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NO. A07-1706

State of Minnesota
In Supreme Court

Midwest Pipe Insulation, Inc., d/b/a MPI, Inc.,
Respondent,

vs.

MD Mechanical, Inc.,
Defendant,
Minneapolis Pipefitters Union, Local 539,
Appellant.

APPELLANT'S BRIEF

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STATEMENT OF LEGAL ISSUES

I. IS RESPONDENT'S TORTIOUS INTERFERENCE CLAIM PREEMPTED UNDER GARMON BECAUSE IT IS PREMISED ON AN ALLEGED "THREAT" THAT CONSTITUTES ARGUABLY PROHIBITED SECONDARY ACTIVITY UNDER THE NATIONAL LABOR RELATIONS ACT?

The Court of Appeals ruled in the negative, and the Trial Court ruled in the affirmative.

Most Apposite Cases:

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners, 90 F.3d 1318 (8th Cir. 1996).

Hennepin Broadcasting Assoc., Inc. v. American Federation of Television and Radio Artists, 223 N.W.2d 391 (Minn. 1974).

Most Apposite Statutory Provisions:

Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)

II. IS RESPONDENT'S TORTIOUS INTERFERENCE CLAIM PREEMPTED UNDER GARMON TO THE EXTENT THAT IT ATTACKS THE UNION'S FEDERALLY PROTECTED RIGHT TO MAKE A GRANT FROM ITS MARKET RECOVERY PROGRAM?

The Court of Appeals ruled in the negative, and the Trial Court did not address the argument although it was presented.

Most Apposite Cases:

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

Can-Am Plumbing, Inc., 335 NLRB 1217 (2001), rev'd and remanded, 321 F.3d 145 (D.C. Cir. 2003), aff'd on reh'g, 350 NLRB No. 75 (2007).

Manno Electric, Inc., 321 NLRB 278 (1996).

J.A. Croson Co. v. J.A. Guy, Inc., 691 N.E.2d 655 (Ohio 1998).

Most Apposite Statutory Provisions:

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157

The Davis-Bacon Act, 40 U.S.C. § 276a

STATEMENT OF THE CASE

On May 10, 2007, Respondent Midwest Pipe Insulation, Inc., d/b/a MPI, Inc., (“MPI” or “Respondent”) commenced this lawsuit in Hennepin County District Court against Appellant Pipefitters Local Union No. 539 (“Local 539,” “the Union,” or “Appellant”) and Defendant MD Mechanical, Inc. (“MD”). (App. 1-10.) The Complaint asserted claims of tortious interference with contract, unfair competition, and violation of the Minnesota Prevailing Wage Act (“MPWA”), Minn. Stat. §§ 177.41 *et seq.* (App. 3-10.) The District Court Judge was the Honorable John Q. McShane.

Local 539 filed a Motion for Judgment on the Pleadings on June 20, 2007. (App. 18-19.) In its Memorandum in Opposition to the Motion for Judgment on the Pleadings, submitted on August 2, 2007, MPI voluntarily dismissed all of its claims against MD without ever serving MD and abandoned its prevailing wage claim. (App. 109 & n.1.) MPI conceded that its unfair competition claim merely duplicated its tortious interference claim and was subject to the same legal analysis. (App. 110, n.2.) On August 8, 2007,

the District Court heard oral arguments on Local 539's Motion for Judgment on the Pleadings. On August 23, 2007, Judge McShane granted Local 539's Motion for Judgment on the Pleadings. (App. 164.) The District Court ruled that MPI's state-law tortious interference and unfair competition claims were preempted by federal labor law. (App. 164-68.) Judgment was entered on August 27, 2007.

On September 5, 2007, MPI filed its Notice of Appeal and Statement of the Case with the Minnesota Court of Appeals. (App. 169-70.) On June 4, 2008, the Minnesota Court of Appeals heard oral arguments on MPI's appeal of the District Court's Order dismissing the case. On August 26, 2008, the Court of Appeals filed its decision reversing the decision of the District Court and ruling that MPI's tortious interference claim was not preempted by federal labor law. (App. 230-41.)

On August 29, 2008, Pipefitters Local 539 filed a charge with the National Labor Relations Board alleging that this lawsuit is preempted and unlawfully interferes with rights protected by the National Labor Relations Act. (App. 242.)

On September 25, 2008, Local 539 filed its Petition for Review of the Decision of the Court of Appeals with the Minnesota Supreme Court. (App. 243-47.) On November 18, 2008, the Minnesota Supreme Court issued an Order granting the petition for further review of the decision of the Court of Appeals. (App. 248.)

STATEMENT OF FACTS

I. THE PARTIES

Respondent MPI is a Minnesota corporation and is an insulation contractor in the business of pipe, boiler, and duct insulation work throughout the state of Minnesota.

(App. 3, 5.) MPI is an employer within the meaning of Section 2(2) of the National Labor Relations Act (NLRA), 29 U.S.C. § 152(2), as amended.

Appellant Pipefitters Local 539 is an unincorporated labor organization within the meaning of the NLRA, 29 U.S.C. § 152(5), as amended. (App. 3, 11-12.) Local 539 represents pipefitters for purposes of collective bargaining with their employers in the territorial jurisdiction of the Union, including the Counties of Hennepin, Scott, Carver, Anoka, McLeod, Wright, Isanti, Mille Lacs, Sherburne, Big Stone, Todd, Swift, Pope, Kandiyohi, Chippewa, Stearns, Stevens, Morrison, Benton, Meeker, Lac Qui Parle, and Yellow Medicine. (App. 11-12, 45-46, 86-87.) Local 539 does not represent insulators. Pipefitters Local 539 is party to a collective bargaining agreement that covers pipefitter work but not insulation work. (App. 44-45, 85-86.)

II. PIPEFTTERS LOCAL 539'S MARKET RECOVERY PROGRAM

Market Recovery Programs ("MRPs") are a common and long-established practice in the construction industry. MRPs are sometimes referred to as "job-targeting" programs. (App. 4-5.) Local 539's MRP offers grants of funds to contractors on certain construction projects for purposes of organizing and increasing job opportunities for Local 539's members. (App. 4-5, 40.) As a condition of receiving funds from the MRP, the contractor must agree to be or become signatory to Local 539's collective bargaining agreement and that all covered pipefitter work on the project will be performed by pipefitters dispatched from Local 539. (App. 4-5, 40.) The MRP agreement covers "all pipefitter hours" on the project but does not cover insulator work hours. (App. 40, 44-45, 85-86.)

MPI alleges that the MRP is funded, in whole or in part, by dues deductions from employees' wages and that some of these dues are deducted on prevailing wage projects. (App. 5.) Local 539 does not collect dues that are specifically earmarked for the MRP. MRP grants are drawn from Local 539's general fund, which is funded by regular membership dues and fees.

III. THE ST. MICHAEL-ALBERTVILLE ELEMENTARY SCHOOL CONSTRUCTION PROJECT

The St. Michael-Albertville Elementary School Construction Project ("the Project") involved the construction of a new elementary school for the St. Michael-Albertville communities located in Wright County. (App. 4.) The Project was not covered by the Federal Davis-Bacon Act or the Minnesota Prevailing Wage Act. (App. 12, 111).

On or about June 8, 2006, Local 539 agreed to provide a market recovery grant of \$80,000 to MD Mechanical, Inc. ("MD") relating to pipefitting work on the Project that would be covered by Local 539's collective bargaining agreement. (App. 4, 40.) MD is a Minnesota corporation with its principal place of business in St. Cloud, Minnesota. (App. 3.) MD is primarily engaged in the business of plumbing and pipefitting work. (App. 3, 11.)

On or about June 8, 2006, MPI submitted a bid to MD Mechanical to perform plumbing and hydronic pipe insulation and external duct insulation work on the project. (App. 5.) On or about June 26, 2006, MD accepted MPI's bid, and sent MPI a standard subcontract agreement signed and executed by Michael Brum, president of MD. (App.

5.) Pursuant to the subcontract agreement, MD promised payment of \$166,800 upon MPI's performance of the subcontract agreement. (App. 5.)

IV. THE PURPORTED "THREAT" TO RESCIND THE MARKET RECOVERY GRANT TO "PRESSURE" OR "FORCE" MD MECHANICAL NOT TO DO BUSINESS WITH A NON-UNION INSULATION CONTRACTOR.

MPI alleges that on or about July 11, 2006, the president of MD Mechanical told the office manager of MPI that "MD was being pressured by Local 539 to breach its subcontract agreement with MPI," and that Local 539 specifically "threatened to rescind" its market recovery grant if MPI's non-union insulators were used to perform the insulation work on the project. (App. 6.) Local 539 vigorously denies these allegations. (App. 13.)

MPI alleges that on or about July 11, 2006, MD sent a letter to MPI terminating their subcontract agreement as a result of Local 539's purported "threat to rescind" the market recovery grant. (App. 6.) MPI's Complaint suggests that MD chose to breach the subcontract agreement and incur a liability of \$166,800 instead of simply enforcing a market recovery grant agreement worth \$80,000. (App. 6, 40.) MPI further alleges that MD "was forced by Local 539 to hire a union signatory contractor to replace MPI, in order to perform the pipe insulation work in relation to the Project." (App. 6.)

ARGUMENT

I. INTRODUCTION

This state-court case was filed in the wrong forum. This is a labor law case that belongs before the National Labor Relations Board ("NLRB") under the doctrine of

Garmon preemption. Under Garmon any state law claim applicable to conduct that is “arguably prohibited” or “arguably protected” by the National Labor Relations Act (NLRA) is preempted. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959). Respondent’s tortious interference claim alleges both arguably prohibited conduct and arguably protected conduct and thus is preempted under Garmon. The parties have agreed that the tort of unfair competition merely duplicates the tortious interference claim such that the two claims should be analyzed together. (App. 110, n.2, 183); see Midwest Sports Marketing, Inc. v. Hillerich, 552 N.W.2d 254, 267 (Minn. App. 1996); see also United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628, 632 (Minn. 1982).

A. Arguably Prohibited Conduct: The Alleged “Threat” To Rescind The Market Recovery Grant To “Force” MD Mechanical Not To Do Business With MPI, A Non-Union Contractor Performing Work Not Covered By Local 539’s CBA.

The gravamen of Respondent MPI’s tortious interference claim is the allegation that Appellant Pipefitters Local Union No. 539 “threatened” MD Mechanical that it would rescind a grant of money from the Union’s market recovery program to “force” and “pressure” MD not to do business with MPI, a non-union insulation contractor. (App. 6.) This allegation is false and unfounded, but it must be assumed to be true for purposes of this motion. If true, this alleged “threat” would constitute unlawful secondary pressure in violation of section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4). Local 539 was allegedly using a “threat” as economic pressure to “force” the employer not to do business with a non-union employer—a classic allegation of unlawful

secondary activity. Accordingly, the state-law tortious interference claim is premised on conduct that is arguably prohibited by the NLRA and must be dismissed.

This case is analogous to BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners of Am., 90 F.3d 1318 (8th Cir. 1996). The Court ruled that a state-law tortious interference claim was preempted where the employer alleged that a union had threatened to picket the employer to force it to cease doing business with a non-union construction contractor. By analogy, the state-law tortious interference claim is preempted in this case where the employer alleges that the Union threatened to rescind a market recovery grant to force the employer to cease doing business with a non-union construction contractor.

The only circumstances in which the alleged “threat” in this case would be lawful and protected under the NLRA is if Local 539 were simply acting to enforce an agreement to preserve pipefitter work covered by Local 539’s collective bargaining agreement (CBA) by forbidding subcontracting to non-union pipefitting contractors. A statutory provision known as the “construction industry proviso” to section 8(e) of the NLRA protects a union’s right to enter into an agreement restricting subcontracting of work covered by the union’s CBA. 29 U.S.C. § 158(e). However, that is not what is alleged here. MPI is an *insulation* contractor hired to perform *insulation* work, which is not covered by the Pipefitters Union’s CBA. (App. 3, 5, 6, 40, 44-45, 85-86.) Therefore, the construction industry proviso does not apply to the alleged threat to rescind the market recovery money, and the alleged secondary pressure would be arguably prohibited by the NLRA. On the other hand, if the construction industry proviso did apply to protect the alleged threat to rescind the grant, then the alleged conduct would be arguably

protected by the NLRA. Ultimately, it is the role of the NLRB, not a state court, to determine whether the conduct is actually prohibited or protected by the NLRA.

B. Arguably Protected Conduct: The Making Of A Grant From Local 539's Market Recovery Program.

Notwithstanding what is alleged in the Complaint, the principal issue that MPI desires to litigate is the argument that the making of a market recovery grant was *per se* unlawful in violation of the federal and state prevailing wage laws. This case is ill-suited to that issue since MPI voluntarily abandoned its prevailing wage claim and fails to allege any relevant facts supporting a purported prevailing wage claim. (App. 109.) The St. Michael-Albertville School Project was admittedly *not a prevailing wage job*, and MPI fails to allege any underpayment of any amount of money to any employee of any employer on any project. (App. 4.) In the absence of any prevailing wage claim, MPI seeks to litigate the prevailing wage issue in the abstract in the context of its tortious interference claim.

The tortious interference claim must be dismissed as preempted because, as framed by MPI in its briefs, it challenges the legality of making a grant from Local 539's market recovery program. Under longstanding case law, the making of a market recovery grant is clearly protected by section 7 of the National Labor Relations Act, 29 U.S.C. § 157. Manno Electric, Inc., 321 NLRB 278 (1996). The Supreme Court of Ohio has applied Garmon preemption to dismiss a lawsuit challenging a market recovery program under a state prevailing wage law. J.A. Croson Co. v. J.A. Guy, Inc., 691

N.E.2d 655 (Ohio 1998). Thus, this lawsuit must be dismissed as preempted because it is directed at “arguably protected” activity.

The Minnesota Court of Appeals in this case rejected the argument that the making of a market recovery grant was “arguably protected” for technical reasons because the Union had not filed an NLRB charge alleging that this lawsuit illegally interferes with activity protected by section 7 of the NLRA. “NLRB involvement” is a prerequisite for making the argument that a state-law claim applies to “arguably protected” conduct. The Union has since filed a charge with the NLRB, and this Court should thus find that the making of a market recovery grant was arguably protected. (App. 242.)

This Court should resist the temptation to wade into the labor law questions that are currently before the NLRB. However, if the Court chooses to address this issue, the following analysis applies. The issue of the extent to which the alleged market recovery activity is protected will require the NLRB to reconcile two potentially competing considerations: (1) That the operation of market recovery programs, and in particular, offering market recovery grants, clearly constitutes protected activity under section 7 of the NLRA and (2) the collection of dues earmarked for market recovery programs on federal prevailing wage jobs has been determined to violate the Davis-Bacon Act by the federal Department of Labor (DOL) and the federal courts.

The way to reconcile these competing considerations is straightforward. All aspects of a market recovery program are protected by section 7 of the NLRA, including

offering MRP monetary grants, with the narrow exception of collection of MRP dues on a federal Davis-Bacon prevailing wage job. Such collection of MRP dues on a Davis-Bacon job can be challenged by employees on a case-by-case basis if it occurs.

However, there is no legal authority for ruling that such collection of dues would somehow deprive all market recovery activity of its well established section 7 protection.

The principled basis for striking this balance between section 7 protection and Davis-Bacon enforcement is the legal distinction between the making of a market recovery *grant* of money to organize and create job opportunities for members, on one hand, and the collection of *dues* on federal projects to provide some of the funds for the program, on the other. The NLRB has ruled that making MRP grants is protected section 7 activity, and neither the DOL nor the courts have ruled that making an MRP grant is unlawful, *regardless of the source of funds*. The collection of dues for market recovery has been determined to be unlawful by the DOL and the courts only under very limited circumstances, which are those instances in which dues earmarked for market recovery are deducted on federal Davis-Bacon jobs. There is no legal basis to extrapolate from those narrow rulings to hold that the presence of dues from a small number of federal Davis-Bacon jobs somehow taints all of the protected activity that takes place in the program. Such an approach would badly misconstrue the DOL and court rulings and in the process roll back section 7 protections that have long been recognized. Such an approach would needlessly throw the baby of section 7 protection out with the bathwater of dues collection on Davis-Bacon jobs.

The most sensible approach, and the approach supported by the case law, is that offering market recovery grants is protected section 7 activity, no matter the source of the funds, and that the collection of dues earmarked for market recovery on Davis-Bacon jobs can be challenged on a case-by-case basis by employees if it occurs. Under the governing case law, Local 539's MRP is arguably protected by section 7, and the state court claim challenging the MRP grant is preempted.

II. STANDARD OF REVIEW

An appeal from a dismissal on the pleadings is reviewed de novo. See Barton v. Moore, 558 N.W.2d 746, 749 (Minn. 1997). To withstand a motion for judgment on the pleadings, Plaintiff must state facts that, if proven, would support a colorable claim and entitle it to relief. Northern States Power Co. v. Franklin, 122 N.W.2d 26, 29 (Minn. 1963). The district court must accept the allegations contained in the pleading under attack as true. State ex rel. City of Minneapolis v. Minneapolis St. Ry. Co., 56 N.W.2d 564, 567 (Minn. 1952). If it is clear that Plaintiff would not be entitled to relief under any of the facts alleged in its Complaint, Plaintiff has failed to state a claim and the case must be dismissed. Martens v. Minnesota Min. & Mfg. Co., 616 N.W.2d 732, 747 (Minn. 2000); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. GARMON PREEMPTION

Under the Garmon doctrine, the United States Supreme Court has long held that federal labor law preempts any state-law claim that applies to conduct that is arguably prohibited or arguably protected by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, et seq. "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, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.” Garmon, 359 U.S. at 244.

The purpose of Garmon preemption is to avoid conflicts between state law and federal labor policy and to defer to the administrative expertise of the National Labor Relations Board (“NLRB”). The Court explained: “[W]hen an activity is arguably subject to § 7 or § 8 of the Act, 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.” Garmon, 359 U.S. at 245; see also Farmer, Special Adm’r. v. United Bhd. of Carpenters & Joiners of America, Local 25, et al., 430 U.S. 290, 296 (1977) (stating that “[t]o leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress, and requirements imposed by state law.”), cited in Ferrell v. Cross, 557 N.W.2d 560, 564 (Minn. 1997). Under the Supremacy Clause of the United States Constitution, state jurisdiction must yield to avoid such interference with federal labor policy. Midwest Motor Express, Inc. v. Teamsters Local 120, 512 N.W.2d 881, 891 (Minn. 1994).

The Minnesota Supreme Court has followed Garmon in dismissing state-law claims. See Hennepin Broadcasting Associates, Inc. v. American Federation of Television and Radio Artists, 223 N.W.2d 391 (Minn. 1974) (finding Garmon preemption of state-law claims that union tortiously interfered with plaintiff’s contractual obligations and made threats); see also Midwest Motor Express, 512 N.W.2d at 881

(Minnesota Striker Replacement Act was preempted by federal labor law). The Minnesota Court of Appeals has applied Garmon preemption to dismiss state-law claims alleging conduct that is arguably prohibited by the NLRA and state-law claims that regulate arguably protected conduct. See, e.g., Wright Electric, Inc. v. Ouellette, 686 N.W.2d 313 (Minn. App. 2004) (arguably protected); Jara v. Buckbee-Mears Co., 469 N.W.2d 727, 729 (Minn. App. 1991) (arguably prohibited); Robillard v. Local 10, Sheet Metal Workers International Association, 353 N.W.2d 248 (Minn. App. 1984) (arguably prohibited).

IV. MPI'S TORTIOUS INTERFERENCE CLAIM IS PREEMPTED UNDER GARMON BECAUSE IT IS PREMISED ON AN ALLEGED "THREAT" THAT CONSTITUTES ARGUABLY PROHIBITED SECONDARY ACTIVITY UNDER THE NATIONAL LABOR RELATIONS ACT.

The United States Supreme Court has explained that conflict between state law and federal labor policy is inevitable if separate state and federal remedial schemes apply to conduct that is arguably prohibited by federal labor law:

It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. . . . Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," . . . the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. . . . The rule is designed to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," . . . and this Court has recognized that "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy."

Wisconsin v. Gould, 475 U.S. 282, 286 (1986) (internal citations omitted).

In this case, MPI seeks to invoke a state remedial scheme—a court action for tortious interference with contract—where a federal unfair labor practice remedy already exists with the NLRB for alleged unlawful secondary activity in violation of the NLRA.

The Minnesota Supreme Court has previously relied on Garmon in holding that an employer's claims of tortious interference with contract and business relationships were preempted because they alleged conduct that was arguably prohibited by the NLRA. Hennepin Broadcasting, 223 N.W.2d at 391. In Hennepin Broadcasting, the employer asserted that defendants “(1) conspired to maliciously and unlawfully terminate the broadcasting of plaintiff's stations; (2) *tortiously interfered with plaintiff's individual employment contracts* with its employees; (3) *interfered with plaintiff's contracts with advertisers and engaged in an unlawful secondary boycott*; (4) unlawfully threatened visitors and employees; and (5) carried out acts of violence against plaintiff's employees.” 223 N.W.2d at 394 (emphasis added).

The Minnesota Supreme Court held that all of the alleged conduct except the alleged acts of violence was exclusively governed by federal labor law such that the state law claims were preempted under Garmon. In particular, the Court held that the claims of tortious interference with contract and business relationships were preempted. The United States District Court for the District of Minnesota agreed with the Minnesota Supreme Court. See Hennepin Broadcasting Assoc., Inc. v. NLRB, 408 F.Supp. 932 (D. Minn. 1975) (finding that the employer's state law claims of tortious interference with business relations and contract were preempted by federal labor law). By analogy, in this

case the tortious interference claim is preempted because it alleges conduct that is arguably prohibited by the NLRA.

A. The “Threat” Alleged By MPI, If True, Would Arguably Constitute Secondary Activity Prohibited By Section 8(b)(4) of the NLRA.

Section 8(b)(4) of the NLRA makes it an unfair labor practice to “*threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce...where...an object thereof is...forcing or requiring any person to cease...doing business with any other person.*” 29 U.S.C. § 158(b)(4) (emphasis added). Federal labor law thus preempts state law claims that arise from alleged “secondary pressure,” *i.e.* attempts to coerce or force a neutral employer to cease doing business with another employer. BE & K Constr. Co., 90 F.3d at 1330.

The gravamen of MPI’s Complaint is a classic allegation of secondary pressure—the use of a “threat” to “force” a neutral employer not to do business with a non-union contractor:

Local 539 *threatened* to rescind its promised “target money” if MPI’s non-union laborers were used to perform the subcontract insulation work for the Project. On or about July 11, 2006, as a result of Local 539’s *threat* to rescind its promised “target money,” MD sent a letter to MPI terminating and breaching the June 26, 2006 executed written subcontract agreement with MPI . . . *MD was forced by Local 539 to hire a union signatory contractor to replace MPI . . .* Defendants knowingly, intentionally and without justification induced MD to breach its obligations with MPI to the benefit of and in favor of Defendants.

(App. 6-7.) (emphasis added). Thus, MPI’s Complaint allegations fall squarely within the secondary pressure provisions of the NLRA, and the tortious interference claim is preempted under Garmon.

“Section 8(b)(4)(ii)(B) essentially creates two separate requirements for a Board finding of an unfair labor practice on the part of a union: (1) The challenged union conduct must have as an object *forcing or requiring a neutral business to cease doing business* with another business; and (2) the union must pursue its object by *threatening, coercing, or restraining the neutral business.*” Soft Drink Workers Union Local 812 v. NLRB, 657 F.2d 1252, 1261 (D.C. Cir. 1980) (emphasis added); see also Carpenters, Local 112, 217 NLRB 902, 912 (1975) (stating that to find a violation of Section 8(b)(4) there must be conduct which amounts to unlawful inducement of employees, or restraint and coercion of employers, and that such conduct was undertaken for an object proscribed by the statute). When economic pressure is placed upon a company with the objective of causing that company to cease doing business with the employer with whom the Union has its real primary dispute, the pressure is secondary and unlawful. 29 U.S.C. § 158(b)(4).

The question of whether the union pursued a secondary object by “threaten[ing], coerc[ing], or restrain[ing]” the employer goes to the nature and foreseeable consequences of the pressure that the union actually placed on the employer. Soft Drink Workers Union Local 812, 657 F.2d at 1263. Activity with a secondary object is unlawful under Section 8(b)(4) whether the actual coercive effect is great or relatively small. See generally NLRB v. Twin City Carpenters District Council, 422 F.2d 309, 315 (8th Cir. 1970) (finding that the picketing of a general housing contractor with sign declaring in part “cabinets being installed on this job were not made by members” of respondent union, was proscribed secondary boycott, notwithstanding that coercive effect

may not have been great). In this case, the Union's alleged threat to rescind a monetary grant of \$80,000 is arguably a "threat" within the meaning of section 8(b)(4) because it would have the reasonably foreseeable effect of causing MD to cease doing business with MPI. In fact, MPI alleges in its Complaint that the alleged threat did in fact "force" MD to breach its contract with MPI. (App. 6.)

Moreover, the alleged threat is clearly secondary in nature. MPI has alleged that Local 539 threatened to rescind an \$80,000 market recovery grant to "pressure" or "force" MD to cease doing business with MPI, a non-union insulation contractor with whom the Union allegedly had its real primary dispute. (App. 6.) MPI alleges that the threat was made in order to "pressure" or "force" MD to use a union insulation contractor rather than MPI: *"[A]s a result of Local 539's threat . . . MD was forced by Local 539 to hire a union signatory contractor to replace MPI."* (App. 6.) (emphasis added). This would clearly constitute unlawful secondary pressure unless some form of exception applies.

The only exception to the secondary pressure prohibition that could conceivably apply in this case is what is referred to as the "construction industry proviso to section 8(e)" of the NLRA. 29 U.S.C. § 158(e). Under this proviso, unions and employers are permitted to enter into work preservation agreements that restrict subcontracting of construction work to be done at the project site. The agreement to provide an MRP grant in this case contains a work preservation clause stating that "Contractor/Owner agrees to contract or subcontract *all work covered by the Collective Bargaining Agreement* to United Association signed contractors" and applies to "*all pipefitting hours.*" (App. 40.)

(emphasis added). Thus, the MRP grant was given on the express condition that any subcontracting of pipefitting work contained in the collective bargaining agreement (CBA) must be limited to union signatory contractors. If the insulation work that MD subcontracted out were pipefitter work contained in the CBA, then the proviso might arguably apply to the conduct in question.

However, the proviso to section 8(e) would not even arguably apply to protect the alleged conduct because the pipefitter CBA plainly does not cover insulation work. (App. 40, 44-45, 85-86); see generally Woelke & Romero Framing, Inc v. NLRB, 456 U.S. 645, 657 (1982) (ruling that union signatory subcontracting agreements are only lawful if intended to preserve work and are limited to the work covered by the collective bargaining relationship). Thus, the alleged secondary pressure by Local 539 is not plausibly shielded by the proviso to section 8(e). Accordingly, the alleged threat to rescind the grant is arguably prohibited by the Act.

In order to sustain a preemption defense, Local 539 need only “put forth enough evidence to enable [this] court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation.” Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 395 (1986). The Union submitted to the Court the MRP grant agreement and the CBA, which were incorporated by reference in the Complaint. (App. 40, 41-107.) Those documents do not cover or even mention insulation work. Those documents, together with the Complaint allegations, are sufficient for the Court to conclude that the proviso to section

8(e) does not apply and that the NLRB reasonably could uphold an unfair labor practice charge alleging a violation of section 8(b)(4).¹ (App. 3, 5-6.)

Even if the proviso to section 8(e) did apply, this would simply mean that Local 539's conduct was arguably protected by the Act, and the tortious interference claim would still be preempted under Garmon. See Sheet Metal Workers' Intl. Assn., Local 17, 241 NLRB 880, 882 (1979) (union signatory subcontracting restriction protecting work covered by CBA is protected by the proviso). Ultimately, it is the role of the NLRB, not a state court, to determine whether the alleged conduct is actually prohibited or protected by the NLRA.

B. The Eighth Circuit's Decision In BE & K Is Precisely Analogous And Controls This Case.

In BE & K, 90 F.3d at 1318, the Eighth Circuit considered a state-law tortious interference claim based on allegations of secondary pressure that are precisely analogous to this case. The plaintiff non-union construction contractor, BE & K, alleged that its

¹ In ruling on a motion for judgment on the pleadings, the Court may consider documents beyond the pleadings "if the complaint refers to a document and the document is central to the claims alleged." Brown v. State, 617 N.W.2d 421, 424, cert. denied 532 U.S. 995 (2001), citing In re Hennepin County, 1986 Recycling Bond Litig., 540 N.W.2d 494, 497 (Minn. 1995). Consideration of a document on which a plaintiff bases its claims but fails to attach to its Complaint does not convert a motion for judgment on the pleadings to one for summary judgment. Johnson v. State, 536 N.W.2d 328, 332 (Minn. App. 1995), rev'd. on other grounds 553 N.W.2d 40 (Minn. 1996) (citing Herr & Haydock, Minnesota Practice, § 12.9, at 87 (1995)). More particularly, a court may consider a collective bargaining agreement referenced in but not attached to the pleadings. Jenisio v. Ozark Airlines, Inc., 187 F.3d 970, 972 n.3 (8th Cir. 1999). Here, the MRP grant was referenced in the Complaint, and the CBA is explicitly referenced in the MRP grant agreement. (App. 4-6, 40.) MPI has previously conceded that this motion should not be converted to a summary judgment motion. (App. 113, n.4.)

contract was terminated after representatives of the Paperworkers union made various “threats” to force their employer, Potlatch, to reconsider using BE & K for a construction project. Id. at 1322-23, 1327. The “threats” alleged by plaintiff included the threat by the Paperworkers union that the Paperworkers and Carpenters unions would picket and handbill Potlatch to pressure it not to do business with the non-union construction contractor. Id. at 1322.

The non-union contractor brought suit against the Paperworkers union as well as the Carpenters union:

It claimed the unions had engaged in unlawful secondary boycott activity in violation of § 303(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187(a), by using threats and coercion to force Potlatch to cease doing business with BE & K. It also asserted that the unions had tortiously interfered with its contractual relationship or business expectancy under Arkansas law.

Id. at 1323. Both the federal and state-law claims were based on the Paperworkers union’s alleged threats to picket and handbill Potlatch because of the dispute with BE & K. Id. at 1322-23. Section 303(a) of the LMRA provides a federal cause of action to redress secondary pressure in violation of section 8(b)(4) of the National Labor Relations Act. 29 U.S.C. § 187(a).

The Eighth Circuit held that plaintiff’s state-law tortious interference claims were preempted by federal labor law. Id. at 1327-1330. The Eighth Circuit explained:

The statute makes it unlawful for a labor organization to use threats or coercion to force a neutral employer (such as Potlatch) to cease doing business with a primary employer (such as BE & K), but it does not prohibit the use of persuasion to achieve the same end . . . ***[I]t occupied the field of regulation of secondary activities and closed it to state regulation.*** . . . Section 303 was carefully drawn to balance union rights with legitimate restrictions on threats and coercion, and ***state regulation cannot be allowed to interfere with that balance.***

Id. at 1328 (emphasis added, internal citations omitted).

As in BE & K, the plaintiff in this case, the non-union construction contractor MPI, is alleging that its contract was terminated after Local 539 made “threats” to “force” MD to reconsider doing business with MPI. (App. 6.) The alleged “threat” in this case, like the alleged threat in BE & K, is secondary because a union allegedly used the threat to “force” an employer with whom it has a relationship not to do business with a non-union contractor. (App. 6.) MPI’s tortious interference claim is preempted because the alleged secondary pressure of Local 539, if true, would be arguably prohibited by section 8(b)(4) of the NLRA. As in BE & K, MPI’s alleged state-law claim of tortious interference is preempted by federal labor law under Garmon.

The Minnesota Court of Appeals attempted to distinguish BE & K because it involved alleged threats of violence. (App. 240-41.) However, such allegations regarding violence have nothing to do with the finding of preemption. In fact, when violence or threats of violence are alleged, it is well established that Garmon preemption does not apply and state law may apply to such serious local concerns. United Mine Workers of America v. Gibbs, 383 U.S. 715, 721 (1966). The fact that violence was alleged is the reason why the state-law claims were allowed to proceed to trial, i.e. so that a jury could determine the fact issues as to whether threats of violence were made such that Garmon preemption would not apply. BE & K, 90 F.3d at 1328. No such exception is alleged here. Garmon preemption is a jurisdictional rule. Where, as here, it is clear the

state court has no jurisdiction over the alleged facts, the case must be dismissed.

Garmon, 359 U.S. at 244.

In attempting to distinguish BE & K, the Minnesota Court of Appeals also erroneously stated that non-union contractor BE & K “argued that . . . the alleged union activity would otherwise be *protected* by federal labor law and preempted from state regulation.” (App. 240.) In fact, BE & K argued the exact opposite. BE & K argued that the alleged union threats to picket Potlatch were “*unlawful secondary boycott activity.*” Id at 1323. This was the alleged basis of BE & K’s federal section 303 claim as well as a basis of the tortious interference claim. Id. at 1322-23. This is what led the Eighth Circuit to conclude:

There was some evidence that could imply that the union representatives may have been contemplating *unlawful secondary picketing* . . . *This could support a finding that they intended to threaten Potlatch with such action in order to force it to terminate its contract with BE & K . . .*

Id. at 1331 (emphasis added).

In BE & K, the plaintiff pursued a federal labor law section 303 claim challenging the union’s alleged threat to picket as unlawful secondary activity. The state law tortious interference claim was clearly preempted to the extent that it challenged the same conduct. The state law claim in this case challenges the exact same type of conduct—a threat used to place secondary economic pressure on an employer. The fact that MPI chose not to file a federal secondary boycott claim in this case does not allow MPI to avoid preemption.

Courts have consistently applied Garmon preemption where, as here, no unfair labor practice charges or section 303 claims were filed to challenge the arguably prohibited conduct. See Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America v. Lockridge, 403 U.S. 274 (1971) (state-law breach of contract claim challenging enforcement of union security clause was preempted under Garmon despite absence of unfair labor practice charge); Hennepin Broadcasting, 223 N.W.2d at 391 (finding Garmon preemption of state-law claims that union tortiously interfered with plaintiff's contractual obligations and made threats despite the fact that the employer had not yet filed an unfair labor practice charge or section 303 claim); Jara, 469 N.W.2d at 729-30 (finding that union's claim that employer fraudulently induced concessions during bargaining negotiations was preempted despite absence of unfair labor practice charge); Robillard, 353 N.W.2d at 248 (state court action by a union member against his union requesting damages for lost employment opportunities was preempted despite absence of unfair labor practice charge); see also DeRoche v. All American Bottling Corp., 38 F.Supp.2d 1102 (D. Minn. 1998) (finding that claim of allegedly discriminatory denial of employment was preempted despite absence of unfair labor practice charge).

C. In Distinguishing BE & K, The Minnesota Court of Appeals Erroneously Stated That Secondary Pressure Is Protected By Federal Labor Law When In Fact It Is Prohibited.

The Minnesota Court of Appeals acknowledged that “we are uncertain as to the district court’s reasoning” in relying on BE & K. (App. 240.) This uncertainty was reflected in the fundamental error of law by the Court of Appeals in attempting to distinguish that case. In discussing the issue of secondary activity, the Minnesota Court

of Appeals stated: “section 303 of the LMRA *protects* secondary union activity such as handbilling or picketing.” (Emphasis added). This is inaccurate. In fact, section 303 *prohibits* union activity such as picketing for a secondary objective. BE & K, 90 F.3d at 1331 (referring to “unlawful secondary picketing”). The text of section 303 is as follows:

(a) It shall be *unlawful* . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefore in any district court of the United States . . .

29 U.S.C. § 187 (emphasis added). Thus, Section 303 authorizes a federal cause of action to challenge unlawful secondary activity by a union that violates section 8(b)(4) of the NLRA. It does not protect any labor activity. Section 7 of the NLRA is the principal provision that protects labor activity. 29 U.S.C. § 157.

The Minnesota Court of Appeals may have been confused by the fact that handbilling for a secondary purpose, unlike picketing for a secondary purpose, is not unlawful and is protected by section 7 of the NLRA. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568 (1988) (finding that union's handbilling at shopping mall entrances for a secondary purpose did not violate Section 8(b)(4)). This is because handbilling is considered pure free speech and not coercive, whereas picketing is considered to be conduct that can be coercive if done for a secondary objective. See NLRB v. Retail Clerks Local 1001, 447 U.S. 607, 611-15 (1980) (concluding that the union's picketing was coercive and plainly violated the statutory ban on secondary pressure). Therefore, the Eighth Circuit in BE & K ruled that

some of the alleged conduct was arguably protected, *i.e.* the threat to handbill Potlatch or engage in primary picketing of BE & K, 90 F.3d at 1328, whereas other alleged conduct was arguably prohibited, *i.e.* the Paperworkers' threat to picket Potlatch, 90 F.3d at 1331. In reading BE & K, the Minnesota Court of Appeals appears to have mistakenly concluded that the Eighth Circuit ruled that all of the alleged conduct was arguably protected.

Following the erroneous assumption that secondary picketing is protected—not prohibited—the Minnesota Court of Appeals misinterpreted BE & K as follows: “[a]s a result, according to the court, the unions engaged in federally *protected* conduct squarely within federal labor law, which meant that the contractor’s state tort claim was barred.” (App. 240.) (emphasis added). The Court thus reasoned that BE & K did not apply here since the market recovery grant, unlike the threat to picket in BE & K, was purportedly “*removed from federal labor law protection.*” (App. 237, 241.)

Apparently, it was not clear to the Minnesota Court of Appeals that Appellant and the District Court were relying on BE & K for the proposition that a tortious interference claim is preempted when it alleges secondary activity that is arguably *prohibited* by the Act. (App. 167-68, 207-10.) In BE & K, the plaintiff employer alleged that the Paperworkers union made threats to picket if the employer used a non-union construction contractor. (App. 1322-23.) This threat to picket for a secondary objective is illegal under section 8(b)(4) and section 303. 90 F.3d at 1323, 1331. A tortious interference claim challenging such a threat is preempted under Garmon.

D. If The Alleged Conduct Is Arguably Prohibited, The Argument That An Aspect Of The Conduct Is Also Allegedly “Removed From The Protection” Of The NLRA Is Wholly Irrelevant.

The misreading of BE & K and section 303 on the part of the Court of Appeals is significant because the Court’s rationale in finding no preemption here is that the market recovery grant was purportedly “*removed from the protection*” of the federal labor laws due to purported (but unidentified and unsupported) prevailing wage violations. (App. 237.) This rationale is wholly inapplicable if the threat to rescind the market recovery grant is arguably prohibited, not protected, by the federal labor laws.

If the alleged conduct is arguably prohibited by the NLRA, the state law claim is preempted, regardless of whether any component of the alleged conduct may be “removed from the protection” of the NLRA. A good example to support this proposition is found in Hennepin Broadcasting. The conduct alleged—conspiring to maliciously terminate the broadcasting of plaintiff’s radio stations by destroying electronic signals, interfering with contractual obligations with employees and advertisers, and threatening visitors and employees—is “removed from the protection of the NLRA,” yet a tortious interference claim challenging such conduct is preempted. See Hennepin Broadcasting, 223 N.W.2d at 392, 394.

Perhaps a more closely analogous illustration of this principle is the central case relied on by Respondent, IBEW Local 48 (Kingston Constructors, Inc.), 332 NLRB 1492 (2000). In that case the NLRB exercised its exclusive jurisdiction over a union’s alleged “threats” to terminate employees under a union security clause for refusing to pay market recovery dues on federal prevailing wage jobs. The NLRB retained exclusive jurisdiction

over the case *even though a component of the alleged prohibited conduct was a purported prevailing wage violation*. The NLRB explained: “We find . . . that the Union violated Section 8(b)(1)(A) [of the NLRA] by threatening employees with discharge for failing to pay MRP dues owing from their employment on Davis-Bacon projects.” *Id.* at 1492. Although the NLRB “deferred” to judicial rulings under the prevailing wage laws in reaching its decision, at no point did the NLRB relinquish jurisdiction over the issue of whether section 8(b)(1)(A) of the NLRA was violated by the alleged “threats” to enforce the union security clause. Kingston Constructors was an NLRA case within the exclusive jurisdiction of the NLRB. The employees who filed the charges in Kingston Constructors could not have challenged the alleged “threats” of discharge under state law, regardless of whether prevailing wage violations were also alleged.

In this case, it is significant that the tortious interference claim—the only remaining claim—is essentially a claim of secondary pressure. (App. 6-7.) MPI’s claim that the MRP grant violates the prevailing wage laws was abandoned. (App. 109.) MPI fails to allege any facts whatsoever to support a violation of the prevailing wage laws. The St. Michael-Albertville School Project was admittedly not a prevailing wage job, and MPI has failed to allege any underpayment of the prevailing wage to any employee on any project. (App. 4, 111.) A prevailing wage violation cannot be premised on unidentified underpayments of unidentified amounts of money to unidentified employees of unidentified employers on unidentified projects. The only allegation left related to the prevailing wage laws is a vague assertion that the Union’s MRP purportedly contains dues deducted on federal and state prevailing wage jobs. (App. 5.) This vague prevailing

wage allegation cannot save the tortious interference claim from preemption where the tortious interference claim plainly alleges conduct that is arguably prohibited by the NLRA.

E. MPI Failed To File A Timely Unfair Labor Practice Charge Against Local 539 With The NLRB.

Although Local 539's alleged "threat," if true, was arguably prohibited by the NLRA, MPI failed to file an unfair labor practice charge against Local 539 with the NLRB within the applicable six-month limitations period. See 29 U.S.C. §160(b). By the time MPI filed this lawsuit against Local 539 almost a year after the alleged conduct, the six-month statute of limitations had run on a possible Board charge. 29 U.S.C. § 160(b).

V. MPI'S TORTIOUS INTERFERENCE CLAIM IS PREEMPTED TO THE EXTENT THAT IT ATTACKS THE UNION'S FEDERALLY PROTECTED RIGHT TO MAKE A GRANT FROM ITS MARKET RECOVERY PROGRAM.

On its face, MPI's tortious interference claim only challenges alleged secondary pressure to force MD not to do business with MPI. (App. 6-7.) As explained above, such conduct is arguably prohibited by the NLRA and the Complaint should be dismissed for that reason.

The tortious interference claim does not explicitly allege that making a grant from the Union's market recovery program violates the prevailing wage laws. (App. 6-7). However, the issue that MPI wants to litigate is the legality of making a grant from the MRP under the prevailing wage laws—even though it has dropped its prevailing wage claim. (App. 109.) In its appellate briefing Respondent emphatically stated: "MPI's

tortious interference and unfair competition claims are exclusively based on the illegal funds contained in the MRP grant to MD in violation of the Davis-Bacon Act.” (App. 184.) (emphasis added).

If the Court chooses to address the legality of the MRP grant, the state-law tortious interference claim should be dismissed because it is directed at conduct that has been clearly held to be protected by section 7 of the NLRA, 29 U.S.C. § 157. The NLRB and the courts have repeatedly ruled that state-law claims challenging MRPs are preempted, including prevailing wage claims.

In Can-Am Plumbing, Inc., the NLRB ruled that the employer violated Section 8(a)(1) of the NLRA by pursuing a preempted state court lawsuit challenging an MRP under California’s laws regarding unfair trade practices, prevailing wage, and employer kickbacks from employees. See Can-Am Plumbing, Inc., 335 NLRB 1217 (2001). The Board rejected the argument that the MRP was deprived of section 7 protection simply because it allegedly contained dues deducted on federal Davis-Bacon jobs. On appeal, the D.C. Circuit reversed and remanded for clarification of the standards the Board was applying in finding the MRP was protected, noting that “the Board on remand may yet determine that the [MRP] is protected under section 7.” 321 F.3d 145, 154 (D.C. Cir. 2003). On remand, the NLRB reaffirmed its previous ruling that the MRP was protected on procedural grounds. 350 NLRB No. 75 (2007). At no point did the NLRB rule, or has the NLRB ever ruled, that an MRP is completely deprived of section 7 protection due to alleged deduction of dues for the MRP on federal Davis-Bacon jobs.

In Manno Electric, Inc., 321 NLRB 278, 298 (1996), the NLRB ruled that state-law claims of restraint of trade and interference with business directed at a market recovery program were preempted under Garmon because an MRP is protected activity under section 7 of the NLRA. See also Associated Builders and Contractors, Inc., 331 NLRB No. 5 (2000), modified as to remedy, 333 NLRB No. 116 (2001) (finding that the employer violated the NLRA by pursuing a state court lawsuit against the Charging Parties challenging an MRP with a claim of unfair and fraudulent business practices).

In J.A. Croson Co. v. J.A. Guy, Inc., 691 N.E.2d 655, 665 (Ohio 1998), the Ohio Supreme Court held that a state court lawsuit attacking the union's MRP was preempted because it restrained arguably protected activity. An unsuccessful bidder on two public improvement projects brought a state court action alleging that the successful bidder and the union violated the Ohio prevailing wage law as a result of the use of MRP grants on the projects. Id. at 657. The Ohio Supreme Court held that the application of the state prevailing wage statute was preempted under Garmon to the extent that it could be construed to restrain or inhibit federally protected use of the MRP and that J.A. Croson's claims sought to invoke Ohio law to thwart the union's use of its MRP. Id. at 665. Here, as in J.A. Croson Co., the state-law claim is preempted because Respondent is attempting to thwart the Union's use of its protected MRP, and in particular, the making of a market recovery grant by citing to alleged prevailing wage violations.

A. Garmon Preemption Is Now Applicable Under An “Arguably Protected” Theory Because Local 539 Has Filed An NLRB Charge Since The Date When The Court Of Appeals Decision Was Rendered.

When arguably protected activity is alleged, preemption does not occur in the absence of “Board involvement” in the matter. 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), *citing* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 203 (1978), *abrogated on other grounds*, Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). In finding no preemption in this case, the Minnesota Court of Appeals stated that the MRP:

is at best *arguably protected* activity, which under *Sears, Roebuck* means that state jurisdiction over the union's conduct exists in the absence of Board participation. . . . In this case, Local 539 has not filed a charge with the Board . . . Accordingly, we conclude that state jurisdiction over MPI's tort claim is not preempted by federal labor law.

(App. 239.) (emphasis in original).

Since the date when the Minnesota Court of Appeals decision was issued, Local 539 has filed a charge with the NLRB in this matter. (App. 242.) The charge alleges that MPI's state-court lawsuit violates the NLRA because it is directed at an MRP grant, which is conduct that is protected by section 7 of the Act. The charge is currently under consideration by the NLRB's Division of Advice in Washington, D.C. As a result of the Board's involvement, Garmon preemption now applies and the state-law tortious interference is preempted and must be dismissed.

B. Market Recovery Programs, And Offering Market Recovery Grants, Are Clearly Protected Under Section 7.

There is no dispute in this case that MPI is attempting to challenge Local 539's MRP, and in particular, the making of a market recovery grant. Thus, the only issue is whether the program itself and the making of a market recovery grant is "arguably protected" by section 7 such that preemption applies.

Local 539's MRP offers grants of funds to contractors on certain construction projects for purposes of organizing and increasing job opportunities for Local 539's members. (App. 4-5, 40.) Local 539's MRP works as a tool of union organizing and increases job opportunities for members because as a condition of receiving funds from the MRP, the contractor must agree to be or become signatory to Local 539's collective bargaining agreement and that all covered work on the project will be performed by employees dispatched from Local 539. (App. 4-5, 40.) By offering funds, the MRP creates a financial incentive for contractors to be or become signatory with Local 539 and to employ workers referred by Local 539. (App. 4-5, 40.) It is well established that union organizing and promoting job opportunities are protected section 7 activities. See Manno Electric, 321 NLRB at 298 (finding that "[t]he objectives of the 'job targeting program' are to protect employees' jobs and wage scales. These objectives are protected by section 7.").

Even in the principal case relied on by MPI, Kingston Constructors, 332 NLRB 1492, 1496 (2000), the Board noted that an MRP constitutes protected activity: "The

Board has held that ‘job targeting’ programs, such as the Union’s MRP program, are not inconsistent with public policy and are affirmatively protected by section 7.”

C. None of the Relevant Decisions Has Held That Making A Market Recovery *Grant* Is Unlawful, Only That Collection of *Dues* Earmarked For Market Recovery Is Unlawful On Federal Prevailing Wage Projects.

MPI’s principal argument is that making a grant from the MRP is purportedly unprotected because the MRP is “illegally funded” with dues from wages earned on projects covered by federal and state prevailing wage laws. This argument relies on the dubious proposition that offering grants from the MRP is stripped of section 7 protection simply because a portion of the dues for the MRP may have been collected on federal prevailing wage projects. Nothing in the case law supports this proposition.

The relevant cases stand for the narrow proposition that the collection of dues earmarked for a market recovery program on a federally funded construction project violates the federal prevailing wage law, known as the Davis-Bacon Act , 40 U.S.C. Section 276a. International Broth. of Elec. Workers, Local 357, AFL-CIO v. Brock, 68 F.3d 1194 (9th Cir. 1995); Building & Const. Trades Dep’t v. Reich, 40 F.3d 1275 (D.C. Cir. 1994). Those Court cases say nothing about whether MRP *grants* are lawful. Indeed the statute and Department of Labor regulations only address the legality of *collection* of dues, not the subsequent *use* of such funds. The statute provides that workers on federal projects must be paid the prevailing rate “unconditionally and not less than once a week, ***and without subsequent deduction or rebate on any account***, the full amounts accrued at time of payment...” 40 U.S.C. § 276a(a) (emphasis added). The language prohibiting a “subsequent deduction or rebate” is what the courts and DOL have relied on in ruling that

MRP dues deductions are unlawful on federal projects. See Brock, 68 F.3d at 1198, 1201; Reich, 40 F.3d at 1277, 1279-80. There is no such statutory language that has been interpreted to restrict MRP grants.

It should be noted that the Minnesota Court of Appeals referred in dicta to a separate prevailing wage issue—the alleged “artificial inflation” of prevailing wage rates as a result of the MRP. The cases cited by Respondent, Brock, Reich, and Kingston Constructors, do not stand for the proposition that an MRP violates the Davis-Bacon Act because of a purported impact on computation of prevailing wage rates. Although there was some discussion in dicta in those cases about the potential impact on rate computations, the holdings of those cases was narrowly limited to the collection of dues for an MRP on federal jobs. Notably, MPI’s prevailing wage claim, which was based on just such an “artificial inflation” theory, was voluntarily abandoned. (App. 7-8, 109.)

Moreover, the NLRB has ruled that MRPs and the making of MRP grants are protected by section 7 even *after* the court decisions in Brock and Reich were handed down. See Manno Electric, Inc., 321 NLRB 278, 298 (1996). There is no credible basis to argue now that Brock and Reich somehow should be applied to abrogate the subsequent decision in Manno Electric and strip MRPs of their well established protection.

Additionally, the NLRB ruled in Can-Am Plumbing in 2001 that an MRP was protected despite alleged dues deductions on federal Davis-Bacon jobs even *after* the decision in Kingston Constructors was handed down in 2000. 335 NLRB at 1217. The NLRB reaffirmed its Can-Am Plumbing decision for procedural reasons in 2007. 350

NLRB No. 75. It makes no sense to argue that Kingston Constructors rendered MRPs unprotected and should be applied to abrogate the subsequent decisions in Can-Am Plumbing.

D. Section 7 Protection Can Be Reconciled With The Davis-Bacon Act Because Protecting MRP *Grants* Under Section 7 Does Not Conflict With The Davis-Bacon Act Prohibition Against Collection of MRP *Dues* On Federal Jobs.

When a potential conflict arises between the NLRA and another federal statute, such as the Davis-Bacon Act, the NLRB is obligated to undertake a careful balancing of the competing policies. As the Supreme Court has observed:

The Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Can-Am Plumbing, 321 F.3d at 153-54, *quoting* Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942). “Thus, where the policies of the Act conflict with another federal statute, the Board cannot ignore the other statute; instead, it must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute.” Id. at 154 (citations and internal quotation marks omitted).

Here, the proper balance is straightforward. The balance is premised on the distinction between MRP *grants*, which are protected by section 7 and unregulated by Davis-Bacon, and collection of MRP *dues* on federal projects, which is prohibited by Davis-Bacon. The NLRB’s continued recognition of section 7 protection for MRPs and

MRP grants does not conflict with case-by-case enforcement of the prohibition on collection of MRP dues on Davis-Bacon jobs. Aggrieved employees can challenge such dues deductions with the federal Department of Labor (DOL) if they occur. Aggrieved employees can also file NLRB charges if they are forced to pay such dues on Davis-Bacon jobs, as in Kingston Constructors.

There is no basis to extrapolate from the court rulings on dues collections to nullify longstanding section 7 protection of MRP grants. Under the governing case law, Local 539's MRP and the making of MRP grants is arguably protected by section 7 regardless of the source of the funds.

E. There Is No Viable Argument That Any Aspect Of The Market Recovery Program Violates The Minnesota Prevailing Wage Act.

The argument that Local 539's MRP violates the Minnesota Prevailing Wage Act (MPWA), Minn. Stat. §§ 177.41, et seq. is even more tenuous. Unlike the federal Davis-Bacon Act, the MPWA does not contain any language whatsoever forbidding subsequent reductions or rebates—the key language on which the courts in Reich and Brock based their decisions pertaining to dues deductions. Therefore, it is highly implausible to argue that the MRP would violate the MPWA.

Additionally, it must be emphasized that the MPWA is a state law, not a federal law. The preemption doctrine is based in part on the Supremacy Clause of the United States Constitution, which holds that federal law trumps conflicting state laws. Can-Am Plumbing, 321 F.3d at 149. The Garmon preemption doctrine clearly applies to any claim that the MRP violates the state prevailing wage law. See J.A. Croson Co., 691

N.E.2d at 655 (ruling that state prevailing wage claim challenging MRP was preempted). Accordingly, preemption applies all the more clearly to the allegation that the MRP violates the MPWA because there is not the same need to balance competing federal policies when a state law is at issue.

F. This Lawsuit Interferes With Protected Section 7 Rights.

It is clear that the lawsuit filed by MPI against Local 539 interferes with—indeed it is designed to stop—the operation of the MRP and the making of market recovery grants, which are protected by section 7 of the NLRA. MPI’s claim is admittedly exclusively based on the alleged illegality of making grants from Local 539’s MRP. (App. 184.) Thus, a court decision finding that Local 539’s MRP activity is unprotected and illegal would put a complete halt to protected section 7 activity. Thus, this lawsuit is preempted under Garmon.

G. MPI’s Principal Authority, Kingston Constructors, Does Not Support State Court Jurisdiction Because It Was An NLRB Decision That Did Not Involve Any State-Law Claims.

Respondent primarily relies on Kingston Constructors, 332 NLRB at 1492 to argue for state court jurisdiction. The Minnesota Court of Appeals misread Kingston Constructors as follows:

MPI argues that the Board has already determined that an MRP funded with union employees’ wages from federal prevailing wage projects violates the Davis-Bacon Act, thus removing the program from federal labor law protection and from application of the Garmon preemption doctrine. We agree.

(App. 236-37.) (emphasis added).

This account of Kingston Constructors is off the mark because that case did not involve any finding that the MRP was “removed from federal labor law protection,” and the case did not involve any state-law preemption issue. If the NLRB had truly ruled in the year 2000 in Kingston Constructors that the MRP was “removed from federal labor law protection” based on dues deductions on Davis-Bacon jobs, then it would make no sense that the NLRB would rule the exact opposite one year later in Can-Am Plumbing, Inc., 335 NLRB 1217 (2001). In its 2001 decision in Can-Am Plumbing the NLRB ruled that the deduction of dues on federal jobs did not deprive an MRP of section 7 protection.

Kingston Constructors is an NLRB decision finding improper enforcement of a union security clause in violation of Section 8(b)(1)(A) of the NLRA. Preemption of state-law claims was not at issue because the case *did not involve a state court lawsuit*. Instead it involved an unfair labor practice charge alleging violations of the NLRA.

In Kingston Constructors, the NLRB found a violation of Section 8(b)(1)(A) of the NLRA based on a union's admitted practice of “threatening” employees with discharge pursuant to a union security clause for failing to make contributions to the union’s MRP from wages earned on federal prevailing wage jobs. 332 NLRB at 1502. In determining that the Union contravened the NLRA, the NLRB cited federal court cases finding a violation of the federal Davis-Bacon Act where employees were required to pay MRP dues on federal prevailing wage jobs. *Id.* at 1500-01. Thus, the NLRB deferred to federal court interpretations of the Davis-Bacon Act in reaching its decision applying the NLRA.

In Kingston Constructors the NLRB retained its exclusive jurisdiction to interpret and apply section 8(b)(1)(A) of the NLRA, which governs the use of union security clauses to discharge an employee for failure to pay dues. Because the conduct in question was prohibited by section 8(b)(1)(A) of the NLRA, the aggrieved employees could not have gone to state court to complain of the union's alleged "threats" to enforce the union security clause for their refusal to pay their MRP dues on federal prevailing wage jobs. The NLRB did not abandon its exclusive jurisdiction over the union's alleged "threats" in violation of the NLRA simply by deferring to and relying on federal judicial interpretations of another federal statute. By analogy, in this case the NLRB is not deprived of its primary jurisdiction over the alleged "threats" to "force" MD not to do business with MPI simply because a prevailing wage violation is also alleged.

H. The Fact That The NLRB Has Not Yet Issued A Complaint Does Not Alter The Preemption Analysis.

It is well known that the NLRB process can be slow. Judge Richard Posner has referred to the NLRB as the "Rip Van Winkle of administrative agencies." NLRB v. Thill, Inc., 980 F.2d 1137, 1142 (7th Cir. 1992). The fact that the NLRB may not have issued a Complaint and may still be processing the charge should not give this Court pause to find the claim to be preempted.

The Minnesota Court of Appeals has previously addressed the issue of whether the failure of the NLRB to issue a Complaint in a case involving "arguably protected conduct" precludes a finding of preemption by a state court. In Wright Electric, Inc. v. Ouellette, 686 N.W.2d 313 (Minn. App. 2004), the Court of Appeals was presented with

a case in which the NLRB had considered a charge and refused to issue a Complaint for interference with arguably protected conduct. The Court ruled that the NLRB's decision not to issue a Complaint did not affect the preemption analysis, and held that the conduct in question was arguably protected such that the state-law claims must be dismissed.

The Court of Appeals emphasized that the Garmon decision itself stood for the proposition that an NLRB finding of merit and issuance of a Complaint was not necessary to a finding of preemption:

The United States Supreme Court has already decided that the [NLRB] general counsel's refusal to file a charge is not the same as a decision finding a party's claims are not preempted by the NLRA. See San Diego Bldg. Trades Council, 359 U.S. at 245-46. The Supreme Court stated that the NLRB's failure to determine the status of the disputed conduct by declining to assert jurisdiction or the "refusal of the General Counsel to file a charge" does not "leave the States free to regulate activities they would otherwise be precluded from regulating." Id. The Supreme Court concluded that "[i]n the absence of the [NLRB's] clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.... The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." Id. at 246.

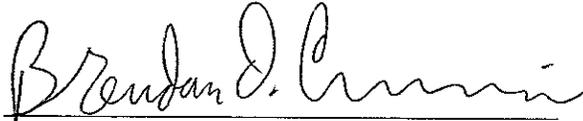
686 N.W.2d at 321. Thus, under Garmon, this Court should find that the state-law tortious interference claim is preempted even if the NLRB has not yet issued a Complaint in this case.

CONCLUSION

For the foregoing reasons, Appellant Pipefitters Local 539 respectfully requests that the Minnesota Supreme Court reverse the decision of the Court of Appeals and remand with instructions that Respondent's Complaint shall be dismissed with prejudice and judgment shall be entered in favor of Pipefitters Local 539.

Dated: December 18, 2008

MILLER·O'BRIEN·CUMMINS, P.L.L.P.

A handwritten signature in cursive script, reading "Brendan D. Cummins". The signature is written in black ink and is positioned above a horizontal line.

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