

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 REPLY BRIEF

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INTRODUCTION

This is a labor law case that belongs before the National Labor Relations Board (NLRB) because it involves conduct that is arguably prohibited and conduct that is arguably protected by the National Labor Relations Act (NLRA). The arguably prohibited conduct is the alleged threat to rescind a market recovery grant to force MD Mechanical not to do business with a non-union contractor performing work not covered by Appellant Local 539's contract. The arguably protected conduct is the issuance of a market recovery or "job targeting" grant.

Respondent MPI attempts to score debater's points by suggesting that the alleged conduct cannot be both arguably prohibited and arguably protected by the NLRA. However, preemption cases typically are complex. Courts frequently find that alleged conduct is either arguably prohibited or arguably protected and defer to the NLRB to decide the issue because it is within the Board's primary jurisdiction. In a case cited by Respondent, the United States District Court in Massachusetts recently quoted Garmon in explaining the proper approach. Am. Steel Erectors v. Iron Workers Local 7, 2006 WL 300422 (D. Mass.), *aff'd in relevant part, rev'd in part, rem'd*, 536 F.3d 68, 84-85 (1st Cir. 2008) (Resp. Br. at 17, n.4.) Like this case, the American Steel Erectors case involved a state-law tortious interference claim challenging a market recovery program (MRP) that allegedly was funded in part by dues deducted on prevailing wage jobs. In finding the tortious interference claim preempted, the court quoted Garmon as follows:

At times it has not been clear whether the particular activity regulated by the States was governed by [Section] 7 or [Section] 8 or was, perhaps, outside of both these sections. But courts are not

primary tribunals to adjudicate such issues. *It is essential to the administration of the [NLRA] that these determinations be left in the first instance to the [NLRB]*. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board.

2006 WL 300422 at *2, quoting Garmon, 359 U.S. at 244-4 (emphasis added). The Court of Appeals for the First Circuit adopted the District Court's preemption analysis wholesale. 536 F.3d at 84-85. In this case, as in American Steel Erectors, state jurisdiction must yield to the "exclusive primary competence of the Board."

MPI's principal theme in this case appears to be that it purportedly suffered an "admitted" wrong that will have no remedy if preemption applies. This theme is unfounded. First, Local 539 has not "admitted" that it committed any wrong. Indeed Local 539 has consistently denied that its MRP violates the Davis-Bacon Act or the Minnesota Prevailing Wage Act. Local 539 collects general dues on all projects and does not earmark any dues for its MRP. The Davis-Bacon regulations specifically permit the deduction of "regular membership dues" on federal and private projects alike. The fact that Local 539 does not earmark dues for market recovery activity distinguishes this case from the precedents relied on by MPI: Reich, Brock, and Kingston Constructors.

Additionally, no court or agency has held that the issuance of a market recovery grant constitutes an alleged "wrong." The NLRB case law has consistently held that MRP grants are protected regardless of the source of the funds. The D.C. Circuit's decision in Can-Am Plumbing is not to the contrary. That case simply remanded to the

NLRB for further findings and explanation of the NLRB's holding that MRPs are protected—which is still the law.

Moreover, even if a prevailing wage violation were committed in this case—which Local 539 vigorously denies—MPI is not the party that was wronged and not the party that would have a remedy. This is presumably why MPI abandoned its prevailing wage claim. The Supreme Court has long held that the prevailing wage laws were not enacted to protect contractors but instead were passed to protect workers from substandard earnings. Although MPI lacks a remedy for any alleged prevailing wage violation, employees could pursue remedies with the NLRB and/or DOL if they believed (erroneously) that their rights were being violated by deduction of general dues on federal projects. However, as the DOL's Wage Appeals Board has explained, such a challenge to dues deductions has no bearing on whether issuing an MRP grant is protected.

The only “wrong” to MPI alleged in this case—and the only remaining claim—is tortious interference with contract. That claim is plainly preempted because on its face it alleges secondary activity within the meaning of section 8(b)(4) of the NLRA. In the American Steel Erectors case, the court explained as follows:

The gravamen of the Complaint is that Local 7 uses economic weapons to coerce nonunion employers into hiring union workers—an allegation that lies at the heart of the regulatory province of the NLRB. The Complaint cites repeated instances of [the Union's] alleged . . . job targeting, threats to picket . . . These are quintessential examples of the types of conduct that are committed by the NLRA to the primary jurisdictional oversight of the NLRB.

2006 WL 300422 at *4 (emphasis added). There is no principled way to distinguish this preemption analysis.

MPI attempts to distinguish the BE & K and Hennepin Broadcasting cases cited by Local 539 by suggesting that those cases involved “unquestionably” prohibited conduct and plaintiffs had “specifically invoked” the federal labor laws. MPI misstates the legal standard. Preemption applies if the alleged conduct was “arguably prohibited,” regardless of whether plaintiff also files a federal labor law claim.

MPI also attempts to avoid the “arguably prohibited” doctrine by changing the subject. MPI states that “the underlying conduct here . . . is clearly outside of federal labor law *protection*.” (Resp. Br. at 25.) This is non-responsive. For purposes of determining whether alleged conduct was “*arguably prohibited*,” it does not matter whether some component of the conduct was also “*outside of labor law protection*.”

The bottom line is that MPI is asking this Court to usurp the NLRB’s role. Garmon requires that state jurisdiction “must yield to the exclusive primary competence of the Board.” 359 U.S. at 245.

I. THE UNION’S MARKET RECOVERY PROGRAM DOES NOT VIOLATE THE DAVIS-BACON ACT OR THE MINNESOTA PREVAILING WAGE ACT; THE COURT NEED NOT ACCEPT A PLAINTIFF’S LEGAL CONCLUSION AS TRUE.

MPI contends that “the Court must accept as true the allegations that Local 539 is illegally funding its MRP with Davis-Bacon and state prevailing wage moneys.”¹ (Resp.

¹ MPI also asserts that Local 539 “admitted” at oral argument before the Court of Appeals that it collected dues in violation of the prevailing wage laws. (Resp. Br. at 7.) This is untrue. Local 539 simply acknowledged the holdings of two federal courts of appeals and the Department of Labor that collecting dues earmarked for market recovery on federal prevailing wage jobs violates the Davis-Bacon Act. Local 539 specifically emphasized at oral argument that MPI lacked any evidence to support its allegations of prevailing wage violations and objected to MPI’s attempts to rely on the unfounded assertion that it is “general knowledge in the industry” that MRPs typically are funded unlawfully. Local 539’s counsel noted that, as a lawyer who is often on the plaintiff’s side, he would be very concerned about going to court armed only with vague allegations of “general knowledge in the industry.”

Br. at 19.) This is inaccurate. The Court does not have to accept as true MPI's *legal conclusion* that Local 539's MRP is purportedly "illegally funded." The legal issues are for this Court to resolve.

A. Deducting General Dues That Are Not Specifically Earmarked For The MRP Is Legally Permissible On Prevailing Wage Projects.

MPI's legal position as stated in its brief is that "[f]or purposes of Davis-Bacon compliance, it does not matter whether the union MRP specifically 'earmarks' its deductions for the MRP, or simply takes the money out of dues." (Resp. Br. at 10, n.1.) Respondent's statement of the law is inaccurate.

It is undisputed in this case that Local 539 does not "earmark" dues for market recovery. The applicable Pipefitters collective bargaining agreement, which was part of the record before the trial court and incorporated by reference in the Complaint, illustrates that Local 539 earmarks no dues for market recovery and that the only dues are regular membership dues. See App. 80 (referring to "Working Fee Fund" for journeyman dues); App. 103 (same); App. 81 (referring to "Credit Union/Check Off" for apprentice dues); App. 104 (referring to "Working Fee/Credit Union for apprentice dues); App. 105 (same).

Local 539's MRP does not contain dues collected in violation of the Davis-Bacon Act because all monies collected and placed into the Local 539 general fund constitute "*regular ... membership dues,*" a deduction that is specifically permitted by the Davis-Bacon Act's regulations. 29 C.F.R. § 3.5(i). Accordingly, the MRP is not funded in violation of the Davis-Bacon Act.

The Davis-Bacon Act requires that mechanics and laborers be paid “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). The legislative history of the Davis-Bacon Act demonstrates that the reference to “subsequent deduction or rebate” was intended to create a contractual remedy for coerced return of a portion of a worker’s wages to his or her employer. It is this language that has been cited in the court decisions holding that deductions by unions to fund job targeting programs violate the Davis-Bacon Act. International Broth. of Elec. Workers, Local 357, AFL-CIO v. Brock, 68 F.3d 1194, 1202-03 (9th Cir. 1995); Building & Const. Trades Dep’t v. Reich, 40 F.3d 1275, 1277-80 (D.C. Cir. 1994).

There is an exception to the prohibition on subsequent deductions on Davis-Bacon jobs for regular membership dues. In 1964, the Secretary of Labor adopted regulations at 29 C.F.R. Part 3 that allow certain deductions to be made from wages. Section 3.5(i), for example, provides that deductions may be made without the approval of the Secretary of Labor “*to pay regular union initiation fees and membership dues...*” Id., § 3.5(i).

The phrase “regular ... membership dues” is not defined in the Davis-Bacon Act nor in its implementing regulations, but the phrase has been interpreted by the courts. In Brock, the Ninth Circuit held that Job Targeting Program (“JTP”) deductions did not constitute membership dues, and therefore violated the Davis-Bacon Act. 68 F.3d 1194, 1202-03 (9th Cir. 1995). In reaching this conclusion, the Ninth Circuit found it relevant that the deductions were earmarked for the JTP, and paid directly to the Union’s JTP fund. Id.; see also Reich, 40 F.3d 1275, 1278 (noting that the case involved “JTP payroll

deductions”). The Union in Brock maintained a separate checking and savings account for the JTP funds, and that the JTP funds were not used to fund other expenses such as union salaries, collective bargaining activities, rent, and utilities. 68 F.3d 1194, 1202-03. *None* of the money collected for the JTP was used for everyday union expenses. Id.

Unlike the deductions in Brock and Reich, Local 539 undisputedly does not collect dues that are earmarked for its MRP. While it is true that Local 539 takes money out of its general fund to issue MRP grants, the general fund is also used to fund other expenses such as union salaries, collective bargaining activities, contract enforcement, rent, and utilities. All of the money in the general fund comes from general dues and fees collection. None of the money collected from members is earmarked specifically for use in the MRP. The same amount of regular membership dues is collected on all projects where Local 539 members work, including federal Davis-Bacon projects, state prevailing wage projects, and private jobs. The money collected from Local 539 members on all jobs, including federal Davis-Bacon projects, constitutes regular membership dues and is therefore permissible under the Davis-Bacon Act.

Citing Kingston Constructors, MPI argues that Local 539’s regular membership dues are nonetheless unlawful because they are collected for a purpose “inimical to public policy.” (Resp. Br. at 10, n.1.) However, Kingston Constructors involved an employee’s challenge to dues specifically earmarked for market recovery collected on Davis-Bacon jobs in violation of the law. It did not involve the use of regular membership dues to fund a market recovery program. Funding a market recovery program with regular membership dues is not inimical to public policy. As the NLRB

recognized in Kingston Constructors: “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.” 332 NLRB 1492, 1496 (2000) (emphasis added).

The argument that Local 539’s MRP violates the Minnesota Prevailing Wage Act (MPWA), Minn. Stat. Sec. 177.41, et seq. is even more tenuous. Unlike the federal Davis-Bacon Act, the MPWA contains no language whatsoever forbidding subsequent deductions or rebates—the key language on which the courts in Reich and Brock based their decisions. Moreover, no court or agency has ever held that an MRP violates the MPWA. Thus, there is no legal basis whatsoever to argue that deduction of regular membership dues used to fund the MRP would violate the MPWA.

B. The Davis-Bacon Act Does Not Apply To MRP Grants, And Neither The DOL Nor The Courts Have Ruled That The Use Of MRP Funds Is Unprotected Or Unlawful.

The decisions in Reich, Brock, and Kingston Constructors only applied to deduction of dues, not to MRP grants. MRP grants have not been held unlawful by any court or agency. MPI treats this distinction as novel. However, it is supported by the DOL Wage Appeals Board’s decision In the Matter of Building and Construction Trades Unions Job Targeting Programs, WAB Case No. 90-92, 1991 WL 494718. The WAB decision affirmed the Administrator’s decision that “subsidization of Davis-Bacon projects was not unlawful, *as the regulations only address the legality of deductions, not the subsequent use of funds.*” Id. at *5 (emphasis added). Respondent cites but cannot distinguish this case. (Resp. Br. at 22.) Respondent does not dispute that no court or agency has ruled that the use of MRP funds is unlawful or unprotected. (Resp. Br. at 19.)

MPI invokes “common sense” and argues that all monies in the MRP are somehow “tainted” if the Union deducts general dues on any Davis-Bacon project. However, common sense would suggest that a court should not declare an entire MRP unlawful and forbid the whole panoply of protected job-targeting activity simply because a union has allegedly collected general dues on a few federal Davis-Bacon projects.

II. EVEN IF THE UNION DID COLLECT DUES IN VIOLATION OF DAVIS-BACON—WHICH THE UNION DENIES—THE PROPER REMEDY WOULD BE FOR EMPLOYEES TO CHALLENGE THE CONDUCT WITH THE DOL OR NLRB, NOT FOR AN EMPLOYER TO BRING A PREVAILING WAGE CLAIM REPACKAGED UNDER THE GUISE OF A TORTIOUS INTERFERENCE CLAIM.

Even if there were some sort of wrong to be remedied—which Local 539 denies—MPI is not the party that was wronged by any alleged prevailing wage violation and not the party that is entitled to a remedy.

Each of the principal cases relied on by MPI—Brock, Reich, and Kingston Constructors—involved a right belonging to individual employees, not employers. If employees believe the Davis-Bacon Act has been violated, they are free to file a complaint with the DOL, and if they believe they are being forced to pay dues in violation of the Davis-Bacon Act, they are free to file a charge with the NLRB. Employers have no standing to do so.

The Court will note that MPI’s Complaint contains a claim of violation of the Minnesota Prevailing Wage Act (MPWA). (App. 7-8.) MPI dropped its prevailing wage claim voluntarily in its memorandum of law in response to Local 539’s brief in support of its motion to dismiss. (App. 109.) The principal argument Local 539 made in its brief

was that MPI lacked standing to assert a prevailing wage violation because the harm alleged by MPI was not in the “zone of interests” protected by the MPWA. (App. 16-20.) Local 539 cited federal district court law from Minnesota and United States Supreme Court law in arguing that prevailing wage laws are “not enacted to benefit contractors, but rather to protect...employees from substandard earnings...” Mathiowetz Constr. Co. v. Minn. Dept. of Transportation, 2002 WL 334394 (D. Minn. 2002), citing United States v. Binghamton Constr. Co., 347 U.S. 171, 176-77 (1954) (explaining that the Davis-Bacon Act “was not enacted to benefit contractors, but rather to protect...employees from substandard earnings by fixing a floor on wages on Government projects.”). (App. 39.)

Even though MPI dropped its prevailing wage claim, it continued to argue the issue to the trial court. Indeed the issue occupied the bulk of MPI’s briefing. (App. 113-120.) MPI simply shifted gears and argued that the tortious interference claim gave it standing to pursue its prevailing wage allegations. MPI should not be permitted to use state tort law to do an end-run around prevailing wage standing requirements.

III. MPI’S STATE-LAW CLAIM IS PREEMPTED BECAUSE THE NLRB HAS CONSISTENTLY HELD THAT THE USE OF MRP FUNDS IS PROTECTED BY SECTION 7, AND THERE ARE NO CONTRARY CASES FINDING MRP GRANTS UNPROTECTED.

MPI’s claim challenging the MRP grant is preempted under Garmon because the National Labor Relations Board has consistently held that market recovery programs, and the use of market recovery grants, is protected activity under section 7 of the NLRA. The NLRB has never wavered from this position. See Manno Elec., Inc., 321 NLRB 278, 298 (1996); see also 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); Associated Builders and Contractors, Inc., 331 NLRB No. 5 (2000). MPI cites no case law finding MRP grants to be unprotected.

A. The D.C. Circuit's Decision In Can-Am Plumbing Did Not Overrule Longstanding NLRB Precedent.

Respondent's position on the NLRA case law, and the reasoning of the Minnesota Court of Appeals on this issue, appear to be based principally on the D.C. Circuit's decision in Can-Am Plumbing—which was not an NLRB decision and which simply remanded to the NLRB for further findings and explanation. Notably, the California state court in Can-Am Plumbing was preempted from deciding the purported prevailing wage claim, *even after the D.C. Circuit decision was issued*. The Can-Am Plumbing decision does not authorize a state court to consider whether or not an MRP is protected by federal labor law. This is the job of the NLRB.

The Minnesota Court of Appeals appeared to assume erroneously that Can-Am Plumbing reversed NLRB precedent. The Court of Appeals stated: “Notwithstanding the federal court's interpretation in *Can-Am Plumbing*, the Board has not definitively ruled that an MRP that violates the Davis-Bacon Act is unprotected activity under the NLRB. Consequently, an allegedly unlawful MRP is at best *arguably protected* activity . . .” (App. 238-39.) The Minnesota Court of Appeals' description of the case law was backwards. The Court in Can-Am Plumbing did *not* rule that MRPs are deprived of section 7 protection if funded by dues on Davis-Bacon jobs, and the Board *has* ruled that MRP grants *are protected* activity even if funded in part by dues on Davis-Bacon jobs.

See Manno Elec., Inc., 321 NLRB 278, 298 (1996); see also 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).

The last word of the NLRB on this issue is that an MRP is protected activity even if funded in part by dues collected on Davis-Bacon projects. Can-Am Plumbing, 335 NLRB 1217. The D.C. Circuit simply remanded to the NLRB for further analysis and explanation of its ruling—*which is still the law*—that MRPs are protected even if funded in part by dues from a Davis-Bacon job. The D.C. Circuit noted that “the Board on remand may yet determine that the [MRP] is protected under section 7.” 321 F.3d at 154. On remand, the NLRB declined to reconsider the issue on procedural grounds since the issue was not adequately presented by the contractor. 350 NLRB No. 75 (2007).

A federal Court of Appeals decision remanding to the NLRB for further explanation is a thin reed to rely on to argue that MRPs are no longer protected activity simply because they may contain some general dues deducted on a federal Davis-Bacon job. The NLRB law is consistent and has not changed. The essence of the Garmon doctrine is deference to the administrative expertise of the NLRB. If that doctrine is to mean something, then this Court should follow NLRB precedent in finding that the use of a market recovery grant is protected by section 7 such that Garmon preemption applies.

B. The MRP Grant Is “Clearly Protected” By Section 7 Such That The Complaint Challenging The MRP Grant Must Be Dismissed.

The relevant and consistent NLRB case law compels the conclusion that the MRP grant is “clearly protected” by the NLRA. If conduct is “clearly protected” by the

NLRA, the state-law claim is preempted and must be dismissed without any need for NLRB involvement. Garmon, 359 U.S. at 244; Can-Am Plumbing, 321 F.3d at 149.

C. If The Court Does Not Find That The MRP Grant Is Clearly Protected, Then It Is At Least “Arguably Protected” Such That Preemption Applies.

Even if the MRP grant is not “clearly protected”—which the case law confirms it is—there is no question that it is at the very least “arguably protected” in light of the consistent NLRB case law finding MRPs protected and the absence of any contrary case law finding that MRP grants are unprotected.

MPI contends that preemption does not apply until the NLRB General Counsel issues a complaint if the MRP grant is “arguably protected” rather than “clearly protected.” However, the Garmon case itself and the Minnesota Court of Appeals have explained that 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.” Garmon, 359 U.S. at 245-46; quoted in Wright Electric, Inc. v. Ouellette, 686 N.W.2d 313, 321 (Minn. App. 2004). In the analogous American Steel Erectors case, the United States Court of Appeals for the First Circuit applied Garmon preemption to dismiss a tortious interference claim against an MRP even though the NLRB General Counsel had previously declined to issue a complaint finding a violation of the law. 536 F.3d at 84-85; compare American Steel Erectors, et al., 2007 WL 5156981 (NLRBGC December 31, 2007). Following the First Circuit’s lead, this Court should dismiss the tortious interference claim regardless of whether the General Counsel issues a complaint.

D. Taken Together, The Associate General Counsel's Advice Memo Dated December 31, 2007 And The Underlying Federal Court Case in American Steel Erectors Support Preemption Of MPI's Tortious Interference Claim.

Respondent attempts to rely on an NLRB Associate General Counsel Advice Memorandum ("Advice Memo") to support its argument that Local 539's MRP is unprotected. American Steel Erectors, et al., 2007 WL 5156981 (NLRBGC December 31, 2007) (Resp. Br. at 15.) An Advice Memo is a recommendation to the NLRB's General Counsel about whether to proceed with an unfair labor practice case and does not have the force of law. Moreover, MPI's argument mischaracterizes the Advice Memo.

The Advice Memo was issued in connection with the Iron Workers union's attempts to recoup fees and costs through the NLRB after succeeding in getting a state-law tortious interference claim dismissed as preempted by the federal court in American Steel Erectors. The Advice Memo did not and could not overturn the federal court's ruling in that case that the underlying tortious interference claim filed against the MRP was preempted. Notably, the United States Court of Appeals for the First Circuit affirmed the district court's preemption ruling and adopted the District Court's reasoning wholesale after the Advice Memo was issued. 536 F.3d 68, 84-85 (1st Cir. 2008).

The Advice Memo involved a so-called "Bill Johnson's charge," which allows a union to recoup fees and costs and/or enjoin a lawsuit if the claims are both baseless and retaliatory. NLRB v. Bill Johnson's Restaurants, 461 U.S. 731 (1983); see also BE &K, 351 NLRB No. 29 (2007). Bill Johnson's also allows for charges to be filed against employers seeking litigation costs for having to defend against preempted lawsuits regardless of whether the claims are retaliatory or baseless. 461 U.S. at 737, n.5.

The Advice Memo acknowledged that “*the district court granted a motion to dismiss the Employers’ state-law claims as preempted, concluding that the claims were arguably protected or prohibited by the Act and therefore preempted under Garmon.*” 2007 WL 5156981 at *4 (emphasis added). However, the Memo recommended against pursuing an unfair labor practice charge against the employers for filing the suit because the state-law claims involved conduct that was “arguably protected or prohibited” rather than clearly preempted.

An Advice Memo declining to pursue an employer for fees and costs is a far cry from finding that the state-law tortious interference claim was not preempted or that it is open season for plaintiffs to sue unions under state law for use of MRPs. This Court should instead be guided by the underlying federal court rulings dismissing the state-law tortious interference claim as preempted.

Interestingly, Respondent attempts to distinguish the American Steel Erectors court case from this case by arguing that “in that case the underlying ‘bad act’ was also a federal labor violation, *which was clearly preempted.*” (Resp. Br. at 17, n.4.) (emphasis added). If the underlying bad act was “clearly preempted” then surely Respondent would disagree with the Advice Memo suggesting there was no clear preemption in that case. There is no way to distinguish the court decision on preemption in American Steel Erectors in a principled manner. Like this case, American Steel Erectors involved a state-law tortious interference claim challenging an MRP which allegedly derived some of its funding from membership dues on Davis-Bacon jobs. The United States District Court

ruled the claim was preempted, and the United States Court of Appeals adopted the District Court's reasoning. 536 F.3d 68, 84-85. The same analysis applies here.

IV. THE ALLEGATION OF A VIOLATION OF THE MINNESOTA PREVAILING WAGE ACT IS PLAINLY PREEMPTED.

Garmon preemption 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. As the Ohio Supreme Court has held, Garmon preemption clearly applies to any claim that an MRP violates a state prevailing wage law. See J.A. Croson Co. v. J.A. Guy, Inc., et al., 691 N.E.2d 655 (Ohio Sup. Ct. 1998). In such cases, there is not the need to balance competing federal policies. Accordingly, the allegation that the MRP violates the MPWA is obviously preempted.

V. THE ALLEGED "WRONG" TO MPI IS NOT A PREVAILING WAGE VIOLATION—A CLAIM WHICH MPI ABANDONED—IT IS TORTIOUS INTERFERENCE WITH CONTRACT; THE EXCLUSIVE REMEDY IS UNDER FEDERAL LABOR LAW.

Based on MPI's briefing and the Minnesota Court of Appeals decision, one would think this is a prevailing wage case. It is not. The sole claim at issue is a claim of tortious interference. (App. 109.) Such a claim is preempted because it alleges conduct that is arguably prohibited by section 8(b)(4) of the NLRA.

A. The Alleged Threat to Rescind the Market Recovery Grant Was "Arguably Prohibited" If The Pipefitters' Contract Does Not Cover Insulation Work; It was "Arguably Protected" If The Contract Does Cover Insulation Work.

Any good legal analysis starts with the statutory language. Section 8(b)(4) of the NLRA makes it an unfair labor practice to "*threaten*, coerce, or restrain any person

...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). The Complaint allegations track this provision closely: “[A]s a result of Local 539’s *threat* to rescind its promised “target money,”: . . . *MD was forced by Local 539 to hire a union signatory contractor to replace MPI.*” (App. 6.) (emphasis added).

MPI attempts to sidestep section 8(b)(4) by stating that “Local 539 never mentioned the details of this alleged primary dispute [with MPI].” (Resp. Br. at 26.) It was not necessary to mention any details because they are alleged in the Complaint. A “primary dispute” allegedly existed with MPI because “MD was forced by Local 539 to hire a union signatory contractor to replace MPI.” (App. 6.) In this sense, the facts alleged here are analogous to BE & K. In that case there was no detailed allegation that the Paperworkers union had a “primary dispute” with BE & K, a construction company, other than that BE & K was non-union and the Paperworkers wanted their employer to hire a union contractor. BE & K v. Carpenters, 90 F.3d 1318 (8th Cir. 1996).

This case is on all fours with American Steel Erectors. The court in that case applied Garmon to dismiss a state-law tortious interference claim challenging an MRP:

The gravamen of the Complaint is that Local 7 uses economic weapons to coerce nonunion employers into hiring union workers—an allegation that lies at the heart of the regulatory province of the NLRB. The Complaint cites repeated instances of [the Union’s] alleged . . . job targeting, threats to picket . . . These are quintessential examples of the types of conduct that are committed by the NLRA to the primary jurisdictional oversight of the NLRB.

2006 WL 300422 at *4 (emphasis added). The United States Court of Appeals adopted this reasoning wholesale, stating “we agree with the district court’s preemption analysis .

. . . [W]here a district judge produces a well-reasoned opinion that reaches the correct result, a reviewing court should not write at length.” 536 F.3d at 85. There is no plausible way to distinguish this preemption analysis. Like this case, American Steel Erectors even involved allegations of dues deductions in violation of the prevailing wage laws, as indicated the Advice Memo discussed above. 2007 WL 5156981 at *4.

The only argument that could potentially avoid application of the “arguably prohibited” doctrine in this case is if Local 539 were simply enforcing the terms of its MRP agreement with MD in allegedly threatening to rescind the grant. (App. 40.) The MRP agreement specifically forbids subcontracting of work covered by Local 539’s collective bargaining agreement (“CBA”) to non-union contractors. Id. The “construction industry proviso” to section 8(e) of the NLRA creates an exception to the secondary pressure prohibition and specifically permits enforcement of such work preservation clauses. 29 U.S.C. § 158(e); see Woelke & Romero Framing, Inc v. NLRB, 456 U.S. 645, 657, 666 (1982); compare In re South Jersey Regional Council of Carpenters, 335 NLRB No. 49 (2001). If Local 539 were simply attempting to preserve union pipefitter work by enforcing this subcontracting restriction, which is protected by law, then the alleged conduct would be arguably protected. However, it is undisputed that Local 539’s CBA does not cover insulation work. (App. 40, 44-45, 85-86.) Thus, the conduct in question is “arguably prohibited.”

As the Supreme Court explained in Garmon, and the court confirmed in American Steel Erectors, it is the role of the NLRB to decide whether conduct alleged in a state-law tortious interference claim challenging an MRP is *actually* prohibited or protected. 2006

WL 300422 at *2, quoting Garmon, 359 U.S. at 244-45. If the conduct is even *arguably* prohibited or protected, state court jurisdiction must yield.

B. MPI Fails To Distinguish BE & K; The Relevant Legal Standard Is Whether The Conduct Is “Arguably Prohibited,” Not “Unquestionably Prohibited.”

MPI attempts to distinguish the BE & K and Hennepin Broadcasting decisions on the basis that both involved “*unquestionably*” prohibited conduct for which the plaintiff “*specifically invoked*” federal labor law. (Resp. Br. at 25) (Emphasis in Original.) MPI thus misstates the applicable legal standard. The Garmon doctrine requires only that the conduct be “arguably prohibited” by the NLRA. 359 U.S. at 245. If the conduct is “arguably prohibited,” the state-court claim must be dismissed regardless of whether an NLRB charge has been filed. *Id.*; see also Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America v. Lockridge, 403 U.S. 274 (1971). In this case, the alleged threat to rescind a grant of money to force MD not to do business with a non-union insulation contractor—where Local 539’s CBA does not cover insulation work—arguably constitutes secondary activity prohibited by the Act. It does not matter whether plaintiff opted to specifically invoke federal labor law. A defendant cannot be deprived of the right to have the matter heard before the NLRB simply because a plaintiff mistakenly opts not to file a labor law claim and instead invokes state court jurisdiction.

C. If The Alleged Tortious Interference Is “Arguably Prohibited” By The NLRA, It Is Irrelevant That A Tool Used In The Alleged Tortious Interference Is “Outside The Protection” Of The NLRA.

In its response to the argument that the tortious interference claim applies to “arguably prohibited” conduct, MPI once again attempts to change the subject. MPI

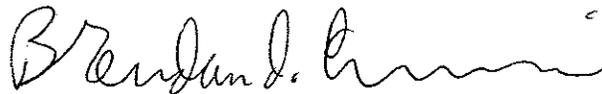
reverts back to its central theme that “the underlying conduct here, which supports Respondent’s claim is the illegal funds held in the union’s MRP which is clearly outside of federal labor law *protection*.” (Resp. Br. at 25) (emphasis added). This is non-responsive. For purposes of determining whether the alleged conduct was “arguably prohibited,” it does not matter whether the alleged conduct was also “outside of labor law protection.” Arguably prohibited conduct is within the exclusive jurisdiction of the NLRA, and the tortious interference claim in this case constitutes arguably prohibited conduct. Thus, MPI’s tortious interference claim must be dismissed in its entirety.

CONCLUSION

For the foregoing reasons, Appellant Pipefitters Local 539 respectfully requests that the Minnesota Supreme Court reverse the decision of the Court of Appeals.

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