No. 08-70521

UNITED STATES COURT of APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

CAN-AM PLUMBING, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce the Board's Supplemental Decision and Order issued against Can-Am Plumbing, Inc. ("Can-Am"). The Board's Supplemental Decision and Order issued on September 24, 2007, and is reported at

350 NLRB No. 75. (ER 275-78.)[1]

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practice occurred in Pleasanton, California, where Can-Am has its headquarters and transacts business.

The Board's application for enforcement, which was filed on January 24, 2008, is timely; the Act places no time limit on the institution of proceedings to enforce Board orders. On February 12, 2008, Can-Am filed with the Court a motion to dismiss the Board's application for enforcement. The Board opposed the motion and, on April 24, 2008, the Court denied Can-Am's motion without prejudice to renewing the arguments in its opening brief.

STATEMENT OF THE ISSUES PRESENTED

1. Unless a court explicitly retains jurisdiction over a remand, Section 10(e) of the Act limits the Board's ability to apply for enforcement of an order to

[1] "ER" refers to the excerpts of record filed by Can-Am with its brief. "SER" refers to the Board's supplemental excerpts of record filed with its brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to Can-Am's opening brief.

the circuit where the unfair labor practice occurred or where the respondent resides or transacts business. Given that the unfair labor practice occurred in California, where Can-Am "resides" and transacts business, does the Court have jurisdiction to consider the Board's application for enforcement of its Supplemental Decision and Order?

2. The Act prevents a party from complaining about the disposition of an issue that was never raised before the Board. Here, the amended unfair labor practice complaint alleged that the Act preempted Can-Am's state-court lawsuit challenging the Union's[2] job targeting program ("JTP") because the lawsuit targeted federally protected activity. Thus, because Can-Am's lawsuit attempted to interfere with protected activity, the complaint charged that Can-Am violated Section 8(a)(1) of the Act. In defense, Can-Am never asserted that its lawsuit was privileged because the JTP violated federal law, the Davis-Bacon Act,[3] and it expressly disavowed any Davis-Bacon Act violation as a defense. The Board's own rules and Section 10(e) of the Act deprive an appellate court of jurisdiction to

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[2] United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 342, AFL-CIO.

[3] The Davis-Bacon Act (40 U.S.C. § 276a(a)) requires contractors on federally funded construction projects to pay prevailing area wages "without subsequent deduction or rebate on any account . . . regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics."

consider arguments not first raised to the Board. Therefore, the issue is whether the Board properly found that it lacked authority to consider whether the presence of Davis-Bacon money in the JTP deprived the JTP of the Act's protection?

STATEMENT OF THE CASE

In its Supplemental Decision and Order currently under review, the Board accepted the District of Columbia Circuit's remand, *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145 (2003) ("*Can-Am Plumbing*"), as the law of the case, and examined the issue remanded, namely, whether the inclusion of dues collected on Davis-Bacon public works projects in the Union's JTP funds deprived the JTP of the Act's protection, thereby privileging Can-Am's lawsuit from attack as an unfair labor practice. (ER 275-79.) On the basis of its review, the Board found that, although it had discussed a Davis-Bacon case *sua sponte* in its original Decision, Can-Am had not raised the Davis-Bacon issue when the case was before the Board initially. Therefore, the Board concluded that, pursuant to its own rules and Section 10(e) of the Act, it was without authority to consider the specific issue remanded by the court. (ER 276-78.) The facts supporting the Board's findings are detailed below, followed by the summaries of the Board's initial decision, the D.C. Circuit's opinion, and the Board's Supplemental Decision and Order.

I. STATEMENT OF FACTS

A. Background

This case arose out of a JTP maintained by the Union since 1989. The JTP works to expand the job opportunities of covered employees by providing financial subsidies to union contractors on targeted construction projects. As the D.C. Circuit stated in its decision, *Can-Am Plumbing*, 321 F.3d at 146, the mechanics of the JTP are straightforward. Union contractors facing competition from nonunion contractors for work on a particular construction project can request a JTP subsidy from the Union. *Id*. If the Union approves the request, the union contractor takes the amount of the subsidy into account when submitting its bid on the project. *Id*. If the union contractor wins the project, it must pay its covered employees the wages specified in the collective-bargaining agreement, and the Union then reimburses it for the difference between the contract wages paid and the wages listed in the bid for the project. *Id.*

Initially, union employees themselves elected to establish the JTP with a transfer of "seed money" from a strike fund. They subsequently elected to maintain the JTP through a portion of their membership dues collected on all projects. (ER 149; SER 7A.)

In May 1996, L. J. Kruse Co., a unionized plumbing and heating contractor located in Berkeley, California, won a contract to perform plumbing work on a

new corporate headquarters for Ascend Communications, Inc. ("the Ascend Project"), in Alameda, California. Prior to submitting its bid, Kruse had requested and received a JTP subsidy from the Union for the project. *Id.*

Can-Am, a nonunion residential and commercial plumbing contractor located in Pleasanton, California, was Kruse's primary competitor for the work on the Ascend Project. After losing the bid, Can-Am filed a complaint against Kruse in the Superior Court of the State of California. (ER 150.) The lawsuit alleged that Kruse's acceptance of the JTP subsidy from the Union violated California law regarding unfair labor practices, unfair competition, prevailing wages, and wage kickbacks to employers.[4] *Id*. By way of relief, the lawsuit sought to enjoin Kruse from ever accepting, directly or indirectly, JTP funds from the Union. It also sought disgorgement of any gains received by Kruse from its participation in the JTP, actual and punitive damages, and attorney's fees. (ER 3-5.)

B. The Underlying Unfair Labor Practice Proceedings

Based on an unfair labor practice charge filed by the Union,[5] the Board's General Counsel issued an amended complaint alleging that Can-Am violated 8(a)(1) of the Act (29 U.S.C § 158(a)(1)) by prosecuting and maintaining the

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[4] *See* Cal. Lab. Code §§ 221, 223, 1771 *et. seq*.; California Business and Professions Code § 17200 *et. seq*. (ER 3-5.)

[5] Can-Am's state-court lawsuit did not name the Union as a party. (ER 1-5.)

lawsuit against Kruse. (ER 13-19.) Under Board law, the Act protects JTPs like the Union's because, by pooling funds to increase job opportunities, employees engage in classic "concerted activity for mutual aid and protection."[6] And, under *Bill Johnson's Restaurants v. NLRB*,[7] and *BE&K Construction v. NLRB*,[8] an employer violates the Act by prosecuting a lawsuit under state law that interferes with core protected activity because the Supremacy Clause preempts state laws that conflict with the Act. Thus, the amended complaint notified Can-Am that the Board had jurisdiction over the matter pending before the state court and that the state court's jurisdiction was therefore preempted. (ER 16-17.)

In its answer to the complaint, Can-Am did not claim that the JTP violated the Davis-Bacon Act, which would have provided a federal basis for challenging the JTP because the Department of Labor—affirmed by this Court and the D.C. Circuit—had interpreted the Davis-Bacon Act to prohibit the inclusion of dues

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[6] *See* Section 7 of the Act (29 U.S.C. § 157); *Manno Electric*, 321 NLRB 278 (1996), *enforced*, 127 F.3d 34 (5th Cir. 1997) ("*Manno Electric*"). In *Manno Electric*, the Board held that JTPs "level the playing field" by lowering the labor costs for unionized employers, thereby improving their competitive position relative to their nonunion counterparts. 321 NLRB at 298. The Board further held that because the objectives of JTPs are to protect employees' jobs and wage scales, those objectives fall squarely under the "other mutual aid or protection" clause of Section 7. *Id.*

[7] 461 U.S. 731, 737 n.5 (1983).

[8] 536 U.S. 516 (2002).

from Davis-Bacon projects in JTP, reasoning that doing so provided unlawful rebates to employers of Davis-Bacon wages.[9] Instead, Can-Am asserted several affirmative defenses, all addressing the legality of its lawsuit under California law. (ER 21-23.) Specifically, it argued that:

> The Lawsuit cannot be deemed baseless because the monies received by L.J. Kruse Company from the [JTP] are kickbacks prohibited by California Labor Code. The Supreme Court and the United States Court of Appeals for the Ninth Circuit have repeatedly held that minimum labor standards, such as those embodied in the sections of the California Labor Code that prohibit kickbacks, are not preempted by the [Act].

(ER 22.)

Can-Am filed a motion to dismiss the amended unfair labor practice complaint, in which it raised the same state law defenses. (ER 23-25.) It reiterated that the "lawsuit is well-founded on California Law," and that both the United States Supreme Court and lower courts have repeatedly held that there is no conflict between state minimum labor standards and the Act. (ER 31-34.)

While asserting that the Act should not preempt its state lawsuit against Kruse, Can-Am's motion to dismiss broadly argued that the Ninth Circuit had held that JTPs are not protected under the Act, citing *Brock* and *Reich*, cases applying the Davis-Bacon Act. Can-Am did not claim, however, that those cases or the

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[9] *See Electrical Workers Local 357 v. Brock*, 68 F.3d 1194, 1202-03 (9th Cir. 1995) ("*Brock*"); *Building and Construction Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1280-81 (D.C. Cir. 1994) ("*Reich*").

Davis-Bacon Act applied directly here. Instead, it claimed only that they applied by analogy, stating that, if, under *Brock*, "the Ninth Circuit found no conflict between the [Act] and the Davis-Bacon Act regulations prohibiting JTP deductions, it will not find that California statutes prohibiting JTP deductions are preempted by the [Act]." (ER 33-34, 36.)

At the hearing before the administrative law judge, Can-Am also failed to raise a federal Davis-Bacon Act defense. It submitted a written opening statement that repeated virtually verbatim the arguments in its motion to dismiss. (ER 44-65.) During its oral opening arguments in support of the motion to dismiss, Can-Am's counsel characterized the state-court lawsuit against Kruse as "a private dispute, between two companies, in which the Union sought to interject itself" by filing the unfair labor practice charge. (ER 151.) He expressly disavowed that Can-Am was making any claim that JTP contributions were unprotected under the Act based on the type of Davis-Bacon Act violations found in *Brock* and *Reich*. (ER 76, SER 2-6.) He emphasized that, unlike in *Brock*, Can-Am was not contesting the payments of contributions to the JTP, but only their use for alleged anticompetitive purposes in violation of California law. (ER 277.)

At the hearing, for the first time, evidence tangentially linked contributions from Davis-Bacon projects to the Union's JTP. Thus, in response to questions about prevailing wage jobs, Union Business Manager/Financial Secretary Larry

Blevins testified that, at maximum, 1-2 percent of the JTP contributions came from Davis-Bacon projects and probably 2 percent came from state prevailing wage jobs. (ER 277; SER 8-9.) On cross-examination, Blevins testified that these figures were just estimates based on his experience in the industry and on the limited information the Union obtains regarding the name and nature of particular projects. (ER 277; SER 13-13.) Can-Am's post-hearing brief to the judge cited Blevins' testimony only to support its arguments that the inclusion of state funds in the JTP rendered the JTP unprotected by the Act. (ER 130.)

The General Counsel's post-hearing brief acknowledged the inclusion of contributions from state and federal prevailing wage projects in the JTP, but asserted that they represented only a *de minimis* portion of the JTP. (ER 86-88 n.9.) In refuting Can-Am's California law defense, the General Counsel asserted that there was no evidence that any money collected from federal or state prevailing wage projects was distributed to Kruse. As to Can-Am's arguments based on *Brock* and *Reich*, the General Counsel answered that those cases, which arose under federal law, did not address challenges to the legality of JTPs based solely on state prevailing wage laws. (ER 112.)

C. The Administrative Law Judge's Recommended Decision and Order; Can-Am's Exceptions

The administrative law judge issued a recommended decision and order, finding that Can-Am's state-court lawsuit violated the Act because it had "the

direct and foreseeable consequence of interfering with employees' concerted ability to achieve the JTP's protected objectives." The judge found that, although 2-3 percent of the JTP funds originated from federal and state prevailing wage jobs combined, the Ascend Project was not a public works job governed by Davis-Bacon regulations. (ER 277.) Even so, the judge noted Can-Am's position that JTPs are not protected under *Brock* and *Reich*. (ER 152 n.2, 153, 155) The judge found, however, that those cases involved the Davis-Bacon Act and that they only held that the Department of Labor's interpretation of that statute was not plainly erroneous, not that state statutes similar to the Davis-Bacon Act could also preempt federal labor law. (ER 156.)

Can-Am's exceptions and supporting brief to the Board did not argue that the judge erred in failing to find that the outcome of the proceeding is controlled by the Davis-Bacon Act. Nor did Can-Am even mention the Davis-Bacon Act. Rather, Can-Am reiterated, as it had before the judge, that JTPs are susceptible to state law, citing *Brock* and *Reich* by analogy in support of that general proposition. (ER 159-77.)

II. THE BOARD'S ORIGINAL DECISION AND ORDER

On September 21, 2001, the Board (Members Liebman, Truesdale and Walsh) issued its Decision and Order[10] affirming the judge's rulings, findings and

[10] 335 NLRB 1217 (2001).

conclusions, and adopting the recommended order as modified. (ER 212-24.) The Board found that Can-Am violated Section 8(a)(1) of the Act by maintaining and prosecuting a preempted state-court lawsuit against Kruse for accepting a JTP subsidy from the Union for the Ascend Project. (ER 212-13.) In reaching that decision, the Board relied on its holding in *Manno Electric* that a JTP constitutes protected activity under Section 7 of the Act (29 U.S.C § 157). (ER 213.) The Board rejected Can-Am's argument that the Board could not enjoin its lawsuit absent a finding that the lawsuit was baseless and filed for a retaliatory motive, per *Bill Johnson's*. (ER 213.) The Board found that analysis was inapplicable where, as here, the lawsuit was preempted. (ER 213.)

The Board also chose, *sua sponte*, to discuss its then-recent decision in *IBEW Local 48* (*Kingston Constructors*), 332 NLRB 1492 (2000), *enforced*, 346 F.3d 1049 (9th Cir. 2003), which issued after the judge's decision and the parties' filing of exceptions in the instant case. (ER 213.) In *Kingston Constructors*, the Board deferred to the Department of Labor's interpretation of the Davis-Bacon Act, agreeing that it is unlawful for unions to extract dues from employees working on Davis-Bacon projects to support JTPs. 332 NLRB at 1052.[11] Here, however,

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[11] Specifically, in *Kingston Constructors*, the Board concluded that a union violates Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by threatening to have employees fired for not making JTP payments "owing from their employment on Davis-Bacon projects." 332 NLRB 1492, 1052 (2000). The Board in *Kingston*

the Board explained that *Kingston Constructors* was inapplicable because the Ascend Project was not a Davis-Bacon project, there was no evidence that Kruse had ever worked on a Davis-Bacon project and, at most, only 2 to 3 percent of the funds in the JTP came from employees working on federal and state prevailing wage jobs, which were not directly traceable to Kruse. (ER 213.) The Board's observations explained why *Kingston Constructors* did not require a different result, given that the litigated issues focused on the effects of California law, rather than the Davis-Bacon Act, on the protected status of the JTP as a whole. (ER 277.)

As a remedy, the Board ordered Can-Am to cease and desist from its unlawful conduct and from in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7. (ER 214.) Affirmatively, the Board ordered Can-Am to seek dismissal of the state-court lawsuit against Kruse; to reimburse Kruse, with interest, for all legal and other expenses incurred in the defense of the preempted lawsuit; to post copies of a remedial notice; and to sign and return to the Board's Regional Director

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Constructors cited its lack of "institutional expertise or authority with respect to the interpretation of Davis-Bacon," and deferred to the view of the Department of Labor, as upheld by the courts of appeals in *Brock* and *Reich*. *Id*. The Board also concluded, however, that a union does not act unlawfully by "attempting to enforce" the payment of JTP dues on projects *not* covered by the Davis-Bacon Act. *Id*. at 1497.

sufficient copies of the remedial notice for posting by Kruse and the Union, if they are willing. (ER 214.)

III. THE D. C. CIRCUIT'S DECISION AND REMAND ORDER

Can-Am filed a petition for review of the Board's Decision and Order in the D.C. Circuit, and the Board filed a cross-application for enforcement of its Order. On the merits, the D.C. Circuit agreed with the Board that the Act preempted Can-Am's state law case with respect to dues collected from employees working on non-Davis-Bacon projects, and that a recent Supreme Court decision had not changed the analysis. *See Can-Am Plumbing*, 321 F.3d at 151-52.

Nonetheless, the court remanded the case to the Board to consider whether the Union's JTP was clearly protected by the Act. *Id.* at 154. Specifically, the court was troubled by Larry Blevins's testimony showing the inclusion of dues from Davis-Bacon prevailing-wage jobs in the JTP, which the court believed may have rendered the JTP here inconsistent with *Brock*, *Reich*, and *Kingston Constructors*. *Id*. at 153-54. Observing that the Board is required to balance the Act against other federal statutes, such as the Davis-Bacon Act, the court found that the Board had made only a "cursory" attempt to engage in that balancing analysis here. *Id*. at 147, 154. The court listed several factors that the Board may consider on remand. For example, the court suggested that the Board could make further evidentiary findings that could justify its overlooking the presence of

Davis-Bacon Act funds in the Union's JTP. *Id.* at 154. Importantly, the court emphasized that "the Board on remand may yet determine that the JTP is protected under Section 7." *Id.*

IV. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

The Board accepted the D.C. Circuit's remand as the law of the case, and invited the parties to file position statements. Both Can-Am and the Union submitted statements of positions. The Board also issued a Notice of Invitation to File Briefs soliciting amici curiae.[12] The Board examined the record for evidence, and considered the parties' and amici curiae's position statements and briefs in light of the court's remand instructions. (ER 275.)

On August 24, 2007, the Board (Chairman Battista and Members Liebman and Walsh) issued its Supplemental Decision and Order reaffirming its original finding that Can-Am violated Section 8(a)(1) of the Act. (ER 275-78.) Initially, the Board noted that it only decides issues that are presented and litigated by the parties. (ER 276.) Therefore, the Board explained that, before it resolved any possible conflict between the policies of the Act and the Davis-Bacon Act, as

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[12] Several amici responded and filed briefs including: Building and Construction Trades Department, AFL-CIO and the International Brotherhood of Electrical Workers, AFL-CIO; International Brotherhood of Electrical Workers, Local 48; National Right to Work Legal Defense Foundation; Sierra Nevada Chapter of Associated Builders & Contractors and Electro-Tech, Inc.; and the Minnesota State Building and Construction Trades Council, AFL-CIO. Can-Am and the Board's General Counsel filed replies to the amici briefs. (ER 275 n.10.)

directed by the court, it must first determine whether Can-Am had argued in the underlying proceeding that the JTP was unprotected because it was funded with Davis-Bacon money, not just that similar state laws might have rendered the JTP unprotected. (ER 276.) Based on a "careful" examination of the Board's decision and the record in the underlying proceeding, particularly Can-Am's exceptions, and in accordance with the Board's rules, the Board concluded that Can-Am had never raised the issue of whether the Union's JTP violated the Davis-Bacon Act, just California law, before the Board. (ER 276-78.)

The Board found it "particularly" noteworthy that Can-Am "made no mention at all of the Davis-Bacon Act" in its exceptions and brief in support of exceptions, or in its answering brief to the General Counsel's exceptions. (ER 276, 277.)[13] The Board found that, rather than raising the Davis-Bacon issue to the

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[13] The Board's Rules and Regulations Section 102.46 (29 C.F.R § 102.46) provide that:

> (a) parties may file "exceptions to the administrative law judge's decision or to any other part of the record or proceeding . . . together with a brief in support of said exceptions . . . .
>
> (b)(1) each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken . . . .
>
> (b)(2) Any exception to a ruling, finding, conclusion, or recommended order which is not specifically urged shall be deemed to have been waived.
>
> (g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board or in any further proceeding.

Board, Can-Am argued, as it had before the judge, that the JTP is unprotected and cited *Reich and Brock* only to analogize the treatment of JTPs under the federal Davis-Bacon Act to its California equivalent. (ER 277.)

Importantly, the Board noted that, in its original decision, it was cognizant of the tension created by the apparent inclusion of some Davis-Bacon money in the Union's JTP and its recent holding of *Kingston Constructors*. (ER 277.) Consequently, the Board had *sua sponte* reviewed *Kingston Constructors* and explained why it did not require a different result. (ER 277.)

In the absence of Can-Am's presentation of the Davis-Bacon Act issue to the Board, the Board found that the issue was waived and could not be considered. (ER 277.) Although the Board acknowledged that the court's remand asked for review of specific issues surrounding *Kingston Constructors*, the Board offered that it does not believe that the court's remand order required the Board to ignore its own fundamental procedural rules. (ER 278 n.21.) The Board further noted that in its view, Section 10(e) and (f) of the Act (29 U.S.C § 160(e) and (f))[14] bar Can-Am from raising the matter before an appellate court because Can-Am did not raise the issue to the Board. (ER 278 n.21.) The Board made clear, however, that

[14] Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused by extraordinary circumstances." Section 10(f) provides that upon the filing of a petition, the court shall proceed in the same manner as under Section 10(e).

its finding does not preclude Can-Am from raising allegations that any aspect of the JTP violates the Davis-Bacon Act in an appropriate manner and forum, as occurred in *Reich, Brock*, and *Kingston Constructors.* (ER 277 n.20.)

The Board thus held to its original finding that the Union's JTP is protected by Section 7 of the Act and, therefore, that Can-Am violated Section 8(a)(1) of the Act by filing and maintaining a state-court lawsuit against its competitor for participating in the JTP. (ER 214, 278.) Accordingly, the Board reaffirmed its original Order. (ER 157-58, 278.)

SUMMARY OF ARGUMENT

Because of the unusual procedural posture of this case, the issues on review by the Court are relatively narrow. First, Can-Am has reiterated its argument, made in a motion to the Court, that, since the Board's Supplemental Decision and Order proceeded from the D.C. Circuit's remand order, this Court lacks jurisdiction to consider the Board's application for enforcement. Insofar as this challenge concerns whether this Court is the proper venue for this appeal, the answer lies in Section 10(e) of Act, which limits the Board to applying for enforcement of its Order in the "circuit wherein the unfair labor practice . . . occurred or wherein [Can-Am] resides or transacts business." Because the D.C. Circuit did not explicitly retain jurisdiction over the case, and in light of the fact that the unfair labor practice occurred in California, where Can-Am "resides" and

does business, this Court, not the D.C. Circuit, amply satisfies the Act's venue requirement.

Can-Am's only challenge to the merits of the Board's Supplemental Decision and Order is also easily dispensed with. Although the D.C. Circuit remanded the case to the Board for a balancing of the policy concerns of the Davis-Bacon Act with those of the Act, the Board properly found, based on its application of settled principles to the unique circumstances of this case, that, as a threshold matter, it could not undertake that ordered balancing analysis because Can-Am never presented that issue to the Board in the underlying litigation. On the basis of that finding, the Board was not obligated to pursue an inquiry that runs counter to fundamental procedural rules prohibiting the Board from considering issues not presented by parties before it. Accordingly, the Board properly concluded that Can-Am's failure to present the Davis-Bacon issue before the Board in the underlying proceeding foreclosed the Board from consideration of that issue, and that Section 10(e) of the Act further bars Can-Am from raising the matter before an appellate court.

Importantly, Can-Am fails to mount any meaningful challenge to the Board's finding of waiver. Instead, it redundantly insists that the Board erroneously failed to adhere verbatim to the D.C. Circuit's remand mandate to "make a factual inquiry" into whether the inclusion of money collected on Davis-

Bacon projects rendered the Union's JTP unprotected under the Act. It does Can-Am no good to claim that the Board was obligated to address an issue that was not charged in the complaint, nor asserted in the answer, specifically disavowed in the hearing, never excepted to before the Board, and over which Can-Am never sought reconsideration once the Board had *sua sponte* addressed it in the original Decision and Order. Can-Am's failure to challenge the JTP on Davis-Bacon grounds in the proceedings before the Board bars judicial review of that issue.

To the extent that Can-Am raises any remaining issues, including its challenge to the reasonableness of the Board's preemption finding, and the applicability of California law to the JTP, these issues have been previously resolved by the D.C. Circuit. Therefore, those issues are foreclosed by the remand mandate, and the Court should deny Can-Am's attempt to relitigate them here.

Likewise, Can-Am's claim that, after the D.C. Circuit issued its remand order, Can-Am amended its state-court lawsuit to allege a Davis-Bacon violation and subsequently settled and dismissed the lawsuit is of no moment. Can-Am's mere assertion of its alleged compliance with one affirmative provision of the Board's Order, while also admittedly refusing to comply with the posting requirement, falls short of what is required for full compliance. Moreover, before filing this brief, Can-Am never formally informed the Board that it had dismissed the state-court lawsuit.

ARGUMENT

I. THE COURT HAS JURISDICTION TO CONSIDER THE BOARD'S APPLICATION FOR ENFORCEMENT OF ITS SUPPLEMENTAL DECISION AND ORDER

Before the Court, Can-Am contends (Br. 1-3) that because the Board's Supplemental Decision and Order issued in response to the D.C. Circuit's remand order, the Board was obligated to file its application for enforcement in the D.C. Circuit. Accordingly, it argues that the Court lacks "jurisdiction" and urges the Court to dismiss the case. While Can-Am frames its challenge solely in terms of this Court's "lack of jurisdiction" to entertain the Board's application, the proper analysis is whether venue lies in this Circuit. As shown below, because the D.C. Circuit did not explicitly retain jurisdiction over the case, the Board properly complied with the venue provisions of Section 10(e) of the Act.

The Act provides "a bifurcated scheme of judicial consideration of Board orders." *NLRB v. Wilder Mfg. Co.*, 454 F.2d 995, 998 (D.C. Cir. 1972). Section 10(f) of the Act (29 U.S.C. § 160(f)) authorizes persons aggrieved by Board orders to seek review in any circuit where the unfair labor practice occurred, or where they reside or transact business, or in the D.C. Circuit. Section 10(e) of the Act (29 U.S.C. § 160(e)), in contrast, authorizes the Board to petition for enforcement of its orders only in the circuit "wherein the unfair labor practice in question occurred or [the respondent] resides or transacts business."

Here, 4 months after it issued its Supplemental Decision and Order, the Board filed its application for enforcement in this Court. That filing complies with the plain language of Section 10(e) of the Act because the instant unfair labor practice not only occurred in California, but also Can-Am resides and does business in the State, within the Court's jurisdictional boundary.

Can-Am's suggestion (Br. 1-2) that this Court lacks jurisdiction and that the D.C. Circuit is the proper forum is predicated on its erroneous view that jurisdiction in the D.C. Circuit has been established by that court's remand mandate. The D.C. Circuit did not explicitly retain jurisdiction over the case, and its "unqualified remand in th[e] case operated to divest [it] of jurisdiction." *United Mineworkers of America v. NLRB*, 468 F.2d 1139, 1142 (D.C. Cir. 1972).

On this issue, the D.C. Circuit's decision in *NLRB v. Wilder Mfg. Co.*, 454 F.2d 995 (D.C Cir. 1972), is both pertinent and instructive. In *Wilder*, following the court's remand order in a petition-for-review case, the Board issued a supplemental decision and order and filed an application for enforcement with the court. *Id.* at 998. The employer moved for dismissal of the Board's application, contending that the court was not the proper forum for the Board's filing under Section 10(e) of the Act because the unfair labor practice did not occur within the court's jurisdictional boundary, and the employer neither resided nor transacted business in that circuit. *Id*. The court granted the employer's motion and

transferred the case to the Second Circuit, where venue was proper. *Id.* In so doing, the court rejected the Board's contention that the court retained jurisdiction over the case because the supplemental decision and order had proceeded from the court's remand. *Id*. The court held that:

> Whenever our intention had been to remand but to retain jurisdiction, we have included an explicit statement indicating the retention of jurisdiction in this court. For example, we have specifically stated in such cases that only the record, rather than the case is remanded. Consequently, upon remand to the [Board] in [this case], this court divested itself of jurisdiction over the instant controversy, and jurisdiction passed from this court to the [Board]. As a result, any subsequent petition for enforcement must be considered as a new proceeding which the respondent has a right to require be brought in a forum designated by Section 10(e).

Id. (citations omitted).

As in *Wilder*, the D.C. Circuit remanded the instant case to the Board without an explicit statement indicating the retention of jurisdiction. Accordingly, the Board's application for enforcement is a new proceeding and, under Section 10(e) of the Act, the Board properly filed it in this Court. *See, e.g.*, *NLRB v. Williams Enterprises, Inc.*, 50 F.3d 1280, 1285-86 (4th Cir. 1995) (following D.C. Circuit's remand, the Board filed for enforcement of its supplemental decision and order in the Fourth Circuit where the unfair labor practice occurred). *Cf. Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) ("While a mandate is controlling as to matters within its compass, on the remand [the Board] is free as to other issues.") (citation omitted).

Ultimately, Can-Am's argument ignores one salient fact: of the two parties in this case, only Can-Am has statutory authority under Section 10(f) of the Act to seek review of the Board's Supplemental Decision and Order in the D.C. Circuit. Can-Am had ample opportunity during the 4-month period that elapsed between the issuance of the Supplemental Decision and Order and the Board's application for enforcement in this Court. Since Can-Am failed to file a petition for review in that court, the Board was obligated to seek enforcement in this Court, the only circuit that meets Section 10(e)'s venue requirements.

II. THE BOARD REASONABLY FOUND, IN ACCORDANCE WITH THE D.C. CIRCUIT'S REMAND, THAT CAN-AM WAIVED THE RIGHT UNDER SECTION 10(e) OF THE ACT TO CHALLENGE THE UNION'S JTP ON DAVIS-BACON GROUNDS BECAUSE IT FAILED TO RAISE THE DAVIS-BACON ISSUE BEFORE THE BOARD

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the Act. Section 7 (29 U.S.C. § 157), in turn, protects the right of employees "to engage in other concerted activities for the purpose of . . . other mutual aid or protection . . . ." The Board has held, with court approval, that a JTP through which employees pool resources to enhance their employment opportunities is classic Section 7 activity. *See Manno Electric*, 321 NLRB at 298. A JTP, however, might lose its protection under the Act if it includes money from Davis-Bacon projects because the Davis-Bacon Act, an

equally competent federal statute, prohibits employees from remitting any wages earned on covered projects to their employers, which the Department of Labor has interpreted to include JTPs. *See Kingston Constructors*, 332 NLRB at 1052.

Here, Can-Am sued under California law to prohibit Kruse from participating in the Union's JTP. The D.C. Circuit agreed with the Board that Can-Am's state-court lawsuit, filed to restrain core Section 7 activities, is preempted by the Act. *See Can-Am Plumbing*, 321 F.3d at 151. *Accord Bill Johnson's*, 461 U.S. at 744. However, the court was concerned whether, under federal law, Davis-Bacon money affected the JTP in this case, and if so, whether that meant Can-Am's state-court lawsuit was not preempted. The Board reasonably found that Can-Am's failure to raise a violation of the Davis-Bacon Act as a defense against preemption precludes the Board (and this Court) from considering that issue now.

A. Section 10(e) of the Act Precludes Judicial Review of an Issue Not Raised Before the Board

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides in relevant part that "no objection that has not been urged before the Board . . . shall be considered by the [C]ourt" absent "extraordinary circumstances" not argued here. This statutory provision conditions appellate review of a Board order on a party's having raised and litigated its objections before the Board in the first instance.

The Supreme Court has held that a party's failure to present an issue to the Board deprives a court of jurisdiction to consider that issue on review. *See Woelke*

& Romero Framing, Inc. v. NLRB, 456 U.S. 645, 666-67 (1982) ("*Woelke & Romero*"); *Garment Workers Union v. Quality Mfg.*, 420 U.S. 276, 281 n.3 (1975); *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961). This Court enforces that bar strictly, holding consistently that a litigant's failure to present a question to the Board in the first instance precludes this Court from considering it on appeal. *See NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1103 n.10 (9th Cir. 2008); *NLRB v. Electrical Workers, Local 952*, 758 F.2d 436, 439 (9th Cir. 1985); *NLRB v. Apico Inns, Inc.*, 512 F.2d 1171, 1174 (9th Cir. 1975). Indeed, because the waiver rule is jurisdictional, its application is "mandatory, not discretionary." *NLRB v. Houston Building Services*, 128 F.3d 860, 864 (5th Cir. 1997) (citation omitted).

Even when the Board discusses an issue *sua sponte* in its decision, as the Board did here in discussing *Kingston Constructors*, a party must challenge the Board's disposition of that issue in a motion for reconsideration before the Board if it wishes to preserve the issue for later argument on appeal. *See Woelke & Romero*, 456 U.S. at 666-67 (party's failure to petition Board for reconsideration of issue that the Board raised for the first time in its decision "prevents consideration of the question by the courts"); *Garment Workers Union.*, 420 U.S. at 281 n.3 (Section 10(e) of the Act precluded judicial consideration of party's contention that Board denied it due process by basing order on a theory neither charged nor

litigated, because party failed to urge its due process objection to the Board in a postdecision motion for reconsideration). *Accord NLRB v. Sambo's Restaurant, Inc.*, 641 F.2d 794, 796 (9th Cir. 1981) (judicial review precluded where employer failed to move for reconsideration of Board's *sua sponte* imposition of remedies that were not sought by parties).

The Board enforces a similar procedural limitation through its rule, which provides that any exception to a finding of the administrative law judge not specifically urged before the Board "shall be deemed to have been waived," and may not "thereafter be urged before the Board, or in any further proceeding." 29 CFR §§ 102.46(b), 102.46(g). That rule serves a sound purpose, and unless a party's neglect to press an exception before the Board is excused by the statutory "extraordinary circumstances" exception, the Court is bound by it. *See, e.g., NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961).

B. Can-Am's Failure to Raise the Davis-Bacon Issue Before the Board Precludes the Board and the Court from Considering It

As shown above, Can-Am never "urged" to the Board the issue of whether the Union's JTP violated the Davis-Bacon Act, thereby privileging Can-Am's lawsuit from preemption. True, in its Supplemental Decision, the Board acknowledged both that Can-Am analogized Davis-Bacon cases to similar California laws, and that, in its original Decision, it *sua sponte* discussed how

Kingston Constructors intersects with the instant case. Neither fact, however, is a substitute for Can-Am's duty to specifically apprise the Board that it believed the actual comingling of federal Davis-Bacon funds in the JTP account deprived the JTP of Section 7 protection, or to contest the Board's *sua sponte* analysis in a motion for reconsideration. Importantly, in its brief, Can-Am does not dispute the Board's finding that it never specifically raised the Davis-Bacon issue before the Board. These failures deprive the Court of jurisdiction to consider whether the presence of any Davis-Bacon funds in the JPT remove it from the Act's protection. *See Woelke & Romero*, 456 U.S. at 666-77; *Garment Workers Union*, 420 U.S. at 281 n.3.

Indeed, this case is controlled by the Court's decision in *NLRB v. Sambo's Restaurant, Inc.*, 641 F.2d 794, 796 (9th Cir. 1981). There, the Board *sua sponte* ordered certain remedies that had not been litigated below; the employer challenged those remedies before the Court without first asking the Board to reconsider. The Court held that where, as here, a party fails to raise an issue before the Board, but the Board speaks to it anyway, and the party then does not move for rehearing or reargument in order to present its theory of the case, that party may not raise the issue for the first time before the Court of Appeals. *Id.* The Court emphasized that this is true even where the party could not have foreseen raising the issue in the course of the original Board proceeding. *Id.* As in *Sambo's*, Can-

Am's failure to put the Board on notice of its disagreement with the Board's *sua sponte* disposition of *Kingston Constructors* precludes further review of that issue at any further stage of the proceeding. *Cf. Barton Brands Ltd. v. NLRB*, 529 F.2d 793, 801 (7th Cir. 1976) (where employer failed to raise statute of limitations argument to the Board, Section 10(e) precluded resurrection of "the matter in this court or on remand").

Moreover, had the lineage of the Davis-Bacon issue been brought to the D.C. Circuit's attention, the court would likely have recognized that its consideration and remand of that argument represented a departure from its settled in-circuit precedent showing a rigorous application of Section 10(e) waiver in situations like this. That court's recent decision in *Highlands Hosp. Corp. Inc. v. NLRB*, 508 F.3d 28, 32-33 (D.C. Cir. 2007), highlights this point. In that case, the court found that the employer had never contested a specific part of the remedy in its exceptions to the judge's decision, and had objected only broadly to the "excessive breath" of the judge's recommended order. *Id.* at 33. The court held that the employer's single reference to the "excessive breath" of the remedy "was insufficient to satisfy [S]ection 10(e) because it failed to give the Board 'adequate notice' of the argument it seeks to advance on review." *Id.* (quotations omitted). The court observed that the Board on its own had considered the issue, but held that "the Supreme Court [and the court have] made clear . . . that '[t]he § 10(e) bar

applies even though' the Board has decided an issue." *Id.* (quoting *Woelke & Romero*, 456 U.S. at 666). Accordingly, the Court held that it lacked jurisdiction to consider the employer's challenge to the bargaining order. *Id. See also UFCW Local 204 v. NLRB*, 506 F.3d 1078, 1087 (D.C. Cir. 2007) (a petitioner must seek Board reconsideration before it brings issue to the courts, even when the Board has discussed and decided the contested issue).

Admittedly, the D.C. Circuit considered the Board's *sua sponte* distinguishing of *Kingston Constructors* in its original decision, and did so aided by the parties' discussions of that matter in their briefs to that court. *See* Co. Br. 17-18 (available at SER 18-19); Bd. Br. 20-22 (available at 2002 WL 34245583, at *20-*22). Yet, Section 10(e) of the Act speaks to jurisdiction, and a failure to present an argument to the Board in the first instance deprives a reviewing court of jurisdiction to consider it, even if the issue had been engaged by the Board and the parties in their briefs. As the D.C. Circuit itself observed in *Exxel/Atmos, Inc. v. NLRB*, where the Board fully briefed an issue without arguing it had been waived: "It is of no moment that the Board neglected to invoke § 10(e) in its brief to this court" because "Section 10(e) 'speaks to courts, not parties,' and the Board cannot waive its jurisdictional requirements simply by neglecting to mention them before us." 147 F.3d 972, 978 (D.C. Cir. 1998) (internal citation omitted).

This logic similarly applies here: The D.C. Circuit was without authority to consider the Davis-Bacon argument in the first instance, and the parties' failure to bring that point to the court's attention does not retroactively confer jurisdiction for further proceedings. *Cf. Barton Brands*, 529 F.2d at 801. Thus, while Can-Am correctly notes (Br. 7-8, 14) that the Board could have asked the D.C. Circuit for rehearing or petitioned the Supreme Court for *certiorari*, the Board's failure to do so did not vest this Court with authority to hear Can-Am's previously waived argument, *nunc pro tunc*.

In sum, because the Board can only decide issues that are presented and litigated by parties, its determination that it could not undertake to resolve the issue of possible conflict between the Davis-Bacon Act and the Act as directed by the D.C. Circuit is a reasonable interpretation of its procedural rules and the requirements of Section 10(e) of the Act. Because Can-Am has not alleged any extraordinary circumstances to explain its failure to raise the issue before the Board or to move for reconsideration, this Court lacks jurisdiction to consider any challenge to the Board's Order based on the Davis-Bacon Act. *See Friendly Cab Co.*, 512 F.3d at 1103 n.10; *Apico Inns, Inc.*, 512 F.2d at 1174; *accord W&M Properties of Connecticut, Inc. v. NLRB*, 541 F.3d 1341, 1345-46 (D.C. Cir. 2008).

C. Can-Am's Remaining Arguments Have No Merit

Instead of arguing that it actually did preserve the Davis-Bacon issue, Can-Am devotes a substantial portion of its brief (Br. 4-5, 18-25) to challenging issues that are either not before the Court because they were considered and rejected by the D.C. Circuit, or have no merit. Those issues are addressed below.

Throughout its brief, Can-Am challenges generally the reasonableness of the Board's underlying finding that the JTP constitutes protected activity under Section 7. First, it argues (Br. 5-6, 22-24) that the Board erred by failing in this case to reconsider the decision in *Manno Electric* that found protected JTPs funded by wages earned on *privately financed* projects. Next, it argues (Br. 5-6, 25-26) that the Board misapplied the *Bill Johnson's* standard in its initial decision to find preempted Can-Am's state-court lawsuit, which relied *only* on provisions of California law in contending that the JTP was protected. It further argues (Br. 5, 18-21) that "the law is still unsettled" on whether the Act preempts California's purported prohibition of employer acceptance of JTP subsidies derived from state prevailing wage projects.

Those arguments, however, were considered and settled by the D.C. Circuit. *See Can-Am Plumbing*, 321 F.3d at 150-51. Therefore, under the law of the case doctrine, the Court must deny Can-Am's attempt to relitigate them here. *See Arizona v. California*, 460 U.S. 605, 618 (1983) (noting that the law of the case

doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case"); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1467 (9th Cir. 1997) ("'The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case.'") (quoting *U.S. v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995)).

Conversely, Can-Am erroneously claims (Br. 16-18) that doctrines of *res judicata* and issue preclusion prevent the Board from recognizing, albeit belatedly, that the Davis-Bacon issue was never properly before the D.C. Circuit. In making that argument, Can-Am confuses jurisprudential doctrines designed to avoid unnecessary relitigation of issues with subject-matter jurisdiction. Unlike the judicially-created *res judicata* and collateral estoppel rules, Section 10(e)'s waiver provision confers jurisdiction, which can be challenged at any time in any proceeding. *See May Dept. Store v. Graphic Process Co.*, 637 F.2d 1211, 1217 (9th Cir. 1980) (holding that "[a] party may raise jurisdictional challenges any time during the proceedings" and determining to "dismiss an action on appeal if jurisdiction is lacking") (internal citations omitted).

Next, there is absolutely no support in the record for Can-Am's claim (Br. 8-9), raised here for the first time, that the Board failed to allow it "to substitute or modify its pleadings before the [Board] or in the State trial court." Board counsel

have combed the record, and find no evidence showing that Can-Am ever sought to make such changes. Interestingly, Can-Am has failed to cite any record support for its bald assertion.

Equally lacking is Can-Am's claim (Br. 12, 15) that the Board contravened the D.C. Circuit's "specific remand instructions" that it "make a factual inquiry as to how much federal Davis-Bacon Act money was in the [JTP]." Can-Am's argument should be rejected not only because, as shown above, that issue was waived, but also because it marks a "sea change" from the position that Can-Am advocated while the case was before the Board on remand. Thus, in its position statement that it submitted to the Board after the D.C. Circuit's remand, Can-Am specifically urged the Board not to remand the case to the administrative law judge for more evidence concerning the extent and duration of contributions to the JTP from Davis-Bacon Act projects. (SER 20-22: Employer's Letter Brief to the Board and Statement of Position on Behalf of Can-Am Plumbing, p. 2, 12.) According to Can-Am, such a remand would have been futile because "Counsel for the Union honestly represented to the [D.C. Circuit] that the Union lacked the records to reasonably estimate the percentage of JTP funds that came from wages on Davis-Bacon Act projects." (SER 21.) Can-Am argued that absent such evidence, the Board cannot create any meaningful standard for a *de minimis* level of contributions. (SER 21.) Thus, concluded Can-Am, "[t]his case is simply not a

trial of facts, but a trial of law, and therefore remand to the [] judge would be futile." (SER 21.) In that light, Can-Am's argument to the Court that further fact finding was necessary is disingenuous at best.

Finally, Can-Am's attack on the enforceability of the Board's Order on "mootness" grounds is unpersuasive. The Board's Order is not moot simply because, as Can-Am claims (Br. 6, 15-16, 26-27), Can-Am may have sought to amend its state court lawsuit to allege a Davis-Bacon violation (presumably bringing this case under *Kingston Constructors*) and then may have subsequently settled and dismissed that lawsuit (complying with one provision of the Board's Order). To the contrary, in its brief, Can-Am admittedly refuses (Br. 26) to comply with the Order's posting provision, and thus falls short of what is required for full compliance. Moreover, compliance with the Board's Order also requires Can-Am to "file with the [Board] a sworn certification . . . attesting to the steps that [Can-Am] has taken to comply" (ER 151); Can-Am has never informed the Board of the compliance actions it now claims to have taken. Thus, because Can-Am has not yet complied with the Board's Order, the case is not moot.[15]

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[15] In any event, even if Can-Am had fully complied with the Board's Order, the Board is still entitled to enforcement. *See NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567 (1950) ("We think it plain . . . that the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court.").

In sum, the court's remand mandate required the Board to decide whether the presence of Davis-Bacon money in the JTP rendered it unprotected under the Act, an issue not squarely presented in the underlying proceeding. The Board properly determined that adherence to the court's order would have required the Board to ignore its fundamental procedural rules, which preclude consideration of issues not litigated. Because Can-Am does not allege "extraordinary circumstances" for its failure to litigate the issue before the Board, this Court cannot consider the issue. 29 U.S.C. § 160(e). *Accord Apico Inns, Inc.*, 512 F.2d at 1174. Accordingly, the Board is entitled to enforcement of its Order, given the D.C. Circuit's approval of the issues actually litigated in the first instance. *See NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 389 (1946) ("Justification of . . . an order . . . is not open for review by a court if no prior objection has been urged before the case gets to the court . . . .").

CONCLUSION

For the foregoing reasons, the Board respectfully asks that the Court enter judgment enforcing, in full, the Board's Supplemental Decision and Order, which affirms the Board's original Decision and Order. (ER 278.)

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August 2008

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
	*	No. 08-70521
v.	*	
	*	Board No.
CAN-AM PLUMBING, INC.	*	32-CA-16097
	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,729 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

s/Linda Dreeben_____
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Dated at Washington, DC
this 4th day of August, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief and supplemental exercpts of record in the above captioned case, and has served two copies of that brief and the supplemental exercpts of recods by first-class mail upon the following counsel at the addresses listed below:

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Dated at Washington, DC
this 4th day of August, 2008