No. 01-518

**IN THE SUPREME COURT OF THE UNITED STATES**

*BE & K CONSTRUCTION*
Petitioner.

v.

*NATIONAL LABOR RELATIONS BOARD*
Respondent

# BRIEF FOR THE RESPONDENT

Filed December 5th, 2001

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), authorized the NLRB to find that BE&K's meritless lawsuit, seeking treble damages against Intervenors, a group of labor organizations, violated the National Labor Relations Act ("NLRA") by interfering with the Section 7 right of Intervenors' member "employees" to engage in concerted activities for the purpose of mutual aid and protection?

2. Whether the Court of Appeals properly held that substantial evidence on the record as a whole supported the NLRB's factual finding that BE&K's meritless lawsuit was filed to retaliate against Intervenors' exercise of rights protected by the NLRA?

3. Whether the Court of Appeals properly held, pursuant to *Bill Johnson's Restaurants*, that once the NLRB found an unfair labor practice it had the authority to award Intervenors the attorneys' fees they incurred in defending against BE&K's meritless and retaliatory lawsuit because the award of such fees would, pursuant to Section 10(c) of the NLRA, "effectuate the policies" of that statute?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES





TABLE OF AUTHORITIES—Continued



FEDERAL STATUTES

TABLE OF AUTHORITIES—Continued



IN THE

# Supreme Court of the United States

No. 01-518

BE&K CONSTRUCTION CO.,
*Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF IN OPPOSITION *

## STATEMENT

A. This Petition for a Writ of Certiorari raises legal issues that are "virtually identical" to those presented by the recently denied petition for certiorari in *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26 (D.C. Cir. 2001), *cert. denied*, 70 U.S.L.W. 3312 (U.S. Oct. 29, 2001) (No. 01-92).[1] The Petition in this case also does not merit review.

*Petrochem* and this case arose from employer attempts to impose treble damage antitrust liability on unions based upon

* This Brief in Opposition is filed on behalf of Intervenors, who were parties in the court below and, therefore, are parties in this Court pursuant to Rule 12.6 of the Court's rules. This Brief supports the position being taken by Respondent, National Labor Relations Board.

[1] *See* Letter from Lawrence W. Marquess, Esq., counsel for Petrochem Insulation, Inc. to Francis Lorson, Chief Deputy Clerk, Supreme Court of the United States (Oct. 23, 2001).

their governmental petitioning activities. In both cases, the district courts summarily dismissed the lawsuits and the Ninth Circuit unanimously affirmed. Thereafter, in each case, the National Labor Relations Board ("Board" or "NLRB") applied the clear standards established by this Court in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) and found that the employer's lawsuit was both meritless and retaliatory and, therefore, violated the National Labor Relations Act ("NLRA"). A panel of the D.C. Circuit in *Petrochem*, and a panel of the Sixth Circuit in this case, unanimously affirmed the Board; and no judge voted to rehear either of the cases *en banc*.

B. This case arises from a labor dispute between Petitioner BE&K, a nationwide non-union general contractor, and Intervenors, who are local labor organizations. In the late 1980s, BE&K bid on a large construction project in California. Although Intervenors objected, BE&K was awarded the contract. Pet.App. 4a. Despite the fact that it suffered no damages, BE&K initiated antitrust litigation against Intervenors designed, as the Sixth Circuit found, to "squelch certain concerted activity in which the unions were engaging on behalf of members who were on the BE&K construction site as employees of various sub-contractors and to ensure safe working conditions on the job-site." Pet.App. 3a.[2]

Petitioner's lawsuit primarily targeted Intervenors' governmental lobbying and petitioning activities. *See* Pet.App. 4a.

[2] This was not the first time that BE&K filed a meritless lawsuit against unions with whom it had a labor dispute. *See BE&K v. Carpenters*, 90 F.3d 1319, 1325-27 (8th Cir. 1996) (case meritless as a matter of law); *BE&K v. Carpenters*, Civil Action No. CV95-6078 (Ala. Cir. Ct., July 2, 1998) (granting summary judgment against BE&K). BE&K has also settled NLRB charges similar to those in this case by agreeing to reimburse a union for the attorneys' fees it incurred, and by agreeing to post a notice promising not "to file or maintain baseless lawsuits for the purpose of retaliation." *BE&K Constr. Co.*, Case No. 26-CA-17650 (1997).



BE&K's initial complaint alleged that Intervenors' concerted activities violated Section 303 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C.§ 187. The district court summarily dismissed most of the complaint, noting that much of Intervenors' challenged activities were protected by the First Amendment. Pet.App. 5a-6a.[3]

BE&K next filed an amended complaint adding allegations under the antitrust laws. That complaint was also summarily dismissed by the district court. Pet.App. 6a.

Finally, BE&K filed a second amended complaint reasserting many of its previous allegations. The district court dismissed the allegations it had previously rejected, and sanctioned BE&K under Rule 11 for continuing to raise them. Pet.App. 7a. Ultimately, the court also granted Intervenors' motion for summary judgment on the antitrust claim; and BE&K voluntarily dismissed its remaining Section 303 claims with prejudice, waiving any right to appeal them. Pet.App. 8a.

C. Before the Ninth Circuit, BE&K challenged only the dismissal of its antitrust claim and the district court's imposition of sanctions. Pet.App. 8a. The Court of Appeals unanimously affirmed the dismissal based on the *Noerr-Pennington* doctrine.[4] Judge Kozinski, writing for the court,

[3] When the lawsuit was commenced, Intervenors informed BE&K's counsel that it was frivolous because most of the unions' alleged unlawful conduct was protected by the First Amendment and, therefore, immune from liability. BE&K's counsel responded that he had been instructed to "stop [the unions'] conduct" and, accordingly, had filed a "novel" lawsuit, although he was unaware of any cases that contradicted the unions' claim of First Amendment immunity. Joint Appendix in Sixth Circuit Court of Appeals ("Joint Appendix") at 68, 334. Thus, contrary to BE&K's assertion (Pet. 11), it is not "undisputed" that Petitioner "had a reasonable belief that it would prevail."

[4] *See Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S.

held that as a matter of law "[t]he record . . . forecloses any possibility BE&K could substantiate its [antitrust] claim." *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994). The court rejected BE&K's claim that Intervenors had engaged in "sham" conduct, finding that Intervenors' petitioning activities "cannot be reconciled with the charge that [they] were filing lawsuits and other actions willy-nilly without regard to success." *Id.* at 811 (emphasis added).[5]

D. After the Ninth Circuit affirmed the dismissal of BE&K's lawsuit, the NLRB applied the principles set forth in *Bill Johnson's* and held unanimously that Petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by litigating (i) a meritless lawsuit against Intervenors (ii) in retaliation for their having engaged in protected concerted activity on behalf of their members. Pet.App. 28a-68a. The Sixth Circuit unanimously affirmed the Board, Pet.App. 1a-25a, and no member of the court voted in favor of BE&K's petition for rehearing *en banc*. Pet.App. 26a.

## REASONS FOR DENYING THE WRIT

While BE&K contends that four separate holdings by the Sixth Circuit warrant the granting of certiorari, in fact no aspect of the decision below merits review under any of this Court's usual criteria.

*First*, the Court of Appeals' decision did not break any new legal ground. Rather, when reviewing the Board's determination that BE&K's lawsuit constituted an unfair labor practice which warranted the normal remedial order, the Sixth Circuit simply applied the principles established by this Court's unanimous decision in *Bill Johnson's*.

*Second*, despite BE&K's claim to the contrary, there is no conflict among the circuits regarding the meaning or application of *Bill Johnson's*.

*Third*, there is no intra-circuit conflict between this case and another decision of the Sixth Circuit and, even if there were, that would not be a compelling reason for granting certiorari.

We will respond to the questions presented by BE&K in the same order that they are raised in its petition.

### I. BE&K'S LAWSUIT WAS "UNMERITORIOUS" PURSUANT TO *BILL JOHNSON'S RESTAURANTS.*

BE&K first claims that the clear language in *Bill Johnson's*, relied upon by the NLRB and the Court of Appeals, was *dicta* by this Court that was implicitly rejected in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993); and that there is a split among the circuits regarding the proper interpretation of *Bill Johnson's*. These contentions are without merit.

1. In *Bill Johnson's*, the Court held that while a *pending* lawsuit can be *enjoined* as an unfair labor practice only if it is *baseless* (*id.* at 744), a different standard is applicable once the lawsuit is *completed*:

> *If judgment goes against the employer in . . . court . . . or if his suit is withdrawn or is otherwise shown to be* ***without merit***, the employer has had its day in court . . . and the Board may then proceed to adjudicate the §8(a)(1) . . . unfair labor practice case.

*Id.* at 747 (emphasis added); *accord, id.* at 749 ("*If the . . . proceedings result in a judgment adverse to the plaintiff*, the

---

657 (1965), holding that governmental petitioning activity is immune from antitrust liability unless it is "sham."

[5] The Ninth Circuit also reversed the imposition of Rule 11 sanctions against BE&K because Petitioner's belief that it had to reassert previously dismissed claims to preserve them for appeal, although wrong, was not frivolous. *Id.* at 812. Thus, the reversal of sanctions had nothing to do with the *merits* of BE&K's lawsuit. *Id.*; Pet.App. 48a.

Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief.") (emphasis added). The Courts of Appeals have consistently found that *Bill Johnson's* means what it says, and have applied its clearly articulated post-adjudication standard. *See, e.g., BE&K Constr. Co. v. NLRB*, 246 F.3d 619, 629 (6th Cir. 2001); *Petrochem*, 240 F.3d at 32; *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1088 (9th Cir. 1995); *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 243 (6th Cir. 1995); *NLRB v. Vanguard Tours*, 981 F.2d 62, 65 (2d Cir. 1992); *NLRB v. International Union of Operating Engineers*, 15 F.3d 677, 679 (7th Cir. 1994); *see also White v. Lee*, 227 F.3d 1214, 1237 (9th Cir. 2000); *Cardtoons v. Major League Baseball Players Ass'n.*, 208 F.3d 885, 887 n.4 (10th Cir.) (*en banc*), *cert. denied*, 531 U.S. 873 (2000).

Petitioner would dismiss the above-quoted statements from *Bill Johnson's* as mere "*dicta*" in which this Court "briefly opined" (Pet. 6) on what might be the correct standard in a case different from the one under consideration. But the Court's considerable discussion of the post-adjudication standard cannot be so characterized. In order to explicate the heightened standard that must be met before a *pending* lawsuit can be *enjoined* as an unfair labor practice, the Court necessarily contrasted it with the basic standard that must be met before a lawsuit that has been *adjudicated* may be found to constitute an unfair labor practice:

> [A]lthough it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis.

461 U.S. at 749. Articulation of the post-adjudication standard was also integral to the opinion because the Court directed the Board to apply that standard on remand should the employer's state court lawsuit have been dismissed:



> If [the employer's] other claims have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that petitioner acted unlawfully by prosecuting these unmeritorious claims if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose."

461 U.S. at 749 n.15. *See also id.* at 736 n. 3.[6]

2. Contrary to BE&K's assertion, *Professional Real Estate* did not implicitly reject the post-adjudication standard that *Bill Johnson's* established, in the labor context, for determining whether a lawsuit constitutes an unfair labor practice. Rather, *Professional Real Estate* simply "define[d] the 'sham' exception to the doctrine of *antitrust* immunity first identified in [*Noerr*]." 508 U.S. at 51 (emphasis added). The Court clarified that there cannot be *antitrust treble damage liability* for the filing of a lawsuit that is not "objectively baseless." *Id.* at 60-61; *see BE&K Constr. Co.*, 246 F.3d at 629 (*Professional Real Estate* "involved only . . . immunity from *antitrust* liability."). But the Court did not suggest (*see* Pet. 7) that *Professional Real Estate's* "objectively baseless" standard was "synonymous" with the post-adjudication standard of "without merit" established by *Bill Johnson's*. Indeed, the Court recognized that the antitrust law's sham exception is akin to the *Bill Johnson's* standard for *enjoining* a lawsuit as an unfair labor practice. *See* 508 U.S. at 59; *accord, Bill Johnson's*, 461 U.S. at 741, 744 (citing *California Motor Transport Co., Inc. v. Trucking Unlimited*,

---

[6] The Court's articulation of the post-adjudication standard clearly was not inadvertent. The briefs before the Court discussed the *Noerr-Pennington* antitrust standard and the similarities and differences between the antitrust and labor contexts. *See* Respondent's Br. in No. 81-2257 at 31-33 & n.2; Petitioner's Reply Br. in No. 81-2257 at 9-11. Moreover, during oral argument, the Court repeatedly questioned counsel about how the standard for reviewing a retaliatory lawsuit *after* it had been adjudicated should differ from the standard for deciding whether to *enjoin* such a lawsuit. *See* Oral Arg. Tr. at 7, 19, 20, 44, 45 in No. 81-2257.

404 U.S. 508 (1972)). Since *Professional Real Estate*, the Courts of Appeals have continued to apply *Bill Johnson's* "without merit" standard when determining whether an adjudicated lawsuit violates the NLRA. *See BE&K Constr. Co.*, 246 F.3d at 629; *Petrochem*, 240 F.3d at 31-32; *Diamond Walnut Growers*, 53 F.3d at 1088; *Johnson & Hardin*, 49 F.3d at 243; *International Union of Operating Engineers*, 15 F.3d at 679.[7]

3. BE&K attempts to create a circuit split by implying that the Second Circuit in *Vanguard Tours* applied a "reasonable basis" standard for assessing whether a lawsuit that is "judicially determined" is "meritless" within the meaning of *Bill Johnson's*. Pet. 11. *Vanguard Tours*, however, interpreted the *Bill Johnson's* post-adjudication standard consistently with every other circuit that has addressed the issue: "If the plaintiff has lost on the merits—even if he had a reasonable basis in bringing his suit—the Board may consider the filing of the suit to have been an unfair labor practice." 981 F.2d at 65. The Second Circuit did question whether a suit that is *voluntarily withdrawn* should be viewed as

[7] This Court's different accommodations between the antitrust laws and the First Amendment on the one hand (*Professional Real Estate*), and between the NLRA and the First Amendment on the other (*Bill Johnson's*), reflect that antitrust and labor law are two entirely distinct statutory schemes, with different purposes and remedies. *White*, 227 F.3d at 1236-37; *Cardtoons*, 208 F.3d at 888-90 & n.4. The potential liability for having brought an unsuccessful lawsuit is far greater when the antitrust laws are invoked (*i.e.*, treble damages) than when an unfair labor practice is alleged (*i.e.*, attorneys' fees). *See* James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 105 (1985). Moreover, the potential "chilling effect of a . . . lawsuit upon an employee's willingness to engage in protected activity" exists only in the labor context. *Bill Johnson's*, 461 U.S. at 741. Finally, while an employer's right to bring a retaliatory lawsuit must be balanced against the First Amendment protected associational rights of employees, no such countervailing right exists in the antitrust context. *See White*, 227 F.3d at 1237.



"without merit," pursuant to *Bill Johnson's*. *Id.* at 66. But, as the Sixth Circuit noted in this case, "*Vanguard Tours* . . . did not address the situation in which the majority of the plaintiff's cause of action is dismissed *on the merits* and only a portion is voluntarily withdrawn." *BE&K Constr. Co.*, 246 F.3d at 629 n.3.[8]

## II. BE&K'S ACTIONS AGAINST INTERVENOR UNIONS VIOLATED THE NLRA.

BE&K next argues that its meritless lawsuit could not have violated the NLRA because it was brought against labor unions, rather than "employees." The Board and the Court of Appeals also applied settled law in rejecting that claim.

1. BE&K relies upon a single sentence in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), which did not announce the sweeping revision of existing law that BE&K attributes to it. *See* Pet. 12; *BE&K Constr. Co.*, 246 F.3d at 625. The only issue in *Lechmere* was whether an employer, who denies union organizers access to its private property, violates the Act by interfering with the Section 7 right of *its* employees to engage in "self-organization." *See* 502 U.S. at 531-32; 29 U.S.C. § 157. It was in that context that this Court stated: "the NLRA confers rights only on *employees*, not on unions or their non-employee organizers." *Id.* at 532.

That statement, however, does not support BE&K's claim that the Intervenor unions had no "standing" to invoke Section 7 protections on behalf of their members, who *are* "employees." Though BE&K refers to Intervenors as "non-employee labor organizations," Pet. 3, that label is a

[8] As noted earlier, BE&K voluntarily dismissed only certain of its Section 303 claims; and that dismissal was with prejudice and without any right of appeal. Moreover, because the voluntarily dismissed claims had never been pursued, Intervenors incurred (at most) *de minimus* legal fees with regard to them. Accordingly, as a practical matter, the Board's order granting Intervenors their attorneys' fees has no application to those claims.

misnomer since an entity can only be a "labor organization" if "employees participate" in it. *See* 29 U.S.C. § 152(5). And because Section 7 affords "employees" the right to "form, join, or assist labor organizations . . . for the purpose of . . . mutual aid or protection," to permit an employer, such as BE&K, to retaliate with impunity against a union for engaging, on behalf of its members, in such mutual aid and protection as governmental petitioning activities, would impair the Section 7 associational rights of the union's member "employees" by denying them the means to engage effectively in concerted actions protected by the NLRA. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Geske & Sons v. NLRB*, 103 F.3d 1366, 1377, 1378 n.16 (7th Cir. 1997); *Diamond Walnut Growers*, 53 F.3d at 1089-90.

In *Lechmere*, after the statement quoted above that BE&K relies upon, this Court went on specifically to note that an employer's actions against a union *can* violate the NLRA. *See* 502 U.S. at 537; *accord, Thunder Basin Coal v. Reich*, 510 U.S. 200, 217 n.21 (1994); *BE&K Constr. Co.*, 246 F.3d at 627. As the D.C. Circuit stated in *Petrochem*, "we cannot imagine a more reasonable interpretation" of the Act (240 F.3d at 29); and, since *Lechmere*, the Board and Courts of Appeals have continued to find that various employer conduct directed at labor organizations is violative of the NLRA. *See, e.g., Petrochem*, 240 F.3d at 29, *enf'g* 330 NLRB No. 10 (1999); *Geske & Sons*, 103 F.3d at 1377, *enf'g* 317 NLRB 28 (1995); *Lucile Salter Packard Childrens' Hosp. v. NLRB*, 97 F.3d 583, 592 (D.C. Cir. 1996), *enf'g* 318 NLRB 433 (1995); *O'Neil's Markets v. NLRB*, 95 F.3d 733, 739 (8th Cir. 1996), *enf'g in relevant part* 318 NLRB 646 (1995); *Diamond Walnut Growers*, 53 F.3d at 1089-90, *enf'g* 312 NLRB 61 (1993).

2. BE&K again attempts to create a circuit split where none exists. In *Diamond Walnut*, the Ninth Circuit held (consistent with the Sixth Circuit in this case) that an



employer that files a meritless, retaliatory lawsuit against a *union* commits an unfair labor practice pursuant to *Bill Johnson's*. 53 F.3d at 1089-90.

BE&K also mistakenly asserts that there is a conflict between the Sixth Circuit's earlier ruling in *Johnson & Hardin* and its decision in this case. Pet. 12-13. But *Johnson & Hardin* held that an employer violated the NLRA by excluding union organizers from its property, 49 F.3d at 242; and that holding is consistent with the principle, applied by the Sixth Circuit in this case, that employer conduct directed against a labor organization can constitute an unfair labor practice. Moreover, no Circuit judge voted to rehear this case *en banc*, *see* Pet.App. 26a; and even if there were an intra-circuit conflict (which there is not), that is not a compelling reason for granting certiorari. *See* Supreme Court Rule 10.

## III. SUBSTANTIAL EVIDENCE SUPPORTED THE BOARD'S FINDING THAT BE&K'S MERITLESS LAWSUIT WAS FILED TO RETALIATE AGAINST INTERVENORS' EXERCISE OF RIGHTS PROTECTED BY THE NLRA.

BE&K also contends that certiorari should be granted because the Sixth Circuit improperly considered Petitioner's request for treble damages as evidence of its retaliatory intent, and because the Sixth Circuit's decision conflicts with that of another circuit. Again, there is no merit to these claims.

1. The Sixth Circuit properly found that "substantial evidence in the record convincingly indicates that BE&K did indeed possess an improper, illegal retaliatory motivation." *BE&K Constr. Co.*, 246 F.3d at 630-31. The relevant evidence included: (1) the lack of merit of the underlying suit as evidenced by its summary dismissal; (2) BE&K's decision to seek treble damages against Intervenors; and (3) "the fact that BE&K sought recompense from two union organizations for a previous lawsuit" to which they were not parties, and that

BE&K refused to dismiss those unions even after "extensive discovery [did not] uncover any evidence of [their] participation." *Id.* at 630.[9]

BE&K asserts, however, that the Sixth Circuit improperly considered Petitioner's demand for treble damages because the Board did not rely on that evidence for its determination of retaliation. Pet.15. But the Board specifically found (and it is undisputed) that BE&K sought such punitive damages against Intervenors. Pet.App. 35a. The Sixth Circuit simply considered that evidence, which was in the record before it, when it affirmed the Board's factual finding of retaliation. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951) (agency factual findings will be upheld if "on the record as whole there is substantial evidence" to support such findings). No basis exists for granting certiorari because, as this Court stated in *Universal Camera*, "Congress placed [the substantial evidence inquiry] in the keeping of the Courts of Appeals. This Court will intervene only . . . when the standard appears to have been misapprehended or grossly misapplied." *Id.*[10]

[9] When Intervenors initially informed BE&K's counsel that the two unions in question had no connection to the prior lawsuit, he conceded that he had no evidence to the contrary but refused to dismiss them from the claim based on that litigation. Joint Appendix at 68, 334.

[10] *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), cited by Petitioner, is inapposite. There, on appeal, the Board based its argument on a *legal* theory "that d[id] not appear clearly in any Board opinion." *Id.* at 685. Here, by contrast, the Court of Appeals affirmed a *factual* finding by the Board based on evidence that was cited in the Board's opinion. Moreover, it was clear to the Sixth Circuit that the Board considers a request for treble or punitive damages to be evidence of retaliatory motive. *See, e.g., Petrochem*, 330 NLRB No. 10 at 5 (1999), *enf'd* 240 F.3d 26; *Diamond Walnut*, 312 NLRB 61, 69 (1993), *enf'd* 53 F.3d 1085. Thus, "[t]here is not the slightest uncertainty" that the Board would find retaliation if the case were remanded. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality op.).



2. Contrary to BE&K's assertion, the Sixth Circuit's consideration of treble damages as evidence of retaliation does not create a circuit split with *International Union of Operating Engineers*. *See* Pet. 16. In that case, the Seventh Circuit found that while "it is well established that a . . . request for money damages . . . may support an inference that the lawsuit was filed for retaliatory purposes," under the facts presented in *Operating Engineers* the request for punitive damages *by itself* was "not sufficient to support a finding of retaliatory intent." 15 F.3d at 680. There is no conflict between that holding and the finding by the Sixth Circuit that a demand for treble damages, *together with other evidence*, supported the Board's finding of retaliation.[11]

## IV. THE AWARD OF ATTORNEYS' FEES INCURRED BY INTERVENORS IN DEFENDING AGAINST BE&K'S MERITLESS AND RETALIATORY LAWSUIT WAS NECESSARY AND PROPER TO REMEDY BE&K'S UNFAIR LABOR PRACTICE.

Lastly, BE&K contends that certiorari should be granted because the Sixth Circuit erred in upholding the Board's award of attorneys' fees to Intervenors, and because its decision to do so conflicts with that of other circuits.

1. The NLRA authorizes the Board to order any proper relief that would "effectuate the policies of [the Act]." *Bill Johnson's*, 461 U.S. at 747 (citing 29 U.S.C. §160(c)). In *Bill Johnson's*, this Court held, without qualification, that "the

[11] BE&K also vaguely suggests that the Sixth Circuit's holding on retaliation somehow conflicts with *Petrochem Insulation* and *Vanguard Tours*. *See* Pet. 14. That suggestion is simply wrong. *See Petrochem*, 240 F.3d at 32-34 (upholding Board's finding of retaliation based on the lack of merit of the company's suit and its decision to seek treble damages against the unions); *Vanguard Tours*, 981 F.2d at 65 (noting, without discussion, "there is little question that [the employer] had a retaliatory motive").

Board may order the employer to reimburse [those] whom he had wrongfully sued for their attorney's fees and other expenses." 461 U.S. at 747.

BE&K argues, however, that the Sixth Circuit ignored *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters*, 456 U.S. 717 (1982)—decided before *Bill Johnson's*—which held that Section 303 of the LMRA is not a fee-shifting statute. Petitioner then suggests that, because a portion of its meritless suit was brought pursuant to Section 303, the Board cannot remedy BE&K's unfair labor practice by awarding Intervenors any of the attorneys' fees they incurred in defending against that lawsuit. Extending BE&K's argument to its logical conclusion, the Board could *never* award attorneys' fees against a party whose meritless and retaliatory lawsuit constituted an unfair labor practice unless that underlying suit was brought pursuant to a fee-shifting statute.

Petitioner's argument reflects its fundamental misunderstanding of the remedy ordered in this case. As Courts of Appeals have explained, no fee-shifting statute is necessary to justify an award of attorneys' fees pursuant to *Bill Johnson's* because "the award responds not to the Company's loss of its suit, but to the fact that the suit itself amounted to a 'illegal act.'" *Petrochem*, 240 F.3d at 35; *see also BE&K Constr. Co.*, 246 F.3d at 632.[12]

In this case, both the Board and the Sixth Circuit found, based on substantial evidence, that Petitioner's lawsuit was both meritless and retaliatory. Pet.App. 20a-22a; 5a-6a. As the Sixth Circuit noted, only an award of attorneys' fees could remedy the type of unfair labor practice committed by

[12] Petitioner also relies upon *J.P. Stevens*, 268 NLRB 8 (1983). But in that case, unlike here, the attorneys' fees at issue were not incurred in defending a lawsuit that itself constituted an unfair labor practice. *See J.P. Stevens & Co. v. NLRB*, 668 F.2d 767, 774-77 (4th Cir.), *vacated and remanded*, 458 U.S. 1118 (1982).



BE&K and act as a deterrent to the filing of additional meritless, retaliatory lawsuits. *BE&K Constr. Co.*, 246 F.3d at 632. And requiring Petitioner to pay attorneys' fees is hardly a novel remedy. *Cf.* 29 U.S.C. §107(e) (requiring payment of union's attorneys' fees if employer does not prevail in request for injunctive relief).[13]

2. The Sixth Circuit's enforcement of the Board's remedy does not conflict either with the Ninth Circuit's holding in the underlying litigation, *USS-POSCO*, *supra*, or with the Sixth Circuit's decision in *Johnson & Hardin*. As noted earlier, in *USS-POSCO* the Ninth Circuit reversed an award of Rule 11 sanctions against BE&K that was based on "its persistent reincorporation of stricken parts of the complaint in the amended complaints." 31 F.3d at 811. The propriety of Rule 11 sanctions against BE&K for allegedly ignoring the district court's order about future pleadings is totally irrelevant to the issue of whether the Board can award attorneys' fees as a remedy because BE&K's meritless and retaliatory lawsuit constituted an unfair labor practice. And, as discussed *supra*, the Sixth Circuit's unanimous decision in this case not to grant rehearing *en banc* makes it clear that there is no intra-circuit conflict between this case and *Johnson & Hardin*. *See* Pet.App. 22a, 26a.

[13] Notwithstanding the considerable hyperbole in the Petition, the award of attorneys' fees in this case does not "undercut vital First Amendment protections" or threaten anyone's "right of access to the courts on labor issues." Pet. 5. These statements totally ignore the second prong of the Bill Johnson's post-adjudication standard, *viz.* that a meritless lawsuit can constitute an unfair labor practice only if the Board, and the reviewing Court of Appeals, also conclude "that [it] was filed with retaliatory intent." *Bill Johnson's*, 461 U.S. at 749 (emphasis added).

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PETER D. NUSSBAUM*
MEERA TREHAN
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

* Counsel of Record

*Attorneys for Intervenors International Brotherhood of Electrical Workers, Local 302, AFL-CIO; and Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO*

SANDRA RAE BENSON *
THEODORE FRANKLIN
VAN BOURG, WEINBERG, ROGER & ROSENFELD
180 Grand Avenue, 14th Floor
Oakland, CA 94512-3741
(510) 839-6600

*Attorneys for Intervenors District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Contra Costa County Building and Construction Trades Council, AFL-CIO; Northern California District Council of Laborers, Laborers International Union of North America; Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO;*



*Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL-CIO; and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO*