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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1706**

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

vs.

MD Mechanical, Inc.,
Defendant,

Minneapolis Pipefitters Union, Local 539,
Respondent.

**Filed August 26, 2008
Reversed and remanded
Shumaker, Judge**

Hennepin County District Court
File No. 27-CV-07-11647

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Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant non-union contractor challenges the district court's entry of judgment on the pleadings in favor of respondent union. The district court determined that appellant's claims are preempted by federal labor law. Because appellant's complaint is based primarily on alleged violations of federal and state prevailing wage statutes, the interpretation of which does not require invoking federal labor law, federal preemption does not apply to preclude the state court's jurisdiction over this matter. We reverse and remand.

FACTS

Appellant Midwest Pipe Insulation, Inc. (MPI) is a non-union employer that performs pipe, boiler, and duct work in Minnesota. In June 2006, MPI submitted a bid to perform plumbing, pipe and duct insulation for MD Mechanical, Inc. (MD), a Minnesota business hired to perform pipefitting work on a school construction project. MD accepted MPI's bid and both parties executed a subcontract agreement.

MPI alleges that on July 11, 2006, MD informed MPI that respondent Minneapolis Pipefitters Union, Local 539 was pressuring MD to breach its subcontract agreement with MPI. Local 539 had previously granted MD \$80,000 from the union's market recovery program (MRP). An MRP is a job-targeting program designed to subsidize wage costs of contractors who employ union members on certain projects, and is funded entirely through union employees' wage deductions. One condition of eligibility for MRP grant money is that the contractor must agree to hire union employees to perform the targeted

work on the project. According to MPI, Local 539 threatened to rescind its MRP grant if MD used MPI's non-union employees to perform the pipe insulation work on the school construction project.

That same day, MD terminated its subcontract agreement with MPI.

MPI brought suit against both Local 539 and MD, asserting claims of tortious interference with contract and unfair competition. MPI also asserted that Local 539 violated the Minnesota Prevailing Wage Act (MPWA), Minn. Stat. §§ 177.41-.44 (2006), and the Davis-Bacon Act, 40 U.S.C. §§ 3141-3148 (2006).¹ The MPWA requires as a matter of state policy that contractors on state-funded projects pay laborers wages no less than the prevailing wage for similar work in the greater community. Minn. Stat. §§ 177.41, .43. The MPWA was modeled after the federal Davis-Bacon Act, which requires that workers on certain federally funded projects receive the prevailing wage as determined by the Secretary of Labor “without subsequent reduction or rebate.” 40 U.S.C. § 3142(a)-(c); *see also Dicks v. Minn. Dep’t of Admin.*, 627 N.W.2d 334, 337 (Minn. App. 2001) (reviewing legislative history of MPWA and its federal counterpart), *review denied* (Minn. July 24, 2001). According to MPI’s complaint, the MRP grant money used here was “funded, in whole or part, by deductions from employees’ wages on past and/or present” state and federally funded construction projects, and its use as a wage subsidy for contractors hiring union employees “has the purpose and/or effect of

¹ Formerly cited as 40 U.S.C. §§ 276a to 276a-5, the current renumbered version of the Davis-Bacon Act became effective September 27, 2006.

artificially inflating the regional prevailing wage” on similar construction projects, which violates state and federal policy.

Local 539 moved for judgment on the pleadings under Minn. R. Civ. P. 12.03, arguing that MPI failed to state a claim upon which relief can be granted. Local 539 asserted that MPI’s tortious-interference and unfair-competition claims “are within the exclusive jurisdiction of the National Labor Relations Board and must be dismissed as preempted by federal labor law.” Local 539 further asserted that MPI’s claim under the MPWA fails because MPI “does not allege any amount of money that any employee was purportedly underpaid and, in any event, the [MPWA] did not apply to the construction project at issue.”

In its response, MPI dismissed MD as a party to the suit, and dismissed its claim that Local 539 violated the MPWA. MPI also admitted that the school construction project was not subject to prevailing wage requirements under either state or federal law. Nevertheless, MPI argued that its surviving tortious-interference and unfair-competition “claims are *directly premised* on Local 539’s MRP grant tainted with fraudulent and illegal funds” collected on past state or federal prevailing wage construction projects.

The district court granted Local 539’s motion for judgment on the pleadings, concluding that MPI’s claim of tortious interference with contract² was preempted by federal labor law. While the district court acknowledged MPI’s allegation that the MRP

² Because success on a claim of unfair competition requires establishing a claim of tortious interference with contract, *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 267 (Minn. App. 1996), *review denied* (Minn. Sept. 20, 1996), the parties agreed that the district court should consider MPI’s tortious-interference claim as the only issue for decision.

grant was in fact illegally funded and therefore could not justify Local 539's intentional procurement of the contract's breach, the court did not reach the merits of the tortious-interference claim.

Judgment was entered, and this appeal by MPI follows.

D E C I S I O N

In reviewing an appeal from a case dismissed on the pleadings, the only question before this court is whether the complaint sets forth a legally sufficient claim for relief. *In re Trusts by Hormel*, 543 N.W.2d 668, 671 (Minn. App. 1996) (citing *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980)). This question of law is subject to de novo review. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). This court will "consider only the facts alleged in the complaint, accepting those facts as true" and will "construe all reasonable inferences in favor of the nonmoving party." *Id.* "It is immaterial to our consideration here whether or not the plaintiff can prove the facts alleged." *Elzie*, 298 N.W.2d at 32 (quotation omitted).

In its complaint, MPI alleges that Local 539 tortiously interfered with MPI's subcontract with MD. In order to establish a claim of tortious interference with contract, a plaintiff must show "(1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of the contract's breach; (4) absence of justification; and (5) damages caused by the breach." *Bebo v. Delander*, 632 N.W.2d 732, 738 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). Interference might be justified if such action is lawful and based on a legitimate economic interest. *Harman v. Heartland Food Co.*, 614 N.W.2d 236, 242 (Minn. App. 2000). The burden is on the plaintiff to "show

that the breach of plaintiff's contract with the third party resulted at least in part from the defendant's commission of an independent tort or other illegality." *Id.* MPI alleges that Local 539 was not justified in intentionally procuring the contract breach because the union's MRP, which if legally funded might properly be used to induce an employer into hiring union employees, was here illegally funded.

For purposes of this appeal, this court will consider as true MPI's claims that Local 539 knowingly and intentionally induced MD to breach its subcontract with MPI, causing MPI damage. This court will also consider as true—regardless of whether it can be proved—MPI's claim that Local 539's MRP grant was funded in some part by wage deductions on prior Davis-Bacon and MPWA projects in violation of federal and state prevailing wage laws. This allegation of illegal activity, MPI insists, forms the basis of its lawsuit. Accordingly, the limited issue before this court is whether the district court correctly determined that federal labor law preempts state jurisdiction over MPI's claim. "When federal preemption bars relief under any set of facts consistent with the pleadings, the complaint fails to state a claim and must be dismissed." *Leonard v. Northwest Airlines, Inc.*, 605 N.W.2d 425, 428 (Minn. App. 2000), *review denied* (Minn. Apr. 18, 2000).

The United States Supreme Court articulated the doctrine of federal preemption as it relates to federal labor law in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959). The *Garmon* court held that states are preempted from regulating conduct that "may fairly be assumed" to be a protected labor practice under section 7 of the National Labor Relations Act (NLRA), 29 U.S.C.

§ 157, or to be a prohibited labor practice under section 8 of the NLRA, 29 U.S.C. § 158, except when the type of conduct involved constitutes an imminent threat to public order or implicates deeply rooted local interests.³ *Id.* at 244, 79 S. Ct. at 779. When it is unclear whether an activity is governed by sections 7 or 8, “these determinations [must] be left in the first instance to the National Labor Relations Board.” *Id.* at 244-45, 79 S. Ct. at 779. The Supreme Court later modified *Garmon* to permit state jurisdiction over union conduct that is only arguably protected, as opposed to clearly protected and thus preempted, if “the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of” obtaining a Board ruling on the matter. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 202-03, 98 S. Ct. 1745, 1760 (1978).

In this case, MPI does not dispute that a union’s use of MRP grant money to subsidize wage costs is a protected activity under section 7 of the NLRA. *See Int’l Bhd. of Elec. Workers, Local 48, AFL-CIO (Kingston Constructors, Inc.) & Patrick Mulcahy*, 332 N.L.R.B. 1492, 1496 (2000) (“The Board has held that ‘job targeting’ programs, such as the Union’s MRP program, are not inconsistent with public policy and are affirmatively protected by Section 7.”)⁴ MPI argues that the Board has already determined that an MRP funded with union employees’ wages from federal prevailing

³ MPI does not, and could not, argue that either exception applies to this matter.

⁴ Although no section in the NLRA refers specifically to MRPs or job-targeting programs, section 7 provides that union employees may “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (2006).

wage projects violates the Davis-Bacon Act, thus removing the program from federal labor law protection and from application of the *Garmon* preemption doctrine. We agree.

MPI relies on the Board's decision in *Kingston Constructors*. There, the Board concluded that the union violated section 8 of the NLRA when it threatened to fire members who failed to pay MRP dues from their employment on Davis-Bacon projects. *Id.* at 1502. In reaching its conclusion, the Board deferred to previous decisions by federal courts of appeal and the labor department. *Id.* at 1501. Those decisions concluded that a union collecting dues from Davis-Bacon projects to fund job-targeting programs violates the Davis-Bacon Act "by returning a portion of employees' wages to contractors and by tending to inflate computations of prevailing wages." *Id.* (relying on *Int'l Bhd. of Elec. Workers, Local 357, AFL-CIO v. Brock*, 68 F.3d 1194 (9th Cir. 1995); *Bldg. & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994); and *In re Bldg. & Constr. Trades Unions Job Targeting Programs*, No. 90-02, 1991 WL 494718 (W.A.B. June 13, 1991)). Such deference was required, according to the Board, because it "has no institutional expertise or authority with respect to the interpretation of Davis-Bacon." *Id.* Thus "[t]he Labor Department and the courts, not the Board, have the responsibility to enforce the Davis-Bacon Act." *Id.* at 1500. The Board's decision was enforced by the Ninth Circuit Court of Appeals, which approved of the Board's "correct[] determin[ation] that deductions from employees' wages which revert to contractors and artificially increase the prevailing local wages are antithetical to the purposes of the

Davis-Bacon Act.” *Nat’l Labor Relations Bd. v. Int’l Bhd. of Elec. Workers, Local 48, AFL-CIO*, 345 F.3d 1049, 1057 (9th Cir. 2003).⁵

By acknowledging that it lacks authority to interpret federal non-labor policy in the form of the Davis-Bacon Act, the Board’s decision in *Kingston Constructors* suggests two interrelated propositions. The first is that an MRP is no longer protected union activity under section 7 of the NLRA when it violates the Davis-Bacon Act. MPI urges us to adopt this position, and points to the federal court of appeals decision in *Can-Am Plumbing, Inc. v. Nat’l Labor Relations Bd.*, 321 F.3d 145, 152 (D.C. Cir. 2003), which interprets *Kingston Constructors* to hold that “ordinarily a [MRP or job-targeting program] is clearly protected under section 7 . . . unless it violates federal policy.” If we accept *Can-Am Plumbing*’s interpretation, that an MRP that violates the Davis-Bacon Act is no longer protected under federal labor law, then the *Garmon* preemption doctrine does not apply to bar state jurisdiction.

The second proposition suggested by *Kingston Constructors* is that the Board has no preemptory jurisdiction over singular challenges to the union’s administration of its MRP under the Davis-Bacon Act. This position is consistent with the Supreme Court’s modified preemption doctrine. Notwithstanding the federal court’s interpretation in *Can-Am Plumbing*, the Board has not definitively ruled that an MRP that violates the Davis-Bacon Act is unprotected activity under the NLRA. Consequently, an allegedly unlawful

⁵ Federal courts of appeal have further held that this is a general prohibition that applies regardless of whether the actual contract at issue is a Davis-Bacon project. *Can-Am Plumbing, Inc. v. Nat’l Labor Relations Bd.*, 321 F.3d 145, 152 (D.C. Cir. 2003) (citing *Brock*, 68 F.3d at 1201 and *Reich*, 40 F.3d at 1283).

MRP is at best *arguably protected* activity, which under *Sears, Roebuck* means that state jurisdiction over the union's conduct exists in the absence of Board participation. *See* 436 U.S. at 203, 98 S. Ct. at 1760 (holding that states may regulate arguably protected union activity if the appropriate party did not raise the issue with the Board and the other party could not otherwise obtain a Board ruling). In this case, Local 539 has not filed a charge with the Board, and neither party disputes that MPI cannot seek the Board's ruling on this matter. Accordingly, we conclude that state jurisdiction over MPI's tort claim is not preempted by federal labor law.⁶

Local 539 argues that the district court correctly relied on *BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 90 F.3d 1318 (8th Cir. 1996), to conclude that MPI's claim was preempted by federal labor law. In *BE & K Constr.*, a non-union contractor was hired as a general contractor on a construction project, but was later terminated after union representatives asked the employer to reconsider the contract or be subject to union picketing or handbilling. 90 F.3d at 1321-23. Contractor sued the unions in federal court, alleging that they violated section 303 of the Labor Management Relations Act (LMRA) by engaging in unlawful secondary boycott activity, namely, threatening and coercing the employer to breach its contract with contractor. *Id.* at 1323.

⁶ In light of the above analysis and conclusion, we decline to further discuss MPI's argument that *Can-Am Plumbing* is directly analogous to this case. While we find the federal court's analysis informative, we note that the decision does not set forth any legal principle to follow, but instead remands to the Board for more adequate analysis of the issues raised regarding violations of the Davis-Bacon Act. *Can-Am Plumbing*, 321 F.3d at 154. We further note that on remand, the Board declined to engage in such analysis on procedural grounds. *Can-Am Plumbing, Inc. & United Ass'n of Journeymen & Apprentices in the Plumbing & Pipefitting Indus. of the U.S. & Canada, Local 342, AFL-CIO*, 350 N.L.R.B. No. 75 (2007).

Contractor also raised a tortious-interference-with-contract claim under state law. *Id.* A jury found in favor of contractor on both claims, and the unions challenged the verdict on appeal. *Id.* at 1324.

The Eighth Circuit Court of Appeals reversed the verdict, holding that contractor's tortious-interference claim was preempted by federal labor law. *Id.* at 1330. The court explained that while section 303 of the LMRA protects secondary union activity such as handbilling or picketing, states may regulate such "secondary activity[] that is marked by violence and imminent threats to the public order." *Id.* at 1328. Contractor had argued that the union threatened violence, thus fitting its allegation within the exception to the *Garmon* preemption doctrine. *Id.* at 1330. But the court determined that contractor had failed to present evidence supporting that allegation. *Id.* at 1331. As a result, according to the court, the unions engaged in federally protected conduct squarely within federal labor law, which meant that contractor's state tort claim was barred. *Id.*

We disagree with Local 539 that *BE & K Constr.* is analogous to MPI's case, largely because *BE & K Constr.* does not address MRPs or union activity with respect to state or federal prevailing wage statutes. We note that the district court here did not explain why it thought *BE & K Constr.* was persuasive or controlling, and we are uncertain as to the district court's reasoning. Moreover, *BE & K Constr.* is distinguishable because there contractor argued that while the alleged union activity would otherwise be protected by federal labor law and preempted from state regulation, the *Garmon* preemption exception for imminent threats or violence applied to permit state jurisdiction. *Id.* The court of appeals held that federal preemption barred

contractor's claim, but only after it determined that contractor failed to prove that the union activity fell within the exception. *Id.*

In this case, however, MPI strenuously argues that it is not alleging that Local 539 engaged in any activity that falls within the scope of federal labor law, and insists that neither the *Garmon* preemption doctrine nor its exceptions applies to this matter. MPI's complaint supports its argument, and under our standard of review, we must construe inferences in MPI's favor. We further note that unlike contractor in *BE & K Constr.*, MPI has not had a chance to prove its case. Thus, *BE & K Constr.* does not pertain to our decision here.

Reversed and remanded.