No. 21-1449

In the Supreme Court of the United States

GLACIER NORTHWEST, INC., DBA CALPORTLAND,
PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL UNION NO. 174

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Whether the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, preempts an employer's state tort claim against a union for property damage that allegedly occurred because workers failed to take reasonable precautions to protect the employer's property before going on strike.

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INTEREST OF THE UNITED STATES

This case concerns the preemptive effect of the National Labor Relations Act. Congress has granted the National Labor Relations Board primary responsibility for interpreting and applying the Act's provisions. Preemption under the Act serves to protect the Board's authority to adjudicate unfair-labor-practice charges and provide for the uniform interpretation and implementation of the Act. The United States accordingly has a substantial interest in the resolution of the question presented.

STATEMENT

A. Legal Background

1. In 1935, Congress passed and President Franklin D. Roosevelt signed the National Labor Relations Act

(NLRA or Act), ch. 372, 49 Stat. 449 (29 U.S.C. 151 *et seq.*). The Act aims to redress the "inequality of bargaining power" between employers and employees. 29 U.S.C. 151. To that end, Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, 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." 29 U.S.C. 157. Section 8 of the Act prohibits employers as well as unions from engaging in various unfair labor practices, such as restraining or coercing employees in the exercise of their rights under Section 7. 29 U.S.C. 158(a)(1) and (b)(1)(A).

The Act establishes the National Labor Relations Board (NLRB or Board) to investigate violations, hold hearings, issue orders, and otherwise enforce its provisions. 29 U.S.C. 153-156. The Board consists of five members appointed by the President with the advice and consent of the Senate. 29 U.S.C. 153(a). The General Counsel of the Board, who is likewise appointed by the President with the advice and consent of the Senate, conducts investigations and pursues complaints before the Board. 29 U.S.C. 153(d).

If a person believes that an employer or union has committed an unfair labor practice in violation of the Act, the person may file a charge with the agency. 29 C.F.R. 101.2. A regional director, exercising authority delegated by the General Counsel, investigates the charge. 29 C.F.R. 101.5-101.6. If "the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful," the regional director issues a complaint. 29 C.F.R. 101.8. An administrative law judge then holds a hearing and issues a recommended

decision, which the Board may review. 29 C.F.R. 101.10-101.12. If the Board finds that a party has engaged in an unfair labor practice, it "shall" order the party to "cease and desist" and to take "such affirmative action as will effectuate the policies of the Act" (*e.g.*, reinstating an employee who has been fired unlawfully). 29 U.S.C. 160(c). The Board's decision is subject to review in a court of appeals. 29 U.S.C. 160(e)-(f).

2. This Court has developed a substantial body of doctrine concerning the Act's preemptive effect. This case concerns a branch of that doctrine known as *Garmon* preemption, after *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

In *Garmon*, this Court explained that a state court may not entertain claims based on conduct that is protected by Section 7 of the Act. See 359 U.S. at 244. Under longstanding principles of conflict preemption, a federal law that guarantees the right to engage in an activity preempts a state law that forbids that activity. See *Brown* v. *Hotel Employees*, 468 U.S. 491, 503 (1984); *Gibbons* v. *Ogden*, 9 Wheat. 1, 212 (1824). Section 7 secures the right of workers to engage in concerted activities, and a State may not impair the exercise of that federal right.

The Court also held in *Garmon* that the Act limits a state court's power to resolve claims based on conduct that is *arguably* protected by Section 7 of the Act. See *Garmon*, 359 U.S. at 245. To show that Section 7 "arguably" protects an activity, a party must first "advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Longshoremen* v. *Davis*, 476 U.S. 380, 395 (1986) (citation omitted). The party must then "put forth enough evidence to enable

the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Ibid.*

If Section 7 arguably protects the conduct at issue, a state court must wait for the Board to resolve the legal status of the conduct in an administrative proceeding. See *Garmon*, 359 U.S. at 245. If the Board decides, subject to judicial review, that the conduct falls within the scope of the Act, "then the matter is at an end"; the state court may not grant relief on the state-law claim. *Ibid.* But "if the Board decides that the conduct is not protected," the state court may proceed to "entertain the litigation." *Davis*, 476 U.S. at 397. The state court also may resolve the claim if the party raising it lacks a "reasonable opportunity" to secure a decision from the Board (because, for example, the employer does not have a basis to file an unfair-labor-practice charge and the union has declined to do so). *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 201 (1978).

The "arguably protected" prong of *Garmon* preemption reflects the understanding that the Act does more than establish substantive rules of law. The Act "confide[s] primary interpretation and application of its rules to a specific and specially constituted tribunal"—namely, the Board. *Garmon*, 359 U.S. at 242 (citation omitted). Disputes about whether Section 7 protects an activity fall within the Board's special competence, and state as well as federal courts must ensure that the Board has the opportunity to resolve those disputes. See *id.* at 245. The Board's decision "is not the last word"—it remains subject to judicial review in a federal court of appeals—but "it must assuredly be the first."

Marine Engineers v. *Interlake S.S. Co.*, 370 U.S. 173, 185 (1962).[1]

B. Facts And Proceedings Below

Petitioner Glacier Northwest, Inc., filed a tort action in Washington state court, seeking damages for injury to its property that allegedly resulted from a strike. The parties dispute many of the pertinent facts. See Cert. Reply Br. 1. But because the state courts resolved the case on the union's motion to dismiss, the courts were required to assume the truth of the allegations in Glacier's complaint. J.A. 150; see J.A. 5-27 (complaint). In addition, because Washington allows a plaintiff to defeat dismissal by relying on "hypothetical facts supporting the complaint," the courts were also required to assume the truth of the factual claims in Glacier's response to the motion to dismiss and in three declarations that Glacier submitted to the state court. J.A. 150 n.7; see J.A. 28-60 (response to motion to dismiss); J.A. 71-84 (declarations).

1. Glacier sells and delivers concrete in Washington. J.A. 5. It prepares concrete for delivery by measuring and mixing raw materials (such as sand, cement, and water) to meet the customer's specifications. J.A. 7-8. It then loads the concrete in a revolving drum on the back of a ready-mix delivery truck. J.A. 8. Once loaded, concrete must be delivered and poured the same day; it "cannot be saved for another day." *Ibid.* It begins to harden if it remains in the drum too long, making it unusable and threatening damage to the truck. *Ibid.*

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[1] In *Garmon*, this Court separately held that the Act limits a state court's authority to adjudicate a claim based on conduct that is actually or arguably *prohibited* by Section 8 of the Act as an unfair labor practice. See 359 U.S. at 245. Those aspects of *Garmon* preemption are not at issue here. See pp. 28-29, *infra*.

The International Brotherhood of Teamsters Local Union No. 174 represents Glacier's truck drivers as their exclusive bargaining representative. J.A. 5. The collective bargaining agreement between Glacier and the union expired on July 31, 2017. J.A. 112. On August 11, 2017, during negotiations for a new collective bargaining agreement, the truck drivers went on strike. J.A. 10.

Glacier alleges that the union called for the drivers to begin the strike at around 7:00 in the morning, while Glacier was in the middle of putting some loads of concrete on its trucks and delivering other loads to its customers. J.A. 10-11. From 7:00 to 7:45, at least 16 truck drivers who had already set out on deliveries returned to Glacier's yard with fully loaded trucks. J.A. 72. Nine of the drivers allegedly "abandoned their trucks" in the yard "with no notice to anyone at Glacier." *Ibid.*

Glacier alleges that the drivers' acts created an "emergency situation." J.A. 13. On the one hand, Glacier maintains, it could not leave the concrete in the trucks: Once concrete "starts to set," it puts "pressure on the hydraulic system" of the revolving drum, threatening "significant damage" to the truck. J.A. 9. On the other hand, Glacier maintains, it could not just dump the concrete out of the trucks, because concrete contains "environmentally sensitive chemicals and mixtures that must be disposed of promptly, safely and correctly." J.A. 7. Glacier contends that it had to find a way to avert "costly damage to the mixer trucks" without creating "an environmental disaster." J.A. 72.

The result, Glacier claims, was "complete chaos." J.A. 72. According to one of Glacier's management officials, there was a "mad scramble to figure out which trucks had concrete in them; how close the concrete was to setting up (hardening); and where to dump it safely and in

an environmentally correct manner." J.A. 82. Over the course of the next five hours, 15 employees built special "bunkers" and offloaded the concrete in them. J.A. 13; see J.A. 84. Those measures prevented damage to the trucks, but the concrete was "destroyed by hardening." J.A. 13. Glacier states that it later had to bring in excavating equipment and trucks to break up the concrete and haul it away to a suitable disposal site. *Ibid.*

2. Glacier sued the union in Washington Superior Court, claiming that the union was liable for the "intentional and malicious sabotage, ruination, and destruction" of its concrete. J.A. 19. The court dismissed the property-damage claims on the pleadings. J.A. 101-102. In an oral ruling, the court concluded that the work stoppage was at least "arguably protected" by Section 7 of the Act, and that, as a result, the state-law claims for property damage flowing from that conduct were preempted under *Garmon*. J.A. 96; see J.A. 89-100.[2]

3. The Washington Court of Appeals reversed the dismissal of the property-damage claims. J.A. 110-137. The court observed that, under the Board's decisions, the Act does not protect employees who fail "to take reasonable precautions to prevent the destruction of an employer's plant, equipment, or products before engaging in a work stoppage." J.A. 125. The court then noted that, according to Glacier's allegations, the union timed the work stoppage to maximize damage to Glacier's property and "failed to take reasonable precautions to protect Glacier's equipment, plant, and batched concrete from 'foreseeable imminent danger' resulting

[2] The Washington Superior Court later granted the union summary judgment on other claims that are not at issue here, J.A. 103-106, and the Washington Court of Appeals and Washington Supreme Court affirmed as to those separate claims.

from the Union's sudden cessation of work." J.A. 128. The court concluded that such alleged conduct was not even "arguably protected" under the Board's decisions and that, as a result, the Act did not preempt the employer's claims. J.A. 129.

4. The Washington Supreme Court reversed as to the property-damage claims. J.A. 138-178. It acknowledged that, under the Board's decisions, "employees must take reasonable precautions to protect an employer's plant, property, and products." J.A. 160. And the court observed that, on a "full factual analysis," it might conclude that the drivers who walked out after returning their trucks with concrete still in the drums did not take reasonable precautions to protect the trucks and concrete. J.A. 165. On the other hand, the court continued, "the strike could also be viewed as protected because the concrete loss was incidental damage given the perishable nature of the concrete." *Ibid.* The court reasoned that the "fact-specific determination" whether the union took reasonable precautions should be made by the Board, not by a state court, and that Glacier's claims were accordingly preempted under *Garmon*. *Ibid.*

The state supreme court also noted that this Court had recognized an exception to *Garmon* preemption in cases involving state interests that are "deeply rooted in local feeling and responsibility." J.A. 155 (citation omitted). But the state supreme court determined that the local-interest exception applies only to "violent conduct, such as vandalism." J.A. 159. The court concluded that, because this case involved "product damage incidental to [a] strike" rather than the violent destruction of property, it fell outside the scope of that exception. J.A. 158. The court accordingly held that the trial court

had properly dismissed Glacier's property-damage claims. J.A. 177.

5. Meanwhile, the union had filed a charge with the Board alleging that Glacier had engaged in unfair labor practices. See J.A. 63-65. The charge (as later amended) alleged that Glacier had engaged in a months-long "campaign" to punish the union's members for protected conduct. J.A. 68. The Board deferred consideration of the union's charge pending arbitration between Glacier and the union, see Wash. Ct. App. R. 218-221, but in the end, the parties' efforts to resolve the dispute through arbitration failed.

In January 2022, after the state supreme court issued the decision below, the NLRB regional director issued a complaint based on the agency's investigation of the union's charge. See App., *infra*, 1a-7a. The agency complaint alleged that Glacier had committed unfair labor practices by (1) disciplining drivers "for leaving their trucks on August 11, 2017," when the strike began, (2) disciplining employees for failing to return to work on August 19, 2017 (a separate incident not at issue here), and (3) filing this lawsuit to retaliate against the union. *Id.* at 4a.

After this Court granted certiorari, the agency initially postponed further proceedings. See Pet. Br. 13. But the union sought reconsideration, arguing that, even if this Court reverses the dismissal of Glacier's claims, the state courts would be required to stay proceedings on remand pending resolution of the regional director's complaint. Mot. for Reconsideration, *Glacier Northwest*, No. 19-CA-203068 (NLRB Oct. 20, 2022); see pp. 25-28, *infra*. The agency granted the union's motion and scheduled a hearing for January 2023. See Pet. Br. 13.

SUMMARY OF ARGUMENT

Under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), state courts may not resolve claims based on conduct that is actually or arguably protected by the NLRA. But taking the allegations in the complaint as true, the conduct at issue here was neither.

A. The NLRA protects the right to strike. Strikes constitute protected conduct even though they inflict economic losses upon the employer; after all, the whole point of a strike is to threaten such losses in order to pressure the employer to raise wages or improve working conditions. The Board has long recognized, however, that in some circumstances, an employee who goes on strike has an obligation to take reasonable precautions to protect the employer's property from foreseeable, imminent damage that would be caused by the sudden cessation of work.

B. Accepting the allegations in Glacier's complaint as true, the state courts erred in dismissing Glacier's claims. Glacier alleges that, by abruptly stopping work in the morning of August 11, 2017, its truck drivers put its trucks and concrete in danger of imminent harm. It says that the truck drivers could have taken at least two precautions to avoid or mitigate those harms: First, they could have started the strike at a different time, rather than at a time when concrete had already been poured in the trucks. Second, all the drivers could have notified company management when returning the trucks to the company yard, instead of abandoning the trucks there without telling anyone. Accepting Glacier's allegations as true, the failure to take those steps constituted a failure to take reasonable precautions. The Act does not protect (or arguably protect) such conduct.

C. After the state supreme court issued its decision, a regional director at the NLRB, acting on the basis of the evidence gathered in the agency's investigation rather than just the facts alleged by Glacier, issued a complaint stating that the truck drivers had engaged in protected conduct when they stopped work on August 11, 2017. The agency complaint suffices to show that the truck drivers' conduct was at least *arguably* protected, and that a state court may not resolve claims based on that conduct until the Board settles the argument. Because the state courts have not yet had the opportunity to consider the effect of the agency complaint, however, this Court should not address that issue in the first instance, but should instead leave it for the state courts to resolve on remand.

D. Glacier's remaining arguments are incorrect. Glacier relies on the local-interest exception to *Garmon* preemption, but that exception concerns preemption under Section 8 of the Act (which prohibits unfair labor practices), not preemption under Section 7 (which protects concerted activities). Glacier also questions the soundness of *Garmon* preemption, but *Garmon* accords with ordinary principles of conflict preemption and is in any event well established. Finally, contrary to Glacier's contention, a finding of preemption would not raise serious questions under the Just Compensation Clause.

ARGUMENT

A. The National Labor Relations Act Protects The Right To Strike, But Strikers' Conduct Is Unprotected To The Extent They Fail To Take Reasonable Precautions To Avoid Foreseeable, Imminent Damage To Property

1. Section 7 of the NLRA guarantees, among other things, the right of employees to engage in "concerted activities for the purpose of collective bargaining or

other mutual aid or protection." 29 U.S.C. 157. That right includes the right to strike—that is, to engage in a concerted stoppage of work. See *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 389 (1951). A separate provision of the Act expressly refers to "the right to strike." 29 U.S.C. 163.

The right to strike lies at the core of the Act's effort to achieve "equality of bargaining power between employers and employees." 29 U.S.C. 151. A single employee usually has little leverage in dealing with an employer. The employee could in theory threaten to quit the job unless the employer raises pay or improves working conditions, but a solitary employee's threats would likely leave the employer unmoved. When employees collectively withdraw their labor, in contrast, production may stall, deliveries may break off, and profits may dry up. The threat of those losses in turn pressures the employer to make concessions or accede to the employees' demands. That is what makes the strike "the ultimate weapon in labor's arsenal for achieving agreement upon its terms." *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 181 (1967).

Given that strikes inherently cause economic harm in order to improve wages or working conditions, the Board has repeatedly determined that a concerted work stoppage to achieve lawful objectives does not become unlawful simply because it leads or threatens to lead to the spoilage of perishable products. For example, in *Central Oklahoma Milk Producers Ass'n*, 125 N.L.R.B. 419 (1959), enforced, 285 F.2d 495 (10th Cir. 1960), milk-truck drivers refused to make further deliveries until their employer raised their wages and shortened their working hours. See *id.* at 420. The Board found that the Act protected the work stoppage, even though the

milk in the employer's warehouse would go bad if no one showed up to deliver it. See *id.* at 435. It made no difference that "the milk handled [wa]s perishable and loss might be sustained; loss is not uncommon when a strike occurs." *Id.* at 435. Applying the same logic in other cases, the Board has found strikes protected even when they have led to the spoilage of other products on the employer's premises. See, *e.g.*, *Lumbee Farms Cooperative, Inc.*, 285 N.L.R.B. 497, 506-507 (1987) (poultry), enforced, 850 F.2d 689 (4th Cir. 1988), cert. denied, 488 U.S. 1010 (1989); *Leprino Cheese Co.*, 170 N.L.R.B. 601, 604-605 (1968) (cheese), enforced, 424 F.2d 184 (10th Cir.), cert. denied, 400 U.S. 915 (1970); *Morris Fishman & Sons, Inc.*, 122 N.L.R.B. 1436, 1445-1447 (1959) (perishable leather), enforced, 278 F.2d 792 (3d Cir. 1960).

2. The right to strike is, however, subject to certain "limitations" and "qualifications." 29 U.S.C. 163. The right to strike does not include the right to use violence. See *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939). It does not include the right to violate other federal laws. See *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 40-46 (1942). It does not include the right to breach a valid agreement not to strike. See *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 235, 248-249 (1970). And it does not include the right to strike in pursuit of an unlawful objective. See *NLRB* v. *Teamsters*, 362 U.S. 274, 281 (1960).

The Board has recognized an additional limitation on the right to strike: In various contexts, it has held that Section 7 does not protect workers' conduct to the extent the workers fail to take "reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work," *Bethany Medical Center*, 328 N.L.R.B.

1094, 1094 (1999), at least when the damage to the property is sufficiently substantial or "aggravated," *Central Oklahoma*, 125 N.L.R.B. at 435. For example, in *Marshall Car Wheel & Foundry Co.*, 107 N.L.R.B. 314 (1953), enforcement denied on other grounds, 218 F.2d 409 (5th Cir. 1955), workers walked out of a foundry during preparations to pour molten iron out of a furnace. See *NLRB* v. *Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 411 (5th Cir. 1955). The furnace had to be "emptied immediately," or else there would have been "severe damage to plant and equipment." *Id.* at 411 n.3. The Board explained that stopping work at that critical moment constituted "unprotected activity." *Marshall Car Wheel*, 107 N.L.R.B. at 315. Applying the same approach in other cases, the Board has found that strikers have engaged in unprotected conduct by abandoning company equipment without securing it with a lock, see *M&M Backhoe Service, Inc.*, 345 N.L.R.B. 462, 470-471 (2005), enforced, 469 F.3d 1047 (D.C. Cir. 2006); or walking out of a chemical plant without shutting down their equipment, see *General Chemical Corp.*, 290 N.L.R.B. 76, 83 (1988).

The Board's reasonable-precautions doctrine is consistent with the text of Section 7, which protects the right to engage in concerted activities "for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Routine economic losses caused by a strike—including the incidental spoilage of perishables that the employees would have handled but for the stoppage—are the unexceptional consequences of conduct that serves "the purpose of collective bargaining." *Ibid.* The "damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle." *Vegelahn* v. *Guntner*, 44 N.E. 1077, 1081 (Mass.

1896) (Holmes, J., dissenting). By contrast, stopping work in a manner that risks substantial and imminent damage to property serves no such legitimate function. Because the damage is imminent, the employer cannot avoid it by accepting the strikers' terms, and indeed may not be able to avert it at all.

The Board's approach also makes sense in the context of the broader statutory scheme. Under that scheme, employers have various tools at their disposal to avoid or resist the economic pressure of a strike. They may, for instance, forestall a strike altogether by locking workers out. See *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 308-309 (1965). They may also hire new workers to replace strikers. See *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). And they may use existing workers who have not gone on strike to fill in for those who have. See Richard A. Posner, *Some Economics of Labor Law*, 51 U. Chi. L. Rev. 988, 998 (1984). The availability of those and other options means that strikers are not responsible for the incidental spoilage of perishables after they have stopped work. The employer, at least as a general matter, can simply hire new workers or redeploy existing workers to sell or deliver those products before they spoil. See *Central Oklahoma*, 125 N.L.R.B. at 435 (noting that the employer used replacements to deliver the milk after the milk-truck drivers went on strike). But when employees engage in a "sudden cessation of work," *Marshall Car Wheel*, 107 N.L.R.B. at 315, the exigency of the situation may deprive the employer of the opportunity to use comparable measures to avert "imminent damage" to its property, *ibid.*

The Board's reasonable-precautions doctrine is well established. The Board has long recognized that, in

some circumstances, employees must take appropriate steps to protect their employer's property before they stop work. See, *e.g.*, *In re International Protective Services, Inc.*, 339 N.L.R.B. 701, 702 (2003); *Bethany Medical Center*, 328 N.L.R.B. at 1094; *Johnnie Johnson Tire Co.*, 271 N.L.R.B. 293, 295 (1984), aff'd, 767 F.2d 916 (5th Cir. 1985) (Tbl.); *Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806, 1828 n.27 (1954). And many courts of appeals have endorsed the Board's approach. See, *e.g.*, *NLRB* v. *Special Touch Home Care Services, Inc.*, 708 F.3d 447, 457-458 (2d Cir. 2013); *NLRB* v. *Reynolds & Manley Lumber Co.*, 212 F.2d 155, 158, 163 (5th Cir. 1954); *Columbia Portland Cement Co.* v. *NLRB*, 915 F.2d 253, 257-258 (6th Cir. 1990); *East Chicago Rehabilitation Center, Inc.* v. *NLRB*, 710 F.2d 397, 404-405 (7th Cir. 1983).

The Board's longstanding views deserve significant deference. Because Congress entrusted the Board with the task of applying the Act's general language to particular circumstances, the Board "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 501 (1978). In addition, the Board has experience and expertise in the "complexities of industrial life," in the "'actualities of industrial relations,'" and in balancing "'the conflicting legitimate interests'" of employers and employees. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (citations omitted). Applying the Act's broad language in light of its expertise, the Board has recognized for more than 70 years that, notwithstanding the general rule that economic losses caused by a strike do not render the strikers' conduct unprotected, strikers in some circumstances have an obligation to take precautions to avoid

imminent damage to property. The Board's standard directly addresses the property-damage issue presented here.

3. Glacier proposes (Br. 1) a different rule: Strikers may not "intentionally destroy private property." That test differs from the Board's reasonable-precautions doctrine in important ways. The Board's approach focuses on the objective reasonableness of the employee's conduct, while Glacier's focuses on the employee's subjective intent. And the Board's test asks whether the failure to take reasonable precautions risks *imminent* damage to the employer's property, but Glacier's omits that qualifier.

Glacier's focus on the strikers' intent is misplaced. The whole point of a strike to secure a collective bargaining agreement is to threaten the employer with economic losses in order to pressure it to accept the strikers' terms. See *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921). It follows that strikers inherently intend to cause a degree of economic harm through their refusal to work. That intent does not become objectionable simply because the economic harm in question includes the eventual loss of a perishable product in the employer's possession. In that respect, there is no principled distinction between the spoilage of a perishable and any other routine economic harm that might befall an employer during a strike, such as the loss of a sale or the cancellation of a delivery. Just as strikers may lawfully intend to cause those other harms, so too they may lawfully intend to cause the loss of perishables through the withdrawal of their labor.

Glacier also errs in focusing (Br. 1) on whether the union has "deliberately" timed the work stoppage to

maximize the harm to the employer. It is entirely lawful for a union to time a strike to put "maximum pressure on the employer," *NLRB* v. *Insurance Agents*, 361 U.S. 477, 496 (1960)—just as it is lawful for an employer to time a lockout to put maximum pressure on the union and the employees, see *American Ship Building*, 380 U.S. at 310. A union may, for example, "threaten a strike at a department store two weeks before Easter"; it has no obligation to "postpon[e] the strike until after Easter when the employer will feel it less severely." *Insurance Agents*, 361 U.S. at 496 n.27. Again, the critical issue is not whether the strikers "deliberately" sought to maximize economic loss generally; it is whether they failed to take reasonable precautions to guard against imminent damage to property.

Glacier's proposed rule thus goes too far to the extent it covers any property damage that results from any strike, regardless of imminence. Consider the strike by the milk-truck drivers in *Central Oklahoma*. See p. 12, *supra*. The Board found the strike protected even though milk is perishable, explaining that the stoppage of work did not threaten imminent property damage in the distinct and "aggravated" manner that its precedents have identified. *Central Oklahoma*, 125 N.L.R.B. at 435. Yet Glacier's rule would seemingly have allowed the dairy producers to sue the drivers or the union for intentionally spoiling any milk that may have been lost because of the strike. See *Allen* v. *United States*, 164 U.S. 492, 496 (1896) ("[E]very man is presumed to intend the natural and probable consequences of his own act.").

In other respects, Glacier's test would appear to protect conduct that the Act does not. In *M&M Backhoe Service*, for example, an employee walked out of work

without properly locking up his excavating equipment. 345 N.L.R.B. at 470-471. Applying an objective test, the Board explained that "[e]mployees who go on strike have an obligation to assure that the equipment they are leaving is secure" and that the employee in that case had violated that obligation. *Id.* at 471. On Glacier's subjective approach, in contrast, the failure to lock up might have been protected if it reflected negligence rather than intent to damage the employer's property.

To take another example, in *General Chemical*, employees who were working with "dangerous chemicals" walked out without "shutting down their equipment" or "notifying their supervisor of the status of the chemical process." 290 N.L.R.B. at 83. "Although no actual damage took place," the Board found the employees' conduct unprotected; it was enough that there "was a reasonably foreseeable possibility of danger." *Ibid.* But Glacier's proposed rule might have precluded the employer from disciplining the employees for that conduct, because it asks whether the conduct "destroyed" rather than endangered the employer's property (Br. 1).

Finally, although Glacier's test might seem easy to apply to the facts alleged in the complaint in this case, it may prove harder to administer in other cases. A "probe of an employee's subjective motivations" tends to involve "an endless and unreliable inquiry." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 608 (1969). An objective reasonableness standard does not raise the same concerns. Indeed, "[r]easonableness, as a standard, is prescribed in several places" in labor law. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 257 n.5 (1975).

B. Accepting The Allegations In Glacier's Complaint As True, The Truck Drivers Failed To Take Reasonable Precautions

1. In Washington, a court resolving a motion to dismiss must accept the allegations in the complaint as true. See J.A. 150. The court must also consider any additional factual assertions made by the plaintiff that are consistent with the complaint; dismissal is proper only if "the plaintiff can prove no set of facts, consistent with the complaint, which entitle the plaintiff to relief." *Ibid.* (citations omitted); see J.A. 150 n.7. "Any hypothetical situation conceivably raised by the complaint defeats" a motion to dismiss "if it is legally sufficient to support [the] plaintiff's claim." *Bravo* v. *Dolsen Cos.*, 888 P.2d 147, 150 (Wash. 1995) (en banc) (brackets and citation omitted). Under that generous standard, Glacier's complaint sufficiently alleges that the truck drivers failed to take reasonable precautions to protect its property from imminent danger and that such conduct was thus not actually or arguably protected by Section 7 of the Act.

Glacier's complaint alleges that the strikers' "sudden cessation of work" in the morning of August 11, 2017, created a "foreseeable imminent danger" to its property. J.A. 11. Specifically, Glacier states that concrete is a "highly perishable product" that can last for only a "limited amount of time" in a truck's revolving drum and that it will harden if left there too long. J.A. 8-9. Glacier adds that, once concrete begins to thicken, it puts "pressure on the hydraulic system" in the truck's barrel, threatening "significant damage" to the truck. J.A. 9. Glacier further alleges that, by abruptly stopping work after returning the loaded trucks to Glacier's yard, the drivers created an "emergency situation" in

which Glacier had to find a way to avoid, on the one hand, the "costly damage to the mixer trucks" that would have been caused by leaving the concrete in the drums, and, on the other hand, the "environmental disaster" that allegedly would have been caused by simply dumping the concrete out on the ground. J.A. 13, 72. Glacier claims that, as a result of the employees' actions, it had to build special "bunkers" on its property, offload the concrete into the bunkers, bring in an excavator a week later to break up the hardened concrete, and rent a truck to haul the concrete away. J.A. 13.

Glacier identifies two precautions that, in its view, could have been taken to avoid that crisis. First, it alleges that the union could have started the strike at a different time. See J.A. 12. For example, Glacier suggests that the drivers could have started the strike the previous night, before Glacier had begun to mix new batches of concrete and load it onto its trucks. See J.A. 76. Or drivers could have started the strike later the same day, after delivering loads already in progress. See J.A. 34; see also Pet. Br. 32. Glacier alleges that, by instead starting the strike for all drivers at 7:00 in the morning, the union needlessly endangered the company's trucks and caused the loss of the concrete. See J.A. 9; cf. *Marshall Car Wheel*, 107 N.L.R.B. at 316 (observing that workers had acted unreasonably by walking out at the moment the foundry was preparing to pour molten iron out of the furnace).

Second, Glacier asserts that, although some of the striking truck drivers notified management when leaving their trucks in the company yard, many of the drivers simply abandoned their trucks there without telling anyone. See J.A. 72. Glacier suggests that, if the drivers had simply notified it when dropping off their

trucks, it "could have asked [them] to add a retardant to their loads, or offload elsewhere, or park their trucks in a certain sequence for offloading." *Ibid.* Glacier says that, with such notice, it could have been spared the "mad scramble" in which its employees were "going from truck-to-truck to determine which trucks were loaded, which ones needed to be offloaded, and which ones needed to be washed out." J.A. 82-83. "Many of the problems," Glacier claims, "were exacerbated by drivers simply parking their trucks and walking away." J.A. 83.

Before the Board or a court could definitively decide whether the drivers failed to take reasonable precautions, it would need to address several factual questions. For example:

- Was the danger to Glacier's property as "imminent" as Glacier suggests (J.A. 11)? Or did Glacier have enough time to call on drivers at other Glacier locations or to bring in "striker replacements" to deliver the concrete (Br. in Opp. 3)?
- Did the work stoppage endanger Glacier's trucks (J.A. 9)? Or did it endanger only the concrete (Union Wash. Sup. Ct. Br. 7)?
- Would dumping the concrete out of the trucks have created an "environmental disaster" (J.A. 72)? Or could the concrete have been "safely unloaded" (Br. in Opp. 7)? How burdensome were the measures that Glacier says were required to dispose of the concrete safely?
- Is Glacier right that the union could have avoided the harm by starting the strike at a different time (J.A. 11)? Or is the union right that, given "the staggered start times and the repeated concrete deliveries

throughout the day, beginning the strike at a different time would not have avoided the destruction of a similar amount of concrete" (Br. in Opp. 8)?

- Is Glacier right that the union had no legitimate objective in starting the strike when it did (J.A. 12)? Or is the union right that stopping work at a different time would have "seriously undermin[ed] the effectiveness of the strike" (Br. in Opp. 8)? For example, could the drivers who were already on the road when the strike was called have completed their deliveries before stopping work?

At this stage of the litigation, those questions and others remain unresolved. But in addressing the union's motion to dismiss, a court must assume the answers most favorable to Glacier. See p. 20, *supra*. Given that assumption, the complaint sufficiently alleges that the truck drivers failed to take "reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work." *Bethany Medical Center*, 328 N.L.R.B. at 1094; see *Marshall Car Wheel*, 107 N.L.R.B. at 315. Such a failure is neither protected nor arguably protected by the Act. The state courts accordingly erred in dismissing Glacier's claims on the pleadings.

2. The state supreme court reached the wrong result because it misapplied this Court's cases on *Garmon* preemption. The state supreme court reasoned (correctly) that, in order to decide definitively whether Section 7 protects the union's conduct, a decisionmaker would need to "engage with the facts" and conduct "a full factual analysis." J.A. 165. But the court then concluded (incorrectly) that, because Glacier's claims call for "this kind of fact-specific determination," they are necessarily preempted. *Ibid.* The test for *Garmon*

preemption is not whether the plaintiff's claims call for a fact-intensive analysis. The test, rather, is whether Section 7 of the Act protects or arguably protects the conduct at issue—here, the conduct alleged in the complaint and Glacier's other filings.

This Court's decision in *Longshoremen* v. *Davis*, 476 U.S. 380 (1986), confirms that the state supreme court's analysis was flawed. There, the protected status of the conduct at issue turned on whether a given individual qualified as a supervisor, as distinguished from an ordinary employee. See *id.* at 394. "Supervisory status is an inherently fact-specific determination that turns on an individual's duties." *Id.* at 407 (Blackmun, J., concurring in part and dissenting in part). Yet the Court determined that a party could not establish preemption simply by making "a conclusory assertion" of the employee's status. *Id.* at 394 (majority opinion). The Court instead explained that the party asserting preemption must "put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim." *Id.* at 395.

In this case, the state courts decided the case on a motion to dismiss, and the record does not contain evidence from which the Board could reasonably conclude that the employees took precautions that were reasonable under the circumstances. If the record contained such evidence, the drivers' conduct would have been at least arguably protected, and the state-law claims would be barred under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), unless the Board later determines that the precautions were insufficient. But given the absence of the evidentiary showing required under *Davis*, *Garmon* did not bar the case from proceeding beyond the motion-to-dismiss stage.

3. Even if the union had made out an arguable case for protection, it would not have been entitled to outright dismissal of Glacier's claims. When a state claim rests on conduct that the Act arguably protects, the state court must wait for the Board to resolve the argument. See *Garmon*, 359 U.S. at 245. If the Board decides that the Act protects the conduct, the state court must dismiss the claim; but "if the Board decides that the conduct is not protected," the court may "entertain the litigation." *Davis*, 476 U.S. at 397. *Garmon* thus does not require the state court to dismiss the claims with prejudice. Rather, a state court that finds conduct arguably protected should either stay the litigation pending Board proceedings, or else dismiss the claims with leave to refile them once Board proceedings conclude.

Here, the state supreme court did not consider the possibility of staying Glacier's claims. The court instead sustained the trial court's dismissal of the claims, without specifying that the dismissal would be without prejudice and without considering whether the statute of limitations might preclude Glacier from refiling its claims after the Board proceedings conclude. See J.A. 177. The court's disposition thus raises the prospect that, even if the Board later decides that the employees' conduct exceeded the scope of the right to strike, Glacier might still be unable to recover damages for harm to its property. Nothing in *Garmon* requires that result.

C. The Issuance Of The NLRB Complaint Independently Establishes *Garmon* Preemption, But That Issue Is Not Before This Court

For the reasons discussed above, the state supreme court's rationale for dismissing Glacier's claims was wrong and its judgment should be reversed. On re-

mand, however, the union's *Garmon* preemption defense should prevail for a different reason that the state courts have not yet considered: After the state supreme court's decision, the agency issued its own complaint concerning the conduct at issue here.

When the agency issues a complaint alleging that a given activity is protected, that allegation, at least in the absence of exceptional circumstances, establishes that the activity was at least *arguably* protected—meaning that state courts may not resolve claims concerning that activity. See *Davis Supermarkets, Inc.* v. *NLRB*, 2 F.3d 1162, 1179 (D.C. Cir. 1993); *Makro, Inc.*, 305 N.L.R.B. 663, 670 (1991), petition for review denied, 74 F.3d 292 (D.C. Cir.), cert. denied, 519 U.S. 809 (1996). The agency may issue a complaint only after a regional office receives a charge from a private party. 29 C.F.R. 101.2. The regional office must then "take steps necessary to ascertain the truth of the allegations." NLRB, *Casehandling Manual, Part 1, Unfair Labor Practice Proceedings* § 10054 (Oct. 2022). The regional office does so by gathering evidence from the charging party, giving the charged party an opportunity to respond to the allegations, and, if necessary, interviewing the parties' representatives and witnesses. 29 C.F.R. 101.4.

If the agency determines, after that investigation, that "there has been no violation" or that "the evidence is insufficient to substantiate the charge," it dismisses the charge. 29 C.F.R. 101.5; see 29 C.F.R. 101.6. Only if "the charge appears to have merit" does the agency issue a complaint. 29 C.F.R. 101.8. The agency's issuance of a complaint accordingly signifies that, in the agency's view, "sufficient evidence has been presented to demonstrate a prima facie case." *Makro*, 305 N.L.R.B. at 670. Allegations that make it through that

process may or may not ultimately be found to be correct, and the legal rationale on which the agency complaint rests may or may not ultimately be sustained by the Board or a reviewing court. But the agency's allegations are at least *arguably* sound, especially from the perspective of a state court in this context, and that is ordinarily all that *Garmon* requires for preemption.

In addition, the rationale for *Garmon* preemption acquires added force once the agency issues a complaint. The "arguably protected" branch of *Garmon* preemption serves to protect the Board's adjudicatory authority from potential interference by state courts. See *Garmon*, 359 U.S. at 242. "The need for protecting the exclusivity of NLRB jurisdiction is obviously greatest when the precise issue brought before a [state] court is in the process of litigation through procedures originating in the Board." *Marine Engineers* v. *Interlake S.S. Co.*, 370 U.S. 173, 185 (1962). And "when the Board has actually undertaken to decide an issue, relitigation in a state court creates more than theoretical danger of actual conflict between state and federal regulation of the same controversy." *Ibid.* The state court might find conduct unprotected and award damages, but the Board might later find the same conduct protected.

In its complaint charging Glacier with unfair labor practices, the agency—relying on the facts found in its investigation rather than solely on those set out in the state-court pleadings—alleged that Glacier had interfered with protected conduct by, among other things, disciplining truck drivers "for leaving their trucks on August 11, 2017," at the start of the strike. App., *infra*, 4a. Those allegations do not prove that the truck drivers' activity was actually protected, but they do show that it was at least arguably protected.

This Court, however, need not resolve those issues here. The agency complaint, as discussed above, rests on the facts found in the agency investigation rather than the facts alleged in Glacier's state-court filings. It thus does not resolve the sole question presented here: whether *Garmon* required the state courts to dismiss Glacier's claims at the pleading stage. The agency, moreover, issued its complaint after the state supreme court issued its decision. That means that the state courts have not yet had the opportunity to consider the effect of the agency complaint on the preemption analysis. As explained above, in our view the agency complaint should establish that the truck drivers' conduct was at least arguably protected. But because this Court is a "court of review, not of first view," it should allow the state courts to consider the agency complaint in the first instance on remand. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

D. Glacier's Remaining Arguments Lack Merit

1. Glacier relies (Br. 23-29) on an exception to *Garmon* preemption that allows enforcement of state law to protect interests that are "deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 244. But this Court's cases have applied that exception in the context of preemption under Section 8 of the Act, not under Section 7, which is the section at issue here.

Whereas Section 7 protects the right to engage in concerted activities, see 29 U.S.C. 157, Section 8 forbids employers and unions from engaging in various unfair labor practices, see 29 U.S.C. 158. This Court has read Section 8 to mean that the federal remedies for unfair labor practices are exclusive and that the States may not supplement the federal scheme with their own remedies. See *Garner* v. *Teamsters*, 346 U.S. 485, 498-499

(1953). But the Court has recognized an exception to that general rule: A State may enforce its laws to protect interests that are "deeply rooted in local feeling and responsibility," even if the regulated conduct also amounts to an unfair labor practice. *Garmon*, 359 U.S. at 244. For example, state courts may hear tort claims against unions for violence and threats of violence, see *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 668-669 (1954); malicious libel, see *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 55 (1966); and intentional infliction of emotional distress, see *Farmer* v. *Carpenters*, 430 U.S. 290, 303-304 (1977) —even though such conduct may, in some circumstances, also constitute an unfair labor practice, see 29 U.S.C. 158(b).

Although a State's local interests may permit it to provide an additional remedy for conduct that also constitutes an unfair labor practice under Section 8, this Court has squarely held it does not entitle the State to forbid activity that is actually protected by Section 7. See *Brown* v. *Hotel Employees*, 468 U.S. 491, 502-503 (1984). A federal law that protects the right to engage in an activity necessarily conflicts with, and so preempts, a state law that forbids the same activity. *Id.* at 503. "[T]he relative importance to the State of its own law is not material" in that situation, "for the Framers of our Constitution provided that the federal law must prevail." *Ibid.* (citation omitted).

This Court thus should not rely on the local-interest exception in this case. It should instead decide the case on the rationale described above: On the facts alleged in Glacier's complaint, the drivers engaged in conduct that the Act does not protect or arguably protect.

2. Glacier also argues (Br. 41-46) that *Garmon* preemption departs from the principles that this Court ordinarily applies in other preemption cases. That is incorrect. In *Garmon*, this Court explained that the NLRA not only sets forth substantive rules protecting some activities and prohibiting others, but also "confide[s] primary interpretation and application of [those] rules to a specific and specially constituted tribunal." 359 U.S. at 242 (citation omitted). A state court contravenes that allocation of authority when it resolves matters that fall within the bailiwick of the Board. And under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, state laws may no more conflict with federal "remedial schemes" than they may conflict with federal "standards of substantive law." *Garmon*, 359 U.S. at 242; see, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001).

In any event, this Court decided *Garmon* more than six decades ago. Since then, the Court has "reiterated many times the general pre-emption standard set forth" in that decision. *Davis*, 476 U.S. at 391; see, *e.g.*, *Building & Construction Trades Council* v. *Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224-225 (1993); *Wisconsin Department of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 286-287 (1986); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 284-285 (1971); *Iron Workers* v. *Perko*, 373 U.S. 701, 706 (1963). This Court should leave that well-established doctrine in place and should reject any invitations to question or narrow it.

3. Glacier finally argues (Br. 47-49) that finding preemption here would raise serious constitutional doubts under the Just Compensation Clause. That, too,

is mistaken. Federal law often preempts state tort claims for injury to property. See, *e.g.*, *Atlantic Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1352-1357 (2020); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494-497 (1987). Glacier cites no authority for the proposition that such preemption amounts to a taking requiring federal compensation. In addition, a determination that the Act arguably protects the truck drivers' conduct would not deprive Glacier of a remedy for the damage to its property; it would simply mean that the dispute about whether the Act protects the conduct would have to be resolved in front of the Board rather than in state court. If the Board finds the conduct unprotected, the state tort suit could proceed. See p. 25, *supra*. The allocation of primary decisionmaking authority to the Board rather than the state courts does not constitute a taking of private property.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed and the case remanded to that court for further proceedings as set forth in this brief.

Respectfully submitted.

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NOVEMBER 2022

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

Cases: 19-CA-203068, 19-CA-211776

GLACIER NORTHWEST, INC.
D/B/A CALPORTLAND

AND

TEAMSTERS UNION LOCAL 174

[Jan. 31, 2022]

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Pursuant to § 102.33 of the Rules and Regulations of the National Labor Relations Board (the "Board") and to avoid unnecessary costs or delay, IT IS ORDERED THAT Cases 19-CA-203068 and 19-CA-211776, which are based on charges filed by Teamsters Union Local 174 (the "Union") against Glacier Northwest, Inc. d/b/a CalPortland ("Respondent"), are consolidated.

This Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, which is based on these charges filed by the Union, is issued pursuant to § 10(b) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*, and § 102.15 of the Rules and Regulations of the National Labor Relations Board (the

"Board") and alleges that Respondent has violated the Act as described below.

1.

(a) The charge in Case 19-CA-203068 was filed by the Union on July 24, 2017, and a copy was served on Respondent by U.S. mail on about July 25, 2017.

(b) The amended charge in Case 19-CA-203068 was filed by the Union on September 6, 2017, and a copy was served on Respondent by U.S. mail on about September 8, 2017.

(c) The charge in Case 19-CA-211776 was filed by the Union on December 15, 2017, and a copy was served on Respondent by U.S. mail on or about December 15, 2017.

(d) The amended charge in Case 19-CA-211776 was filed by the Union on December 29, 2017, and a copy was served on Respondent by U.S. mail on or about January 4, 2018.

2.

(a) At all material times, Respondent has been State of Washington corporation with an office and place of business in Federal Way, Washington ("facility"), engaged in the sale, delivery, and/or installation of sand, gravel, and/or construction products, including asphalt, cement, and ready-mix concrete.

(b) In conducting its business operations described above in paragraph 2(a) during the past 12 months, a period representative of all material times, Respondent derived gross revenues in excess of $500,000.

(c) In conducting its business operations described above in paragraph 2(a) during the past 12 months, a period representative of all material times, Respondent purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Washington.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of §§ 2(2), (6), and (7) of the Act.

3.

At all material times, the Union has been a labor organization within the meaning of § 2(5) of the Act.

4.

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of § 2(11) of the Act and/or agents of Respondent within the meaning of § 2(13) of the Act, acting on Respondent's behalf:

* * * * *

5.

(a) On or about August 11, 2017, the Union commenced a strike against Respondent after the expiration of the collective-bargaining agreement.

(b) On or about August 18, 2017, the Union ratified a new collective-bargaining agreement.

6.

(a) On or about August 23, 2021, Respondent issued written discipline to the following of its employees (collectively, "August 23 disciplined employees") for not returning to work on August 19, 2017:

* * * * *

(b) On or about August 28, 2017, Respondent, by * * * , issued written discipline to the following of its employees (collectively, "August 28 disciplined employees") for leaving their trucks on August 11, 2017, when the strike referenced above in paragraph 5(a) began:

* * * * *

(c) Respondent engaged in the conduct described above in paragraphs 6(a) and 6(b) because its August 23 and August 28 disciplined employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these or other Union and/or protected, concerted activities.

7.

(a) Beginning on or about December 4, 2017, Respondent, by its unnamed agents, filed and maintained a lawsuit against the Union in King County Superior Court alleging various causes of action premised on concrete product loss during the strike and for an alleged misrepresentation by a Union representative that Respondent claimed interfered with its ability to service a concrete mat pour (the "lawsuit").

(b) The lawsuit against the Union described above in paragraph 7(a): is preempted; lacked a reasonable basis, as Respondent could not reasonably expect success on the merits or produce evidence of actual malice;

and is retaliatory, as it sought excessive monetary damages and targeted Union and/or protected concerted conduct.

(c) On August 31, 2020, Respondent filed and maintained an appeal of the Superior Court's Dismissal with the Court of Appeals of Washington, Division 1.

(d) On December 15, 2020, Respondent took and maintained a further appeal of the Superior Court's decision with the Supreme Court of the State of Washington.

(e) On December 16, 2021, the Supreme Court of the State of Washington, *en banc,* affirmed in part and reversed in part, and remanded the case to the trial court with instructions to dismiss all of Respondent's claims in the lawsuit.

8.

By the conduct described above in paragraphs 6 and 7, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

9.

By the conduct described above in paragraph 6, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of §§ 8(a)(1) and (3) of the Act.

10.

The unfair labor practices of Respondent described above affect commerce within the meaning of §§ 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, while the General Counsel seeks rescission of the letters issue to the August 23 and August 28 disciplined employees as well as assurances that the disciplines will not be used against them in any way, the General Counsel recognizes that Respondent has already rescinded the discipline issued to * * * .

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, the General Counsel seeks an Order requiring that Respondent:

(a) schedule a meeting to ensure the widest possible attendance during worktime at which a responsible official will read the notice to employees in the presence of a Board agent or, alternatively, a Board agent shall read the notice to employees in the presence of its supervisors and/or agents identified above in paragraph 4;

(b) distribute any notice to employees, in addition to any standard notice-posting, via text message to employees' personal phone numbers and via any internal or messaging applications Respondent uses to communicate with employees;

(c) provide training on employees' rights under the Act to its employees, supervisors and managers, to be conducted at the discretion of the Regional Director or by a Board agent; and

(d) Draft and send letters, with copies to the Regional Director within 14 days of issuance, to each of the August 23 and August 28 disciplined employees apologizing to them for their discipline and any hardship or distress it caused, and assuring them that the discipline will not be used against them in any way.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, the General Counsel seeks an Order requiring Respondent to reimburse the Board and the Union for all costs and expenses incurred in the investigation, preparation, and participation in that part of this consolidated matter related to the lawsuit, both before the Board and the courts.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

* * * * *

Dated at Seattle, Washington, this 31st day of Jan., 2022.

/s/ RONALD K. HOOKS
RONALD K. HOOKS, Regional Director
National Labor Relations Board, Region 19
915 2nd Ave., Ste. 2948
Seattle, WA 98174-1006

Attachments

APPENDIX B

1. 29 U.S.C. 151 provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively

safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

2. 29 U.S.C. 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

3. 29 U.S.C. 163 provides:

Right to strike preserved

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.