No. 01-518

# In the Supreme Court of the United States

BE&K CONSTRUCTION COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION


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## QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (Board) reasonably concluded that petitioner committed an unfair labor practice, in violation of 29 U.S.C. 157 and 158(a)(1), by prosecuting a retaliatory and unmeritorious lawsuit against labor unions.

2. Whether the Board acted within its authority in ordering petitioner, as a remedy for the unfair labor practice, to reimburse the unions for attorney's fees they incurred in defending against petitioner's suit.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 246 F.3d 619. The decision and order of the National Labor Relations Board (Pet. App. 28a-68a) are reported at 329 N.L.R.B. 717.

## JURISDICTION

The judgment of the court of appeals was entered on April 9, 2001. A petition for rehearing was denied on June 28, 2001 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on September 25, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. Section 8(a)(1) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. The rights guaranteed in Section 7 include the right to engage in concerted activity "for the purpose of * * * mutual aid or protection." 29 U.S.C. 157.

This Court held in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), that it is an unfair labor practice for an employer "to prosecute an unmeritorious lawsuit for a retaliatory purpose," but "the offense is not enjoinable unless the suit lacks a reasonable basis." *Id.* at 749. Thus, the National Labor Relations Board (Board) may not halt the prosecution of a suit unless the suit lacks a reasonable basis in fact or law. *Id.* at 748. But "[i]f judgment goes against the employer * * * or if his suit is withdrawn or is otherwise shown to be without merit," and if the Board determines that the suit was filed in retaliation for the exercise of employees' Section 7 rights, then the Board may find that the lawsuit violated Section 8(a)(1) of the Act. *Id.* at 747. The Board, moreover, may consider the suit's lack of merit in determining whether the suit was filed in retaliation for the exercise of Section 7 rights. *Ibid.* If the Board finds a violation, it may order any proper relief that would effectuate the policies of the Act, including ordering the employer to reimburse the employees for their attorney's fees and other expenses of defending against the wrongful suit. *Ibid.* (citing § 10(c), 29 U.S.C. 160(c)).

2. Petitioner is an industrial general contractor. Pet. App. 4a, 32a. Petitioner's employees are not

unionized. *Id.* at 4a, 33a. In late 1986 or early 1987, USS-POSCO Industries (USS-POSCO) awarded petitioner a contract to modernize a steel mill in Pittsburg, California. Petitioner formed a joint venture with Eichleay Constructors, Inc. (Eichleay) to perform the contract. *Ibid.*

In September 1987, petitioner and USS-POSCO filed a complaint in the United States District Court for the Northern District of California against a number of construction-industry unions. Pet. App. 4a, 33a. The complaint sought damages under Section 303 of the Labor-Management Relations Act, 1947, 29 U.S.C. 187, based on allegations that the unions violated Section 8(b)(4) of the NLRA, 29 U.S.C. 158(b)(4), by supporting a new county ordinance addressing toxic waste emissions in an effort to delay the Pittsburg project; by bringing contractual grievances against Eichleay; by picketing and handbilling at petitioner's and USS-POSCO's premises; and by filing a lawsuit in state court, which alleged among other things that petitioner and USS-POSCO had violated California's Health and Safety Code. Pet. App. 4a-5a, 34a; see *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 692 F. Supp. 1166 (N.D. Cal. 1988).

In July 1988, the district court granted in part the unions' motions for partial summary judgment and dismissed all claims relating to the unions' lobbying and initiation of contractual grievances. Pet. App. 5a-6a, 34a-35a; see *USS-POSCO*, 692 F. Supp. at 1168-1170. The court declined to grant the unions summary judgment on the claim relating to their state-court suit, and it permitted further discovery on that claim. Pet. App. 6a, 35a; see 692 F. Supp. at 1170.

Petitioner and USS-POSCO filed an amended complaint which realleged claims similar to those on which

the district court had granted summary judgment in favor of the unions. The amended complaint also added a new claim for treble damages under Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. Pet. App. 6a, 35a. In May 1989, the district court denied petitioner and USS-POSCO leave to re-allege their lobbying and grievance claims and granted the unions summary judgment on the claim that arose from the unions' state-court suit. *Id.* at 6a, 36a-37a; see *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 721 F. Supp. 239 (N.D. Cal. 1989). The district court allowed petitioner and USS-POSCO to file a revised amended complaint that reflected its rulings. *Id.* at 242.

Petitioner and USS-POSCO filed a second amended complaint which realleged all the claims that the district court had already resolved in favor of the defendant unions, as well as claims that had not been dismissed. Pet. App. 7a, 37a. The court struck the previously dismissed claims and imposed sanctions on petitioner and USS-POSCO pursuant to Fed. R. Civ. P. 11 for continuing to replead those claims. Pet. App. 7a, 38a. USS-POSCO then dismissed all of its remaining claims with prejudice. *Ibid.* Petitioner, however, continued to pursue its remaining claims. In September 1991, the district court granted summary judgment in favor of the unions on petitioner's antitrust claim. *Id.* at 8a, 39a. Petitioner then voluntarily dismissed, with prejudice, its remaining claims under the Labor-Management Relations Act. *Ibid.*

Petitioner appealed the district court's dismissal of its antitrust claims, and the United States Court of Appeals for the Ninth Circuit affirmed. Pet. App. 9a, 39a & n.17; see *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800 (9th Cir. 1994). Although the court of appeals did not

agree with the district court's grounds for dismissing the antitrust claims, it held that the unions' alleged antitrust violations were within the scope of the *Noerr-Pennington* doctrine of antitrust immunity, and thus the unions were protected against liability. See Pet. App. 8a-9a, 40a-41a. In the course of rejecting petitioner's claim that the *Noerr-Pennington* doctrine was inapplicable because the unions' lawsuits were mere shams, the court observed that "more than half of all the [unions'] actions as to which we know the results turn[ed] out to have merit," a fact that "cannot be reconciled with [petitioner's] charge that the unions were filing lawsuits and other actions willy-nilly without regard to success." *Id.* at 9a (quoting 31 F.3d at 811). The court of appeals, however, reversed the district court's award of Rule 11 sanctions against petitioner because, in its view, petitioner had repleaded the claims based on a good-faith (albeit mistaken) view that it was required to do so to preserve the issues for appeal. *Id.* at 9a, 41a; see 31 F.3d at 811-812.

3. In October 1995, acting on charges filed by the unions that petitioner had sued in federal court, the Board's General Counsel issued an administrative complaint against petitioner. Pet. App. 9a, 29a. The complaint alleged that petitioner violated Section 8(a)(1) of the NLRA by filing and maintaining a meritless lawsuit against the unions for a retaliatory purpose. *Id.* at 29a-30a.

The Board sustained the complaint. Pet. App. 25a-68a. The Board concluded that the unions' legislative lobbying efforts, filing of lawsuits, and institution of grievance and arbitration proceedings all concerned conditions of employment and were protected by Section 7 of the NLRA. *Id.* at 56a. The Board rejected petitioner's argument that the unions in fact engaged in

those activities with an unlawful secondary objective of driving non-union contractors out of the California construction market. *Id.* at 33a, 56a-57a. The Board explained that petitioner "brought the identical claims [of an unlawful secondary objective] to the district court" when it alleged violations of the Labor-Management Relations Act, and that petitioner had not appealed the district court's dismissal of its claims. *Id.* at 56a-57a. Thus, the Board found the district court's ruling preclusive of petitioner's defense that the unions' activities were not protected by the NLRA. *Id.* at 57a.

The Board then applied this Court's decision in *Bill Johnson's Restaurants*, *supra*, and held that petitioner's federal-court lawsuit "lacked merit" and was pursued "out of a desire to retaliate against the unions for engaging in protected concerted activity." Pet. App. 62a. The Board first noted that the district court and the Ninth Circuit had rendered judgment for the unions and against petitioner on all claims that they adjudicated, and that petitioner's voluntary dismissal of the remaining claims with prejudice acted as an adjudication on the merits. *Id.* at 46a-49a. Under *Bill Johnson's Restaurants*, therefore, petitioners' federal suit lacked merit. See *id.* at 44a-45a (citing *Bill Johnson's Restaurants*, 461 U.S. at 747).

The Board therefore turned to this Court's additional requirement that the suit must have been filed for a retaliatory purpose. See 461 U.S. at 744. A retaliatory purpose could be inferred, the Board held, from the fact that the suit was "aimed directly at protected activity," from the "utter absence of merit" to petitioner's claims under Section 303 of the Labor-Management Relations Act, and from petitioner's attempt (rejected by the district court, see 721 F. Supp. at 241) to seek damages from two unions that were not parties to the state-court

health-and-safety suit against petitioner. Pet. App. 59a, 60a, 61a. All of those facts, the Board held, "indicate[d] that [petitioner] was interested only in harassing the Unions, not in obtaining justice." *Id.* at 60a.

As a remedy for petitioner's violation of Section 8(a)(1), the Board ordered petitioner to, among other remedies, reimburse the unions for expenses they incurred in defending against petitioner's federal lawsuit. Pet. App. 62a. The Board noted (*id.* at 63a) that *Bill Johnson's Restaurants* explicitly authorized such an award. See 461 U.S. at 747. The Board also rejected petitioner's contention that its authority to award attorney's fees was limited to cases in which the violator of Section 8(a)(1) engaged in "frivolous" litigation. Pet. App. 63a. The Board explained it was awarding attorneys' fees, not as a sanction for filing a frivolous court suit, but as a remedy for petitioner's unfair labor practice in violation of Section 8(a)(1), and that the Board was authorized to award the unions make-whole relief for petitioner's violation of the NLRA. *Id.* at 64a.

4. The United States Court of Appeals for the Sixth Circuit enforced the Board's order. Pet. App. 1a-25a. The court of appeals first rejected petitioner's contention that, under *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), unions (as opposed to employees) enjoy no protected Section 7 rights. Pet. App. 12a-16a. The court of appeals explained that the question before the Court in *Lechmere* was whether the NLRA authorized an organizing union to trespass on an employer's private property when the union had alternative means of access to the employees. *Id.* at 12a. In that context, this Court held that "the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere*, 502 U.S. at 532. The court of appeals, however, agreed with the Board that *Lech-*

*mere* did not hold—and "[i]t would be a curious and myopic reading of the Act * * * to hold that, although employees are free to join unions and to work through unions for purposes of 'other mutual aid and protection,' the conduct of the unions they form and join for those purposes is not protected by the Act." Pet. App. 15a; see *id.* at 52a.

Next, the court of appeals upheld the Board's conclusion that petitioner's lawsuit against the unions constituted an unfair labor practice under *Bill Johnson's Restaurants*. Pet. App. 16a-22a. The court of appeals agreed with the Board that petitioner's suit was unmeritorious under *Bill Johnson's Restaurants* because the district court "had already determined that [petitioner's] claims against the unions were all either without merit or voluntarily dismissed." *Id.* at 17a; see 461 U.S. at 747. The court further rejected petitioner's argument that, under *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), the Board should have determined whether petitioner's suit was "baseless." Pet. App. 18a-19a. In *Professional Real Estate Investors*, this Court, quoting *Bill Johnson's Restaurants*, stated that "even an 'improperly motivated' lawsuit may not be *enjoined* under the National Labor Relations Act as an unfair labor practice unless such litigation is 'baseless.'" 508 U.S. at 59 (quoting *Bill Johnson's Restaurants*, 461 U.S. at 743-744) (emphasis added). The court of appeals found *Professional Real Estate Investors* "totally inapplicable" to this case, because it addresses solely "situations in which attempts were made *to enjoin* employer-initiated litigation, not situations in which court rulings had already been rendered." Pet. App. 19a. *Professional Real Estate Investors*, the court of appeals also noted, addressed the sham-litigation ex-

ception to *Noerr-Pennington* antitrust immunity, not the standards for finding an unfair labor practice. *Id.* at 18a-19a.

The court of appeals also upheld the Board's finding that petitioner filed its suit with a retaliatory motive. Pet. App. 20a-22a. The court found that the suit's demonstrated lack of merit; petitioner's filing of amended complaints that re-alleged claims on which the district court had already ruled; petitioner's pursuit of treble damages; and petitioner's attempts to obtain damages from two unions that (as opposing counsel had stated and extensive discovery had confirmed) were not parties to the state-court action, collectively supported the Board's finding of a retaliatory motive. *Ibid.*

Finally, the court of appeals upheld the Board's award of attorney's fees to the unions. Pet. App. 22a-25a. The court explained that the award was an appropriate exercise of the Board's authority to remedy petitioner's violation of protected Section 7 rights because it "return[ed] the injured parties, at least in part, to the financial positions they occupied prior to the filing of [petitioner's] unmerited, retaliatory suit." *Id.* at 24a.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. This Court recently denied a petition for a writ of certiorari that presented the same issues as the instant petition. *Petrochem Insulation, Inc.* v. *NLRB*, cert. denied, No. 01-92 (Oct. 29, 2001). Further review likewise is not warranted in this case.

1. In *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), this Court established one standard governing the Board's authority to enjoin an ongoing

lawsuit as an unfair labor practice, and another standard governing the Board's authority to sanction the filing of a completed lawsuit. *Id.* at 743-749. Before the Board may enjoin an ongoing suit that is retaliatory, it must find that the suit "lacks a reasonable basis." *Id.* at 748. To sanction the party who brought a completed lawsuit with retaliatory motive, the Board must find that the suit was "unmeritorious," which may be established by the judgment itself. *Id.* at 748-749; see *id.* at 746-747.[1]

In this case, petitioner challenges the Board's application of the completed-lawsuit standard of *Bill Johnson's Restaurants*. Petitioner contends (Pet. 5-12) that, to determine whether the underlying lawsuit was an unfair labor practice, the Board should have applied the "objectively baseless" standard articulated in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993), and not followed the rule established in *Bill Johnson's Restaurants* (*i.e.*, that a judgment adverse to the plaintiff will support a finding of an unfair labor practice, when the suit was brought with retaliatory motive).[2]

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[1] Contrary to petitioner's assertions (*e.g.*, Pet. 6, 8), the standard established in *Bill Johnson's Restaurants* for sanctioning the filing of a completed lawsuit was not dictum. Rather, this Court specifically stated its understanding that some claims in the underlying lawsuit had been dismissed, and it remanded so that the Board could apply the Court's standard for completed litigation to those claims. 461 U.S. at 750 n.15.

[2] Although *Bill Johnson's Restaurants* involved state-court litigation, petitioner does not question the Board's practice of adhering to the rules set out in that case when a federal lawsuit is the basis for an allegation of an unfair labor practice. See Pet. App. 44a n.28.

Like the Sixth Circuit in this case, the other courts of appeals that have considered the issue have uniformly rejected the argument that *Professional Real Estate Investors* overruled *Bill Johnson's Restaurants sub silentio*. See *Petrochem Insulation, Inc.* v. *NLRB*, 240 F.3d 26, 31-32 (D.C. Cir. 2001), cert. denied, No. 01-92 (Oct. 29, 2001); *White* v. *Lee*, 227 F.3d 1214, 1235-1236 (9th Cir. 2000).[3] *Professional Real Estate Investors* established that, for purposes of antitrust liability, "litigation cannot be deprived of immunity [under the *Noerr-Pennington* doctrine] as a sham unless the litigation is objectively baseless." 508 U.S. at 51. In so holding, the Court noted that the "objectively baseless" test is similar to the "baseless" standard that governs the Board's authority to enjoin an ongoing lawsuit under *Bill Johnson's Restaurants*. *Id.* at 59. But *Professional Real Estate Investors* did not address, much less alter, the standard stated in *Bill Johnson's*

[3] Petitioner's assertion (Pet. 10-11, 14-15) of a conflict between the court of appeals' decision in this case and the Second Circuit's decision in *NLRB* v. *Vanguard Tours, Inc.*, 981 F.2d 62 (1992), is unfounded. In *Vanguard Tours*, the Second Circuit held that, for purposes of applying *Bill Johnson's Restaurants*, a plaintiff's voluntary withdrawal of a state-court lawsuit does not "signif[y] a determination by the state court that the suit was 'without merit.'" *Id.* at 66. As the court of appeals below explained (Pet. App. 18a n.3), *Vanguard Tours* does not address the situation presented here, where "the majority of a plaintiff's cause of action is dismissed on the merits and only a portion is voluntarily withdrawn." Nor did the *Vanguard Tours* court address voluntary dismissal of claims *with prejudice*, which has the same effect as a dismissal on the merits. See *id.* at 49a & n.37. The *Vanguard Tours* court, moreover, explained that where, as here, "the plaintiff has lost on the merits[,] * * * the Board may consider the filing of the suit to have been an unfair labor practice" upon a showing of retaliatory motive. 981 F.2d at 65.

*Restaurants* for determining whether the filing of a *completed* lawsuit constituted an unfair labor practice. See Pet. App. 18a-19a; *Petrochem Insulation*, 240 F.3d at 32.

Petitioner notes (Pet. 8-10) that the D.C. Circuit (in *Petrochem Insulation*) and the Ninth Circuit (in *White*) have questioned whether the "unmeritorious" standard of *Bill Johnson's Restaurants* is consistent with the "objectively baseless" standard of *Professional Real Estate Investors*. It is, however, not clear—and indeed it appears unlikely—that any tension between the two standards has significance in this case. The Ninth Circuit and the federal district court in California together determined that all of the claims on which petitioner went to judgment were without merit. See *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994) ("The record * * * forecloses any possibility that [petitioner] could substantiate its [antitrust] claim."); *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 721 F. Supp. 239, 242 (N.D. Cal. 1989) (petitioner "cited no evidence" that would support its unfair-labor-practice claim based on unions' state-court suit); *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 692 F. Supp. 1166, 1170 (N.D. Cal. 1988) (complaint fails to contain allegations supporting claim that lobbying constituted an unfair labor practice; petitioner concedes that allegedly pretextual union grievances were in fact successful). The Board, moreover, found that petitioner's claims under Section 303 of the Labor-Management Relations Act, 29 U.S.C. 187, which were the core of petitioner's federal suit, suffered from an "utter absence of merit." Pet. App. 61a. In those circumstances, the Board could reasonably have concluded that petitioner's suit was

"objectively baseless" under *Professional Real Estate Investors*. See 508 U.S. at 60 (lawsuit is "objectively baseless" if "no reasonable litigant could realistically expect success on the merits" and it is not legally viable).

In any event, there is no clear "anomaly" (Pet. 5) in this Court's rule that, whereas a plaintiff is insulated from antitrust liability for filing a suit so long as it had an objective basis for the suit (even if the litigant does not ultimately prevail), an employer is subject to liability for committing an unfair labor practice if its retaliatory suit fails. The Ninth Circuit has noted that it may be appropriate to have a different rule in the labor-law context than in the antitrust context because of the special economic dependency of employees on their employers. See *White*, 227 F.3d at 1236-1237; see also *Bill Johnson's Restaurants*, 461 U.S. at 740 (noting that "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation"); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969) (discussing circumstances in which employer speech may violate the Act as a threat of retaliatory action against the employees' exercise of Section 7 rights). Moreover, a plaintiff who files a lawsuit with an improper motive faces lesser liability under the Act than under the antitrust laws. Compare *Bill Johnson's Restaurants*, 461 U.S. at 747 (Board may award defendants attorney's fees and other appropriate relief), with 15 U.S.C. 15(a) (authorizing treble damages and attorney's fees as remedy for antitrust violations).

Finally, and also contrary to petitioner's suggestion (Pet. 11), application of the *Bill Johnson's Restaurants* "unmeritorious" standard rather than the *Professional Real Estate Investors* "objectively baseless" standard does not "chill[] the right of employers everywhere to

petition the courts." *Bill Johnson's Restaurants* ensures that the employer may file a non-frivolous lawsuit and have it adjudicated on the merits by the courts. The employer will not be liable for committing an unfair labor practice if the suit proves meritorious. Even if the suit is found to lack merit, moreover, the employer will not face potential liability for violating Section 8(a)(1) unless it filed the suit with an improper, retaliatory motive. See 461 U.S. at 744-747.

2. Petitioner next asserts (Pet. 12-14) that the Board erred in finding an unfair labor practice under Section 8(a)(1) of the Act because petitioner sued only unions, not employees, and unions supposedly cannot claim the protections of Section 7. Petitioner's reliance on *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), as support for that argument is misplaced. As the court of appeals correctly explained (Pet. App. 12a-13a), *Lechmere* held only that the Act does not authorize non-employee union representatives to trespass on employer property when the representatives could reach employees through reasonable alternative means. See 502 U.S. at 537-538. This case involves no issue of access to an employer's property. The *Lechmere* Court recognized, moreover, that Section 7 does protect union activities in some circumstances. *Id.* at 537. And the Court did not call into question the import of the plain language of Section 2(3) of the NLRA, which provides that the term "employee," as used in the Act, "shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise." 29 U.S.C. 152(3). Because unions are organizations of "employees" as defined in Section 2(3), interference with the rights of unions is, in many contexts, an interference with the Section 7 rights of employees. See, *e.g.*, *Old Dominion Branch No. 496*,

*Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 278-279 (1974) (Section 7 protects union "freedom of speech" in organizational context); *Geske & Sons, Inc.* v. *NLRB*, 103 F.3d 1366, 1377 (7th Cir.) (baseless lawsuit against union interferes with the organizational rights of employees), cert. denied, 522 U.S. 808 (1997); *O'Neil's Markets* v. *United Food & Commercial Workers' Union, Meatcutters Local 88*, 95 F.3d 733, 737 (8th Cir. 1996) (union's peaceful area-standards activity is protected by Section 7).

Contrary to petitioner's contention (Pet. 13-14), the Board did not "erroneously" rely on *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978), in concluding (Pet. App. 56a) that Section 7 protected the union activities that formed the basis for petitioner's federal lawsuit. In *Eastex*, the Court concluded that the "mutual aid or protection" clause of Section 7 (quoted at p. 2, *supra*) protects employees when they invoke administrative, legislative, and judicial processes in otherwise proper concerted activities that support employees of other employers. 437 U.S. at 564-566. The Board correctly noted in this case that, under *Eastex*, the unions' activities would be protected under Section 7 if engaged in by employees, whether or not those employees were employed by petitioner. Pet. App. 54a-55a, 56a & n.55. The Board, upheld by the court of appeals, reasonably rejected petitioner's "perverse" contention that "conduct * * * protected when engaged in by two or more employees together would lose its protection if engaged in by the employees' union on their behalf." *Id.* at 52a; see also *id.* at 14a-15a.

There is no merit to petitioner's further argument (Pet. 13) that the court of appeals' decision on the scope of Section 7 conflicts with *Diamond Walnut Growers, Inc.* v. *NLRB*, 53 F.3d 1085 (9th Cir. 1995). In *Dia-*

*mond Walnut Growers*, the Ninth Circuit applied *Bill Johnson's Restaurants* and held that the employer violated Section 8(a)(1) by filing a meritless and retaliatory suit against the union that "drained the [u]nion's resources, and had an inevitable impact on the employees who were exercising their Section 7 right to strike." *Id.* at 1090. Contrary to petitioner's suggestion (Pet. 13), the Ninth Circuit did *not* hold that a suit against a union is actionable under Section 8(a)(1) only in the context of a strike. Rather, the court expressly did not consider the extent to which Section 7 protects unions against retaliatory lawsuits in other contexts. *Diamond Walnut Growers*, 53 F.3d at 1090 n.4.

Petitioner also contends (Pet. 12-13) that the Sixth Circuit's decision in this case conflicts with *Johnson & Hardin Co.* v. *NLRB*, 49 F.3d 237 (6th Cir. 1995). Even if correct, petitioner's claim of an intra-circuit conflict would raise no issue warranting this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, petitioner's claim of an intra-circuit conflict is unfounded. As the court of appeals explained in this case (Pet. App. 12a n.2), *Johnson & Hardin* followed *Lechmere* and "stands for the proposition that nonemployee organizers may enter onto private property only under extremely limited circumstances," but it "does not * * * stand for the broader legal principle that unions have no § 7 rights whatsoever." See 49 F.3d at 241-242 (upholding Board's finding that employer violated Section 8(a)(1) by removing union organizers from a driveway leading to its plant).

3. Petitioner next argues (Pet. 14) that the court of appeals departed from *Bill Johnson's Restaurants*

when it upheld the Board's determination that petitioner filed its lawsuit with a retaliatory motivation. See Pet. App. 20a-22a. There is no merit to that argument. *Bill Johnson's Restaurants* specifically provides that the Board may consider an adverse judgment entered against a plaintiff employer when determining whether the employer's suit was filed in retaliation for the exercise of rights protected by Section 7. 461 U.S. at 747. Applying that principle, the court of appeals (like the Board) correctly viewed the "judicial finding" that petitioner's suit lacked merit to be "*one consideration*" supporting a finding that "[petitioner] did indeed possess [a] * * * retaliatory motivation in prosecuting its suit against the union defendants." Pet. App. 20a, 21a-22a; see also *id.* at 60a-61a.

The court of appeals' ruling on the issue of retaliatory motive also does not conflict with any decision of another court of appeals. Contrary to petitioner's suggestion (Pet. 14), the District of Columbia Circuit has *not* held that a suit may be found to be retaliatory only if it is "utterly frivolous." Rather, that court concluded in *Petrochem Insulation* that the Board may consider the fact that an employer's suit is completely without merit when determining whether the employer acted with retaliatory intent in filing the suit. See 240 F.3d at 32-33. Nothing in the decision below is to the contrary. In *NLRB* v. *International Union of Operating Engineers, Local 520*, 15 F.3d 677 (7th Cir. 1994) (cited at Pet. 14), the Seventh Circuit simply concluded that substantial evidence did not support the Board's finding that a union acted with retaliatory intent in filing a meritless libel suit against one of its members, given the employee's dishonesty and the union's "legitimate reputational concerns." *Id.* at 680. No analogous circumstances are presented here.

Petitioner further asserts (Pet. 15-16) that, when the court of appeals affirmed the Board's finding of a retaliatory motive, it erred by relying in part on petitioner's attempt to recover treble damages against the unions—to which the Board had not explicitly given weight in this case. That claim of error presents no issue of sufficient importance to warrant further review. The court of appeals' view (Pet. App. 21a) that asserting a treble-damages claim is "another factor to be considered in evaluating an employer's motive in prosecuting its lawsuit" is entirely consistent with the Board's position and the holdings of other courts of appeals. See, *e.g.*, *Petrochem Insulation*, 240 F.3d at 34 (upholding Board determination that employer's pursuit of antitrust treble damages supported finding of retaliation); *Diamond Walnut Growers*, 53 F.3d at 1089 (upholding Board finding that request for punitive damages suggests retaliatory motive).[4] The court of appeals, moreover, agreed with the Board that "an additional inference of retaliatory motive may be made from the fact that [petitioner] sought recompense" from unions that clearly were not parties to the state-court suit against petitioner. Pet. App. 21a; see also *id.* at 60a.

4. There is also no merit to petitioner's contention (Pet. 16-17) that the Board "should have * * * given res judicata effect" to the Ninth Circuit's determination that attorney's fees were not warranted in the case of

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[4] *International Union of Operating Engineers*, *supra*, on which petitioner relies (Pet. 16), is not to the contrary. In that case, the Seventh Circuit explained that a request for money damages may support an inference that the lawsuit was filed for retaliatory purposes when "independent evidence of retaliatory motive exist[s] apart from the * * * request for money damages." 15 F.3d at 680. There was such evidence here. See pp. 6-7, 9, *supra*.

*USS-POSCO Industries* v. *Contra Costa County Building & Construction Trades Council*. In that case, the Ninth Circuit reversed the district court's award of attorney's fees against petitioner as a sanction for violating Rule 11 of the Federal Rules of Civil Procedure. See 31 F.3d at 811-812. The Ninth Circuit found that petitioner had repleaded previously dismissed claims out of a legitimate (although incorrect) belief that it was required to do so to preserve the issues for appeal. *Ibid.* That ruling by the Ninth Circuit has no bearing on the questions before the Board and the Sixth Circuit in this case—whether petitioner's lawsuit was an unfair labor practice under *Bill Johnson's Restaurants*, and, if so, whether an award of attorney's fees to the unions was an appropriate make-whole remedy for that violation of the NLRA.[5]

Finally, petitioner contends (Pet. 17-18) that the Board's award of attorney's fees is inconsistent with *Summit Valley Industries, Inc.* v. *Local 112, United Brotherhood of Carpenters*, 456 U.S. 717 (1982). *Summit Valley Industries* established that attorney's fees incurred during earlier Board proceedings "are not a proper element of damages" in a court action brought under Section 303 of the Labor Management Relations Act, 29 U.S.C. 187. 456 U.S. at 727. *Summit Valley* did not involve an award of attorney's fees by the Board, nor did it present the situation of a party who was

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[5] Although petitioner argues (Pet. 18) that the Sixth Circuit's approval of the award of attorney's fees in this case conflicts with that court's earlier decision in *Johnson & Hardin*, *supra*, the decision below explained (Pet. App. 22a) that there is no conflict. In any event, petitioner's claim of an intra-circuit conflict would not support a grant of certiorari. See *Wisniewski*, 353 U.S. at 902.

forced to defend against a meritless and retaliatory lawsuit. The Court addressed that situation a year later in *Bill Johnson's Restaurants*, which expressly authorizes the Board to award attorney's fees to the targets of unmeritorious retaliatory suits that violate the NLRA. See 461 U.S. at 747. The Board and the court of appeals correctly applied *Bill Johnson's Restaurants* in this case.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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