

NO. A07-1706

State of Minnesota
In Supreme Court

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

vs.

Minneapolis Pipefitters Union, Local 539,
Appellant,

MD Mechanical,
Defendant.

RESPONDENT'S BRIEF

Alec J. Beck (#201133)
Douglas P. Seaton (#127759)
Michael L. McCain (#0329095)
SEATON, BECK & PETERS, P.A.
7300 Metro Boulevard, Suite 500
Minneapolis, MN 55439
(952) 896-1700

Attorneys for Respondent

Brendan D. Cummins (#276236)
Nicole M. Blissenbach (#0386566)
MILLER-O'BRIEN-CUMMINS, P.L.L.P.
One Financial Plaza
120 South Sixth Street, Suite 2400
Minneapolis, MN 55402
(612) 333-5831

Attorneys for Appellant

Terry R. Yellig (DC. #946095)
SHERMAN, DUNN, COHEN, LEIFER
& YELIG, P.C.
900 Seventh Street N.W., Suite 1000
Washington, D.C. 20001
(202) 785-9300

*Attorneys for Amicus Curiae Building and
Construction Trades Department, AFL-CIO*

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STATEMENT OF LEGAL ISSUES

I. IS LOCAL 539'S USE OF TARGETING MONEY PROTECTED BY THE NATIONAL LABOR RELATIONS ACT WHEN THE UNION HAS VIOLATED THE LAW IN COLLECTING THAT MONEY?

The Minnesota Court of Appeals held in the negative.

Most Apposite Authorities:

IBEW Local 48 (Kingston Constructors, Inc.), 332 N.L.R.B. 1492 (2000).

Building and Const. Trades Dept. v. Reich, 40 F.3d 1275 (D.C. Cir. 1994).

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J.A. Croson, Inc., N.L.R.B. 9-CA-35163-1 (June 27, 2003).

Can-Am Plumbing, Inc. v. NLRB, 321 F.3d 145 (D.C. Cir. 2003).

II. DOES THE NLRA BOTH PROTECT AND PROHIBIT THE USE OF MARKET RECOVERY FUNDS TO COERCE CONTRACTORS TO ACCEPT UNION CONTRACTOR BIDS?

The Minnesota Court of Appeals held in the negative.

Most Apposite Authorities:

J.A. Croson, Inc., N.L.R.B. 9-CA-35163-1 (June 27, 2003).

IBEW Local 48 (Kingston Constructors, Inc.), 332 N.L.R.B. 1492 (2000).

STATEMENT OF THE CASE

Appellant Midwest Pipe Insulation, Inc. ("MPI") filed a lawsuit against Minneapolis Pipefitters Union, Local 539 and MD Mechanical, Inc. ("MD") on May 10, 2007. (App. 1-10.) In its Complaint, MPI asserted claims of tortious interference with contract, unfair competition and violations of the Minnesota Prevailing Wage Act ("MPWA"), Minn. Stat. § 177.41 *et. seq.* (App. 3-10.) Subsequent to its initial filing,

MPI voluntarily dismissed its claim against MD, and contemporaneously dismissed its claim under the MPWA. (App. 109.)

Local 539 filed a Motion for Judgment on the Pleadings on June 20, 2007. (App. 18-19.) On August 8, 2007, Local 539's Motion for Judgment on the Pleadings came before the District Court, which heard arguments from both parties. On August 23, 2007, the District Court granted Local 539's Motion for Judgment on the Pleadings, finding that MPI's state law tortious interference and unfair competition claims were preempted by federal labor law. (App. 164-168.) Judgment was entered on August 27, 2007.

MPI filed its Notice of Appeal and Statement of the Case on September 5, 2007. (App. 169.) On September 13, 2007, Local 539 filed its Supplemental Statement of the Case. 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 issued 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, Local 539 filed a charge with the National Labor Relations Board ("NLRB") alleging that this lawsuit is preempted and unlawfully interferes with rights protected by the National Labor Relations Act ("NLRA"). (App. 242.) The NLRB has not yet moved to either dismiss or proceed with that charge.

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.) On November 18,

2008, this Court granted the petition for review of the decision of the Court of Appeals. (App. 248.)

STATEMENT OF THE FACTS

I. BACKGROUND.

MPI is a Minnesota Corporation with its principal place of business in Baxter, Minnesota. (App. 3, 110.) MPI is a non-union employer in the business of pipe, boiler and ductwork throughout the State of Minnesota. (*Id.*) Local 539 is an unincorporated labor organization with its principal place of business in Minneapolis, Minnesota. (*Id.*) MD is a Minnesota corporation with its principal place of business in St. Cloud, Minnesota. (*Id.*) MD is primarily engaged in the business of plumbing and pipefitting work throughout the State of Minnesota. (*Id.*) This litigation arises out of Local 539's inducement of a breach of a subcontract between MD and MPI in the amount of \$166,88.00 for work on the St. Michael-Albertville Elementary School Construction Project located in Wright County, Minnesota. (App. 3-9.)

II. LOCAL 539'S MARKET RECOVERY PROGRAM.

Local 539 maintains a Market Recovery Program ("MRP"), which is designed to maintain and improve the market share of unionized contractors by subsidizing the wage costs of union contractors who bid on construction projects. (App. 4, 23, 110.) Local 539's MRP is also designed to induce non-union contractors to become union contractors by subsidizing higher wage costs associated with union laborers. (App. 4, 110.) The MRP is funded entirely by union employees through wage deductions, which are then paid into Local 539's MRP, and thereafter distributed to the union contractor to lower the

contractor's labor costs. (App. 5, 110.) Local 539 strategically and intentionally targets for defeat certain construction bids submitted by non-union contractors by providing wage subsidies, or "target money," for the benefit of the favored union contractor to compete against non-union contractors. (App. 5, 110.)

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, Minnesota. (App. 4, 111.) The Project was publicly funded, but not subject to state or federal prevailing wage requirements. (App. 111.)

IV. LOCAL 539's MRP WAGE SUBSIDY TO MD.

Local 539 provided a MRP grant in the amount of \$80,000.00 to MD relating to pipefitting work on the Project. (App. 4, 23, 111.) The MRP grant to MD was illegal and violated the MPWA, Minn. Stat. §§ 177.41-177.43, subd. 1(2), and the federal Davis-Bacon Act 40 U.S.C. § 276 a(a), to the extent this "target money" was funded, in whole or part, by the deductions from employees' wages paid on past or present MPWA and/or federal Davis-Bacon public works projects. (App. 5, 111.)

V. MPI'S SUB-CONTRACT AGREEMENT WITH MD.

On June 8, 2006, MPI submitted to MD a subcontractor's bid to furnish and provide labor, including, but not limited to, plumbing, hydronic pipe and external duct insulation for the Project. (*Id.*) On June 26, 2006, MD accepted MPI's bid and sent MPI

a standard subcontract agreement signed and executed by MD's President, Michael Brum. (App. 5, 111.) Pursuant to the agreement, MD promised payment in the amount of \$166,800.00, upon MPI's full, faithful and prompt performance of the subcontract agreement on the Project. (App. 5, 112.)

VI. LOCAL 539's THREAT TO RESCIND THE ILLEGAL MRP GRANT.

On July 11, 2006, MD's President contacted MPI's office manager, Kay Johnson, and informed her that Local 539 was pressuring MD to breach its subcontract agreement with MPI. (App. 6, 112.) Specifically, Local 539 threatened to rescind its promised MRP grant if MPI's non-union laborers were used to perform the subcontract insulation work for the Project. (*Id.*) The monies used to fund the MRP grant were, in part, illegal under state and federal law because they were received through deductions from wages paid on stated and federal prevailing wage projects. (App. 5, 112.)

VII. MD TERMINATES ITS SUBCONTRACT AGREEMENT WITH MPI.

On July 11, 2006, MD Mechanical, Inc. sent a letter to MPI terminating the June 26, 2006 subcontract agreement with MPI. (App. 6, 112.) Thereafter, MD hired a union signatory contractor to perform the pipe insulation work on the Project, in place of MPI. (App. 6, 112.) This breach caused substantial damage to MPI. (*Id.*)

ARGUMENT

I. STANDARD OF REVIEW.

A motion for judgment on the pleadings is not a favored way of testing the sufficiency of a pleading, and will not be sustained if by a liberal construction the pleading can be held sufficient. *Ryan v. Lodermeier*, 387 N.W.2d 652 (Minn. App.

1986). When considering a motion for judgment on the pleadings, 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). All assumptions made and inferences drawn must favor the party against whom the judgment is entered. *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 30 (Minn. 1963). The only question on review of a judgment on the pleadings is “whether the complaint sets forth a legally sufficient claim for relief.” *Elzie v. Commissioner of Public Safety*, 298 N.W.2d 29, 32 (Minn. 1980). An appeal from a dismissal on the pleadings is reviewed de novo. *Barton v. Moore*, 558 N.W.2d 246, 749 (Minn. 1997).

II. LOCAL 539’S USE OF TARGETING MONEY IS NOT PROTECTED BY THE NATIONAL LABOR RELATIONS ACT WHEN THE UNION HAS VIOLATED THE LAW IN COLLECTING THAT MONEY.

Generally, operation of union MRPs is protected by section 7 of the NLRA, 29 U.S.C. § 157. *Manno Electric*, 321 N.L.R.B. 278 (1996). However, the Courts and agencies (including the NLRB) all agree that the collection of MRP monies from wages earned on projects covered under the Davis-Bacon Act is illegal and therefore unprotected by the federal labor laws. *See Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 152-53 (D.C. Cir. 2003); *IBEW v. Brock*, 68 F.3d 1194, 1200 (9th Cir. 1995); *In the Matter of Building and Construction Trades Union Job Targeting Programs*, WAB Case No. 90-02, 1991 WL 494718 (1991) *enf’d*, *Building and Const. Trades Dept. v. Reich*, 815 F. Supp. 484 (D.D.C. 1993), *aff’d*, 40 F.3d 1275 (D.C. Cir. 1994); *IBEW Local 48 (Kingston Constructors, Inc.)*, 332 N.L.R.B. 1492, 1500-01 (2000). MPI has alleged that Local 539 used monies from prevailing wage jobs to fund its MRP, and thus violated the

law. Respondent's tortious interference and unfair competition claims are based on Local 539's use of these illegal funds and the resultant breach of Respondent's contract with MD Mechanical.

Until oral argument at the Court of Appeals, Appellant never admitted that its collection of MRP monies from prevailing wage jobs violated the law. Now, Appellant appears to concede that point, but argues for the first time that although its collection of MRP monies is illegal, the subsequent use (*i.e.*, the grant) of this illegal money by Local 539 is nevertheless protected by the federal labor laws. (Appellant's Brief at 34.) Local 539's argument goes against basic NLRB principles concerning illegal *purposes* behind withholding of dues. Beyond that, the issue has never been decided by any court or the NLRB.

A. Unions Violate the Law When they Use Prevailing Wage Monies to Fund MRPs – Evolution of the Law.

The illegality of Appellant's actions is based on caselaw which has developed over the past several years, beginning in the late 1980s, and continuing through the time that this lawsuit has been in existence. As will be shown, at this point there is no serious argument that Appellant's actions violate the Davis-Bacon Act, and most likely the Minnesota Prevailing Wage Act. There is further no argument that the courts and agencies have jurisdiction to remedy those illegal actions.

1. The *Reich* Case: MRP Deductions Held to Violate the Davis-Bacon Act.

In 1988, the Associated Builders and Contractors, a national construction trade association, requested that the Department of Labor's Wage and Hour Division rule on

the legality of deductions taken from employee wages to fund union MRPs. *In re Building and Const. Trades Union Job Targeting Programs*, WAB Case No. 90-02, 1991 WL 494718 (1991) *enf'd.*, *Building and Const. Trades Dept. v. Reich*, 815 F. Supp. 484 (D.D.C. 1993), *aff'd.*, 40 F.3d 1275 (D.C. Cir. 1994). The Division determined that MRP deductions violate prevailing wage requirements of the Davis-Bacon Act and are not permissible under 29 C.F.R. §§ 3.5 or 3.6 because such deductions are returned to and/or directly or indirectly benefit contractors rather than employees. 1991 WL 494718 at *3 - 5. The Building and Construction Trades Department, AFL-CIO (Amicus in this matter) and the National Electrical Contractors Association then filed a request for reconsideration. *Id.* After reconsideration, the Administrator clarified that MRPs violate the Davis-Bacon Act even if they were financed by direct payments from employees rather than through payroll deductions because as long as the payments are attributable to wages paid on a Davis-Bacon project, they constitute a "subsequent deduction or rebate" prohibited by the Davis-Bacon Act. *Id.*

The local union and the various associations filed petitions for review of the Administrator's decision with the Wage Appeals Board. The Wage Appeals Board affirmed the determination of the Administrator and held as follows:

Local 595's [MRP] violates the Davis-Bacon prevailing wage rate requirements and the regulations contained at 29 C.F.R. 3.5. The Board also notes that the job targeting programs, generally, violate the public policy embodied in the Davis-Bacon Act. If funds were deducted from Davis-Bacon projects for use as subsidies on private sector projects, the prevailing wage surveys would be distorted to the extent the subsidy was distributed to any contractor on a private section project. That subsidy would be non-public, unlike a project agreement, and would not affect future prevailing area wage determinations. Over time, the government

would pay more on Davis-Bacon and Related Act projects than the actual area wage rate, a result clearly outside the public interest and definitely not contemplated by the Congress which enacted Davis-Bacon.

Id. at. *6.

The union and trade organizations again sought review of the decision in District Court for the District of Columbia. The district court upheld the Department of Labor's interpretation of the statute as consistent with the purpose of the Davis-Bacon Act, which is to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area. *Building and Const. Trades Dept. v. Reich*, 815 F. Supp. 484 (D.D.C. 1993). On appeal, the D.C. Circuit Court of Appeals affirmed, and stated that the practice of:

Collect[ing] wages from employees in order to pay contractors in exchange for continued or increased employment is inconsistent with the purpose of the Davis-Bacon Act, which is to prevent contractors using cheap labor from unfairly winning contracts by underbidding their local competitors.

40 F.3d at 1279. The Court went on:

Beyond the inconsistency of the [MRP] deductions with the literal language of 40 U.S.C. § 276 a(a), [the DOL's] interpretation of the Act as precluding those deductions furthers the goals of the legislation. [MRP] deductions from wages of mechanics and laborers on Davis-Bacon projects have the effect of artificially increasing the prevailing local rate wage, which must be met by non-union employers, by the inclusion in the local average of pre-deduction wages paid by the unionized employers before the deduction. The union employees then suffer a reduction in their wages (potentially, though not always, below the prevailing wages) through deductions precluded by the language of the Act. Further, the [MRP] funding scheme creates a second opportunity for doing violence to the goals of the Act when the targeted programs drawing on the fund are also Davis-Bacon projects in that the employers on the recipient project are paying their employees in part with a subsidy derived from deductions taken from other Davis-Bacon employees.

Id. 1280. Thus, since 1994 it has been illegal for union MRPs to be funded by Davis-Bacon monies.¹

2. The Brock Case: Davis-Bacon Prevents Unions from Using Dues Collected from Wages on Davis-Bacon Projects To Benefit Any Contractor.

In 1995, the Ninth Circuit Court of Appeals addressed the scope of the *Reich* decision. In *IBEW v. Brock*, a group of unionized employees employed on a federal construction project in Nevada refused to pay MRP deductions as the union required, asserting that they were not allowed as dues under the Department of Labor regulations. 68 F.3d 1194, 1200 (9th Cir. 1995). The local union fined the employees for the amount of the unpaid deductions and suspended them from the union. *Id.* The employees brought an action in Nevada U.S. District Court, which ruled in the union's favor. The employees appealed to the Ninth Circuit Court of Appeals, which overturned the district court ruling and determined that even though the funds to support the union's MRP was not paid directly from the employees' paychecks, the union's MRP still violated the Davis-Bacon Act. *Id.* In so holding, the Ninth Circuit concurred with the D.C. Circuit

¹ For 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. Generally, unions may require deductions for "periodic dues" 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." *Detroit Mailers Local 40*, 192 N.L.R.B. 951, 952 (1971). The Davis-Bacon Act specifically allows for deductions for periodic dues. However, the Board has stated that withholding dues on Davis-Bacon for MRP use is inimical to public policy, and thus not allowable under the *Detroit Mailers* framework. *Kingston Constructors*, 332 N.L.R.B. 1492, 1497 (2000). Similarly, the Ninth Circuit Court has held that all monies withheld from prevailing wage jobs, regardless of how characterized, violates the Davis-Bacon Act. *IBEW v. Brock*, 68 F.3d 1194, 1200 (9th Cir. 1995). In this case, the "inimical" use would be to undercut Davis-Bacon or other prevailing wage rates.

Court and determined that the MRP was antithetical to the purposes of Davis-Bacon, which were to limit occasions on which part of employees' wages could be returned to contractors and to prohibit the use of deductions from employees' pay to benefit employers. *Id.* at 1200-01.

Additionally, the Ninth Circuit held that the Davis-Bacon Act prevents unions from using dues collected from wages on Davis-Bacon Projects to benefit any contractor, not just the specific contractor from whom the wage rebate is derived. *Id.* at 1201. In doing so, the Ninth Circuit declared:

There is no support in the language of the Act for the conclusion that paying government employees less than the prevailing wage must benefit the very employer from which the wage is derived. In contrast, the [Davis-Bacon Act] clearly states that the prevailing wage must be paid "unconditionally" and without reduction in the form of a subsequent deduction or rebate. 40 U.S.C. Sec. 276a(a)...As the legislative history demonstrates, a purpose of the Act was to provide a minimum wage for construction workers in order to prevent contractors from underbidding local competition. To prohibit the return of wages to contractors other than the employer on the Davis-Bacon job is consistent with both the language and the purpose of the Act.

Id.

3. The *Kingston* Case: The NLRB Defers Responsibility for Enforcement of the Davis-Bacon Act to the Labor Department and the Courts.

In 2000, the NLRB itself took up the issue of whether a union violated the NLRA by threatening to fire employees for not making MRP payments out of wages earned on Davis-Bacon projects. *IBEW Local 48 (Kingston Constructors, Inc.)*, 332 N.L.R.B. 1492 (2000). In order to determine whether the union committed an unfair labor practice the board was forced to determine whether collecting dues on Davis-Bacon projects was

itself legal. *Id.* Although the Board reaffirmed the general rule that MRPs are protected under the NLRA, the Board further held, in light of prior decisions by the Department of Labor and the federal courts, the collection of dues for MRPs on Davis-Bacon Projects or the direct payment for dues for such projects violates the Davis-Bacon Act. *Id.* at 1500-01. In so holding the Board commented:

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...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. The Board went on to discuss its jurisdiction to remedy Davis-Bacon violations. The Board reasoned that “the Labor Department and the courts, *not the Board*, have the responsibility to enforce the Davis-Bacon Act.” *Id.* (emphasis added). The Board concluded that:

[b]oth the Labor Department and the courts have definitively construed those provisions as prohibiting the collection of such dues on Davis-Bacon projects. The Board has no expertise and no authority on which to base a contrary finding. We therefore are no freer to disregard those rulings than we would be to disregarding the language of Davis-Bacon itself, had that language contained the same express prohibition.

Id.

As does Respondent here, the Union in *Kingston* argued for near-total preemption of anything having to do with a Market Recovery Program. The Board declined to go so far:

[W]e cannot simply hold, as the Union ... apparently would have us do, that because the collection of MRP dues on Davis-Bacon jobs would otherwise be lawful under the NLRA, any ruling by other agencies or courts that the same conduct violates Davis-Bacon must be preempted as inconsistent with the Act. Were we to do so, we would be announcing, in effect, that the NLRA trumps all other Federal statutes.

Id. The above language is the final word on the subject from the Board. The collection of dues for MRPs on Davis-Bacon Projects or the direct payment for dues for such projects is illegal, and enforcement of this law is not preempted by federal labor law.

4. The *Can-Am Plumbing* Case: The U.S. Court of Appeals holds that Actions Based on Illegal use of MRP Monies are Actionable in Court and Not Preempted.

Amicus is correct in noting that *Can-Am Plumbing, Inc. v. National Labor Relations Board*, 321 F.3d 145 (D.C. Cir. 2003) is the most relevant authority in this matter. In *Can-Am*, a contractor filed a complaint in state court alleging violations of California laws regarding unfair trade practices, prevailing wage levels and employer kickbacks from employees. *Can-Am Plumbing*, 321 F.3d at 147. The contractor claimed that its union competitor had underbid it on a private construction project as the result of an unlawful MRP. *Id.* The MRP was supported, in part, by federal and state prevailing wage monies. *Id.* at 148. The union (which was not a party to the lawsuit) filed a charge with the NLRB alleging that the contractor had violated the NLRA by filing a preempted lawsuit. *Id.* Despite the presence of state and federal prevailing wage monies, the

Board held for the union, and found a violation of section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). *Id.* In so holding, the Board found *Kingston* inapplicable because the project at issue in the case was not a Davis-Bacon project and the amount of dues unlawfully withheld by the union was *de minimis*. *Id.*

The contractor appealed to the U.S. Court of Appeals for the D.C. Circuit. The court reversed and remanded back for additional findings. *Id.* at 147. The court noted that the presence of Davis-Bacon monies in the MRP fund should logically destroy its protected status under the NLRA. *Id.* at 152. The court held as follows:

While the Board...did not treat the existence of [Davis-Bacon] moneys in the [MRP] as wholly irrelevant, neither did it explain why the Davis-Bacon moneys did not affect the [MRP's] legality or why the Union's conduct in that regard was excusable. No court or administrative decision of the Board has yet defined precisely how much Davis-Bacon money may flow into a [MRP] before the program violates public policy. In the circumstances of this case, the Board's conclusory determination that these moneys did not taint the [MRP] is inadequate to support its finding that the operation of the Union's [MRP] was clearly protected conduct.

Id. at 153. Further, the court reminded the NLRB of its obligation to defer to other tribunals where its jurisdiction under the NLRA interferes with a statute in which it has no expertise such as the Davis-Bacon Act. *Id.* Finally, the court commented that the NLRB's decision was troubling "in light of the fact that Can-Am is left with no available means to redress its prevailing wage law grievances if its lawsuit ... is preempted." *Id.* at 154. In effect, the court held that the union's actions were not protected by federal labor law, but invited the NLRB to articulate whether a *de minimus* rule existed in this area.

On remand, the NLRB declined to address the substance of the case.² Thus, the most recent judicial pronouncement on this issue indicates that state regulation is appropriate where a union has violated prevailing wage law in the operation of its MRP funds.

5. The NLRB's December 31, 2007 Advice: MRPs Which Include Dues Derived from Wages on Davis-Bacon Projects are Not Protected by the NLRA.

The most recent development in this area occurred after the current matter was already in litigation. On December 31, 2007, the NLRB's Office of Advice issued an advisory letter on this very issue. The plaintiff in the underlying lawsuit had brought an action for (among other things) tortious interference with contract based on a union's MRP fund. *D.F.M. Industries*, 2007 W.L. 5156981 (NLRBGC 2007). The district court dismissed the action as preempted. In a subsequent unfair labor practice proceeding,³ the NLRB's Associate General Counsel issued the following opinion:

Preemption ... is not implicated in this case because the MRP that the lawsuit is attacking, which includes dues derived from wages on Davis-Bacon projects, *is not actually protected under the [NLRA]*. The Board has not decided whether the inclusion of dues from Davis-Bacon projects in a job targeting program, like the MRP here, renders the entire program unprotected by the [NLRA]. When the D.C. Circuit remanded the proceeding in *Can-Am Plumbing* to the Board for consideration of that issue, the Board determined that the issue of whether the job targeting program in that case violated the Davis-Bacon Act had not been raised by

² On remand, the Board found that the contractor failed to assert that the MRPs inclusion of dues derived from wages on state or federal projects violated the Davis-Bacon Act or undermined the protected status of the MRP as a whole under the NLRA. *Can-Am Plumbing, Inc.*, Case No. 32-CA-16097, 350 N.L.R.B. No. 75 (August 24, 2007). Because the issue had allegedly not been raised previously, the Board held the issue had been waived and therefore would not be considered. *Id.*

³ Unions have the right to bring an Unfair Labor Practice Charge, seeking attorney fees, against an employer who brings an unfounded case against a union. *Bill Johnson's Restaurant* 461 U.S. 731 (1983). In practice, unions bring such a Charge whenever an employer is unsuccessful in a lawsuit.

the respondent, and therefore it specifically refused to consider the issue. *Because the issue of whether the inclusion of any contributions from wages earned on Davis-Bacon projects can ever be protected by the [NLRA] is unsettled, there is no basis for concluding the activity at issue here to be "actually" preempted.*

Id. at *4 (emphasis added). The Associate General Counsel stated that "in light of the [e]mployers' non-frivolous arguments, some of which are supported by federal case law, we conclude that the [e]mployers' state law claims were reasonably based." *Id.* at *5.

As Local 539 has repeatedly pointed out, the operation of an MRP is protected by the NLRA, so long as the program is administered legally. On the other hand, the courts and the NLRB concur that the collection of dues from wages earned on projects covered under the Davis-Bacon Act is illegal and therefore unprotected by the federal labor laws. MPI's tortious interference and unfair competition claims at issue in this matter are based on the illegal funds (and the use of those funds) from Local 539's MRP, which includes moneys from state and federal prevailing wage projects. Just as the collection of such funds is illegal and unprotected by federal labor laws, the use of such tainted money should also be held to be outside the protection of Section 7 of the NLRA.

B. The Collection of Dues To Support An MRP From Projects Covered Under State Prevailing Wage Laws Is An Unsettled Question.

MPI's tortious interference and unfair competition claims are also based on the illegal nature of the funds contained in the MRP grant to MD in violation of the Minnesota Prevailing Wage Act. It is an open question of law whether the collection of MRP dues on state prevailing wage projects is unlawful. Nevertheless, for the same

reasons as argued, such conduct should be considered unlawful under the MPWA and outside the protection of federal labor law preemption.

To date, only one state court has ever reviewed this issue. *J.A. Croson, Inc. v. J.A. Guy, Inc.*, 691 N.E.2d 655 (Ohio Sup.Ct. 1998)⁴. In *Croson*, the Supreme Court of Ohio was faced with the issue of whether the NLRA preempted an action against a union MRP based, in part, on the Ohio prevailing wage statute. The court held, in light of the NLRB's holding in *Manno Electric*, Section 7 of the NLRA preempted Ohio's prevailing wage statute to the extent those provisions could be construed to restrain or inhibit the federally protected use of job targeting programs. *Id.* at 665.

Following the Ohio court's decision, the union in that case filed an unfair labor practice charge against the employer, arguing that the employer's lawsuit was frivolous. That charge was litigated before an Administrative Law Judge at the NLRB. *J.A. Croson, Inc.*, N.L.R.B. 9-CA-35163-1 (June 27, 2003). (See App. 79-89.) The ALJ noted that the Supreme Court of Ohio's decision predated *Kingston*, and thus it was unclear whether the decision was correctly decided.⁵ *Id.* at *9. Lacking definitive authority, the ALJ determined the Board could reach two different outcomes. *Id.* at *8. First, the Board could find that Croson's lawsuit did not violate the NLRA because the

⁴ In *American Steel Erectors, Inc. v. Local Union No. 7*, No. 04-12536 (RGS), 2006 WL 300422 (D. Mass. Feb. 6, 2006), the District of Massachusetts dismissed a contractor's state-law claims for tortious interference as preempted by the LMRA. However, in that case the underlying "bad-act" was also a federal labor violation, which was clearly preempted.

⁵ Appellant supports its preemption argument, in part, using the case of *Associated Builders and Contractors, Inc.*, 331 N.L.R.B. 132 (2000). (Appellant's Brief at 31.) In that case the Board determined that the employer violated the NLRA by pursuing a state court lawsuit challenging the charging party unions' MRPs, and alleging the programs were unfair and fraudulent business practices. Importantly, *Associated Builders and Contractors, Inc.* predated *Kingston*, and the ALJ thus concluded that *Manno Electric* was binding on him as current law at the time.

lawsuit was concluded before the General Counsel issued its complaint.⁶ *Id.* Alternatively, the Board could directly address the issue of whether Croson violated the NLRA by challenging MRP deductions from wages under Ohio's prevailing wage law, in light of the Board's decision in *Kingston*. *Id.* at *9. Believing the latter alternative to be an issue of first impression, the ALJ declined to address it. *Id.* As a result, the ALJ determined that Croson did not violate the NLRA because the state lawsuit was concluded prior to the General Counsel's complaint before the Board. *Id.* at *11. The ALJ did not reach the issue of whether a MRP grant funded by deductions from state prevailing wage public work projects is also illegal. However, the ALJ's decision makes clear that the *Kingston* decision likely changed the law as regards state prevailing wage law and federal preemption.

Although *Kingston* related to the collection of MRP dues on federal Davis-Bacon public works projects, the NLRB's reasoning should logically be extended to MRP dues collected on MPWA public work projects. Similar to the Board's lack of expertise and authority under the Davis-Bacon Act, the NLRB is certainly without expertise and/or authority to base a decision under the MPWA, a deeply-rooted state regulation. Further, although the MPWA does not parrot the language of its federal counterpart, Minnesota's state prevailing wage statute is identical in nature and purpose of the federal Davis-Bacon

⁶ Under the *Loehmann's Plaza* doctrine, "(1) where arguably protected activity is involved, preemption does not occur in the absence of Board involvement in the matter, and (2) upon the Board's involvement, a lawsuit directed at arguably protected activity is preempted by Federal labor law." *Loehmann's Plaza*, 305 N.L.R.B. 663, 669 (1991).

Act. Given the similarity between these statutes, it makes no sense to treat deductions from federal and state prevailing wages differently.

C. As a Matter of Public Policy, the Use of Illegal Targeting Money Should Also Be Deemed Illegal And Outside Federal Labor Law Preemption.

The operation of Local 539's MRP is protected by the NLRA, so long as the program is administered legally. In this matter, the Court must accept as true the allegations that Local 539 is illegally funding its MRP with Davis-Bacon and state prevailing wage moneys. *See State ex. Rel. City of Minneapolis v. Minneapolis St. Ry. Co.*, 56 N.W.2d 564, 567 (Minn. 1952). Pursuant to *Kingston* and other decisions, Local 539's conduct is not only illegal, it is outside of federal labor law regulation.

Local 539 (and Amicus) argue here, for the first time, that while *collection* of prevailing wage monies by an MRP is illegal, the *use* of those illegal monies should nevertheless be protected by the NLRA. (*E.g.*, Appellant's Brief at 34.) The Union's (and Amicus) fails to support this argument with any case law or other support. Instead, both Local 539 and Amicus simply state that no court has ever ruled to the contrary. (*See, e.g., id.*; Amicus Curiae Brief at 15.) All well and good; arguably no court or agency has ruled on the union's specific contention. Local 539 further argues that the Davis-Bacon Act only 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). Thus, Local 539 claims Davis-Bacon only prohibits the collection of

dues on federal projects but does not regulate the subsequent MRP grant, which the union claims is absolutely protected by the NLRA.

Despite Local 539's argument, the foregoing case law established by the federal courts, agencies and accepted by the NLRB have all held that the subsequent "rebate" or grant of Davis-Bacon monies to an employer is also illegal. See *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 152-53 (D.C. Cir. 2003); *IBEW v. Brock*, 68 F.3d 1194, 1200 (9th Cir. 1995); *In the Matter of Building and Construction Trades Union Job Targeting Programs*, WAB Case No. 90-02, 1991 WL 494718 (1991) *enf'd*, *Building and Const. Trades Dept. v. Reich*, 815 F. Supp. 484 (D.D.C. 1993), *aff'd*, 40 F.3d 1275 (D.C. Cir. 1994); *IBEW Local 48 (Kingston Constructors, Inc.)*, 332 N.L.R.B. 1492, 1500-01 (2000). Importantly, the collection of dues for a purpose *not* inimical to public policy is legal under *Detroit Mailers*. 192 N.L.R.B. at 952. On the other hand, the courts and the NLRB have held that the collection of Davis-Bacon monies for the purpose of returning such funds to employers is inimical to public policy and a violation of the Davis-Bacon Act. *Id.* Thus, Local 539's distinction between the collection and subsequent use of Davis-Bacon monies should fail.

Respondent submits (with respect to all involved) that the Court should not leave its commonsense at the door. If the collection of dues on a Davis-Bacon project to fund a MRP is illegal and outside the protection of federal labor laws, it makes sense that the subsequent *use* of that tainted money should also be illegal. Were the Court to accept Local 539's argument, then logically the union's MRP could be funded by *any* illegal method, but the subsequent use of this illegal money would be absolutely protected under

the guise of Section 7 of the NLRA.⁷ This argument is outside of accepted preemption analysis. As the U.S. Supreme Court determined in *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942), there is an obligation to undertake a careful balancing of the policies of the NLRA when it conflicts with another federal statute. Local 539's argument ignores this careful balancing act, and instead seeks a result whereby the NLRA would simply trump the Davis-Bacon Act. Were the Court to accept Local 539's argument, such a result would render the rule against the collection of dues to fund MRPs on Davis-Bacon jobs meaningless. There is a long tradition of regulation and review of union funds, because of a documented history of corruption and misuse.⁸ Allowing the Appellant to blithely break the law, but nevertheless claim absolute legal protection, goes against that tradition. As a matter of public policy, Local 539's argument should fail.

As noted, Local 539 makes this argument free-form, without legal authority. Amicus Curiae makes the same argument, but refers to an opinion letter from the Department of Labor. (Brief of Amicus Curiae at 27.) As previously discussed in the *Reich* matter, the Administrator of the Department of Labor's Wage and Hour division issued a supplemental letter on September 5, 1989, pursuant to Building and Construction Trade Council's (Amicus in this matter) request for reconsideration and clarification of her January 24, 1989 determination that MRP deductions violate prevailing wage

⁷ As noted *supra*, the NLRB Office of Advice has touched on this issue, and noted that there is currently no guidance on this point: "The Board has not decided whether the inclusion of dues from Davis-Bacon projects in a job targeting program, like the MRP here, renders the *entire* program unprotected by the [NLRA]." *DFM Industries, Inc.*, 2007 WL 5156981 *4 (NLRBGC 2007) (emphasis added). As noted above, this is a narrow interpretation of the law concerning the purpose behind withholding of dues.

⁸ See, e.g., Michael J. Nelson, *Slowing Union Corruption: Reforming the Landrum-Griffen Act To Better Combat Union Embezzlement*, 8 Geo. Mason L. Rev. 527, 528-42 (2000).

requirements of the Davis-Bacon Act. *In the Matter of Building and Const. Trades Union Job Targeting Programs*, WAB Case No. 90-02, 1991 WL 494718 (1991). The supplemental letter, in part, addressed an issue then raised by Amicus – “whether subsidies to Davis-Bacon projects are permissible.” *Id.* The Administrator determined that “subsidization of Davis-Bacon projects was not unlawful, as the regulations only address the legality of deductions, not the subsequent use of union funds.” *Id.* Thus, the Administrator opined that subsidies of Davis-Bacon jobs by union MRPs do not violate ***the Davis-Bacon Act***. This is obvious to the point of being tautological – the Davis-Bacon Act deals only with how employees are paid. The Administrator did not (and could not) opine as to whether such actions violate other laws, or whether federal labor law protects such subsidies. If Local 539 and the Amicus Curiae’s arguments are based on the Administrator’s opinion letter, then their arguments have no support at all. This issue of whether it is permissible to subsidize a Davis-Bacon project (presumably with legal funds) is far different than the issue before this Court as to whether a union can use illegal funds in violation of the Davis-Bacon Act to support a MRP grant.

D. Garmon Preemption is Not Applicable Under An “Arguably Protected” Theory Because the NLRB Has Failed To Issue A Complaint

Local 539 misapplies preemption analysis under *Loehmann’s Plaza*. Appellant is correct in stating that when arguably protected activity is alleged, preemption does not occur in the absence of “Board involvement” in the matter. *Loehmann’s Plaza*, 305 N.L.R.B. 663, 668 (1991). Further, upon the Board’s involvement, a lawsuit directed at arguably protected activity is preempted by federal labor law. *Id.* However, Local 539

fails to mention the Board's definition of "Board involvement" established in *Loehmann's Plaza*. Pursuant to the Board, "Board involvement" only occurs when the General Counsel issues a *complaint* alleging that the lawsuit constituted unlawful interference with protected activity. *Id.* at 670-71. Stated differently, preemption does not occur when a party simply files a Charge with the Board. This is black-letter law, and well-known to practitioners in the area.

In the instant matter, Local 539 filed a charge with the NLRB following the Court of Appeals' decision. (App. 242.) As of the date of this writing, the NLRB's General Counsel has not issued a complaint alleging this lawsuit constituted unlawful interference with protected activity. Consequently, even if the unlawful activity in this case *were* protected by the NLRA (which it is not), preemption would not occur because there is no current Board involvement. Appellant's arguments notwithstanding (Appellant's Brief at 40), Local 539 does not have the authority, in and of itself, to strip the Minnesota Courts of jurisdiction over this matter.

III. THE NLRA DOES NOT BOTH PROTECT AND PROHIBIT THE USE OF MRP FUNDS TO APPLY PRESSURE IN THE BIDDING PROCESS

Appellant wants the Court to believe the union's conduct relating to the use of its MRP is "classic secondary pressure," which is prohibited by Section 8(b)(4) of the NLRA. (Appellant's Brief at 16.) With all due respect, this position is illogical. In essence, Local 539 argues that threats through the operation of an MRP are both protected by Section 7 of the NLRA, and simultaneously prohibited by Section 8(b)(4) of the NLRA. Telling, Local 539 has not supported this argument with any case law or

other authority establishing that the subsequent use of an MRP program in an effort to foster employment opportunities for union workers is *prohibited* under Section 8(b)(4) of the NLRA. Apparently, no court or agency has ever addressed this issue, and employers have also evidently not brought charges using this theory. In the absence of any support, Appellant cites several secondary boycott cases which dealt with conduct that was not only *arguably*, but *unquestionably* covered by federal labor law. The question therefore arises as to what type of conduct forms the basis of Respondent's tortious interference claim.

A. The Board has Declined Jurisdiction over Alleged Violations of the Davis-Bacon Act

The dispositive issue regarding Appellant's 8(b)(4) argument is what type of conduct forms the basis of MPI's tortious interference with contract claim, and whether the Board has said it will take jurisdiction over such conduct. That question is partly answered by decisions of the NLRB and other federal courts. The Board in *Kingston* specifically stated that where the Davis-Bacon Act is violated by MRPs, the Board is *without jurisdiction*, and enforcement authority lies with the courts. *Kingston Constructors*, 332 N.L.R.B. at 1500-01. The Courts and agencies have agreed. Nevertheless, a critical issue still remains – whether the subsequent MRP grant of illegal Davis-Bacon funds is outside the protection of federal labor law. If the Court determines MRP grants are outside the protection of federal labor law, then clearly the matter at hand cannot be preempted.

B. The Cases of *BE&K* and *Hennepin Broadcasting* Are Not Controlling

Local 539 cites two tortious interference cases which were held to be preempted by federal labor law. Each of these cases dealt with conduct that was not only arguably, but *unquestionably* covered by federal labor law. In *BE&K Const. Co. v. Broth. Of Carpenters and Joiners*, 90 F.3d 1318 (8th Cir. 1996), the plaintiff *specifically invoked federal labor law*, and was attempting to use threats of violence as the underlying “bad act” to support a tortious interference claim. *Id.* at 1328. The Eighth Circuit Court determined that the evidence concerning those threats related to conduct such as handbilling and picketing – conduct protected and/or regulated under federal labor law. *Id.* at 1330. With no threat of violence, the only remaining “bad act” to support a tortious interference claim was the federal labor violation, which obviously fell under the Board’s jurisdiction. *Id.* In *Hennepin Broadcasting Associates, Inc.*, the court dismissed the plaintiff’s state tortious interference claims because they were based on peaceful secondary picketing and handbilling activities – again, conduct specifically regulated and protected by federal law. *Hennepin Broadcasting Associates, Inc. v. NLRB*, 408 F. Supp. 932, 937 (D. Minn. 1975). The case at hand is not similar to either *BE&K* or *Hennepin Broadcasting*. 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. (App. 5.) Further, the subsequent use of that tainted money should also be held illegal under Davis-Bacon and outside of labor law preemption.

C. The Underlying Bad Act Does Not 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). When economic pressure is placed upon a contractor with the sole objective of causing that contractor to cease doing business with the contractor with whom the union has its real primary dispute, the pressure is secondary and unlawful under the NLRA. *Id.*

In the instant matter, there is no secondary pressure because there was never a primary dispute between MPI and Local 539. Local 539 alleges the threat in this case is “clearly secondary” in nature because it threatened to rescind the MRP grant to pressure or force MD to cease doing business with MPI, with whom Local 539 allegedly had its real primary dispute. (Appellant’s Brief at 18.) Significantly, Local 539 never mentioned the details of this alleged primary dispute. (*Id.*) Apparently, the Union believes the very nature of MPI’s business as a non-union contractor is enough to create a primary dispute. Nevertheless, at no time did MPI ever allege any real underlying dispute with Local 539 in this matter. Consequently, as there was no underlying dispute between MPI and Local 539 its threat to MD cannot be classified as secondary pressure under Section 8(b)(4) of the NLRA.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests that the Court uphold the decision of the Minnesota Court of Appeals.

Dated: January 20, 2009

SEATON, BECK & PETERS, P.A.

By:  _____

Alec J. Beck (#0201133)

Douglas P. Seaton (#127759)

Michael L. McCain (#0329095)

7300 Metro Boulevard, Suite 500

Minneapolis, MN 55439

(952) 896-1700

ATTORNEYS FOR RESPONDENT
MIDWEST PIPE INSULATION, INC.