BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION
STATE OF WISCONSIN

Robert Slamka,

Complainant,

-and-

SMART Local 18,

Respondent.

Slamka ULP Complaint
Case ID: 563.000
Case Type: COMP_CE

RE: [WERC Dec. No. 37778-C]

SMART LOCAL 18's RESPONSE IN OPPOSITION TO PETITION FOR RECONSIDERATION

The Complainant's Petition for Reconsideration is untimely and should be denied. Wis. Stat. §227.49(1). Even if it were timely, the Wisconsin Employment Relations Commission (WERC) should deny the Petition. Reconsideration is only appropriate if the decision contains a material error of fact or law, or if new evidence is discovered that is sufficiently strong to reverse or modify the order and could not have been previously discovered by due diligence. Wis. Stat. § 227.49(3)(a)-(c). There is no material error of fact or law nor is there new evidence that could modify the order.

The Union in its Motion to Dismiss and subsequent briefing, and the Examiner's and WERC decisions, make clear that the WERC's ability to enforce the "Right to Work" law is limited by the doctrine of Garmon preemption. Complainant, Robert Slamka, attempts to impermissibly expand the scope of state law – which is limited to a specific type of provision *in* collective bargaining agreements and efforts to enforce such provisions – and alleges that the "Right to Work" law was violated

because the Union interfered with his right to work because he was expelled from the Union (and, presumably, not a member) and was "blacklisted." Petition, ¶¶1, 4.

A legal conclusion, however, is not simply true on a litigant's say-so. A legal conclusion only exists when sufficiently supported by factual allegations. No factual allegations support Slamka's claim. While he might state a claim under the "Right to Work" law if he alleged that his employment was interfered with because the Union and an employer *actually* maintained and/or enforced or attempted to enforce a collective bargaining agreement that contained a provision requiring that bargaining unit employees be union members, that is not what he alleges. He points to no CBAs clause; none exists. He instead focuses on online advertisements posted *by employers* on their own initiative that contain what appears to be pre-Right to Work-era language.

As has been said repeatedly, the only conduct that Congress allows the State to regulate is the *content* of a contract between a union and private sector employer regarding union membership. Slamka's claim does not fall within the scope of the WERC's jurisdiction. His claim is that he was blacklisted; such a claim is, on its face, a federal one.

Slamka knows his claims are federal. He brought the same and other complaints to the National Labor Relations Board (NLRB) which investigated and fully and finally adjudicated the claims. In addition to being preempted, Slamka's claims are also precluded.

BACKGROUND

On August 20, 2018, Slamka filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging that Local 18 committed various unfair labor practices within the meaning of the Wisconsin Employment Peace Act. Although Slamka referred to Wisconsin's "Right to Work" law, his complaint is that he is being discriminated against because he is not a member of and does not pay dues to the Union. After seeking clarification of his claims, the Union learned via email (not amended complaint) that Slamka's allegations apparently arise out of online employment advertisements that sheet metal contractors Total Mechanical and General Heating placed on their own accord and without Local 18's knowledge. The ads contained language stating (incorrectly) that the employers were "a union shop." See Dec. No. 37775-A (pp. 1-2); Dec. No. 37777-A (pp. 1-2). Nowhere in his Complaint against the Union does Slamka allege involvement by the Union or even reference Total or General. Nowhere does he claim that an unlawful union security provision exist in a collective bargaining agreement or that the Union attempted to or actually enforced a union security provision, even though such allegations are the only ones that fall outside the preemptive scope of *Garmon* and therefore within the scope of WERC's jurisdiction related to the "Right to Work" law. In light of the foregoing, SMART Local 18 filed a Motion to Dismiss the Complaint entirely preempted under the *Garmon* doctrine and time-barred. The Examiner granted the Motion. Dec. No. 37778-A (Davis, 11/6/2018).

Slamka filed a Petition for Review of the Examiner's decision on November 26, 2018, of his Complaint claiming that he was blacklisted contrary to Wis. Stat. § 111.04(3)(a)(2)-(3), and asserting that "blacklisting" due to a previous union expulsion (whether due to potential animus or non-member status is unclear) fell within the scope of the Right to Work Statute. Again, he makes no reference to Total Mechanical or General Heating, nor is there a reference to any the online ads. Instead, he clarifies the four specific allegations from the Complaint, which involve conduct that occurred in or before July 2017 (and are thus time-barred) at an entirely different employer, Zien Services. He then asserts, generally, that the Union has continued to blacklist him. Complainant's Response to Motion to Dismiss, p. 4 (#4). He does not identify how or with which companies the alleged blacklisting occurred nor that he ever even sought employment. Nor does he state when for the purpose of establishing whether or not such a claim is time barred.[1]

Slamka has never stated any claim under which the WERC (or anyone else, for that matter) could grant relief muchless a claim that the Union violated the "Right to Work" law.

Despite repeatedly recognizing that the NLRA permits states to enact "Right to Work" laws prohibiting agreements requiring membership in labor organizations as a condition of employment, Slamka has never identified an unlawful union security clause, did not allege any involvement by the Union in the ads, and asked

[1] Although he claims that the Union interfered with his attempt to gain employment at Total Mechanical as part of the basis for his complaint to the WERC, those claims were dismissed.

the WERC to disregard the fact that this country's labor history is built around a single labor policy, the key to which is the doctrine of *Garmon* preemption.

On April 4, 2019, the WERC issued its Decision dismissing the Petition for Review upholding Examiner Davis's reasoning as sound and finding that the WERC lacked jurisdiction to consider the matter. More specifically, the WERC pointed out that Slamka continues to miss the point: the NLRB preempts all but a very narrow carve-out where the "Right to Work" act exists and it is only over that very narrow carve out that the WERC has jurisdiction. Dec. No. 37778-B (WERC 4/4/19). The WERC's decision was sound.

I. The Petition for Review is Untimely and Should be Dismissed.

Wis. Stat. § 227.49(1) requires that a petition for rehearing be filed within 20 days after service of the Order. On April 4, 2019, the WERC's Decision on the Petition for Review was served on counsel for the Petitioner Robert Slamka via Certified Mail, in accordance with the statutory mandate at Wis. Stat. § 227.47(1). The letter accompanying the decision noted that parties could petition for rehearing of the decision, in accordance with Wis. Stat. § 227.49, by filing a petition for rehearing within 20 days after service of the Order. At page 4 of the letter in bolded text, it reads:

> For purposes of the above-noted statutory time limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing on page 1 of the letter [April 4, 2019]); the date of filing of a rehearing petition is the date of actual receipt by the Commission no later than 4:30 p.m. on the 20th calendar day after the date of this letter; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

The Petition for Review is time barred. A petition for rehearing was to be filed on or before April 24, 2019. Slamka did not file his Petition for Rehearing until May 1, 2019, a date that is thirty (30) days after the date of service.

II. The WERC Correctly Concluded that Slamka's Complaint is Preempted; There is No Basis Upon Which Rehearing Should be Granted.

Rehearing is only appropriate if there is a material error of fact or law, or if new evidence is discovered that is sufficiently strong to reverse or modify the order and could not have been previously discovered by due diligence. Wis. Stat. § 227.49(3)(a)-(c). There is no basis upon which rehearing should be granted.

A. Federal Preemption Law is Settled and Was Properly Applied; Slamka's Claims are Preempted.

Slamka's claims are preempted. Application of federal labor law preemption in disputes involving concerted, protected activity under the National Labor Relations Act has unequivocally been the law for seventy years. See e.g. Algoma Plywood & Veneer Co. v. Wis. Empl. Rels. Bd., 336 U.S. 301, 313, 69 S. Ct. 584, 591 (1949). The doctrine, commonly referred to as Garmon preemption, recognizes that, in the name of a uniform federal policy, the NLRA "largely displaced state regulation of industrial relations," and therefore, when a complained-of "activity is arguably subject to s. 7 or s. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the [NLRB]." Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 286, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 79 S.Ct. 773, 3

L.Ed.2d 775 (1959).[2] The fact that the State maintains statutes that are parallel to federal labor statutes does not somehow mean that the state statutes can operate to circumvent Garmon preemption; they do not and that question was definitively settled by Algoma Plywood in 1949.

While the NLRA contains a limited carve out that explicitly permits states to enact and enforce laws that prohibit private sector employers and unions from agreeing to contractual provisions requiring union security and to enforce those laws, the carve out of states' jurisdiction pursuant to sec. 14(b) is narrow and limited to "power to enforce *their laws restricting the execution and enforcement of union security agreements*." Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 102, 84 S. Ct. 219, 222 (1963) (emphasis added). States may not, under the guise of the 14(b) carve out or laws prohibiting union security provisions, encroach upon the NLRB's exclusive jurisdiction, outlined in Garmon.

Sec. 14(b)'s carve out cannot be asserted as the basis for state jurisdiction in a dispute involving pre-hire conduct. States may not, for instance, regulate pre-hiring conduct subject to federal regulation even if aimed at establishing a union-security arrangement prohibited by state law. Mich. State AFL-CIO v. Callaghan, 15 F. Supp. 3d 712, 717–18 (E.D. Mich. 2014). The "policies that s. 14(b) allows the States to enact relate not to the hiring process but rather to conditions that would come into effect *only after an individual is hired*." Oil, Chem. & Atomic Workers

[2] A provision of a state constitution that impinges upon the NLRB's jurisdiction would be unlawful and preempted for the same reason.

Int'l Union v. Mobil Oil Corp., 426 U.S. 407, 417, 96 S. Ct. 2140, 2145 (1976) (emphasis added).

1. Slamka's Complaint Does Not Arise under the "Right to Work" Act; there is No Basis for the State to Assert Jurisdiction.

The carved-out area that 2015 Wisconsin Act 1 occupies – and WERC can enforce - is limited to one particular type of provision within collective bargaining agreements and the ability to act *only* if and when unions and employers negotiate, maintain, and/or enforce union security clauses in those agreements. The State's jurisdiction over an alleged "right to work" dispute *requires* an unlawful union security provision in a collective bargaining agreement.[3] Slamka does not allege that a CBA contains an unlawful union security provision and/or that such a provision was enforced. He claims he was blacklisted and denied employment. His allegations involve pre-hire conduct outside the scope of sec. 14(b). See OCAW v. Mobile, supra. A right to work law has nothing to do with blacklisting or with interference with employment opportunities. Slamka's claim does not fall within the narrow sec. 14(b) exemption and was properly dismissed.

2. Slamka's Claims Involve Activity within the Scope of Secs. 7 and 8 of the NLRA.

In attempting to have the WERC hear his complaint, Slamka invokes the "right to work" act. Slamka complains of "blacklisting" because he is an expelled

[3] Notably, 2015 Act 1, which amended Wis. Stat. §111.04(3)(a)(3), applies *to collective bargaining agreements*: "This act first applies to a collective bargaining agreement containing provisions inconsistent with this act upon the renewal, modification, or extension of the agreement occurring on or after the effective date of this subsection." 2015 Act 1, §§13.

member and alleges that such conduct affected his ability to obtain employment. Blacklisting or discrimination in hiring and interference with employment opportunities are allegations that fall within the scope of the NLRA. Specifically, he claims that he was blacklisted and that his employment opportunities were interfered with and recites nearly *the exact allegations* he previously made to the NLRB in charges that were investigated and fully resolved. (Case No. 18-CB-199973 and 18-CB- 203635)

A person's claim that a law applies by attaching a convenient label does not magically make the claim or the label true. The preemption doctrine would fall apart quickly if the actual nature of a claim was ignored in place of the labels assigned to it by complainants. See Local 100 of United Ass'n of Journeymen & Apprentices v. Borden, 373 U.S. 690, 698, 83 S. Ct. 1423, 1428, 10 L. Ed. 2d 638 (1963). Slamka's claim could have been brought to the NLRB – in fact, as noted in the Union's Motion to Dismiss, the precise allegations in the charge were brought to the NLRB.

Slamka's assertion in this Petition that blacklisting and interference with employment are *not* federal matters is frivolous. The law is well-settled that backlisting and interference with employment due to union membership status *are* federal matters that fall within the scope of sec. 7 of the Act and claims to state agencies involving such allegations are preempted where the NLRB could assert jurisdiction. See e.g. 29 U.S.C. s. 157; *Nelson v. Pember Excavating Co.,* No. 44508 Ce-2109; Dec. No. 26672-A (2/13/1993).

Slamka admitted in his October 20, 2018, Response to the Motion to Dismiss that the "conduct alleged would be subject to Sec. 7 and/or 8 of the National Labor Relations Act," and that the employer would otherwise be subject to the jurisdiction of the NLRB. (Response to Motion to Dismiss, ¶3). Slamka knows his allegations involve the NLRA; he brought at least three blacklisting and interference with employment claims against the Union to the NLRB, including one dismissed on July 27, 2018, due to a lack of merit presumably lead to the WERC filing.[4]

That Slamka is seeking a second chance – a ruling different htan that of made by the NLRB – is particularly illustrative of the importance and purpose of Garmon preemption. The NLRB resolved Slamka's allegations against the Union, afforded the relief it deemed appropriate, and closed the case. Slamka is now seeking a different result in contravention of the purpose of Garmon preemption.[5]

The alleged conduct falls within the scope of sec. 7 and 8 of the NLRA. The Board could have and did assert jurisdiction. No union security provision is at issue in this case. Slamka's claim is preempted.[6]

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[4] Case No. 18-CB-220555; 18-CA-220545.

[5] Further action on this matter also risks inconsistent results with NLRB cases against Total Mechanical & General Heating. In recently public documents related to Slamka's appeal of the those charges, the NLRB Office of Inspector General stated that the Region took jurisdiction over and investigated the charges, and that "…*there was no ongoing unlawful effect on any employee's terms and conditions of employment; there was no other accompanying violations which require a Board remedy*; and the conduct was of limited duration." See Case No. 18-CA-225257, NLRB OIG letter dated 1/4/2019, letter and charge history available at https://www.nlrb.gov/case/18-CA-225257;Case No. 18-CA-225311 (General Heating), OIG letter dated 1/17/2019, letter and charge history available at https://www.nlrb.gov/case/18-CA-225311.

[6] Slamka's claim that he had a "Hobson's Choice" either misunderstands what such a choice entails or deliberately ignores that he did, in fact, make the blacklisting claims to the NLRB *and* filed a near identical claim against the Union with the NLRB when he wanted additional relief and/or action beyond the NLRB's. This is precisely why Garmon preemption exists. That

3. There is No New Evidence that Justifies Granting the Petition.

In the Petition, Slamka cites to email correspondence between himself and the NLRB involving advertisements posted by contractors that contain language indicating they are "union" shops. In response to several emails from Slamka, the NLRB's Regional Director, Jennifer Hadsall told Slamka that the NLRB would not rule on a violation of a state statute unless it was preempted by the NLRA. She further indicated that one action could violate both state statute and the NLRA, in which case a party could file a charge with the NLRB and state agency. The email, however, contains no new facts or information, nor does it make any conclusions about whether Slamka has actually alleged a violation of a state law.

CONCLUSION

For the foregoing reasons, the Petition for Reconsideration should be denied.

Dated this 17th day of May, 2019.

s/ Sara J. Geenen
Wis Bar No. 1052748
The Previant Law Firm, s.c.
310 W Wisconsin Ave, Suite 100MW
Milwaukee, WI 53203
(414)271-4500
sjg@previant.com

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the NLRB dismissed his various complaints or failed to provide the relief he sought is irrelevant and does not entitle him to seek redress from the NLRB. See Garmon, 359 U.S. 236, 245 ("To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity.")