Associated Builders and Contractors, Inc., Golden Gate Chapter *and* Locals 180, 302, 332, 340, 442, 551, 595, 617, and 684, International Brotherhood of Electrical Workers. Case 32–CA–15647

May 16, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On July 1, 1997, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Parties filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Associated Builders and Contractors, Inc., Golden Gate Chapter, Dublin, California, its officers, agents, successors, and assigns, and all its employer members doing business in Northern California, shall take the action set forth in the Order.

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining a lawsuit against the Charging Parties, we do so solely on the ground that the Charging Parties' job targeting program is concerted, protected activity and that, under *Manno Electric* 321 NLRB 278, 298 (1996), enfd. per curiam mem. (5th Cir. 1997), Respondent's maintenance of its lawsuit constitutes an interference with conduct that is actually protected by Sec. 7. We find it unnecessary to pass on his analysis of the General Counsel's second theory under *Loehmann's Plaza*, 305 NLRB 663 (1991). We also note that in applying *Manno Electric* to the present case, the judge found that the Respondent violated Sec. 8(a)(1) by maintaining the lawsuit after the issuance of *Manno* on May 22, 1996. In the circumstances here, where the General Counsel has not filed exceptions to the judge's prospective application of *Manno* and has indicated in his answering brief that a prospective application is acceptable, we adopt the judge in this matter as well.

Member Hurtgen concludes that there is a violation under *Loehmann's Plaza*, supra, rather than under *Manno Electric*, supra. Thus, in his view, the violation began on December 23, 1996 (when the General Counsel issued complaint), rather than May 22, 1996 (when the Board issued its decision in *Manno*). In this regard, he notes that the violation here began when the *instant lawsuit* became preempted. That occurred when the General Counsel formally placed the instant unfair labor practice case before the Board. See *Loehmann's*. It did not occur when the Board declared that the lawsuit in *Manno* was preempted. The fact that the lawsuit in *Manno* was similar to the instant one does not mean that the lawsuit here became preempted at the moment when *Manno* was issued. Rather, under *Loehmann's*, the preemption occurred only when the General Counsel issued the complaint.

Jeffrey L. Henze, Esq., for the General Counsel.

Mark R. Thierman and *Carriel Freeston, Esqs. (Thierman Law Firm),* of San Francisco, California.

Robert E. Jesinger, AW (Wylie, McBride, Jesinger, Sure & Plattan), of San Jose, California, and *Peter D. Nussbaum, Esq.,* on brief, *Jeffrey B. Demain* and *Scott A. Kronland, Esqs. (Altshuler, Berzon, Nussbaum, Berzon & Rubin),* of San Francisco, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned case in trial on March 24, 1997, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 32 of the National Labor Relations Board (the Board) on December 23, 1996. The charge, docketed as Case 32–CA–15647, was filed on September 3, 1996, by Locals 180, 302, 332, 340, 442, 551, 595, 617, and 684, International Brotherhood of Electrical Workers, AFL–CIO (the Charging Parties or the Locals) against the Associated Builders and Contractors, Inc., Golden Gate Chapter (the Respondent). Posthearing briefs were due on June 2, 1997.

The complaint, as amended at the hearing, generally alleges that the Respondent filed a lawsuit against the Charging Parties in the Superior Court in and for the city and county of San Francisco, California, against the Unions and has filed, maintained, and advanced that lawsuit (sometimes the lawsuit) through various stages and in various courts thereafter violating Section 8(a)(1) of the Act. The Respondent admits its actions respecting the litigation, but denies that its conduct has violated the Act.

FINDINGS OF FACT

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including helpful briefs from the General Counsel, the Charging Parties, and the Respondent, and from my observation of the witnesses and their demeanor, I make the following[1]

I. JURISDICTION

The Respondent, a California corporation, with an office and place of business in Dublin, California, operates a not-for-profit trade association comprised of "nonunion" employers in the construction industry. The Respondent's member employers collectively, and numerous members individually, meet one or more of the Board's jurisdictional standards. The Respondent, itself, in the year preceding the issuance of the complaint, supplied services valued in excess of $50,000 to members of the Respondent who themselves meet one of the Board's jurisdictional standards other than indirect inflow or indirect outflow.

The above facts establish, and I find, that the Respondent and its member employers individually meeting the Board's jurisdictional standards as described above, are employers within the meaning of Section 2(2) of the Act and are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] As a result of the pleadings and the stipulations of counsel, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

Respecting matters relevant herein including the maintenance of the lawsuit described infra, the Respondent has functioned as an agent of its members within the meaning of Section 2(13) of the Act. As an agent of its members as discussed below, the Respondent is now and has at all times material been a person and an employer engaged in commerce within the meaning of Section 2(1), (2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

The Charging Parties are, and each of them is, labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. The job targeting programs

The Charging Parties are constituent locals of the International Brotherhood of Electrical Workers and represent employees in the electrical trade in various geographical areas in Northern California. Many represented employees are employed by "union" construction contractors who compete against "nonunion" contractors for construction work. The Charging Parties favor the success of the employers who employ their members, but are aware that the "nonunion" contractors have significantly lower total wage and benefit costs than "union" contractors who are often at a competitive disadvantage in bidding for particular construction work.

Given this circumstance, all the Charging Parties save Local 442 have at relevant times put in place and maintained job targeting programs (sometimes JTPs) designed to assist "union" contractors compete on particular jobs. While the particular JTPs operated by the various Locals are not identical in provisions, procedures, or precise operation, generally they work as follows. An employer with a contract with the Local informs the Local of particular jobs for which the employer faces "nonunion" competition. The Local applies its own criteria to determine if the particular job should be "targeted." In the event the Local chooses to "target" the job, the Local—utilizing the signatory contractor's estimate of the total hours of work the job will entail and the per work hour subsidy amount it wishes to commit to the project—arrives at a total target amount.

The Local notifies the signatory contractor or contractors of the targeted amounts committed by the Local to the particular job and the contractors presumably take the commitment into account in biding on the targeted job. In the event a signatory contractor in fact gets the targeted work, the agreement between the signatory contractor and the Local is formalized and, given compliance with that formal agreement, the contractor receives as a directly paid subsidy the established hourly amount for each hour worked on the job by the contractor's represented employees up to the estimated maximum number of hours. Save for the moneys paid under the agreement, the employer, the represented employees, and the Local follow the collective-bargaining agreements as on non-JTP jobs.

The JTP funds the Locals pay to the contractors are obtained from Local members' "working dues" which are based on the employees' hours of work. The dues are authorized by the membership in a secret-ballot vote. The Locals have various procedures for the payment of such dues, but in every case all moneys are paid from employees' wages which are the sole source of JTP payments to contractors.

2. The lawsuit

On July 8, 1994, the Respondent filed an action[2] in San Francisco Superior Court against the Charging Parties.[3] The complaint was captioned a "Complaint for Injunction, Disgorgement and Equitable Relief to Stop Job Targeting with Public Works Money Business & Professions Code §§ 17200 et. seq." Paragraph 3 of the lawsuit asserts, in part:

> In addition to bringing this action for the benefit of itself, its members and the general public pursuant to California Business and Professions Code Section 17204, ABC brings this action it its own name on behalf of its members because: (a) its members would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purpose: and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

The lawsuit contends that each Charging Party[4] operated a JTP from 1990 to the filing of the suit which was, inter alia, an "unlawful, unfair and fraudulent business act or practice" in violation of California Business & Professions Code §17000 which generally prohibits unfair business practices. The Respondent's lawsuit by its terms sought to preclude the Charging Parties' use of JTPs on state public work projects and sought the disgorgement of all moneys deducted from employees' wages used for JTP payments and other relief.

The Charging Parties filed an answer on or about August 22, 1994, admitting, save for Local 442, the existence and operation of job targeting programs in each Local, denying that they had violated the law and alleging, inter alia, the lawsuit was preempted by Federal law. On the same date, counsel for the Charging Parties wrote to counsel for the Respondent requesting that Local 442 be dismissed from the lawsuit without prejudice based on the representation that Local 442 "has never had a job targeting program."

The Charging Parties filed a notice of removal with the United States District Court, Northern District of California[5] based on a preemption theory. In that Federal action, District Court Judge William Orrick denied the Respondent's motion to remand the matter to state court on December 15, 1994, and entered judgment on the pleadings for the defendant Charging Parties dismissing the action on June 1, 1995. Thereafter, the Respondent filed a timely appeal of Judge Orrick's decision with the United States Court of Appeals for the Ninth Circuit.

On March 27, 1997, the circuit court[6] reversed the District Court's decision and remanded the action to state court. On May 12, 1997, the circuit panel, amending its original decision

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[2] The filing was captioned: Associated Builders and Contractors, Inc., Golden Gate Chapter v. International Brotherhood of Electrical Workers, AFL–CIO (IBEW): Local Union No. 302, Local Union No. 180, Local Union No. 332, Local Union No. 340, Local Union No. 442, Local Union No. 551, Local Union No. 591, Local Union No. 595, Local Union No. 617, Local Union No. 684, and Does 1–150, inclusive, docketed in the Superior Court as Case 962220.

[3] Local 591 was also named. That Local has merged with Local 595 and is no longer a separate entity.

[4] Local 442 was specifically named as a defendant and, at par. 31 of the complaint, the Respondent alleged: "upon information and belief and based upon reports filed with the United States Department of Labor" Local 442 collected $80, $665 in job targeting money in its fiscal year 1992.

[5] Docketed as C–94–02890–WHO.

[6] 109 F.3d 1353 (9th Cir. 1997).

in part, denied the Charging Parties' petition for rehearing and the Charging Parties' suggestion for rehearing en banc. The opinion of Circuit Judge Fletcher addresses in substantial part the issue of whether or not the state law claims of the Respondent were preempted by § 301 of the Labor Management Relations Act of 1947 as the Federal District Court had ruled. The opinion found the Respondent's state lawsuit was not properly preempted "for § 301 preemption purposes." It vacated the Federal District Court's decision and remanded to the district court with instructions to remand to the state court with the following caveat at footnote 7:

> In so holding, we do not express a view on the merits of ABC's state-law claims. Furthermore, our decision in no way precludes appellees from raising the defense of federal labor law preemption in state court. See *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959) (when an activity is arguably subject to Section 7 or 8 of the National Labor Relations Act, the states as well as the federal courts must defer to the exclusive proficiency of the National Labor Relations Board); *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Commin,* 427 U.S. 132 (1976) (self-help economic activities must be free of state regulations so that Congressional intent in enacting the fedeeral law of labor relations will not be frustrated). These issues, however, must be addressed by the state court in which they were originally filed.

At the time of the final filing of positions by the parties, the lawsuit was in the process of moving from the Federal Circuit Court to the district court and on to the State Superior Court.

B. Analysis and Conclusions

1. Preliminary matters

a. The Respondent's assertion the Board lacks jurisdiction

The Respondent contends on brief at 2:

> [T]he Regional Director lacks jurisdiction to issue a complaint since the Respondent is not an employer under Section 2(2) of the Act. As alleged by the Regional Director, an agency relationship exists between the Respondent and its members. However, such a relationship cannot exist for the purposes of this action since the Respondent does not "represent" any employers for purposes of labor relations: the association neither engages in collective bargaining on behalf of its members nor directs the course of [their] labor relations.

The General Counsel, in the original complaint at paragraph 3, subparagraph (a) alleged that the Respondent was acting as an agent of its members "with respect to multiple trade and labor relations matters, including the Lawsuit defined herein below." The Respondent's claim that it does not engage in labor relations is insufficient to defeat this allegation. I find the lawsuit itself to have been undertaken by the Respondent on its members behalf and that this fact alone is sufficient to meet the evidentiary requirements to establish the Respondent's agency for purposes of the instant action.

As noted, supra, the lawsuit filed and maintained by the Respondent on its face represented at paragraph 3:

> In addition to bringing this action for the benefit of itself, its members and the general public pursuant to California Business and Professions Code Section, Respondent brings this action in its own name on behalf of its members because: (a) its members would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purpose: and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

The record contains no suggestion that the lawsuit was modified in these regards during the various stages it has experienced to date.

In the absence of contrary evidence and based on the original pleadings, I find that the Respondent in filing the lawsuit was acting, as it asserted in the complaint, on behalf of its members and that the Respondent is therefore properly named and included in the complaint on that basis. I further find that the Respondent is properly included as an employer in its own right. Further, as the Board noted in *Manno Electric,* 321 NLRB 278 fn. 3 (1996), it is appropriate to include individuals as respondents in wrongful lawsuit unfair labor practice proceedings to "avoid frustrating the remedial purposes of the Act" where there is established responsibility for filing and maintaining the challenged lawsuit.

The General Counsel amended his complaint at the hearing without objection by the Respondent to specifically allege: (1) that the Respondent was also an employer with at least one statutory employee; (2) that the Respondent on its own met the Board's jurisdictional standards; and (3) that the Respondent was an employer within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent amended its answer to admit the former two amended allegations. Based on the amended complaint and answer, I found, supra, in the jurisdictional section of this decision that the Respondent was an employer engaged in commerce. Thus, there is a second, independent, basis for finding the Respondent subject to the strictures of the Act.

Given all the above, I find the Respondent's jurisdictional argument lacks merit.

b. The Respondent's assertion of a 10(b) defense

The Respondent contends that since the lawsuit was filed substantially more than 6 months before the filing of the charge and, since no actions were undertaken by it in furtherance of its lawsuit during the 6-month period preceding the filing of the instant charge, the case must be dismissed. The General Counsel responds with the Board's decision in *Roofers Local 30 (Grundle Construction Co.),* 307 NLRB 1429, 1430–1431 (1992), enfd. 1 F.3d 1429 (3d Cir. 1993). The case stands for the proposition that the refusal to withdraw a lawsuit may be an action sufficient to violate Section 8 of the Act. In agreement with the General Counsel and in reliance on the cited case, I find Section 10(b) of the Act to be no impediment to the allegations of the complaint.

c. The Respondent's assertion of misconduct and prosecutorial bias and prejudice

(1) Alleged bias of the General Counsel

The Respondent asserts on brief at 3–4:

> If any complaint can be characterized as retaliatory, it is the complaint issued against Respondent in this action. Respondent has vigorously campaigned against the policies of this General Counsel and has testified before Congressional hearings on the misuse of the NLRB's budget in bringing frivolous 10(j) actions instead of normal unfair labor practice procedures. Respondent has every right to

> petition the government to remedy illegal practices occurring in the bidding process for state public work contracts. See testimony of Fred Feinstein attacking Mark R. Thierman's letter to Congressman Fawell, 1995 BNA Daily Labor Report 207, d34 (Oct. 26, 1995) (Attached [to the Respondent's brief] as Appendix A).
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> Considering that the JTP as operated by the Charging Parties necessarily skews the prevailing wage rate, it is incomprehensible how ABC's action, even if unsuccessful, can be retaliatory, let alone baseless. The only reason for the General Counsel to stretch the law to this extreme is to punish Respondent for its right to express a political view opposed by the General Counsel.

Fred Feinstein at all relevant times has been the General Counsel. Mark Thierman has at all relevant times been counsel for the Respondent both in the lawsuit and herein.

The relevant portion of the General Counsel's statement to Congress in the noted reference occurs in a discussion of Board use of Section 10(j) of the Act:

> In this respect, I must take issue with the testimony of Mr. Thierman concerning the Petrochem case. As the attached letter from Regional Director James Scott to Representative Frank Riggs suggests, and as is further supported by the District Court's grant of a 10(j) injunction—under the "high" 9th Circuit standard—I believe the Region was warranted in proceeding as it did in that case.

The Respondent's briefs appendix also contains the referenced letter from Regional Director Scott to Congressman Riggs. That letter defends Regional actions in the Petrochem case—a case not in any way connected to the instant case—in which Thierman represented the respondent.

Having considered all the above, I find there is insufficient evidence of bias and prejudice on behalf of the General Counsel toward counsel for the Respondent to allow me to deal with the instant complaint on any basis other than its merits.[7] I simply find no basis for discounting or dismissing any or all of the complaint allegations because of prosecutorial misconduct on the part of Fred Feinstein. The Respondent's argument is therefore rejected.

(2) Alleged misconduct by the Regional Director

By motion dated June 17, 1997, the Respondent moves that the complaint be dismissed because the Regional Director for Region 32 sent to both counsel for the Respondent and directly to the Respondent, with copies to the Charging Parties and their counsel herein, a variant of the *"Loehmann's* letter"[8] sent by Regional Directors announcing the issuance of an unfair labor practice complaint and the assertion that a particular lawsuit is preempted by virtue of such complaint. The letter at issue, dated June 10, 1997, identifies the instant case and lawsuit.[9] It asserts that under *Manno Electric,* supra*,* 321 NLRB 278, 295–298, and *Loehmann's Plaza,* supra*,* 305 NLRB 663, the state court jurisdiction is preempted. The Regional Director's letter concludes:

> Accordingly, be advised that you are required, within 7 days from the date the United States District Court remands this case to the state court, to cease and desist from prosecuting said state court lawsuit and to take all necessary steps to seek a stay of the state court proceeding. If Associated Builders and Contractors, Inc., Golden Gate Chapter fails to heed these instructions, it may be subject to additional liability under Section 8(a)(1) of the Act.

The Respondent's objection is not to the Regional Director's issuance of the letter, but rather to the service of the letter directly on his client, the Respondent. Counsel argues the letter is "direct communication to a client known to be represented by counsel [and] is calculated **to undermine the confidence of the client in its lawyer, thus eroding the attorney client relationship."** [Emphasis in original.]

The General Counsel filed a response on June 24, 1997, arguing: (1) that there is no prohibition in the Board's Rules and Regulations respecting ex parte communications by the General Counsel with a litigant, (2) were in some fashion the communication an improper communication the matter would never involve any remedy limiting the complaint, and (3) the communication at issue was a Board directed communication which must be served on the Respondent as well as its counsel. The Respondent, on June 26, 1997, filed additional argument.

I accept as correct counsel for the Respondent's contention that the submitted letter was sent to the parties named on its face, including the Respondent directly as well as counsel for the Respondent, on or about the date it bears. I find, however, as the General Counsel argues, that the letter complained of is more in the nature of a formal action by the Regional Director such as the issuance of a complaint or notice of hearing, which under the Board's Rules are to be served on the parties directly as well as on their counsel. Such documents, like the instant complaint, the various notices of hearing dates, notices of hearing postponements, etc., were uniformly sent both to counsel and to the parties directly including the Respondent. Indeed the instant decision will be so served.

I do not find such documents constitute potential "skip counsel" communications. I therefore find the Regional Director in issuing the attached letter has not engaged in misconduct. I therefore overrule the Respondent's motion to dismiss the complaint based on such alleged misconduct.

2. Basic law of wrongful litigation under the Act

Before considering the views of the parties on the merits of the allegations, it is appropriate to briefly consider the highlights of the relevant decisional law respecting lawsuits under the Act.

a. The utilization of state judicial processes to achieve a result inconsistent with the Act

From the very beginning of the administration of the Act the relationship between the Act's regulation of activities falling within Sections 7 and 8 of the Act and the various laws of the several States has been contentious and the cases addressing

[7] Were it otherwise, issues would remain respecting whether the materials included with the Respondent's posthearing brief are properly considered.

[8] The Board in *Loehmann's Plaza,* 305 NLRB 663 fn. 56 at 671 (1991), suggested the General Counsel issue to the parties and the relevant court the type of letter at issue, herein, and provided a model at appendix C pp. 675–676. The practice has apparently been followed thereafter by the General Counsel. See, e.g., a similar letter in *Geske & Sons,* 317 NLRB 28, 49 (1995).

[9] Although the record does not make it clear, the lawsuit may have been formally returned or at least been in the process of being returned to the state court from the Federal court prompting issuance of the letter.

that conflict have often reached the Supreme Court. Justice Frankfurter for the Court in *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244–245 (1959):

> When it is clear or may be fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8 due regard for the federal enactment requires that state jurisdiction must yield.
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> . . . .
>
> At times it has not been clear whether the particular activity regulated by the States was governed by §7 or §8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.
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> . . . .
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> When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.
>
> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by §7, or prohibited by §8, then the matter is at an end and the States are ousted of all jurisdiction.

The Supreme Court further held in *Brown v. Hotel Employees Local 54,* 468 U.S. 491, 502–503 (1984), that where a respondent attempts to "regulate conduct that is actually protected by federal law . . . preemption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right."

The doctrine is not without subtlety. In *Sears, Roebuck v. Carpenters,* 436 U.S. 180 (1978), the Court made clear that there are situations where preemption does not occur respecting arguably protected activity unless and until the Board becomes involved in the matter. In *Longshoremen ILA v. Davis,* 476 U.S. 380 (1986), the Court addressed the timing of preemption in the context of various types of Board involvement.

The Board's approach to situations where a respondent sues in a state forum seeking a result inconsistent with Section 7[10] or 8 of the Act has evolved in light of the Court's holdings. In *Loehmann's Plaza,* 305 NLRB 663 (1991), the Board established a process of analysis for determining state lawsuit preemption issues. While the Board decision discusses relevant Board and court law at length and presents its analysis in depth, relevant here in abbreviated form is the Board's determination that, with respect to "arguably" preempted matters, respondents' lawsuits are not preempted and the respondents' pursuit of the litigation, by virtue of the fact of preemption,[11] is not illegal prior to the time the General Counsel issues his complaint. When the General Counsel has issued an unfair labor practice complaint respecting the matter, the matter is thereafter, by virtue of the simple fact of issuance of the complaint, preempted and the continued pursuit of the state court lawsuit by the respondent thereafter violates Section 8(a)(1) of the Act irrespective of the existence of a retaliatory motive of the respondent in pursuing the state court litigation.

b. The baseless and retaliatory lawsuit

The Board has found respondents' initiation and prosecution of lawsuits-independent of issues of preemption-violate the Act where they seek to retaliate against activity protected by the Act. The Board in such cases looks to the existence of a "reasonable basis upon which to assert" the lawsuit as well as other factors in determining if the respondent prosecuting the lawsuit did so with an illegal motive. See, e.g., *Power Systems, Inc.,* 239 NLRB 445 (1978).

The Supreme Court in *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983), considered the Board's handling of state lawsuits contended to be baseless and prosecuted with improper motive. The Court agreed with the Board that improperly motivated lawsuits in state courts lacking a reasonable basis could violate the Act. The Court held, however, that the Board may not halt a state courts lawsuit regardless of the plaintiff's motives unless the suit on its merits lacked a reasonable basis in fact or law. The Court held that where genuine issues of material factual or state-law disputes are presented, the Board must defer judgment and await the state courts' determination of the merits of the lawsuit. The Court clearly separated this type of case from the cases involving Federal preemption asserting in part at footnote 5:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. [Citations to litigant briefs omitted.] Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting suits for enforcement of fines that could not be lawfully imposed under the Act, [citations omitted] and this Court has concluded that, at the Board's, request, a District Court may enjoin enforcement of a state-court action "where [the Board's] federal power pre-empts the field." *NLRB v. Nash-Finch Co.,* 404 U.S. 138, 144 (1971).

3. The General Counsel's theories of a violation of Section 8(a)(1) of the Act

The General Counsel argues that the Respondent's prosecution of and failure to withdraw the lawsuit violated Section 8(a)(1) of the Act under four separate theories.

The Government's first theory is that the instant case is controlled by the Board's decision in *Manno!Electric, Inc.,* 321 NLRB 278 (1996), which held that job targeting programs are protected concerted activities under the Act and state lawsuits suits attacking such activities are contrary to and preempted by the Act. The General Counsel and the Charging Parties argue

[10] While only employees engage in Sec. 7 activities, suits against labor organizations may be regarded as injurious to the Sec. 7 rights of the union's represented or otherwise involved employees. *Diamond Walnut Growers, Inc.,* 312 NLRB 61, 69 (1993), enfd. 53 F.3d 1085 (9th Cir. 1995).

[11] The pursuit by a respondent of pre-NLRB complaint state court litigation, like other state litigation, generally, may violate the Act under a separate type of analysis established by the Supreme Count in *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983). The *Bill Johnson's Restaurants* doctrine is discussed immediately, infra.

that since the Charging Parties' job targeting programs are attacked by the Respondent in its state lawsuit, which lawsuit was, therefore, clearly preempted by the National Labor Relations Act on May 22, 1996, the date the Board's decision in *Manno Electric* issued, the Respondent's actions thereafter in maintaining its lawsuit violated Section 8(a)(1) of the Act. Under this *Manno Electric* theory, which, the General Counsel argues, has its roots in the Court's decision in *Brown,* supra, the Respondent's action in maintaining and inaction in declining to withdraw its lawsuit has been illegal and in violation of Section 8(a)(1) of the Act at all times on and after May 22, 1996, irrespective of questions of the Respondent's motivation in maintaining and refusing to withdraw the action. Thus, the General Counsel argues that Board law is clearly established on the issues of JTPs being protected activity and that state lawsuits challenging them are preempted. Accordingly, argues the General Counsel on brief, since the critical facts are not in dispute, finding a violation herein should be essentially automatic. He argues on brief at pages 7–8:

> In the instant case, the Board has already held in *Manno* that operating a job targeting program constituted activity that is *actually protected* [underlining in original] by Section 7 of the Act.[5] Furthermore, the Board held in *Manno* that an employer violated Section 8(a)(1) by filing and prosecuting a lawsuit which sought to declare this JTP to be illegal under a Louisiana state law. In the face of the *Manno* decision, the Respondent has continued to prosecute the Lawsuit seeking to have the instant JTP's found unlawful under a different state law.[6] If the Respondent prevails in this suit, the Unions will be placed in a position where they are faced with conflicting federal and state decisions where compliance with both would be a "physical impossibility." The Court in *Florida Lime* [*& AlIvocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963),] held that a state court statute or lawsuit which attempts to achieve this goal is preempted by the Supremacy Cause. Accordingly, the instant case boils down to a routine application of established law (i.e., *Manno*) to a stipulated set of facts. Such a process can have no result other than a finding that the Lawsuit was preempted from the date that *Manno* issued. [Footnote omitted.]

[5] In *Manno,* the Board held that certain job targeting programs constituted activity that was actually protected under the Act. While these job targeting programs are not the same ones that are at issue in the instant case, both sets of programs are run by locals of the International Brotherhood of Electrical Workers, and both sets of programs, in all material aspects, are identical. According, under *Manno,* it has already been established that the instant job targeting programs are actually protected as well. Any contention by the Respondent that the General Counsel is required to relitigate, in each new employer attack on an IBEW job targeting program, that said program was actually protected as well, is simply an invitation for the Administrative Law Judge to overrule *Manno,* something which is beyond the scope of his authority.

[6] Since the *Manno* decision did not issue until May 22, 1996, the Respondent was only on notice that its suit was preempted as of that date. However, since the Respondent continued to prosecute the Lawsuit after that date, its conduct was unlawful from that date on.

The General Counsel's second theory is that the Respondent's state lawsuit was preempted in its entirety as of the date the instant NLRB complaint issued. This lesser included theory is similar to the initial theory set forth above, but takes the more conservative view that the Respondent's state court lawsuit against the job targeting programs was not clearly preempted but rather "arguably" preempted and, therefore, under *Loehman's Plaza*, 305 NLRB 663 (1991), was preempted only upon the issuance of the General Counsel's complaint herein on December 23, 1996, and the Respondent's conduct in supporting and maintaining the lawsuit, while perhaps not violative of the Act until that date, became so thereafter.

The Government's third theory is limited to the special situation of Local 442 which, there is no dispute, has never been involved with a job targeting program. The General Counsel argues that well before March 3, 1996, the limit of the reach of the current charge under the 6-month limitation of Section 10(b) of the Act, the Respondent knew or should have known this was true and therefore that Local 442, under any and all theories in contest, was not a proper defendant in its state court action. Accordingly, the lawsuit is without factual support and is "baseless" with respect to Local 442, since that entity never operated nor maintained a job training program. The General Counsel and the Charging Party Local 442 argue the maintenance of a baseless lawsuit against Local 442 by the Respondent on the facts of this case should be held retaliatory. Given these two findings, the Respondent's maintenance and failure to withdraw its lawsuit as to Local 442 should be found violative of Section 8(a)(1) of the Act with respect to Local 442.

Fourth and finally, the General Counsel asserts that respecting the lawsuit as to all Charging Parties, even if it is found that the Respondent's state lawsuit is not preempted, it should be found to be baseless and retaliatory and hence a violation of the Act citing the Court's decision in *Bill Johnson's Restaurants,* supra. Under this fourth theory, the General Counsel urges that the final analysis of the issue of the lawsuit's merit should be deferred until the state lawsuit has been dismissed or withdrawn.

The Charging Parties substantially support the General Counsel's positions and arguments, although they argue it is unnecessary on the facts of this case to defer any determinations until the conclusion of the state lawsuit. The Respondent opposes each theory of a violation of the Act. The General Counsel's arguments and the arguments of the Charging Parties and the Respondent will be addressed below.

4. The General Counsel's *Manno Electric* theory

As noted, the Government argues that the Respondent's lawsuit was preempted in its entirety on May 22, 1996, the date the Board issued its decision in *Manno Electric,* 321 NLRB 278 (1996). In *Manno* the Board considered an employer's state court lawsuit against a local of the International Brotherhood of Electrical Workers sounding, in part, in a claim that the local participated in a job targeting program which was intended to benefit union members and union signatory contractors to the detriment of the employer and other nonunion contractors and, in so doing, committed unfair trade practices and wrongfully and intentionally damaged the employer. The General Counsel alleged that the employer's filing and maintenance of its state lawsuit violated Section 8(a)(1) of the Act. The Board found a violation of the Act in the employer's maintenance of the lawsuit against the job training program and affirmed[12] the administrative law judge who analyzed the issue as follows at 298:

[12] The Board panel in *Manno* comprised of Chairman Gould and Members Browning and Cohen. Chairman Gould and Member Brown-

> In paragraph 5 [of the state lawsuit] the Plaintiff [in the state lawsuit, a respondent in the Board action] complains that a "job targeting program" was utilized by the Defendant [in the state lawsuit, the charging party local in the Board action] with the intent of injuring and restraining the trade of *Manno Electric* and benefiting the Union, its signatory employers, and its members. Whether the Plaintiff may pursue a state lawsuit on such a claim depends on whether the "job targeting program" is protected by the Act.
>
> The "job targeting program" is a practice utilized by the Union to make possible competitive bidding for jobs by union contractors against nonunion contractors. It works this way. The Union supplements the wages of the employees of certain union contractors so that they may bid on a parity with nonunion contractors whose payscale is lower. By this method the Union is able to maintain the union wage scale on the job and obtain work for its members. Obviously, it also benefits the union contractor.
>
> Section 7 [of the Act] provides that employees shall have the right "to engage in other concerted activities for the purpose of . . . other mutual aid or protection." The objectives of the "job targeting program" are to protect employees' jobs and wage scales. These objectives are protected by Section 7. Thus, the [P]laintiff's suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a)(1) of the Act. The claims which the Plaintiff sought to press were preempted.
>
> . . . .
>
> By instituting and pressing the lawsuit above described for a recovery grounded on matters preempted by the Act, the Respondents violated Section 8(a)(1) of the Act.

The Government in effect argues *Manno* is binding on me and depositive of the critical issues of this case: (1) that JTPs are clearly protected under Section 7 of the Act, (2) that state lawsuits, like the lawsuit herein, which attack JTPs are preempted, and (3) that the Respondent violated Section 8(a)(1) when it maintained the lawsuit after the issuance of *Manno.*

The Respondent argues that *Manno* was ill decided, has been superseded or reversed and, in all events, does not apply to the lawsuit at issue here. The General Counsel and the Charging Parties dispute each contention of the Respondent.

I need not address the scholarly arguments of the parties advanced skillfully and at length respecting the merits or lack of merit underlying the Board's *Manno* analysis and decision. If *Manno* is current law it binds me; inquiry into the quality of analysis, legal merits or correctness of result of a Board decision is not the task of an administrative law judge. This is also true of *Manno* and its findings. Thus, the value or lack of value of JTPs generally, whether or not they are protected activity under Section 7 of the Act or whether or not *Manno* should be reconsidered, if found applicable to the instant case. All these arguments are simply not appropriate for an administrative law judge to consider. Nor shall I do so in this case. It is always necessary and appropriate, however, to determine whether or not a given case has been modified or reversed by subsequent decisions of the Board or Supreme Court. It is also always appropriate to determine if a particular case applies to the issues at hand. I shall therefore limit my consideration of the arguments of the parties to these latter two areas.

The Respondent suggests that the preemption analysis of *Manno,* even if valid at the time of issuance, had been rejected by the Supreme Court's decision in *Califomia Labor Standards Enforcement v. Dillingham Construction,* 519 U.S. 316 (1997). *Dillingham* deals with preemption questions arising under the Employee Retirement Income Security Act (ERISA) and turns on the specific legislative and decisional history of that statute. A fair reading of both the majority opinion and the dissent makes it clear that the Court's analysis of ERISA matters in this area are specific to the statute. I do not find that the result in *Dillingham* commands the conclusion that the Supreme Court has modified or reversed the Board's decision in *Manno Electric.* In agreement with the Charging Parties and the General Counsel, I find *Manno is* current law and, therefore, binding on me.

The Respondent also argues on brief at 18 that *Manno* does not apply to the narrow facts of this case and, therefore, cannot be relied on:

> This decision, which did not involve a public works project, does not refute the fact that California's prevailing wage does not attempt to regulate dues checkoff, does not call into question the underlying collective-bargaining agreements, and does not concern a dispute properly before the NLRB. [Citations omitted.]

I find the Respondent's attempt to distinguish the holding in *Manno* also fails. The lawsuit in *Manno* sought and the lawsuit seeks to halt JTPs of the International Brotherhood of Electrical Workers which have been found to be protected concerted activities in the *Manno* case. The fact that statutory employees utilize JTPs on California Public Works programs does not render the activities less protected because of that fact nor in some manner diminish the preemption rationale in *Manno.* I find that what the Respondent is truly arguing is that *Manno* is badly or too broadly decided. That issue must be taken to the Board.

Given all the above, I find the General Counsel's argument that *Manno Electric* decision controls the instant case is correct. I find, therefore, that the Respondent by maintaining the lawsuit at all times after the date of issuance of the *Manno* decision on May 22, 1996, has violated Section 8(a)(1) of the Act.

5. The General Counsel's *Loehman's Plaza* theory of a violation

The General Counsel's second theory is that the Respondent's lawsuit under *Loehman's Plaza,* 305 NLRB 663 (1991), was preempted upon the issuance of the General Counsel's complaint on December 23, 1996, and the Respondent's conduct in supporting and maintaining the lawsuit after that date was violative of Section 8(a)(1) of the Act.

The Respondent argued at trial and on brief that the *Loehman's Plaza* decision the General Counsel relies on was based on *a* subsequently rejected doctrine *and is* no longer good law. The *Loehman's Plaza* decision relied on by the General Coun-

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ing adopted the judge's findings and conclusions relevant to this issue without comment. Member Cohen expressed a concurring view in part in fn. 4 at 278:

> [state court lawsuit] pars. 5 and 7 relate to arguably protected activity, and there is no evidence of malice. Accordingly, Member Cohen agrees that these paragraphs are preempted within the meaning of fn. 5 of *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983).
>
> In view of the above, Member Cohen does not pass on whether these paragraphs have an "unlawful objective" within the meaning of fn. 5.

sel here had two elements: (1) an access issue and (2) lawsuit/preemption issues. The lawsuit/preemption portion of the case ripened which the Board found a violation of the Act respecting an employer's denial of access. The access element in *Loehman's Plaza* was decided by the Board under the right of access doctrine contained in *Jean Country,* 291 NLRB 11 (1988), a doctrine specifically rejected by the Supreme Court the following year in *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992). In light of that Supreme Court decision the Board reconsidered and reversed the access element of its *Loehman's Plaza* decision and reaffirmed its earlier decision only to the extent consistent with its now reconsidered decision reported at *Loehmann's Plaza,* 316 NLRB 109 (1995) (*Loehman's Plaza II).* Having determined upon reconsideration that access was not improperly denied and no violation of the Act occurred in denying access, the Board in *Loehman's Plaza II* having found no improper denial of access therefore, also, reconsidered the derivative lawsuit issue and found the lawsuit was not in violation of the Act.

Although the Respondent is correct that the earlier *Loehman's Plaza* decision has been modified as noted, I do not find that its discussion of the preemption issues, nor its teachings respecting the issue of the timing of preemption nor the procedural aspects of preemption was later modified or is no longer good law. A similar argument against the preemption holdings in *Loehmann's Plaza* was rejected by the Board in *Geske & Sons,* 317 NLRB 28 (1995). And, as noted in the earlier cited cases, the Board continues to cite and rely on *Loehman's Plaza* respecting preemption matters. This being so, and on the basis of the analysis and cases cited, supra, I find *Loehmann's Plaza* remains good law and binds me. I therefore find that the General Counsel's secondary theory of a violation is also valid. I therefore sustain the violation alleged.[13]

6. The General Counsel's special theory respecting Charging Party Local 442

Separately and in addition to the other theories of the case, the General Counsel amended his complaint to allege that, with respect to Charging Party Local 442 alone, the Respondent's lawsuit lacked a reasonable basis and was retaliatory since Local 442 had never operated its own JTP nor participated in the JTP of other Locals.

Counsel for the Respondent, by letter dated April 15, 1996, asserted that he had reviewed relevant records and "it is obvious to me that I must have misnamed the local number and/or sought only prospective relief" in the lawsuit respecting Local 442. Counsel for the Respondent also indicated he had submitted to counsel for the Charging Parties the proper procedural mechanism whereby Local 442 would be dismissed from the state court action when and if the case is finally remanded to that forum. The General Counsel contests the relevance of the Respondent's posttrial efforts. Thus, at footnote 14, at 13 of his brief, the General Counsel argues:

> It is no defense that Respondent paid lip service at the hearing to the need to dismiss Local 442 from the Lawsuit. It does not appear that Respondent has taken any steps to accomplish this goal since the date of the unfair labor practice hearing other than sending the Union's Counsel a blank dismissal form with instructions for *him* [italics in original] to fill it out!

The General Counsel argues that the total lack of underlying factual support for the principal assertions of the Respondent in its lawsuit as to Local 442, especially after counsel for the Charging Parties specifically pointed out by letter to the Respondent's counsel that Local 442 did not have a JTP and sought the Respondent's dismissal of Local 442 from the lawsuit, is sufficient evidence to conclude the Respondent's motive for the lawsuit as to Local 442 was retaliatory citing *Bill Johnson's,* supra, 461 U.S. at 747; *H. W. Barss,* 296 NLRB 1286, 1287 (1989); *Phoenix Newspapers,* 294 NLRB 47, 48–50 (1989).

Based on the representations of counsel for the Respondent, noted supra, there seems no doubt that the lawsuit, insofar as Local 442 is concerned, will not be pursued to a determination on its merits, but rather will be dismissed or withdrawn. This being so, there is no basis for deferring resolution of the matter until the lawsuit as to Local 442 is formally concluded. Accordingly, and even though I have sustained the prior theories of a violation as to Local 442, a determination of this allegation will effect the remedy in this case, I shall, therefore, address the General Counsel's amended allegation.[14]

Dealing with the lawsuit count against Local 442 alone, there is no dispute that Local 442 never operated its own nor joined another Local's JTP. The lawsuit as to Local 442 is therefore baseless and without merit.

Turning to the issue of retaliatory motive, I am prepared to accept counsel for the Respondent's assertion that the lawsuit was initiated against Local 442 because the Respondent believed—albeit incorrectly—that Local 442, like the other Charging Parties operated or participated in a JTP. The issue before me for resolution however, is not the motivations of the Respondent in filing and initially maintaining the lawsuit.[15] Rather, I must determine the motive of the Respondent in maintaining the challenged litigation in and after March 1996—the period starting 6 months before the filing of the instant charge.

Counsel for the Respondent received the letter, quoted in part supra, from counsel for the Charging Parties asserting that Local 442 had never operated nor participated in a JTP in April 1994. By March 1996, the Respondent had been given more than a reasonable amount of time to verify the factual assertions made by the Charging Parties as to Local 442 or to pursue the matter further with counsel for the Charging Parties. The record is clear that at no time did counsel for the Respondent do so. Given these events, there is no doubt, and I find, that by March 1996 the Respondent knew or should have known that Local 442 had not operated or participated in a JTP and, that the lawsuit—under any and all theories of a violation of state law—improperly included Local 442 as a defendant. Given this

[13] The difference in the violations found is that under the *Loehmann's Plaza* theory the Respondent's violation of Sec. 8(a)(1) of the Act commenced on December 23, 1996. Under the *Manno Electric* theory the violation commenced on the earlier May 22, 1996 date.

[14] I have found, supra, that the Respondent violated Sec. 8(a)(1) of the Act respecting all Charging Parties under both a *Manno Electric* and a *Loehmann's Plaza* theory. Sustaining the General Counsel's theory of a violation here would move the date of the Respondent's commencement of a violation of Sec. 8(a)(1) to March 3, 1996. See also, fn. 16.

[15] Since the charge was filed on September 3, 1996, and Sec. 10(b) of the Act provides that no unfair labor practice may be found to have occurred more than 6 months preceding the filing of the charge, it is unnecessary to find that the Respondent should have withdrawn Local 442 from the lawsuit before March 3, 1996. The lawsuit was filed in 1994.

knowledge, I find the Respondent's continuation of the lawsuit as to Local 442 may be regarded as willfully negligent and retaliatory.[16]

Counsel for the General Counsel and the Charging Parties also argue that the lawsuit, was indisputably initiated and maintained by the Respondent to end or at least to impede and restrict the Charging Parties, including Local 442, and the Locals' represented employees use of JTPs. Noting the Board's finding in *Manno Electric* that JTPs are protected Section 7 activities, they argue further that the lawsuit is, therefore, of its very nature retaliatory against Section 7 activities and therefore retaliatory against Local 442. I agree.

Given all the above and based on the record as a whole, I find the Respondent's lawsuit as to Local 442 was without a reasonable basis, was meritless, and that the Respondent's motives respecting maintenance of the lawsuit as to Local 442, on and after March 3, 1996, were retaliatory against employees' Section 7 activities. Accordingly, I find that the Respondent's continued maintenance of its lawsuit against Local 442 at all times on and after March 3, 1996, violated Section 8(a)(1) of the Act. The complaint allegation is sustained.

7. The General Counsel's general *Bill Johnson's Restaurants'* theory

As the counsel for the General Counsel notes on brief, if he ultimately prevails under his preemption theories as discussed supra, the instant lawsuit will not be determined by the state court on its merits, but rather will be ended as part of the Respondent's compliance with a Board remedial order directing the Respondent withdraw or cause the dismissal of the lawsuit. In such a setting, counsel notes, the instant decision when and if it becomes final "will dispose of this entire matter without the need to hold any portion of this proceeding in abeyance." (G.C. Br. 16.)

The General Counsel argues, however, that it is possible that aspects of the preemption question will ultimately be resolved against the General Counsel and the portion of the complaint, paragraph 7, subparagraph (b), alleging that the lawsuit "may be rendered baseless, if and when the lawsuit's allegations are dismissed on the merits," will ripen for determination. Given this potential state of affairs, the General Counsel moves that I hold this portion of the complaint in administrative abeyance awaiting the final resolution of the lawsuit by the state court and at that time solicit the position of the parties to determine the appropriate course of action to be taken respecting the deferred allegations.

Counsel for the General Counsel emphasizes however that he does not seek that I defer making findings under complaint paragraph 7, subparagraph (b), on the issues of whether or not: (1) the lawsuit concerned Section 7 activities and (2) the lawsuit was filed for a retaliatory motive. Indeed, the General Counsel asserts the Board requires such findings by an administrative law judge in an unfair labor practice case involving a *Bill Johnson's Restaurants'* theory of violation not be deferred.[17]

I agree with the General Counsel that the allegations set forth in complaint subparagraph 7(b) should not be addressed unless, and until, the lawsuit has been finally dealt with by the state court and, that it is therefore, appropriate under *Bill Johnson's Restaurants* for the Board to stay its hand respecting this allegation until the lawsuit is concluded. It is also true, as the General Counsel points out, that the deferral issue arises in an unusual context in the instant case. This is so because the findings I have made, supra, in sustaining other allegations of the complaint, if ultimately sustained, will render a further determination respecting the allegations of complaint paragraph 7, subparagraph (b) unnecessary and a final determination on the merits of the lawsuit by the state court is impossible.

The Board's procedural mechanisms in *Bill Johnson's Restaurants'* cases for deferring rulings on state lawsuits until the state litigation is finalized are not comprehensively set out in any Board's Rule or Regulation nor decision. Background recitations in the cases suggest that at least on some occasions Board regions hold charges in abeyance precomplaint, pending conclusion of state lawsuits.[18] As in the instant case, the General Counsel may ask an administrative law judge at trial to remand to the General Counsel the relevant portion of an unfair labor practice complaint or seek such remand after the submission of evidence but before decision issues. So, too, a judge might issue a decision of the remaining portions of a complaint and retain in deferred status the *Bill Johnson's Restaurants'* issue awaiting state court action. In the absence of definitive Board guidelines, I find that the normal trial discretion granted administrative law judges, as set forth in part in the Board's Rules and Regulations Sections 102.25 and 102.35, allows the exercise of substantial discretion in determining the appropriate deferral process given the circumstances of each particular case.

In the instant case I agree the allegation in question should be deferred. I find, however, that it is most appropriate to neither remand this allegation to the General Counsel nor to retain jurisdiction over it following the issuance of the decision. Rather, on the particular facts of this case, I find it appropriate to transfer the deferred allegation to the Board at the same time my decision issues and the entire case is transferred to the Board for such further proceedings on the deferred allegation as it deems appropriate.

I reach this conclusion because I have directed, as part of the remedy for other violations found here, that the Respondent take action to end its lawsuit and direct the Respondent to take certain other remedial action in the case. Such a remedy, if sustained, will end any need to address the allegations of complaint subparagraph 7(b).[19] If the violations found and remedy

[16] Even if counsel for the Respondent's inaction in the face of the information provided as to Local 442 was simply reckless indifference to and disregard for the circumstances of the Respondent's opponent in litigation, I find such reckless disregard is the legal equivalent of conscious action in the context of events and also sustains and supports my conclusion respecting the Respondent's retaliatory motive.

[17] The General Counsel cites for this proposition an unpublished decision of the Board dealing with a special appeal of an administrative law judge's ruling respecting the specific deferral procedures to be utilized in a *Bill Johnson's Restaurants*' case made at trial. I do not regard such unpublished holdings of the Board to be binding precedent. When the Board establishes controlling precedent on any matter relevant to unfair labor practice proceedings, it does so by rule or published decision.

[18] See, e.g., *H. W. Barss Co.,* 296 NLRB 1286, 1290 fn. 1 (1989).

[19] The only extension of the remedy directed herein that would occur if the deferred violation were sustained would be to require the Respondent to make all Charging Parties other than Local 442 whole for

directed herein do not withstand review, the state court action may go forward and reach a decision on the merits of the lawsuit. In such a setting the Board may chose to decide the deferred matter itself or, as it determines is appropriate, either remand the matter to this or another judge or take other action as appropriate. It is simply neither more efficient nor likely to conserve the resources of the parties for me to retain jurisdiction of the deferred allegation in this setting.

Again because of the unusual context of this remaining allegation, I decline the General Counsel's request that I make findings respecting whether or not the employees' activities challenged by the lawsuit are protected under Section 7 and whether or not the lawsuit has been maintained by the Respondent for a retaliatory motive. I decline to make such findings even though, as the General Counsel anticipated in his brief, I have made such findings with respect to other allegations of the complaint. Rulings on those portions of the General Counsel's case respecting paragraph 7 of the complaint are necessary only if my findings on the other portions of the complaint do not withstand the review process. It is seemingly contradictory to assume that my findings as to protected activity and retaliatory motive made respecting other portions of the complaint will be rejected, yet I should utilize the same analysis and findings and conclusions to make additional findings, respecting motive, and protected activity as they apply to the instant allegation. Rather, I think it far more appropriate to defer all findings respecting all elements of the violation of the Act alleged in paragraph 7 of the complaint and allow the review process to reduce the contingencies necessary to resolve this complaint allegation. With such contingencies removed, if it were then necessary, the Board or, upon remand, an administrative law judge should be able to make all necessary findings and conclusions respecting this deferred allegation in the normal manner.

REMEDY

Having found that the Respondent has violated the Act, I shall direct it to cease and desist therefrom, and take certain affirmative action in order to effectuate the purposes and policies of the Act, including the posting of a remedial notice consistent with the Board's recent modifications to its standard remedies in *Indian Hills Care Center,* 321 NLRB 144 (1996).

That the Respondent should be required to post a notice for the edification of its employees is traditional, but in this case does little to inform the employees truly involved in the matters found violative of the Act. Were the notice posting requirement in this case simply limited to the posting of a notice to be read by the Respondent's few employees, the notification aspect of the Board's remedy would be essentially useless. This is so because it is not just Respondent's employees, but rather, and more importantly, the employees of its employer members and the employees of the employers signatory to contracts with the Charging Parties who have immediate interests in the existence and maintenance of the Respondent's lawsuit. It is they who have the greater interest in the instant unfair labor practice proceeding and who should, in my view, properly be notified of the remedy directed here.

In unfair labor practice cases in which a labor organization is found to have committed violations of the Act with respect to employees of various employers, the normal posting remedy provides, in addition to the "usual" posting by the respondent at its place of business, for the supplying of notices to willing employers whose employees were the subject of the unfair labor practice findings for posting at their places of business. See, e.g., *Electrical Workers IBEW Local 6 (San Francisco Electrical Contractors),* 318 NLRB 109, 143 (1995). That augmented posting remedy seems particularly appropriate in this case. I shall direct it.

It also seems appropriate for the reasons given above to also notify the employees of the Respondent's member employers of the result herein by posting the Board's normal notice. It may fairly be expected however that, although they might well be included in the class of "willing employers" above, it is as a practical reality unlikely the employer members of the Respondent will be interested in voluntarily posting the notice herein for their employees edification. Should they be compelled to do so?

The employer members of the Respondent were not named in the charge nor in the complaint save for jurisdictional purposes. They were not, insofar as the record indicates, served with the charge or the complaint nor did any participate in the hearing. They were not found guilty of any wrongdoing here. No party sought a finding, nor have I found the employer members liable for any misconduct of the Respondent. What possible basis exists then for compelling them to post the remedial notice?

The complaint alleged, the answer admitted, the lawsuit on its face indicates, and the record fully supports the proposition, that the Respondent "functioned as an agent of its members within the meaning of Section 2(13) of the Act with respect to . . . the Lawsuit" and that it filed its lawsuit "on behalf of its constituent members." I specifically find that this uncontested principle-agent relationship existed respecting the lawsuit.

The Board in *Manno Electric,* 321 NLRB 278 fn. 3 (1996), made clear that its remedial provisions could properly be extended to an individual who had acted jointly in filing and maintaining a wrongful lawsuit—without considering the traditional basis for finding joint liability—in that case an alter ego relationship—in order to avoid frustrating the remedial provisions of the Act. There is no suggestion that the Respondent's employer members should be held jointly and severally liable for the financial or other nonposting obligations imposed on the Respondent. Given the unusual circumstances of this case, however, I find there is an important need to insure that all potentially interested employees have an opportunity to read the attached remedial notice and there is a sufficient nexus between the Respondent and its employer members regarding the lawsuit and in the instant unfair labor practice case to subject each of the employer members of the Respondent to the portion of the remedial order requiring their posting of copies of the remedial notice.

I shall also include in the directed remedy the Board's normal requirement in wrongful lawsuit cases that the Respondent cease and desist from prosecuting and withdraw or dismiss its lawsuit. *Manno Electric,* supra. I will also require the Respondent make whole each of the Charging Parties for its reasonable legal fees and expenses at all stages and all courts visited during the lawsuit's litigation, with interest.[20] *Teamsters Local 776*

litigation expenses back to March 3, 1996. Currently all the Charging Parties save Local 442 will receive litigation expenses only to May 22, 1996. See also the section of this decision entitled the remedy, infra.

[20] Three dates have been found the starting dates for the Respondent's violation of the Act under the three theories noted: (1) March 3, 1996, the *Bill Johnson's Restaurant's* date found as to Local 442 and

(Rite Aid), 305 NLRB 832 fn. 10 at 835 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993). Interest shall be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Three different dates have been found the starting dates for the Respondent's violation of the Act under the three theories noted: (1) March 3, 1996, the *Bill Johnson's Restaurants'* date found as to Local 442 and pending respecting the other Charging Parties in the deferred allegation, (2) May 22, 1996, the *Manno Electric* date, and (3) December 23, 1996, the *Loehmann's Plaza* date. Normally the Respondent is liable to make whole the Charging Parties from the time it started to violate the Act. It may be, as the Respondent argues on brief at 3, that nothing occurred in the litigation in the 6-month period before the filing of the charge. That would mean there would be no practical difference in the litigation expense portion of the remedy resulting for selecting one or another of the three different dates discussed, supra, at which the Respondent's violation of the Act commenced under the General Counsel's different theories of a violation. The assertion that nothing happened respecting the lawsuit during this 6-month period is not conclusively established in the record however.

In the unusual circumstances presented here, it is my instinct for simplicity's sake to require the Respondent to make all Charging Parties whole for their litigation expenses incurred on and after March 3, 1996, the date 6 months before the filing of the charge. Board policy, however, is to match the beginning date of the litigation expense to the date the Act was first violated by the Respondent as to each Charging Party. Based on my findings, the date the compensatory period begins shall be March 3, 1996, for Local 442 and May 22, 1996, for the other Charging Parties.[21]

CONCLUSIONS OF LAW

1. The Respondent, its member employers in the aggregate and the employer members individually meeting the Board's jurisdictional standards for other than indirect inflow or indirect outflow are, and each of them is, and has been at all relevant times, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Parties are, and each of them is, labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct with respect to a lawsuit filed against the Charging Parties in California State Superior Court in 1994, and maintained thereafter in various courts to date.

(a) On and after the issuance of the Board's decision in *Manno Electric,* 321 NLRB 278 (1996), on December 23, 1996, maintaining the lawsuit in the face of its preemption by Federal law.

(b) On and after the issuance of original complaint in the instant matter on May 22, 1996, maintaining the lawsuit in the face of its preemption by Federal law.

(c) On and after March 3, 1996, maintaining the lawsuit as to Charging Party Local 442 with a retaliatory motive, knowing that the suit as to Local 442 was baseless and without merit.

4. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

5. The allegations of the complaint alleged in paragraph 7 and its conclusionary paragraphs alleging that the lawsuit in its entirety was without merit and filed for retaliatory reasons will be deferred pending the final resolution of the lawsuit by the California Superior Court in and for the city and county of San Francisco. On such final resolution, individual Charging Parties, the General Counsel, and/or the Respondent may move the Board directly to take such further action concerning this deferred allegation.

On the above findings of fact and conclusions of law and on the basis of the entire record, I issue the following recommended[22]

ORDER

A. The Respondent, the Associated Builders and Contractors Inc., Golden Gate Chapter, Dublin, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prosecuting and maintaining its lawsuit before any court against any of the Charging Parties.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and, if necessary, otherwise seek to dismiss its lawsuit in any and all courts where it is pending or to which it has been remanded.

(b) In the manner set forth in the remedy portion of this decision, reimburse each of the Charging Parties for its reasonable expenses and legal fees incurred in its defense of the lawsuit in the California State Superior Court, the Federal District Court, and the Federal Circuit Court of Appeals and subsequent courts to which the lawsuit have been removed, remanded, or transferred, with interest.

B. The Respondent, the Associated Builders and Contractors Inc., Golden Gate Chapter, Dublin, California, its officers, agents, successors, and assigns, and all its employer members doing business in Northern California shall take the following affirmative action designed to effectuate the policies of the Act.

1. Within 14 days after service by the Region, post at all their Northern California business offices and other places where notices to their employees are customarily posted, copies

pending respecting the other Charging Parties, (2) May 22, 1996, the *Manno Electric* date, and (3) December 23, 1996, the *Loehmann's Plaza* date. Normally the Respondent is liable for injury to the Charging Parties from the time it started to violate the Act. It may be as the Respondent argues on Br. at 3 that nothing occurred in the litigation in the 6-month period before the filing of the charge so that the three different dates at which the Respondent's violation of the Act commenced would not effect the remedy even if such dates were taken at the time when the litigation expense remedy was to commence. This is not conclusively established in the record, however.

[21] Were the *Manno Electric* theory sustained to fail on review, the Charging Parties other than Local 442 would receive compensation for expenses incurred on and after December 23, 1996, under the *Loehmann's Plaza* theory sustained, supra. If the deferred *Bill Johnson's Restaurants'* theory of a violation were to be sustained at some point, all the Charging Parties would receive compensation from March 3, 1996.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and each of its employer members and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Signed copies of the notice shall also be provided to the Region for transmittal to, and posting by, each willing contracting employer signatory to a contract with any of the Charging Parties in sufficient number to allow posting at all jobsites where the willing employers employ employees represented by any of the Charging Parties. Reasonable steps shall be taken by the Respondent and its employer members to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendancy of these proceedings, the Respondent or any employer member has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the closed employer member at any time since March 3, 1996.

2. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent and each employer member has taken to comply. The Respondent may submit such certifications on behalf of its authorizing employer members.

C. The allegations of the complaint set forth in paragraph 7 and its conclusionary paragraphs alleging that the lawsuit in its entirety was baseless and without merit and filed for retaliatory reasons will be deferred pending the final resolution of the lawsuit. On such final resolution, individual Charging Parties, the General Counsel, and/or the Respondent may move the Board directly to take such action concerning these deferred allegations as is then deemed appropriate.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Associated Builders and Contractors, Inc., Golden Gate Chapter, is an association of nonunion employers in the construction industry. The National Labor Relations Board has determined that we have violated the National Labor Relations Act and has ordered us and our employer members to post this notice, and to supply signed notices to willing employers who are signatory to contracts with the following Northern California Locals of the International, Brotherhood of Electrical Workers, AFL–CIO: Locals 180, 302, 332, 340, 442, 551, 595, 617, and 684 for posting at their jobsites.

Federal labor law embodied in Section 7 of the National Labor Relations Act gives employees the right to form, join, or assist any union, to act together for mutual aid or protection and to chose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that the job targeting programs established by the above noted Locals of the International Brotherhood of Electrical Workers, AFL–CIO, are protected concerted activities under the National Labor Relations Act and Federal law. The Board further found that Federal law preempts state law concerning these IBEW job targeting programs and that the programs and the protected concerted activities of the employees working under them may not properly be challenged in state courts.

Given all the above, and as required by the National Labor Relations Board, we give our employees, the employees of our employer members and the employees of signatory contractors with the IBEW Locals noted above the following assurances:

WE WILL NOT challenge in state court the job targeting programs operated by the International Brotherhood of Electrical Workers Locals 180, 302, 332, 340, 442, 551, 595, 617, and 684.

WE WILL NOT continue to prosecute and maintain a lawsuit filed by us or on behalf of our member employers in 1994 in the California Superior Court in and for the city and county of San Francisco, and litigated thereafter in the Federal courts challenging the validity of the IBEW job targeting programs under state law.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL withdraw and, if necessary, otherwise seek to dismiss or end the lawsuit described above.

WE WILL reimburse each of the IBEW Locals used by us in the noted lawsuit for its reasonable expenses and legal fees incurred in its defense against our lawsuit, with interest.

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
GOLDEN GATE CHAPTER

[23] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."