

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.

**BRIEF OF AMICUS CURIAE
 BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO**

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STATEMENT OF LEGAL ISSUES

I. IS THE STATE IS PREEMPTED FROM EXERCISING JURISDICTION OVER THE ALLEGED THREAT BY LOCAL 539 TO WITHDRAW A MARKET RECOVERY GRANT UNLESS MD MECHANICAL, INC. TERMINATED ITS SUBCONTRACT WITH MPI, INC. BECAUSE IT IS PROTECTED CONCERTED ACTIVITY UNDER SECTION 7 OF THE NLRA.?

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

Most Apposite Cases:

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

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

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(1993).

II. DOES THE GARMON PREEMPTION PRINCIPLE APPLY TO MPI'S TORTIOUS INTERFERENCE CLAIM?

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

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

III. IS STATE COURT JURISDICTION OVER THIS CASE PREEMPTED SINCE THE NLRB HELD IN *MANNO ELECTRIC* THAT USE OF MARKET RECOVERY DUES TO SUBSIDIZE WORKERS' WAGES ON "TARGETED" PROJECTS IS PROTECTED CONCERTED ACTIVITY UNDER § 7 OF THE NLRA?

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

Manno Electric, Inc., 321 N.L.R.B. 278, 152 L.R.R.M. 1107 (1996), *aff'd without op.*, 127 F.3d 34 (5th Cir. 1997).

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IV. IS THE COURT OF APPEALS' CONCLUSION CLEARLY ERRONEOUS THAT USE OF MARKET RECOVERY DUES COLLECTED FROM UNION-REPRESENTED WORKERS FOR HOURS WORKED ON PROJECTS COVERED BY THE DAVIS-BACON ACT TO SUBSIDIZE WORKERS WAGES ON "TARGETED" PROJECTS IS ONLY ARGUABLY PROTECTED ACTIVITY?

The Court of Appeals ruled in the negative, and the District Court address the argument.

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Can-Am Plumbing, Inc. v. National Labor Relations Board, 321 F.3d 145 (D.C. Cir. 2003).

V. Does Collection of Market Recovery Dues from the Wages of Union-Represented Workers Employed on Davis-Bacon Projects Deprive the Market Recovery Program of its Status as a Protected Concerted Activity under § 7 of the NLRA?

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

Building and Construction Trades Unions Job Targeting Programs, WAB Case No. 90-02 (June 12, 1991), 1991 DOL Wage App. Bd. LEXIS 39, WL 494718

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INTRODUCTION

Amicus Curiae Building and Construction Trades Department, AFL-CIO (hereafter "BCTD"), submits this brief in support of appellant Minneapolis Pipefitters Union, Local 539 (hereafter "Local 539" or "Union").^{1/} This case presents another chapter in the continuing crusade by non-union contractors to

^{1/} Pursuant to Rule 129.03, Minnesota Rules of Civil Appellate Procedure, it is hereby certified by the undersigned counsel for *Amicus Curiae* BCTD that he is the sole author of this brief and that the BCTD, which derives its revenue from initiation fees paid by affiliated National and International Unions, including the United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry in the United States and Canada, and charter fees from State, Provincial and Local Building and Construction Trades Councils; a per capita tax paid by each affiliated National and International Union upon its membership engaged in building and construction work; affiliation fees paid by each State, Provincial and Local Building and Construction Trades Council; the sale of supplies to State, Provincial and Local Building and Construction Trades Councils; and assessments, is exclusively responsible for the fees and expenses related to the preparation and submission of this brief.

penalize union contractors for participating in market recovery programs also known as “job targeting programs.”

Market recovery programs are developed and initiated by local building and construction trades unions like Local 539. The sole purpose of these programs is to increase job opportunities for workers employed or seeking employment in the building and construction industry, who are represented by building and construction trades unions. They were first conceived in the 1980’s as a response to the loss of jobs and employment opportunities for workers represented by local building and construction trades unions as unionized contractors and subcontractors were losing market share to non-union contractors and subcontractors on both public and private sector construction projects.

The membership of local building and construction trades unions that sponsor market recovery programs decide the amount that each member will pay to support the market recovery program. The membership often votes to increase their union membership dues in order to support the market recovery program, but some building and construction trades unions simply reallocate a portion of their existing dues. Officers and/or representatives of the sponsoring building and construction trades union then select which contracts will be “targeted,” and how much money will be made available for each “targeted” contract. This usually involves a wage subsidy paid by the local building and construction trades union to

the contractor that successfully competes for the “targeted” contract. All contractors that are signatory to a multi-employer bargaining agreement with the sponsoring building and construction trades union are typically eligible to receive a subsidy, but selection of the “targeted” contracts and determination of the amount of the subsidy are within the exclusive discretion of the sponsoring building and construction trades union.

Market recovery programs like the one adopted by Local 539 are simply a means of creating a variable wage rate for workers employed in the building and construction industry who are represented by building and construction trades unions, which enable the sponsoring union to offer union contractors and subcontractors an effectively lower wage rate on selected work without reducing the take-home wages of the workers employed on the “targeted” jobs more so than the wages of other workers also represented by the sponsoring building and construction trades union. This is accomplished by spreading the cost of the wage subsidy throughout the bargaining unit in the form of working dues by having the subsidy financed by union working dues assessed on each hour worked by each worker represented by the building and construction trades union rather than simply reducing the wage rates of the workers employed on the “targeted” projects alone. The members of the building and construction trades union vote to increase their dues to pay for such programs because they recognize that this modified wage

reduction, made relatively small if spread across the entire multi-employer bargaining unit, is a worthwhile investment that rewards the unit with greater collective and individual job security.

STATEMENT OF THE CASE AND THE FACTS

This case arises from a dispute between respondent Midwest Pipe Insulation, Inc., d/b/a/ MPI, Inc. (hereafter “MPI”) and appellant Local 539 resulting from latter’s alleged tortious interference with a contract between the former and MD Mechanical, Inc. (hereafter “MD”) to perform certain labor, including, but not limited to, plumbing and hydronic pipe insulation and external duct installation in a new elementary school for the St. Michael – Albertville communities in Wright County, Minnesota (hereafter the “St. Michael – Albertville Elementary School Construction Project”). (A.A. at 0004, ¶¶ 6&7 and 0005, ¶¶ 13 & 18-26).^{2/}

Specifically, MPI alleges that Local 539 “pressured” MD “to breach its subcontract agreement with MPI” by threatening to rescind its agreement with MD to provide “target money” from the Union’s market recovery program (hereafter “MRP”) to subsidize MD’s bid to obtain award of the contract for installation, alteration and/or repair of the pipefitting systems in the St. Michael – Albertville Elementary School Construction Project. (*Id.* at 0006, ¶ 15; *see also* Local 539 Market Recovery Contract Agreement, at 0040). MPI further alleges that MD

^{2/} All parenthetical references herein are to the Appellant’s Appendix unless otherwise indicated.

terminated its subcontract with MPI “as a result of Local 539’s threat to rescind its promised ‘target money.’” (*Id.* at 0006, ¶ 16).

The Honorable John Q. McShane of the District Court for the Fourth Judicial District, relying on *BE&K Construction Co. v. United Broth’d of Carpenters and Joiners of Am., AFL-CIO*, 90 F.2d 1318 (8th Cir. 1996), dismissed MPI’s tortious interference claim in *Midwest Pipe Insulation, Inc. d/b/a/ MPI, Inc. v. MD Mechanical, Inc.*, File No. 27-CV-07-11647 (Minn. Dist. Ct., Aug. 23, 2007), because it is preempted by federal labor law. (A.A. at 0164-68). On appeal, MPI argued that its tortious interference claim is not preempted by federal labor law inasmuch as the National Labor Relations Board (hereafter “NLRB”) “has already determined that an MRP funded with union employees’ wages from federal prevailing wage projects violates the Davis-Bacon Act, thereby removing the program from federal labor law protection and from application of the *Garmon* preemption doctrine.” (*Id.* at 0237). The Court of Appeals agreed with MPI’s argument in *Midwest Pipe Insulation, Inc. d/b/a/ MPI, Inc. v. MD Mechanical, Inc.*, File No. 27-CV-07-11647 (Minn. Ct. App., Aug. 26, 2008), (*Id.* at 0230-41).^{3/}

^{3/} The District Court relied on *BE&K Constr.* to conclude that MPI’s tortious interference claim was preempted by federal labor law. (A.A. at 0167-68). The Court of Appeals disagreed with Local 539 that *BE&K Constr.* is analogous to MPI’s case. (*Id.* at 0240). Local 539 asserts in its brief to the Court that “[t]he 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. . . .” Appellant’s Brief at 16. As such, Local 539 argues that the alleged

Instead, the Court of Appeals concluded in *MPI, Inc.* that a union's use of market recovery program funds that are deducted from the wages of workers employed on projects covered by the Davis-Bacon Act, 40 U.S.C. §§ 3141-3148:

Is at best *arguably protected* activity, which under [*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 202-03 (1978)] means that state jurisdiction over the union's conduct exists in the absence of [National Labor Relations Board] participation. See 436 U.S. at 203, 98 S. Ct. at 1760 (holding that states may regulate arguably protected union activity if the appropriate party did not raise the issue with the Board and the other party could not otherwise obtain a Board ruling).

(*Id.* at 0239). Consequently, the Court of Appeals reversed the District Court's judgment, which had dismissed the case for lack of subject matter jurisdiction, and remanded it for further proceedings. (*Id.* at 0241). Appellant Local 539 is appealing the Court of Appeals' decision. (*Id.* at 0243-47).

"threat in this case, like the alleged threat in *BE&K Constr.*, is preempted because the alleged secondary pressure exerted by Local 539 is arguably prohibited by Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4), and therefore, MPI's tortious interference claim is preempted by federal labor law. *Id.* at 22.

Amicus Curiae BCTD expresses no opinion regarding Local 539's argument based on *BE&K Constr.* However, this should not be interpreted as a lack of support or agreement with Local 539's argument. Instead, *Amicus Curiae* BCTD requested leave to participate in the above-entitled case in order to address the status of market recovery programs as protected concerted activity under Section 7 of the NLRA and its preemptive effect on State law claims like MPI's tortious interference claim in this case. Accordingly, *Amicus Curiae* BCTD offers no opinion regarding Local 539's contention that MPI's tortious interference claim is arguably prohibited by § 8(b)(4) of the NLRA.

ARGUMENT

I. THE STATE IS PREEMPTED FROM EXERCISING JURISDICTION OVER THE ALLEGED THREAT BY LOCAL 539 TO WITHDRAW A MARKET RECOVERY GRANT UNLESS MD MECHANICAL, INC. TERMINATED ITS SUBCONTRACT WITH MPI, INC. BECAUSE IT IS PROTECTED CONCERTED ACTIVITY UNDER SECTION 7 OF THE NLRA.

In any case concerning preemption, congressional purpose must be the ultimate focus. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). The National Labor Relations Act, 29 U.S.C. §§ 141-187 (hereafter the "NLRA") contains no express preemption provision. "Where the pre-emptive effect of federal enactments is not explicit, 'courts sustain a local regulation "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'"" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-748 (1985), quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985). In determining whether state regulation should yield to subordinating federal authority, the United States Supreme Court has been concerned with potential conflict regarding substantive law, remedies, and administration. The potential for conflict arises when two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, are required to apply inconsistent standards of substantive law and/or

differing remedial schemes. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241-242 (1959).

The Supreme Court articulated two distinct NLRA preemption principles in *Metropolitan Life*. “The first, ‘*Garmon* pre-emption,’ see *San Diego Building Trades Council v. Garmon*, forbids state and local regulation of activities that are ‘protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8.’ [Garmon] 359 U.S. at 244. See also *Garner v. Teamsters*, 346 U.S. 485, 498-499 (1953) (‘When two separate remedies are brought to bear on the same activity, a conflict is imminent’). *Garmon* pre-emption prohibits regulation even of activities that the NLRA only *arguably* protects or prohibits. See *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986). This rule of pre-emption is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress’ ‘integrated scheme of regulation,’ *Garmon*, 359 U.S., at 247, embodied in §§ 7 and 8 of the NLRA, which includes the choice of the NLRB, rather than state or federal courts, as the appropriate body to implement the Act.” (Emphasis *sic.*) *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224-225 (1993) citing *Metropolitan Life*, 471 U.S. at 748-749, and n. 26.

“A second pre-emption principle, ‘*Machinists* pre-emption,’ see *Machinists v. Wisconsin Employment Relations Comm’n*, 427 U.S. [132] at 147 [1976],

prohibits state and municipal regulation of areas that have been left “to be controlled by the free play of economic forces.” *Id.*, at 140 (citation omitted). See also *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614 (1986) (*Golden State I*); *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 111 (1989) (*Golden State II*). *Machinists* pre-emption preserves Congress’ ‘intentional balance “between the uncontrolled power of management and labor to further their respective interests.’ “ *Golden State I*, 475 U.S. at 614 (citations omitted).” *Building & Constr. Trades Council of Metro. Dist.*, 507 U.S. at 225-226,

A. The Garmon Preemption Principle Applies to MPI’s Tortious Interference Claim.

“In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, the U.S. Supreme Court made two statements which have come to be accepted as the general guidelines for deciphering the unexpressed intent of Congress regarding the permissible scope of state regulation of activity touching upon labor-management relations.” *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 187 (1978). The first statement relates to activity that is *clearly* protected or prohibited by the federal statute. The second articulated a more sweeping prophylactic rule concerning activity that is only *arguably* subject to the protections found in Section 7 or the prohibitions found in Section 8 of the NLRA. *Id.*

1. *Clearly Protected or Clearly Prohibited Activity.*

“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. To 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. . . . Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.” *Garmon*, 359 U.S. at 244.

Accordingly, if the NLRB has decided, subject to appropriate federal judicial review, that conduct is either protected by Section 7 or prohibited by Section 8 of the NLRA, the matter is at an end and States are ousted of all jurisdiction. *Id.* at 245.

2. *Arguably Prohibited or Protected Activity.*

Where conduct only *arguably* falls under the protections of Section 7 or the prohibitions of Section 8 of the NLRA, and the NLRB has not yet passed on whether the conduct is actually protected or prohibited, and it may not be fairly assumed that the NLRB would adjudge the conduct to be neither protected nor prohibited, courts generally must refrain from adjudicating the issue. *Id.* at 244. “It

is essential to the administration of the Act that these determinations be left in the first instance to the NLRB.” *Id.* at 244-245. Accordingly, the U.S. Supreme Court has established the doctrine of primary jurisdiction to safeguard Congress’s design to “entrust administration of the labor policy for the Nation to a centralized administrative agency [the NLRB].” *Gould*, 475 U.S. at 289-290.

In enacting the NLRA:

“Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.”

Garmon, 359 U.S. at 242-243, quoting *Garner*, 346 U.S. at 490-491.

B. State Court Jurisdiction Over this Case is Preempted Since the NLRB Held in *Manno Electric* that Use of Market Recovery Dues to Subsidize Workers’ Wages on “Targeted” Projects is Protected Concerted Activity Under § 7 of the NLRA.

In *Associated Builders and Contractors, Inc.*, 331 N.L.R.B. 132 (2000), the NLRB squarely held that a State court lawsuit under the California unfair business practice statutes to preclude the use of market recovery programs on public works

projects was preempted by § 7 of the NLRA and violated § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). 331 N.L.R.B. 132 n.1. The NLRB relied on *Manno Electric, Inc.*, 321 N.L.R.B. 278, 152 L.R.R.M. 1107 (1996), *aff'd without op.*, 127 F.3d 34 (5th Cir. 1997), in which it summarily adopted the relevant findings of its administrative law judge that a market recovery program sponsored by an Electrical Workers' local union was protected concerted activity under § 7 of the NLRA inasmuch as the objective of the MRP is "to protect employees' jobs and wage scales"^{4/} and held that a nonunion employer that initiated a state lawsuit, which broadly attacked the union's market recovery program as an unfair trade practice, committed an unfair labor practice since:

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 employees' jobs and wage scales. Section 7 protects these objectives. Thus, the plaintiffs' suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a)(

^{4/} The NLRB more fully described the market recovery program at issue in *Manno Electric* as follows:

The "job targeting program" is a practice utilized by the Union to make possible competitive bidding for jobs by union contractors against nonunion contractors. It works this way. The Union supplements the wages of the employees of certain union employers so that they may bid on a parity with nonunion contractors whose payscale is lower. By this method the Union is able to maintain the union wage scale on the job and obtain work for its members. Obviously, it also benefits the union contractor.

1) of the Act. The claims that the Plaintiff sought to press were preempted.

Manno Electric, 231 N.L.R.B. at 298.

II. THE COURT OF APPEALS' CONCLUSION IS CLEARLY ERRONEOUS THAT USE OF MARKET RECOVERY DUES COLLECTED FROM UNION-REPRESENTED WORKERS FOR HOURS WORKED ON PROJECTS COVERED BY THE DAVIS-BACON ACT TO SUBSIDIZE WORKERS WAGES ON "TARGETED" PROJECTS IS ONLY ARGUABLY PROTECTED ACTIVITY.

A. The NLRB Has Never Suggested that Receipt of Dues for Hours Worked on Projects Covered by the Davis-Bacon Act Might Deprive a Market Recovery Program of its Status as a Protected Concerted Activity under Section 7 of the NLRA.

In *MPI, Inc.*, the Court of Appeals acknowledged the NLRB's holding in *Manno Electric*. (A.A. at 0236) ("MPI does not dispute that a union's use of MRP grant money to subsidize wage costs is a protected activity under Section 7 of the NLRA"). Furthermore, the Court of Appeals declined to hold in *MPI, Inc.* that the NLRB, "[b]y acknowledging [in *International Bhd. of Elec. Workers., Local 48, AFL-CIO (Kingston Constructors, Inc.) & Patrick Mulcahy*, 332 N.L.R.B. 1492, 1496 (2000), *enf'd National Labor Relations Board v. International Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049 (9th Cir. 2003)], lacks authority to interpret federal non-labor policy in the form of the Davis-Bacon Act, HAS concluded that a market recovery program no longer qualifies as protected concerted activity under

§ 7 of the NLRA if it is funded in whole or in part by members' dues paid for hours worked on projects covered by the Davis-Bacon Act. (*Id.* at 0238).

However, the Court of Appeals concluded in *MPI, Inc.* that the NLRB "suggested" in *Kingston Constructors* that a market recovery program that receives funds collected by a union from members for hours worked on projects covered by the Davis-Bacon Act "is at best *arguably protected* activity, which under [*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 202-03 (1978)] means that State jurisdiction over the union's conduct exists in the absence of Board participation. *See* 436 U.S. at 203, 98 S. Ct. at 1760 (holding that states may regulate arguably protected union activity if the appropriate party did not raise the issue with the Board and the other party could not otherwise obtain a Board ruling)." (*Id.* at 0238-39). This is an erroneous interpretation of the holding in *Kingston Constructors*.

In *Kingston Constructors*, the complaint alleged, *inter alia*, that a local union violated Section 8(b)(2) of the NLRA, 29 U.S.C. § 158(b)(2), by causing and attempting to cause the charging party to be discharged, for failing to pay dues assessed to support the union's market recovery program. Section 8(b)(4) of the Act states that it is an unfair labor practice for a labor organization:

To cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground *other than his failure*

to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Emphasis added.^{5/}

Thus, a union may lawfully cause or attempt to cause an employer to fire an employee, who is covered by a § 8(a)(3) union security agreement and who refuses to pay the “periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining [union] membership,” and the employer may lawfully comply with such a request by the union. Not surprisingly, a question often arises when a union seeks to compel an employee to make payments to the union on pain of discharge as to whether the payments in question constitute “periodic dues . . . uniformly required.” 332 N.L.R.B. at 1492-94. This was the principle issue in *Kingston Constructors*.

In *Teamsters Local 959 (RCA Service Co.)*, 167 N.L.R.B. 1042 (1967), the NLRB held that the term “periodic dues” in Section 8(a)(3) of the NLRA refers only to payments that are for the purpose of supporting the union in its role as the collective bargaining agent of a unit of workers. Four years after it issued its opinion in *Teamsters Local 959*, in *Detroit Mailers Local 40*, 192 N.L.R.B. 951 (1971), the NLRB rejected any attempt to distinguish between dues for collective

^{5/} In addition, the first proviso in Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), allows an employer and a union that has been recognized or certified by the NLRB as the exclusive bargaining representative of the employer’s employees to agree to make union membership a condition of employment after an employee has been employed for 30 days.

bargaining purposes and those earmarked for the union's institutional expenses. The Board held in *Detroit Mailers* that dues may be required under a union-security agreement "so long as they are periodic and uniformly required and are *not devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy.*" *Id.* at 952 (emphasis added).

The NLRB agreed with its administrative law judge, who held that *Detroit Mailers* implicitly overruled *Teamsters Local 959*, and that *Detroit Mailers* "sets forth the Board's framework for determining whether particular employee payments to unions constitute 'periodic dues' within the meaning of Section 8(a)(3) and 8(b)(2) [of the NLRA]." *Kingston Constructors*, 332 N.L.R.B. at 1495. Applying the three-prong *Detroit Mailers*' test, the NLRB

The NLRB General Counsel argued in *Kingston Constructors* that under the *Detroit mailers* test, market recovery dues based on employment on a Davis-Bacon project cannot be "periodic dues" because their force exaction on such projects is inimical to public policy. The General Counsel relied on the decision of the U.S. Department of Labor's Wage Appeals Board in *Building and Construction Trades Unions Job Targeting Programs*, WAB Case No. 90-02 (June 12, 1991), 1991 DOL Wage App. Bd. LEXIS 39, WL 494718 and on the courts of appeals' decisions in *Building & Constr. Trades Dep't, AFL-CIO, v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994); *International Brotherhood of Electrical Workers, Local 357 v.*

Brock, 68 F.3d 1194 (9th Cir. 1995), all of which held that the collection of dues for market recovery programs like Local 539's violates the requirement in the Davis-Bacon Act that contractors and subcontractors "shall pay all mechanics and laborers employed directly on the site of the work . . . without subsequent deduction or rebate on any account, the full amounts accrued at [the] time of payment" computed at the prevailing wage rates determined by the Secretary of Labor. 40 U.S.C. § 3142(c)(1).

Therefore, the General Counsel urged the NLRB in *Kingston Constructors* to find that the respondent local union violated the NLRA by requiring union members to make payments to the union's market recovery program for hours worked on Davis-Bacon projects as a condition of continued employment. 332 N.L.R.B. at 1498. The NLRB agreed with the General Counsel's argument and held that the respondent union violated the NLRA by threatening to have its members fired for refusing to pay market recovery dues, which were owed from their hours of work on Davis-Bacon projects. *Id.* at 1500-02.

Specifically, the NLRB stated:

We agree with the General Counsel that, in light of the decisions of the Labor Department and the courts of appeals, requiring the payment of MRP dues as a condition of employment on Davis-Bacon projects is inimical to public policy under *Detroit Mailers*. The Labor Department and the courts, not the Board, have the responsibility to enforce the Davis-Bacon Act. They have concluded that the collection of dues for job targeting programs on Davis-Bacon projects violates the Davis-Bacon Act. Moreover, the Labor

Department has indicated, and the Ninth Circuit has expressly held, that even the direct payment of dues for such programs, as opposed to deductions pursuant to checkoff, is unlawful under Davis-Bacon. *As a matter of comity we shall defer to those rulings.*

Id. at 1500-01 (emphasis added and footnotes omitted). The NLRB explained:

The Board has deferred to other agencies' and courts' authoritative construction of statutes which they have the responsibility for enforcing. *See. e.g., Roseburg Forest Products*, 331 N.L.R.B. No. 174 (2000) (deferring to U.S. Equal Employment Opportunity Commission's interpretation of confidentiality requirements under the Americans with Disabilities Act); *PCC Structural, Inc.*, 330 N.L.R.B. No. 131 (2000) (deferring to EEOC's and Courts' interpretation of harassment as creating a hostile work environment under the ADA); and *OXY USA, Inc.*, 329 N.L.R.B. No. 26 (1999) (deferring to the Justice Department's opinion regarding the provisions of Sec. 303 of the Act).

Id. at 1501.

On the other hand, , the NLRB concluded in *Kingston Constructors* that, since collecting market recovery dues from employees “under a union security agreement on non-Davis-Bacon jobs is not inimical to public policy,” the respondent union could properly enforce the collection of market recovery dues as a condition of employment on such jobs. *Id.* at 1497.^{6/} Moreover, the NLRB reaffirmed the general rule in *Manno Electric* that market recovery programs are

^{6/} On appeal, the Ninth Circuit held in *National Labor Relations Board v. International Brotherhood of Elec. Workers, Local 48*, 345 F.3d 1049, 1058 (9th Cir, 2003), that the NLRB correctly determined the Electrical Workers local union violated the NLRA by threatening to have a member’s employment terminated pursuant to a lawful union security clause for refusing to dues earmarked for the union’s market recovery program for hours worked on Davis-Bacon jobs.

“not inconsistent with public policy and are affirmatively protected by Section 7,”
Id.

Thus, contrary to the Court of Appeals conclusion in *MPI, Inc.*, the NLRB’s holding in *Kingston Constructors* does not suggest alternatively that a market recovery program is no longer protected concerted activity under Section 7 of the NLRA when it is supported in whole or in part by dues collected from union-represented workers for hours worked on projects covered by the Davis-Bacon Act, (A.A. at 0238); or that the NLRB “has no preemptory jurisdiction over singular challenges to the union’s administration of its MRP under the Davis-Bacon Act” and, therefore, market recovery programs that are supported in whole or in part by dues collected from union-represented workers for hours worked on projects covered by the Davis-Bacon Act are “at best *arguably protected* activity, which under *Sears, Roebuck* means that state jurisdiction over the union’s conduct exists in the absence of [NLRB] participation.” (*Id.* at 0238-39).

All that the NLRB held in *Kingston Constructors* is that market recovery dues collected from union-represented workers for hours worked on projects covered by the Davis-Bacon Act are not “periodic dues” within the meaning of that term in § 8(a)(3) of the NLRA, which the union can lawfully compel its members to pay pursuant to an otherwise lawful union security agreement with the members’ employer. The Court of Appeals opinion in *MPI, Inc.* far too much into *Kingston*

Constructors in order to support its holding that State subject matter jurisdiction over MPI's tortious interference claim is not preempted by federal labor law.

In fact, the only case that comes close to holding that market recovery programs supported in whole or in part by dues collected from union-represented workers for hours worked on projects covered by the Davis-Bacon Act lose their status as protected concerted activity under § 7 of the NLRA and, hence their preemptive effect on challenges to such programs under State law is *Can-Am Plumbing, Inc. v. National Labor Relations Board*, 321 F.3d 145 (D.C. Cir. 2003), which reversed and remanded an NLRB decision that a nonunion plumbing contractor had engaged in unfair labor practices by maintaining and prosecuting a lawsuit in State court against a competitor that had received a subsidy from a local union pursuant to its market recovery program. *Can-Am Plumbing, Inc. and United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local 342, AFL-CIO*, 335 N.L.R.B. 1217 (2001).

The NLRB reasoned in *Can-Am Plumbing* that the respondent nonunion plumbing contractor had engaged in unfair labor practices, inasmuch as the NLRB held in *Manno Electric* that market recovery programs are concerted activity protected by § 7 of the NLRA and, therefore, the nonunion plumbing contractor's suit in State court was preempted *ab initio* because it had the direct and foreseeable

consequence of interfering with the union's concerted ability to achieve its market recovery program's protected objectives. *Can-Am Plumbing*, 335 N.L.R.B. at 1223.

On appeal, the nonunion plumbing contractor argued, *inter alia*, that the holdings in *Building and Construction Trades Unions Job Targeting Programs; Building & Constr. Trades Dep't, AFL-CIO, v. Reich*; and *International Brotherhood of Elec. Workers, Local 357 v. Brock*, deprived the local union's market recovery program of § 7 protection under *Manno Electric*, because it collected some of its funds from workers' wages earned on public works projects covered by the Davis-Bacon Act and, therefore, offends public policy. *Can-Am Plumbing*, 321 F.3d at 152. Consequently, the non-union plumbing contractor asserted that its State court lawsuit was not preempted by federal labor law.

The D.C. Circuit held in *Can-Am Plumbing* that the NLRB had failed adequately to explain why receipt of market recovery dues for hours of work on Davis-Bacon projects did not affect the legality of the local union's market recovery program as a protected concerted activity under § 7 of the NLRA, or why the union's conduct in that regard was excusable. Consequently, the court remanded the case to the NLRB.

Subsequently, the NLRB found that the non-union plumbing contractor had failed to assert that the Local Plumbers Union's job targeting program's inclusion

of dues derived from wages paid on Davis-Bacon projects violated the Davis-Bacon Act or undermined the protected status of the job targeting program under Section 7 of the NLRA. *Can-Am Plumbing, Inc. and United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local 342, AFL-CIO*, Case No. 32-CA-16097, 350 N.L.R.B. No. 75, 2007 NLRB LEXIS 345 (Aug. 24, 2007) at *6. Instead, the NLRB held that the non-union plumbing contractor relied only on provisions of California law in contending the local union market recovery program was not protected and that the State lawsuit against its union competitor was not preempted. *Id.* Accordingly, the NLRB found that the issue of whether the local union market recovery program violated the Davis-Bacon Act, not having been raised by the non-union plumbing contractor, was waived and, therefore, could not be considered. *Id.* at *16.

It appears that resolution of *Can-Am Plumbing* by the NLRB on remand renders the D.C. Circuit's suggestion that receipt by a union of market recovery dues for hours of work by its members on Davis-Bacon projects deprives the union's market recovery program of its status as a protected concerted activity under § 7 of the NLRA under *Manno Electric* nothing more than *dictum*. The Court of Appeals noted in *MPI, Inc.*, the D.C. Circuit's opinion in *Can-Am Plumbing* "does not set forth any legal principle to follow, but instead remands to

the Board for more adequate analysis of the issues raised regarding violations of the Davis-Bacon Act. . . . on remand, the Board declined to engage in such analysis on procedural grounds.” *MPI, Inc.* (A.A. at 0239, n.6 (citations omitted)).

Accordingly, the Court of Appeals holding in *MPI, Inc.* that State jurisdiction over MPI’s tortious interference claim against Local 539 is not preempted by federal labor law if the Union’s market recovery program is supported in whole or in part by dues collected from union-represented workers for hours worked on projects covered by the Davis-Bacon Act is clearly erroneous.

B. Collection of Market Recovery Dues from the Wages of Union-Represented Workers Employed on Davis-Bacon Projects Does Not Deprive the Market Recovery Program of its Status as a Protected Concerted Activity under § 7 of the NLRA.

Contrary to the implicit assumption by the Court of Appeals in *MPI, Inc.*, neither the U.S. Department of Labor nor the federal courts have held that use of market recovery dues paid by union-represented workers for hours worked on Davis-Bacon projects to subsidize the wages of workers employed on “targeted” projects violates the Davis-Bacon Act thereby arguably depriving the MRP of its status as a protected concerted activity under § 7 of the NLRA under *Manno Electric*.

On June 3, 1988, the Associated Builders and Contractors, Inc. (hereafter “ABC”) complained to the U.S. Department of Labor’s (hereafter “DOL”) Wage

and Hour Administrator (hereafter "Administrator") about the effect of job targeting programs on nonunion firms. ABC's primary complaint was that deduction of contributions to job targeting programs from the wages of workers employed on federal and federally-assisted construction projects, which are used to subsidize wages paid by employers on other projects, violates the Copeland Anti-Kickback Act, 18 U.S.C. § 874.

ABC also alleged that deduction of contributions to job targeting programs from the wages of workers employed on federal and federally-assisted construction projects, which are used to provide incentives to union contractors to compete for contracts targeted by the union, violates Sections 3.5 and 3.6 of DOL's regulations, 29 C.F.R. §§ 3.5 and 3.6. ABC maintained in its letter to the Administrator that, notwithstanding the unequivocal authorization of employers to deduct regular union initiation fees and membership dues in Section 3.5(i) of the DOL regulations without prior DOL approval, employer deduction of contributions to market recovery programs "could not be lawfully approved under [Section 3.6], because its avowed purpose is directly to increase the profit of the signatory employer."

On January 24, 1989, the Administrator issued her initial ruling in response to ABC's June 3, 1988, request. The Administrator determined that, although market recovery dues are not wage kickbacks prohibited by the Copeland Anti-Kickback Act, deduction of market recovery dues from wages earned on Davis-

Bacon projects violates the prevailing wage rate requirements in the Davis-Bacon Act, and is not permissible under either Section 3.5 or Section 3.6 of DOL's regulations because such deductions benefit employers.

Pursuant to a joint request by the BCTD and the National Electrical Contractors Association for clarification of her January 24, 1989, determination, the Administrator issued a supplemental ruling on September 5, 1989.^{2/} In reaffirming her earlier determination, the Administrator ruled, *inter alia*, that not only direct deduction of job targeting dues from employees' wages on projects covered by the Davis-Bacon Act violates the Act, but also union-required employee payment of a portion of theft wages earned on Davis-Bacon jobs is prohibited by the Act and its implementing regulations, "to the extent that the payment has the effect of the employee receiving less than the prevailing wage." *Id.* at p. 2. Nevertheless, the Administrator's September 5, 1989 supplemental ruling made it clear that subsidization of Davis-Bacon projects was not unlawful inasmuch as DOL regulations only address the legality of collection of market recovery dues, not the subsequent use of such funds. *Id.*

The BCTD, as well as other labor and management organizations, petitioned DOL's Wage Appeals Board to review and overturn the Administrator's interpretation. In *Building and Construction Trades Unions Job Targeting Programs*, , the Wage Appeals Board upheld the Administrator's determination

that deduction of contributions to job targeting programs from workers' wages earned on Davis-Bacon projects violate the Davis-Bacon Act and the relevant regulations. The Board reasoned that the Davis-Bacon Act requires the payment of prevailing area wages and that DOL's regulations, which generally prohibit payroll deductions unless specifically enumerated or approved by DOL, are intended to effectuate that end. The Board also concluded that deduction of contributions from workers' wages earned on Davis-Bacon projects are not union membership dues as that term is ordinarily understood and, therefore, do not qualify as "membership dues" under Section 3.5(i) of DOL's regulations.

The BCTD and other organizations sought review of the adverse decision of the Wage Appeals Board in the district court. Considering cross-motions for summary judgment, the district court granted DOL's motion on the basis that its interpretation of its own regulations are reasonable and consistent with the purposes of the Davis-Bacon Act. *Building & Constr. Trades Dep't, AFL-CIO, v. Reich*, 815 F. Supp. 484, *amended by, reconsideration denied by* 820 F. Supp. 11 (D. D.C. 1993). The U.S. Court of Appeals for the District of Columbia Circuit subsequently affirmed the district court's holding that DOL's interpretation of the Davis-Bacon Act and its own regulations is clearly reasonable in light of the Act's language and purpose. *Building & Constr. Trades Dep't, AFL-CIO, v. Reich*, 40 F.3d 1275, 1283 (D.C. Cir. 1994).

The essence of the Administrator's ruling and the Wage Appeals Board's decision, as affirmed by the D.C. Circuit, is that the Davis-Bacon Act requires payment of prevailing area wages, and collection of market recovery dues from a worker's paycheck reduces his or her wages below that prevailing wage rate, thereby violating the Davis-Bacon Act. Nevertheless, neither the Administrator nor the Wage Appeals Board held that subsidization of targeted jobs by labor unions violates the Davis-Bacon Act. Therefore, it has never been held that the Davis-Bacon Act prohibits labor unions from providing wage subsidies to contractors performing federally funded projects covered by the Davis-Bacon Act, but are prohibited from collecting job targeting dues from employees working on such jobs.

Subsequently, in *International Brotherhood of Elec. Workers v. Brock* an IBEW local union trial board found several workers employed within the local union's jurisdiction as "travelers" on a project covered by the Davis-Bacon Act guilty of failing and refusing to pay job targeting dues required of all Local Union members and travelers. The union's trial board assessed fines against the travelers in an amount equal to the unpaid job targeting dues plus a 20 percent penalty. *Id.* at 1197. When the travelers refused to pay the amounts assessed, the union filed a complaint in state court to collect the amounts it claimed were due, including attorney's fees and costs. The travelers removed the case to the federal district

court and sought a declaratory judgment that the union was not entitled to collect the job targeting dues and penalties because they were illegal. The district court granted the union's cross-motion for summary judgment and denied the travelers' motion for summary judgment, upholding the union trial board's decision and awarding the union the unpaid two percent market recovery dues, a 20 percent fine, and the attorney's fees and interest requested.

On appeal, the Ninth Circuit reversed the district court relying on the *Building and Construction Trades* cases, holding instead:

Whether [job targeting] payments are deducted from employee wages or made directly to a union, they circumvent the language and purposes of the Davis-Bacon Act and its regulations, which are to restrict severely the occasions when prevailing wages may be returned to contractors and to prohibit the use of deductions from employee wages to profit or benefit contractors.

International Brotherhood of Elec. Workers v. Brock, 68 F.3d at 1201.

Thus, the holdings in the *Building and Construction Trades* cases and *International Brotherhood of Elec. Workers v. Brock* indicate that collection of job targeting dues from workers employed on projects covered by the Davis-Bacon Act is prohibited by that Act, because it reduces the wages received by such workers below the prevailing wage to the benefit of contractors. None of these cases held, however, that use of market recovery dues collected from union-represented workers for hours worked on Davis-Bacon projects violates the Davis-Bacon Act. That is, the Davis-Bacon Act does not prohibit labor unions from using

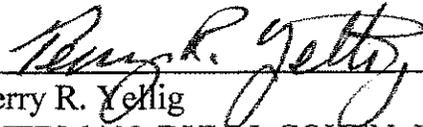
market recovery dues collected on Davis-Bacon jobs to subsidize contractors and subcontractors willing to bid on “targeted” jobs, which is what the MPI is challenging in the above-entitled case as tortious interference with contract.

Accordingly, the holdings in the *Building and Construction Trades* cases and *International Brotherhood of Elec. Workers v. Brock* have no effect whatsoever on the protected concerted activity status under § 7 of the NLRA of using funds collected by market recovery programs, regardless of their source, to subsidize workers wages on “targeted” projects. Therefore, State law claims challenging the use of such funds, such as MPI’s tortious interference claim in the above-entitled case, are preempted by federal labor law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court of Appeals decision in the above-entitled case should be reversed and remanded with instructions that Respondent Midwest Pipe Insulation, Inc.'s Complaint should be dismissed with prejudice for lack of subject matter jurisdiction and judgment entered in favor of Appellant Minneapolis Pipefitters Local 539.

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE WITH RULE 132.01, SUBD. 3(C),
MINNESOTA RULES OF CIVIL APPELLATE PROCEDURE**

I hereby certify that the foregoing Brief of Amicus Curiae Building and Construction Trades Department, AFL-CIO, complies with the type-volume limitation set forth in Rule 132.01, Subd. 3(c), Minnesota Rules of Civil Appellate Procedure. The Brief contains 6,687 words, excluding the pages exempted by Rule 132.01, Subd. 3(c), Minnesota Rules of Civil Appellate Procedure. The Brief was prepared using Microsoft Office Word 2003.


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