JD–19–03
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HANNAH & SONS CONSTRUCTION CO., INC.

and Case 4–CA–28916

METROPOLITAN REGIONAL COUNCIL OF PHILADELPHIA AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Margaret M. McGovern, Esq. and *Jennifer R. Spector, Esq.*, of Philadelphia, Pennsylvania, for the General Counsel.

Frank D. Branella, Esq., and *Marc Syken, Esq.*, of Philadelphia, Pennsylvania, for Respondent.

Richard C. McNeill, Esq., and *Jennifer B. Liebman, Esq. (Sagot, Jennings and Sigmond)*, of Philadelphia, Pennsylvania, for the Charging Party.

SUPPLEMENTAL DECISION ON REMAND

Findings of Fact and Conclusions of Law

Benjamin Schlesinger, Administrative Law Judge. On July 24, 2001, I issued a Decision (JD–96–01) in this proceeding. I concluded that Respondent Hannah & Sons Construction Co., Inc. violated Section 8(a)(1) of the Act because it filed a legal action against Metropolitan Regional Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America (Council), which lacked a reasonable basis in fact and was instituted and maintained to retaliate against the Council and a member of the Council, the Wharf and Dock Loaders and Pile Drivers Local Union 454 (Local 454 or Local; collectively, with the Council, the Union), for having engaged in conduct protected by Section 7 of the Act.

That Decision was based on the law as then interpreted by the Board, pursuant to its reading of *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). By unpublished Order, dated September 26, 2002, the Board remanded this case to me, stating in part, as follows:

> On June 24, 2002, the Supreme Court issued its decision in *BE & K Construction Co. v. NLRB*, ___ U.S. ___, 122 S.Ct. 2390. At issue before the Court was the validity of "the [Board"s] standard for declaring completed suits unlawful." 122 S.Ct. at 2397. Under that standard, "an unsuccessful retaliatory lawsuit violates the NLRA even if reasonably based." 122 S.Ct. at 2398. A "retaliatory" suit was defined by the Board as one "brought with a motive to

interfere with the exercise of protected [NLRA Section] 7 rights." 122 S.Ct. at 2400 (quoting the Board's brief; emphasis added by the Court).

The Court found initially that constitutional considerations under the First Amendment's Petition Clause are raised by the class of lawsuits that are unsuccessful but "genuine" and "reasonably based." 122 S.Ct. at 2399, 2400. In addition, the Court criticized the Board's definition of a "retaliatory" suit on the ground that it "fails to exclude a substantial amount of petitioning that is objectively and subjectively genuine." 122 S.Ct. at 2401. Under these circumstances, the Court stated that it was confronted with "a difficult constitutional question: namely, whether a class of petitioning may be declared *unlawful* when a substantial portion of it is subjectively *and* objectively genuine." Id. (Emphasis in original.)

The Court decided that it could avoid that difficult issue by adopting a limiting construction of Section 8(a)(1). Specifically, the Court concluded as follows:

> Because there is nothing in the statutory text indicating that [Section 8](a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so. Because the Board's standard for imposing liability under the NLRA allows it to penalize such suits, its standard is thus invalid. We do not decide whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity, since the Board's standard does not confine itself to such suits. Likewise, we need not decide what our dicta in *Bill Johnson's* may have meant by "retaliation." 461 U.S., at 747, 103 S.Ct. 2161*;* see supra, at 2400. Finally, nothing in our holding today should be read to question the validity of common litigation sanctions imposed by courts themselves—such as those authorized under Rule 11 of the Federal Rules of Civil Procedure—or the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff. [122 S.Ct. at 2402.][1]

[1] In its opinion, the Court also did not decide whether the Board has the "authority to award attorney's fees when a suit is found to violate the NLRA." 122 S.Ct. at 2398.

In its remand, the Board ordered that I further consider my earlier Decision in light of *BE & K,* including, if necessary, reopening the record to obtain further evidence. In an all-party telephone conference call conducted by me on October 21, 2002, all the parties stated that they were satisfied with the existing record and declined the opportunity to supplement it. Only the General Counsel requested permission to file a brief, and did so. For ease of reading, the following constitutes a restatement of my original Decision, updated to reflect *BE & K* and to eliminate references to legal principles which no longer apply.

Respondent, a Pennsylvania corporation with a facility in Philadelphia, Pennsylvania, has been engaged as a contractor performing excavation, grading, and demolition services in the construction industry. During the period between April 1, 1999 and March 31, 2000,

Respondent performed services valued in excess of $50,000 for Buckley & Company, Inc. (Buckley), a Pennsylvania corporation also with a facility in Philadelphia, which has been engaged as a contractor performing pile driving services in the construction industry. During the 12 months ending January 19, 2001, Buckley purchased and received at its Philadelphia facility goods valued in excess of $50,000 directly from points outside Pennsylvania. I conclude that Buckley and Respondent have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Council and the Local have been labor organizations within the meaning of Section 2(5) of the Act. The unfair labor practice charge was filed by the Council on February 2, 2000, and the complaint was issued on January 19, 2001. This case was tried in Philadelphia, Pennsylvania, on May 21, 2001.

In late October 1998, Local 454 Business Manager Mike Dooley learned that bidding on the Walt Whitman Bridge Corridor Reconstruction project (project) would take place on November 13, 1998. On October 27, 1998, he notified the members of the Pile Drivers Association and other employers with whom the Local had a collective-bargaining agreement of the fact that the Local would be willing to have that job worked by a crew of a foreman and three employees, instead of four, that its agreement required, so that they could compete with nonunion bidders. Dooley assumed that Buckley, which had a collective-bargaining agreement with the Council, had been the successful bidder as the general contractor and thought that the pile driving work had been awarded to a Local-contracted firm, Terry Foundation (Terry).

However, on April 8, 1999, Charles Hannah, Respondent's Construction Manager, telephoned him and announced that he had been awarded that subcontract and wanted to sign a one-job agreement with Local 454.[1] Dooley replied that the Local did not sign one-job agreements and that it was his understanding that Buckley had the job and had awarded the work to Terry. Dooley called Jay Carroll, a principal of Terry, who denied that anyone other than Terry had the job. But, a month later, on May 4, Carroll telephoned and said that he "was having problems with his bonding and his insurance, and that Buckley wanted to use his men, his equipment, but put the contract under Hannah's name, but it would really be Terry doing the job." Dooley said that, if he were not "financially viable to do the job, then he shouldn't be doing it, and we're not going to sign a one job agreement with anybody just for the sake of doing this." About a week later, Dooley received a call from Joe Marcella, a Vice-President of Buckley. He said that Dooley "should let Hannah do the job because he's connected here in the City, had a lot of political friends, and that if [he] didn't do it, [he] would probably be sued." Marcella also called Edward Coryell, the Council's Executive Secretary-Treasurer/Business Manager, to relay the same message.

[1] This was Respondent's first contact with Local 454. The Counsel for the General Counsel offered in evidence a letter, dated November 12, 1998, that Kevin Hannah, Respondent's President, wrote to Dooley, representing that it had already been issued a subcontracting agreement to perform pile driving work on the project. Respondent requested a copy of the Local's current collective-bargaining agreement "for execution by" Respondent, acknowledging that Dooley "had indicated [his] willingness to sign us to a full collective bargaining agreement as opposed to a project specific agreement." Dooley denied that he had ever received this letter. The letter is suspect. Respondent did not enter into the subcontract until February 10, 1999, four months later. In addition, Kevin Hannah's credibility is placed in doubt by his assertion in the letter that Respondent's work was to commence shortly, whereas work actually began eight months later. It may be that Buckley may have indicated that, if it were the successful bidder, it would give the pile driving work to Respondent, but this is not what Kevin Hannah stated. I find that this letter was never sent, noting that the Council and Local 454 seem to have replied to other letters written to them by Respondent; so, if the letter had been received, there is no reason that they would not have replied. On the other hand, it may be that the letter was sent, but not received. Even if that happened, or the letter was not sent, my conclusions in this Decision would be no different.

On June 15, 1999, Respondent faxed Coryell, requesting an agreement, noting that Dooley had refused to provide one without "any reasonable explanation" and that Respondent was "committed to the employment of members of organized labor and, moreover, cannot perform its subcontract without such an Agreement." Respondent further committed that it had "complied with all of the prerequisites necessary to perform this scope of work and we stand able and willing to proceed with this project and to abide by the terms and conditions of either a full collective bargaining agreement or a project specific agreement, at the discretion of the Local." On June 21, 1999, Coryell replied:

> In that letter you assert that your company has "distinguished itself as specialty contractors in the area of excavation, grading, demolition, pile driving and bridge and site work in the Greater Philadelphia Area." As a consequence, you assert that you are bewildered by Local 454's refusal to simply execute a collective bargaining agreement with your company.
>
> Upon receipt of your letter, we conducted an investigation into your company's documented history that, as you also assert, includes ["]goodwill .... with organized labor for more than twenty years . . . . . ". Our investigation, however, has failed to uncover a single project in our jurisdiction that you have completed within the last twenty years or a single hour of fringe benefit contributions that you have made during that period of time. As a consequence, Local No. 454's reluctance to execute a contract with a totally unknown company is seemingly understandable.
>
> We obviously wish to be fair to any company that actually has the credentials that you assert to possess. As a consequence, I am requesting that you provide us with a list of all the projects that you have completed during the past twenty years in which you assert you have been in business. We would be most appreciative if you would include which crafts or trades you are currently signatory to contracts with, the number of hours contributed under those contracts and any other detailed pertinent information regarding your actual experience in the construction industry.
>
> Upon receipt of this requested information, we would be happy to reevaluate our position.

In a letter dated July 12, 1999, Respondent found the Council's request for Respondent's history and background "highly unusual and question[ed] whether it emanate[d] from an unlawful motivation." Respondent threatened legal action, accusing the Union of "a deliberate attempt to continue a pattern and practice of discrimination towards minority members of our community which has resulted in the absence of minorities performing pile driving in the Philadelphia area." Coryell replied on July 20, 1999, that, to make certain that the Council was doing business with legitimate contractors, it commonly questioned the factual history of a contractor and its financial stability before it executed a collective-bargaining agreement. (In fact, the Council had printed a work experience and financial questionnaire that it often used to obtain this information.) Coryell questioned Respondent's assertion that it had a history of utilizing union labor, asking again for the information he requested in his June 21 letter. Upon receipt of that information, the Council could "make a good faith determination as to whether we choose to enter a contractual relationship with your company."

Respondent did not supply the requested information nor did it make any effort to allay the Council's implied fears about its financial stability. Instead, on about September 27, 1999, by

a Praecipe for a Writ of Summons, Respondent filed a civil action in the Court of Common Pleas of Philadelphia County against the Council and the Local and Coryell and Dooley, individually, captioned *Hannah and Sons Construction Co., Inc. v. United Brotherhood of Carpenters and Joiners, et al.*, September Term, 1999, No. 003121. Respondent's first of six causes of action alleged that it was awarded the subcontract and, in an effort to commence construction, wrote to Dooley on November 12, 1998, to obtain qualified persons for employment, agreeing to become a signatory to any collective-bargaining agreements and to comply with the terms thereof fully and faithfully. The Union, however, without any justification, denied Respondent's reasonable and lawful request. Because a collective-bargaining agreement covering the carpenters and workers within the Union's control was essential to Respondent's ability to perform its contractual responsibilities, presumably because Buckley's agreement required it to subcontract only to companies that had a collective-bargaining agreement with the Union, Respondent lost its subcontract and sustained damages of $50,000. The refusal of the Union to bargain with Respondent was purposely intended to interfere with its existing contractual rights.

The second, third, and fourth causes of action were based on the same facts, but alleged that the Union's interference with its subcontract was "negligent" and that the Union intentionally and negligently interfered with Respondent's potential contractual relationships. The fifth cause of action alleged that the Union exercised monopoly power over unionized carpenters in and about the Philadelphia Metropolitan Statistical Area which constitutes the relevant product and geographical markets and that, "[i]n refusing to bargain" with Respondent, the Union engaged in a monopoly in restraint of trade. Finally, the sixth cause of action alleged a civil conspiracy between or among two or more persons or entities to perform an unlawful act. Each of these five additional causes of action also alleged damages of $50,000.

On January 21, 2000, Richard McNeill Jr., counsel for the Council, wrote Respondent's attorney stating essentially the grounds for this unfair labor practice proceeding, that Respondent had no cognizable claim at law, that the matters alleged were preempted by federal law, that antitrust claims were not applicable to the Council, and that the Council would institute the instant unfair labor practice proceeding seeking to recover its attorneys' fees and costs, unless Respondent voluntarily dismissed its action. Respondent failed to do so, and the Union moved to dismiss the complaint. On August 8, 2000, the court sustained the Union's objections. The court found that the first four causes of action involved "the fundamental right" of the Union and the employees represented by it to exercise their free will not to work for a potential employer or not to enter into an agreement; and that was preempted by the Act.

Regarding the remaining causes, the court found that they must also depend upon the rights of the Union, "which cannot be decided by this Court"; that they, however, involve causes of action which may exist under state law; but because they are so intertwined with the Union's right under federal law, the court "will defer to the Federal Courts for resolution unless it is deemed otherwise." The court dismissed the first four causes of action with prejudice. The court dismissed the remaining two "without prejudice to reinstatement."[2] Respondent did not appeal from this decision or attempt to proceed with its state antitrust and conspiracy claims in federal court, the only causes of action that in any manner survived the Union's objections. Again, as noted above, all parties were given the opportunity to supplement the record; and none did so. Had there been an appeal or the filing of new antitrust and conspiracy claims in federal court, surely Respondent would have wanted to supplement the record.

[2] My reading of the court's decision is in accord with Respondent's understanding of it, as reflected in its brief.

Prior to *BE & K*, the Board held, under *Bill Johnson's*, that the filing and prosecution of a meritless lawsuit was an unfair labor practice when done so with the intent of retaliating for the exercise of rights protected by the Act. 461 U.S. at 744, 749. According to the Board's consistent interpretation, if the lawsuit had been finally adjudicated and the plaintiff had not prevailed, the lawsuit was deemed meritless. *Operating Engineers Local 520 (Alberici Construction)*, 309 NLRB 1199, 1200 (1992), enf. denied on other grounds 15 F.3d 677 (7th Cir. 1994). The Supreme Court in *BE & K* made clear that that interpretation was too broad. The Board's test would find an unfair labor practice solely because the petitioner lost, despite the fact that the litigation was not a sham and was subjectively genuine. That would unduly impinge on the First Amendment's right of the people "to petition the Government for a redress of grievances." The result of *BE & K* is that the losing litigation must be analyzed to ensure that genuine petitioning is not punished. The Court noted that it did that in a decision involving allegedly sham antitrust litigation, finding that the merits of litigation could be objectively tested. Quoting from *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60–61 (1993), the test, at least in part, requires that the litigation "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."

The first four causes of action in the complaint were based on the Union's tortious or negligent interference with Respondent's existing or potential contractual rights. Section 7 of the Act protects the rights of employees and their labor organizations to engage in concerted activity for mutual aid and protection. Section 8(f) of the Act permits, but does not require, the execution of prehire agreements in the building and construction industry. The tortious interference claims rest on the Union's refusal to enter into a prehire agreement with Respondent, either arguably protected by Section 7 or arguably prohibited by Section 8. Respondent's first four causes of action are, therefore, preempted under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244–45 (1959), and are thus baseless, because there were no material factual issues or unsettled legal principles upon which to base these claims. *BE & K*, 122 S. Ct. at 2396. The state court correctly dismissed them on the pleadings alone. They were "beyond the jurisdiction of the state courts because of federal law preemption." Bill Johnson's, 461 U.S. at 737 fn 5.

Respondent's fifth and sixth causes of action stand on a different footing, insofar as both were allegedly based on state law and the state court dismissed neither with prejudice, as it had the first four causes of action. Instead, the court gave Respondent leave to refile the conspiracy and antitrust claims in the federal court; but, more than three years later, Respondent has not pursued its federal claims. In determining whether they were genuine, all that the record reveals is based on the pleadings; and, without more, there is not one fact that supports the Respondent's claims.

The substance of almost its entire brief, filed in late June 2001, was its attempt to construct an antitrust case out of no facts, based on a complaint which is almost entirely conclusory and an argument that the complaint in this proceeding should fail because Respondent did not have an opportunity to develop facts because it was denied pretrial discovery. Respondent did not even make an offer of proof of what it thought pretrial discovery might elicit. Thus, while Respondent's brief speaks in terms of the Council's boycott of and absolute refusal to deal with Respondent, the record reveals only a request for preliminary information about the identity and trustworthiness of Respondent, to permit the Council to make an informed decision about whether it wished to represent Respondent's employees in dealing with Respondent.

Although given different circumstances and facts, labor unions might be subject to antitrust statutes, the complaint pleads no facts, and no facts were developed at the hearing, that suggest, no less hint at, any violation of law. Thus, the decisions cited in Respondent's brief are inapposite. There was no restraint on the ability of Respondent to subcontract its work, as there was in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 623 (1975). That Dooley testified that he rejected Respondent's request for an agreement solely for the project, because the Local's agreement with others contained a most-favored nations clause does not supply enough to support Respondent's lawsuit under *Connell Construction*. Respondent did not plead "industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control," as there were in *Allen Bradley Co. v. Electrical Workers IBEW Local 3*, 325 U.S. 797, 799–800 (1945).

There are no facts to support a theory of a conspiracy between trade unions and their members to force nonunion employers out of the local construction market, as there were in *Altemose Constr. Co. v. Building & Constr. Trades Council*, 751 F.2d 653 (3d Cir. 1985), cert. denied 475 U.S. 1107 (1986). Similarly, Respondent made no showing of evidence to suggest that the Union had no interest in representing its employees and instead sought to require Respondent to subcontract to other companies hiring Union-represented employees, as in *James Julian, Inc. v. Raytheon Co.,* 593 F.Supp. 915 (D. Del. 1984). Otherwise, the Union's conduct appears to be specifically exempted from the antitrust statutes by sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52 (1982) and section 4, 5, and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, and 113 (1982). Because the pleadings refer only to the Union's use of its monopoly power "[i]n refusing to bargain" with Respondent, Respondent's state antitrust claim was preempted. *Connell Construction*, 421 U.S. at 635–636. Finally, the antitrust claim is also baseless because it fails to state a cause of action under Pennsylvania law: Respondent sought only monetary damages, not injunctive relief; and under Pennsylvania law, there is no private remedy available for damages on state antitrust violations. *XF Enterprises Inc. v. BASF Corp.*, 47 Pa.D. & C.4th 147, 149-50 (Pa. Ct. Comm. Pleas 2000). For all of these reasons, Respondent's fifth cause of action is meritless.

Finally, facts allegedly supporting the last cause of action, the civil conspiracy, are equally lacking. A civil conspiracy claim requires an underlying tort cause of action. *Allegheny Gen. Hosp. v. Philip Morris, Inc.,* 228 F.3d 429, 446 (3d Cir. 2000). Because the tortious interference and anti-trust claims were preempted and baseless, there can be no civil conspiracy claim. Furthermore, the only unlawful act alleged in the pleadings is the Union's refusal to give Respondent a collective-bargaining agreement, and that brings us back full circle to the preempted violation of a refusal to bargain under Section 8(a)(5) and (1) of the Act. Although Respondent contended at the hearing that the civil conspiracy count was based on Dooley's racial prejudice against Respondent—Dooley's remark that he was "tired of you people" could just as easily have referred to the attempt of Respondent, which had not been in contractual relations with the Local, to become a union enterprise only on its terms and when it suited its purpose—Respondent seemingly abandoned that claim in its brief, noting that such a claim may not be made by a corporation. As a result, none of the causes of action alleged in Respondent's lawsuit was genuine or was reasonably based. Respondent could not have expected to succeed, a finding supported by Respondent's failure to pursue its antitrust and civil conspiracy cases in federal court.

The next issue pertains to the underlying interest of the Board in a *Bill Johnson's* case, the prevention of interference with protected Section 7 rights. *Bill Johnson's*, as now refined by

BE & K, applies, at a minimum,[3] to baseless legal actions which (1) are brought in response to lawful Section 7 protected and concerted and union activities and (2) may tend to interfere with the exercise of those Section 7 rights. *Petrochem Insulation, Inc.*, 330 NLRB 47 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001), cert. denied 534 U.S. 992 (2001). In Respondent's first letter to the Council of June 15, 1999, it introduced itself as:

> the only minority owned and controlled construction company which has distinguished itself as specialty contractors in the area of excavation, grading, demolition, pile driving, and bridge and site work in the Greater Philadelphia Metropolitan Area. Our company has been certified by the Pennsylvania and New Jersey Departments of Transportation, and by the Philadelphia Minority Business Enterprise Council as a Small & Disadvantaged Business and is pre-qualified for work in those classifications. In this connection, Hannah & Sons submitted bid proposals for several projects to perform pile driving within the jurisdiction of your Philadelphia affiliate, the Wharf & Dock Builders & Pile Drivers Local 454, and was awarded a subcontract to perform pile driving in Philadelphia for the Delaware River Port Authority (the Walt Whitman Bridge Corridor Rehabilitation Project Section 02).

The Union had to decide whether Respondent was what it claimed to be, a credible and financially viable, stable, and reliable entity. If it were not, the Union's members had much to lose, should Respondent default in its commitments to pay contractually agreed-upon wages and benefits. As Dooley testified:

> We have responsibilities to our members to make sure that we're signing with legitimate contractors who are going to pay their wages and pay their benefits. Our benefits are over $16 an hour, that's $640 a week a man. For one crew that's $3,200 a week almost. So in a month you're talking, you know, substantial money.

So Coryell attempted to find out by asking in his reply, quoted at length above, who Respondent was. He questioned Respondent's professed "goodwill [that it] has built with organized labor for the more than twenty years [that it] has been in operation." He asked Respondent for a list of the jobs that it had performed, the crafts or trades that Respondent was currently signatory to contracts with, the number of hours contributed under those contracts, and any other detailed pertinent information regarding its actual experience in the construction industry. Rather than providing any evidence, Respondent instituted its lawsuit.

Section 7 provides that employees have the right to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from doing so. The Union was not insisting on indemnification, which is only a permissive, nonmandatory subject of bargaining. *Jasper Blackburn*, 21 NLRB 1240 (1940); *Conway's Express*, 82 NLRB 972 (1949), enfd. 195 F.2d 906 (2d Cir. 1952). The Union was insisting on identification. It had the right to ensure, within the limits of the Act, that Respondent, the employer that was asking for a collective-bargaining agreement, had sufficient indicia of viability that the employees whom the

[3] As noted in the Board's remand, quoted above, the Court left open the possibility that an unsuccessful but reasonably based lawsuit that would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome," may be an unfair labor practice. *BE & K*, 122 S.Ct. at 2402.

Union was being asked to represent would not lose the benefits of the agreement. That is Section 7 protected activity.

Respondent's lawsuit would prohibit any such initial and preliminary discussion and would result in a rather profound change in labor law. No longer would a union have a right to disclaim interest in representing employees of a particular employer. A union would have to accept an employer's offer, even in a "right to work" state, where the union had no hope of ever being reimbursed for its expenses. An employer would have the right to reject a union's request for voluntary recognition as the representative of the employer's employees, but the union would have no right to reject an employer's request, no matter whether the employer had a history of repeated bankruptcies or failing to pay its employees their wages or benefits. The Union had a legitimate interest in protecting the employees from involvement with an untrustworthy employer.

Respondent's suit was, by its terms, directed at that legitimate interest which is protected by the Act. Charles Hannah testified that Respondent's reason for pursuing the lawsuit was that the Council and the Local "denied us to do work on the Walt Whitman Bridge [and future work], and we couldn't get a contract." Respondent's lawsuit necessarily was intended to discourage protected activity and to punish the Union monetarily for failing to give it an agreement. The suit was thus retaliatory, as further evidenced by the fact that, even after the Union's counsel spelled out the applicable law in its detailed letter to Respondent, showing that Respondent's complaint lacked merit, Respondent refused to withdraw its legal action. Indeed, the fact that Respondent's legal action lacked any merit is sufficient to prove that Respondent's aim was to punish the Union, rather than only to make itself whole. *Petrochem Insulation*, supra, 240 F.3d at 32–33. I reject, however, the General Counsel's alternate contention that retaliation is shown by Respondent's demand in its lawsuit of $300,000 damages, far in excess of the amount of Respondent's actual profit loss. Respondent was asking for relief based on six different legal theories, most stemming seemingly from the same facts, and did not evidence an intention to recover separate damages for each cause of action or any amount over and above what it actually and potentially suffered.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I will recommend that Respondent be required to reimburse the Council for all legal and other expenses incurred in defending against Respondent's lawsuit, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). *Petrochem Insulation, Inc.*, supra, 330 NLRB at 51.

On these findings of fact and conclusions of law and on the entire record,[4] I issue the following recommended[5]

[4] The Official Transcript inaccurately refers to Local 454 as "Local 545." The General Counsel's motion to correct the Transcript is granted, without opposition.

[5] 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 to them shall be deemed waived for all purposes.

ORDER

Respondent, Hannah & Sons Construction Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing maintaining, and prosecuting lawsuits with causes of actions against the Metropolitan Regional Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America and the Wharf and Dock Loaders and Pile Drivers Local Union 454 (collectively, the Union) that are without legal merit and are motivated to retaliate against activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Reimburse the Union for all legal and other expenses incurred in the defense of the Respondent's lawsuit in the Court of Common Pleas of Philadelphia County captioned *Hannah and Sons Construction Co., Inc. v. United Brotherhood of Carpenters and Joiners, et al.*, September Term, 1999, No. 003121, in the manner set forth in the Remedy section of this Decision.

(b) Within 14 days after service by the Region, post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 27, 1999.

(c) 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 Respondent had taken to comply.

Dated, Washington, D.C. February 19, 2003

Benjamin Schlesinger
Administrative Law Judge

[6] 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."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT file, maintain, and prosecute lawsuits with causes of actions against the Metropolitan Regional Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America and the Wharf and Dock Loaders and Pile Drivers Local Union 454 (collectively, the Union) that are without legal merit and are motivated to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL reimburse the Union for all legal and other expenses incurred in the defense of the Respondent's lawsuit in the Court of Common Pleas of Philadelphia County captioned *Hannah and Sons Construction Co., Inc. v. United Brotherhood of Carpenters and Joiners, et al.*, September Term, 1999, No. 003121, with interest.

HANNAH & SONS CONSTRUCTION CO., INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1000 Liberty Avenue, Federal Building, Room 1501, Pittsburgh, PA 15222-4173

(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.