respondent's legal proceedings relating to the job targeting program were "pre-empted by federal law, lacked a reasonable basis in fact and law and were retaliatory in their inception and prosecution." Respondent filed timely answers denying the allegations and raised ten affirmative defenses. In its brief to me (GC Br. p. 16), the General Counsel appears to have abandoned the complaint theory that the Respondent's legal proceedings lacked a reasonable basis in fact and law and were retaliatory,[6] urging only the theory that the legal proceedings were preempted by Federal law under footnote 5 of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737(1983).[7]

B. Discussion and Analysis

1. Prior Board decisions on job targeting

The lead Board case involving State lawsuits challenging union job targeting programs is *Manno Electric,* supra, 321 NLRB 278. *Manno* involved a State lawsuit that, inter alia, broadly attacked the union's job targeting program as an unfair trade practice, which wrongfully and intentionally damaged the nonunion employer who brought the suit. With Member Cohen concurring separately, the Board (321 NLRB 278 and fn. 4)

[3] The stipulation mistakenly refers to this ruling as Exh. T. In fact the ruling appears as Exh. P.

[4] The citation was to Administrative Law Judge Clifford Anderson's July 1, 1997, decision in *Associated Builders & Contractor's, Inc*. That decision was reviewed by the Board almost 3 years later; the Board's decision is reported at 331 NLRB 132 (2000). A more detailed discussion of the case appears below.

[5] I grant the General Counsel's unopposed motion to accept formal documents. Those documents, designated Exhs. V(1) through (12), are made part of the record in this case.

[6] The General Counsel held the processing of the charges in abeyance for over a year, until the conclusion of the State lawsuit. The General Counsel was apparently focusing on the since-abandoned theory that the lawsuit was unlawful because it lacked a reasonable basis in fact or law and was retaliatory. Under Board law before the Supreme Court's decision in *BE & K,* supra, a lawsuit was deemed to have no reasonable basis in law or fact if it was ultimately dismissed.

[7] In fn. 5, the Supreme Court pointed out that the case before it involved a lawsuit "that the federal law would not bar except for its alleged retaliatory motivation." The Court added:

> We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act . . . [citations omitted] and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction 'where [the Board's] federal power pre-empts the field,' [citing *NLRB v. Nash-Finch Co*., 404 U.S. 138, 144, (1971)]." Id. at 737 fn. 5.

summarily adopted the relevant findings of the administrative law judge. The judge found that the union's job targeting program was protected under the Act, since its objective was "to protect employees' jobs and wage scales"; and that, by "instituting and pressing the lawsuit . . . for a recovery grounded on matters preempted by the Act, the [r]espondents violated Section 8(a)(1) of the Act." 321 NLRB at 297–298. In finding the lawsuit preempted and violative of the Act, the judge discussed footnote 5 of *Bill Johnson's*, supra, 461 U.S. at 737, and the Board's decision in *Loehmann's Plaza*, 305 NLRB 663 (1991). Ibid.[8]

In *Associated Builders & Contractors, Inc.*, 331 NLRB 132 (2000), the Board again applied the *Manno* rationale to find unlawful the filing and maintenance of a State lawsuit, which was deemed similarly preempted.[9] In that case, the respondent had filed a state lawsuit, alleging that each of the charging party unions' job targeting programs was an "unlawful, unfair and fraudulent business act or practice," under the California Business and Professions Code. The lawsuit sought to preclude application of the programs on State public work projects and asked for the disgorgement of all money deducted from employees' wages for the job training programs and other relief. In finding the State lawsuit preempted, and thus violative of Section 8(a)(1) of the Act, the administrative law judge applied *Manno* as a broad holding that job targeting programs are protected under the Act. Concluding that *Manno* was binding on him as current law, the judge deferred to the Board any argument that *Manno* should be limited to private projects. 331 NLRB at 138. He also found a violation based on the General Counsel's alternative theory that the lawsuit was preempted and unlawful under the Board's decision in *Loehmann's Plaza*, supra, 305 NLRB 663.[10]

In affirming the judge, the Board did not specifically discuss the application of *Manno* to State public works projects. A majority of the Board stated, in a footnote, that it was adopting the judge's finding of an 8(a)(1) violation "solely on the ground" that the job targeting program was concerted, protected activity and, under *Manno*, maintenance of the lawsuit "constitute[d] an interference with conduct that is actually protected by Sec. 7." In the absence of exceptions, the Board also adopted the judge's finding that the violation dated from the issuance of the Board's *Manno* decision. 331 NLRB at 132 fn. 1.[11]

Some 7 months after the Board's decision in *Associated Builders*, the Board issued another decision involving job targeting programs as they applied to projects under the Davis-Bacon Act, a federal prevailing wage law. *Electrical Workers Local 48 (Kingston Constructors, Inc.),* 332 NLRB 1492 (2000). The Board there held that a union violates Section 8(b)(1)(A) by threatening to have employees fired for not making job targeting payments, which the Board characterized as "MRP [market recovery program] dues," that were "owing from their employment on Davis-Bacon projects." 332 NLRB at 1501.[12] The Board reaffirmed the general rule in *Manno* that job targeting programs are "not inconsistent with public policy and are affirmatively protected by Section 7." Thus, it concluded that, since collecting job targeting payments from employees "under a union security agreement on non-Davis-Bacon jobs is not inimical to public policy," the union could properly enforce the collection of those payments as a condition of employment on those jobs. 332 NLRB at 1496. As to Davis-Bacon jobs, however, the Board found to the contrary. Without independently analyzing the impact of the Davis-Bacon Act on job targeting programs, it deferred, as "a matter of comity" to rulings of the Labor Department and holdings of two Federal circuit courts that deductions for job targeting payments are not legitimate deductions under the Davis-Bacon Act. Accordingly, the Board concluded that any attempt to enforce collection of such payments would be "inimical to public policy." 332 NLRB at 1500, 1501

Next came *Can-Am Plumbing, Inc.,* 335 NLRB 1217 (2001). In that case, the Board was faced with the question whether *Manno* applied where some of the money collected under the job targeting program came from Davis-Bacon and state prevailing wage jobs and the State lawsuit "broadly attack[ed] the entire job targeting program." 335 NLRB 1217. The State lawsuit, which was stayed pending completion of the Board proceedings, alleged that a union employer's acceptance of money from the job targeting program constituted an unlawful kickback scheme or, alternatively, violated California's prevailing wage statute governing public works. The nonunion employer who instituted the lawsuit sought to enjoin acceptance of money under the job targeting program and further asked for "actual and punitive damages, restitution and disgorgement." 335 NLRB at 1220.

The Board in *Can-Am* did not specifically address the State prevailing wage statute or its impact on the job targeting program, focusing instead on the *Kingston Constructors* holding that "unions may not lawfully exact dues from employees working on Davis-Bacon projects to support job targeting programs." The Board held that *Kingston Constructors* did not affect *Can-Am,* because there was no evidence that the union employer involved in the State lawsuit had ever worked on a Davis-Bacon project, and, in any event, "at most only 2 to 3 percent of the funds collected for the Union's job targeting

[8] A more detailed discussion of *Loehmann's Plaza* follows later in this decision.

[9] The decision was vacated in part not relevant here, pursuant to a settlement. 333 NLRB 955 (2001).

[10] As indicated in the judge's decision (331 NLRB at 133–134), the State lawsuit was removed to the Federal courts, and, after its removal, the Ninth Circuit held that the lawsuit was not preempted by Sec. 301 of the Act. See *Associated Builders & Contractors v. Electrical Workers Local 302,* 109 F.3d 1353 (9th Cir. 1997). At the time of the judge's decision, the lawsuit was "in the process of moving from the [f]ederal [c]ircuit [c]ourt to the district court and on to the [s]tate [s]uperior [c]ourt." 331 NLRB at 134.

[11] In that same footnote, Member Hurtgen found a violation not under *Manno*, but under the Board's decision in *Loehmann's Plaza,* 305 NLRB 663 (1991). He therefore found that the violation dated from the issuance of the complaint.

[12] As the Board stated, the Davis-Bacon Act requires employers to pay employees the full amount of advertised prevailing wage rates, although applicable regulations permit deductions to pay regular union initiation fees and membership dues, not including fines or special assessments. 332 NLRB at 1498.

program came from Federal or State prevailing wage jobs, and those moneys are not directly traceable to [the union employer]." 335 NLRB 1217. Concluding that the job targeting program was therefore protected under the Act, the Board held that the State lawsuit "which broadly attacks the entire job targeting program" was preempted by Federal law and thus violated Section 8(a)(1) of the Act, citing *Manno* and *Associated Builders*. 335 NLRB at 1219 and fn. 3.

On review, the court of appeals recognized the Board's authority to enjoin State lawsuits that are preempted by Federal law or that have an objective that is illegal under Federal law, citing footnote 5 of *Bill Johnson's Restaurants,* supra, 461 U.S. at 737, which the Court found was left undisturbed by the Supreme Court's decision in *BE & K,* supra. *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 150–151 (D.C. Cir. 2003). The Court was not ready, however, to accept the Board's conclusion that the State lawsuit in *Can-Am* was preempted because it was directed against conduct protected by Section 7 of the Act. Rather, the Court found inadequate the Board's justification for rejecting *Can-Am's* contention that the union's job targeting program was not protected because it included dues from Davis-Bacon projects. The Court stated: "While the Board . . . did not treat the existence of [Davis-Bacon] moneys in the JTP [job targeting program] as wholly irrelevant, neither did it explain why the Davis-Bacon moneys did not affect the JTP's legality or why the [u]nion's conduct in that regard was excusable." 321 F.3d at 153. Accordingly, the Court remanded the matter to the Board for further analysis.

2. Relevant preemption principles

The Supreme Court in *Garmon,* supra, 359 U.S. 236, established two guidelines for federal preemption of conduct allegedly protected under the Act. Under the first guideline, when a State purports to regulate conduct that is clearly protected by the Act, State jurisdiction must yield. 359 U.S. at 244. The Court explained that to leave the States free to regulate conduct so plainly within the central aim of federal regulation would involve "too great a danger of conflict between power asserted by Congress and requirements imposed by State law. Id. at 244. Under the second guideline, even if activity is only arguably protected by the Act, the states "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." Id. at 245. The Supreme Court subsequently qualified the second guideline to permit state regulation in cases involving arguably protected conduct, "when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so," provided the exercise of State jurisdiction would not "create a significant risk of misinterpretation of Federal law and the consequent prohibition of protected conduct." *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180, 202–203 (1978).

3. Filing or maintaining a preempted lawsuit in violation of Section 8(a)(1) of the Act

Addressing the legality of a lawsuit to enjoin peaceful picketing or handbilling on employer premises, the Board stated the following rule, in light of the Supreme Court's decision in *Sears*: "(1) where arguably protected activity is involved, preemption does not occur in the absence of Board involvement in the matter, and (2) upon the Board's involvement, a lawsuit directed at arguably protected activity is preempted by Federal labor law." *Loehmann's Plaza,* 305 NLRB 663, 669 (1991), revd. on other grounds 316 NLRB 109, 114 (1995). Board involvement occurs upon issuance of a complaint alleging that the lawsuit interfered with protected activity. 305 NLRB at 670, and 316 NLRB at 114. But if the Board ultimately determines that the conduct in question is unprotected, the lawsuit to enjoin it will not be held to violate Section 8(a)(1) of the Act. 316 NLRB at 114.

The Board has cited *Loehmann's Plaza* in cases involving lawsuits challenging aspects of job targeting programs. Since the Board found the job targeting programs clearly or actually protected, however, it dated federal preemption and interference with protected activity from filing or maintenance of the lawsuits. *Associated Builders*, supra, 331 NLRB 132 at fn. 1 (in absence of exception to prospective application of *Manno Electric*, Board majority dated violation from maintenance of lawsuit after *Manno*; Member Hurtgen would have held violation did not occur until issuance of complaint, citing *Loehmann's Plaza*); *Can-Am*, supra, 335 NLRB at 1219 fn. 3 (lawsuit clearly preempted and violative of Sec. 8(a)(1) from time it was filed).

4. Issues in this case

The General Counsel contends: (1) the Board has already determined, in *Manno* and *Associated Builders,* that job targeting programs are clearly protected by Section 7 of the Act; and (2) the Ohio Supreme Court has therefore correctly determined that Federal law preempts Respondent's State lawsuit challenging the job targeting deductions at issue in this case. It follows, according to the General Counsel, that Respondent's preempted lawsuit violated Section 8(a)(1) of the Act, consistent with footnote 5 of *Bill Johnson's,* supra, 461 U.S. at 737.

As discussed below, in my view, Respondent's lawsuit challenged job targeting deductions that were arguably, rather than *clearly*, protected by the Act. If the Board agrees with that view, it could conclude, in accordance with *Loehmann's Plaza* and the discussion below, that Respondent's lawsuit did not violate Section 8(a)(1) of the Act because the lawsuit was concluded before complaint issued in this case. Alternatively, the Board may wish to address whether Respondent violated Section 8(a)(1) by challenging job targeting deductions from wages on two public projects, under Ohio's prevailing wage law, in light of the Board's decision in *Kingston* that such deductions on Federal Davis-Bacon projects are inimical to public policy. I do not believe it would be appropriate for me to address that issue of first impression concerning Board policy. Nor do I believe that the Board needs to reach it in this case, which involves state proceedings initiated in 1992 and concluded in 1998.

5. Respondent's lawsuit was narrowly addressed to conduct that was arguably, rather than clearly, protected by the Act

As shown, Respondent's lawsuit challenged only job targeting deductions from employees' wages on two publicly funded projects, under Ohio's prevailing wage law. By contrast, the

Board's lead decision in *Manno Electric*, supra, 321 NLRB 278, involved a broadly framed attack on a union job targeting program. Although the Board, in *Manno,* did not explicitly state whether any of the job targeting funds derived from public works projects, "the decision suggests that all of the projects involved were on private sites, such as banks and department stores; the complaint did not allege that any of the money originated from public projects."[13] In that context, the Board adopted the administrative law judge's conclusion that the lawsuit's broad attack was preempted because job targeting programs are generally protected under the Act, as their objective is "to protect employees' jobs and wage scales." 321 NLRB at 297–298.

The Board's subsequent decision in *Kingston Constructors,* supra, 332 NLRB at 1498–1501, demonstrates that the holding of general protection for job targeting programs in *Manno* is not to be read without exception. Rather, the Board, in *Kingston,* concluded that requiring payment of job targeting dues, as a condition of employment on Davis-Bacon projects, would be "inimical to public policy." Id. at 1500. In reaching that conclusion, the Board deferred, as a matter of comity, to federal decisions holding collections of job targeting dues on federal projects unlawful under the Davis-Bacon Act. Id. at 1500–1501. As shown below, different considerations apply in determining whether the collection of job targeting payments on public projects, contrary to State prevailing wage laws, is also inimical to public policy and therefore unprotected. Nonetheless, that is an arguable question.

Contrary to the General Counsel's position, that question is not answered by the Board's decision in *Associated Builders* or the Ohio Supreme Court's holding in *Croson v. Guy* that the Respondent's lawsuit was preempted. Both decisions predated *Kingston* and both treated the Board's decision in *Manno* as dispositive, without any discussion of the issues presented by applying *Manno* to block enforcement of prevailing wage laws on public projects. *Associated Builders,* supra, 331 NLRB at 132 fn. 1 and 138; *Croson v. Guy,* supra, 81 Ohio St.3d at 352–356. *Kingston* is relevant here, even though it postdated completion of Respondent's lawsuit. Whether a lawsuit challenged protected activity and therefore violated Section 8(a)(1) is to be determined under the law as it stands when the issue ultimately comes before the Board. See *Loehmann's Plaza,* supra, 316 NLRB at 114, discussed above.[14]

Several factors favor like treatment for Federal and State prevailing wage laws in the determination whether job targeting payments in violation of those laws are inimical to public policy or unprotected. The phrasing and purposes of Federal and State prevailing wage laws and regulations are similar. Compare discussion in *Kingston*, 332 NLRB 1498–1501, and *Building & Construction. Trades Dept. v. Reich*, 40 F.3d 1275, 1279 (D.C. Cir. 1994), with *Croson v. Guy,* supra, 81 Ohio St. 3d at 349–350. States have traditionally regulated the wages paid on their public projects. Cf. *California Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 330–331, 334 (1997) (noting traditional state regulation of wages and apprenticeship standards on public works and finding no preemption under ERISA, given the "paucity of indication" of any Congressional intent to preempt). The holding of no preemption in *Dillingham* is, of course, not dispositive of the underlying preemption issue here, under a different Federal statute with very different policy considerations. See *Associated Builders,* supra, 331 NLRB at 138. But the recognition of traditional state regulation of wages on public projects is nonetheless relevant.

Moreover, the concerted needs served by job targeting programs—to protect employees' jobs and wage scales—are diminished on prevailing wage projects. There, the objective of "leveling the playing field"[15] is to some extent achieved by the guarantee of the same prevailing wage for all. As the Ohio Supreme Court observed: "[T]he primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector." *Croson v. Guy,* supra, 81 Ohio St.3d at 349 (internal citation omitted).

Nor is it a sufficient answer to say that job targeting programs generally serve the concerted objective of protecting wages and jobs. *Kingston* and *Can-Am* demonstrate that those generally protected objectives will not override prevailing wage regulation in all circumstances. *Kingston,* supra at 1498–1501; *Can-Am Plumbing,* supra, 335 NLRB 1217, remanded in *Can-Am Plumbing v. NLRB*, supra, 321 F.3d at 152–154. It is also significant, in this respect, that the narrow focus of Respondent's lawsuit leaves the Union's job targeting program intact insofar as it involves private rather than public projects.

The above considerations could support a conclusion that job targeting deductions on state prevailing wage projects are unprotected, as they are on federal projects. There are, however, significant considerations on the other side. The strong policy of uniform national regulation, under the Act, may outweigh factors supporting State regulation. *Garmon, supra*, 359 U.S. at 242–244. It is clear that Congress, in enacting the NLRA, intended no "patchwork quilt" of regulation. *NLRB v. Natural Gas of Hawkins County*, 402 U.S. 600, 603–604 (1971), quoting from *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62–63 (4th Cir. 1965). Rather, Congress sought to avoid the "diversities and conflicts likely to arise from a variety of local procedures and attitudes towards labor controversies." *Garmon,* supra, 359 U.S. at 243, quoting from *Garner v. Teamsters Union*, 346 U.S. 485, 490–491(1953).

Accordingly, deferring to federal decisions under another uniform Federal statute, the Davis-Bacon Act, is sharply distinguishable from allowing prevailing wage laws in the various states to limit otherwise protected conduct under the Act. But the conflicting considerations in this case are not automatically or clearly resolved by reference to past Board decisions. In short, the underlying protected activity and preemption issues here are arguable. And since Respondent's state lawsuit was concluded before complaint issued in this case, it did not vio-

[13] *Can-Am Plumbing, Inc. v. NLRB*, supra, 321 F.3d at 152.

[14] The Ohio Supreme Court's holding does not, of course, act as a limitation on the Board's authority to determine the issues presented in this case. On the contrary, deference to the Board's broad authority to determine those issues was the guiding principle that led the Ohio Supreme Court to conclude that Respondent's State lawsuit was preempted.

[15] *Can-Am Plumbing v. NLRB,* supra, 321 F.3d at 151.

late Section 8(a)(1). *Loehmann's Plaza,* supra, 305 NLRB at 669–671, and 316 NLRB at 114.[16]

[16] The private parties may find it unsatisfactory for the complaint in this case to be dismissed without resolution of the underlying protected activity question. The parties have waited over 10 years for a definitive answer and the issue may be a source of recurring conflict between them. But the passage of time, intervening Board and court decisions, and the conclusion of the State lawsuit may have altered the landscape for the parties. Those changed circumstances could lead the Union to reexamine the wisdom of collecting job targeting payments on prevailing wage projects, whether State or Federal. See *Can-Am Plumbing v. NLRB,* supra, 321 F.3d at 154 ("On remand, additional evidence may show that the Union stopped withholding Davis-Bacon dues at the time . . . [the union contractor] submitted its bid on the . . . project, or, indeed, long before that time.") Such a reexamination could also lead to voluntary resolution of the matter, obviating the need for further litigation in this area.

CONCLUSION OF LAW

The General Counsel has failed to show that Respondent violated Section 8(a)(1) of the Act by filing a State lawsuit that was preempted by the Act.

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended[17]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. June 27, 2003.

[17] 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.