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April 23, 2013

VIA ELECTRONIC FILING

Gary Shinners
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001
www.nlrb.gov

Re: Road Sprinkler Fitters Local Union 669, UA., AFL-CIO (Firetrol Protection Systems, Inc.)
Case No. 27-CC-091349

Dear Mr. Shinners:

Charging Party, Firetrol, submits this very brief letter in opposition to Respondent's Motion for Summary Judgment in the above-captioned matter and requests the Board deny the Union's eleventh hour motion so this matter can proceed to trial on May 1.[1]

For the present (and without prejudice to its opportunity to fully brief this matter in the event the Board issues a Notice to Show Cause), Firetrol bases this opposition/request on the following:

[1] This Motion is the Union's "third bite of the apple" in an attempt to forestall a trial, coming on the heels of face-to-face meetings with the Regional Director (held in Denver on March 26) and then with the acting General Counsel (held at the Board's Headquarters on April 8) in which Union Counsel sought to persuade them to overrule the Division of Advice's authorization to issue the 8(b)(4)(A) and (B) complaint herein. In both instances, Union's counsel appears to have presented the same arguments as those presented here. In both instances, counsel's arguments failed.

1. The Board's Decision in *Road Sprinkler Fitters Local 669 (Local 669)*, 357 NLRB No. 176 (2011) Is Not Dispositive of the Instant Case.

The Union exaggerates the meaning and legal effect of the Board's earlier *Local 669* decision where the Board addressed only the *facial validity* of Addendum C under Section 8(e). But the fact that Addendum C's wording may not contravene Section 8(e) does not preclude the clause from being put to unlawful use or *applied* under circumstances and/or for objective(s) that violate Section 8(b)(4). To the contrary, in *Local 669*, the Board acknowledged the possibility of such an "as applied" charge, Addendum C's facially lawful wording notwithstanding, and explicitly reserved judgment on that very separate and distinct issue until it received a case presenting extrinsic evidence establishing that Addendum C's *application* required a signatory employer (or any other separate person/employer) to cease doing business with another entity. The instant case presents just such an "as applied" challenge, offering ample extrinsic evidence proving that the Union's coercive application of Addendum C here is violative of both Sections 8(b)(4)(A) and (B). Respondent's Motion, grounded primarily on *Local 669* and the facial validity of Addendum C -- and without due regard to extrinsic facts establishing the Union's (A) and (B) objects, must, therefore, be denied. General Counsel must be given the opportunity to present facts which support the theory on which the Complaint is based and cannot be precluded from doing so under the guise of a motion for summary judgment.

2. The Union's Suit to Compel Cosco and MX to Arbitration Can be Enjoined Because It Is (ii) Conduct Carried Out in Furtherance of Unlawful (A) and (B) objects.

The Union's grievance and its suit to compel arbitration against Cosco and MX, is based solely upon and for the purpose of "remedying" the alleged wrongful[2] acts/omissions of Firetrol. See Union Exhibits 3 and 7. But to borrow from the parlance of Addendum C, signatory Cosco has never "established or maintained" Firetrol; it has never exercised control over Firetrol, and it played no role whatsoever in the Denver shutdown. Likewise, though the common owner of both Cosco and Firetrol, MX played no role in Firetrol's decision to shutter its Denver operation. Moreover, MX is not a signatory to the Union's contract and therefore, neither bound to Addendum C nor legally obliged to participate in the arbitration sought by the Union. Thus, the Union's suit against the two secondary employers is aimed, not at achieving legitimate primary ends, but at satisfying the Union's organizational interest with respect to Firetrol and is a violation of Section 8(b)(4). It is because these grievances and the lawsuit against the secondary employers have been undertaken for an illegal object, that the *Bill Johnson/BE&K Construction* line of case have absolutely no application here. *Air Line Pilots Association*, 345 NLRB 820 (2005)[3]; *Iron Workers*, 328 NLRB 934, 935 (1999); *Local 32B-32J,*

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[2] Contrary to the Union's assertion (and even though it is immaterial to the proper disposition of the instant case), Firetrol wishes to make it clear that there was nothing wrongful or unlawful about its shutdown of the Denver operation. Indeed, the Union's own exhibits show that, at the Union's instance, the closure was the subject of a full scale regional unfair labor practice investigation and that the Region concluded that there was insufficient evidence to support the 8(a)(1) and (3) charges made against Firetrol based on said closure. See Union Exhibits 5 and 6.

Service Employees International Union, 313 NLRB 392, 401 (1993). The Union's suit and underlying arbitration are, therefore, the proper subject of this proceeding and properly enjoinable.[4]

Based on the foregoing, Firetrol respectfully requests that the Board summarily deny the Union's Motion for Summary Judgment and that this matter be allowed to proceed to trial on May 1.

Very truly yours,

JACKSON LEWIS LLP

Mark S. Ross

MSR/cc

cc: William Osborne, Esq. and Natalie C. Moffett, Esq.
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Hon. Mary M. Cracraft
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[3] In its Motion, the Union cites to *ALPA* and concedes that an exception to *BE&K* exists "where the General Counsel can establish that the grievance or lawsuit has a [legally proscribed] object". The purpose of the May 1 trial (that the Union seeks to head off with this Motion) is to afford the General Counsel of the opportunity to present evidence and to create a record to establish the Union's unlawful object(s). Nothing in the Union's motion establishes, as a matter of law, that the GC will be unable to sustain that burden. Accordingly, the Union's reliance on *BE&K* is misplaced.

[4] Moreover, to grant the Union's motion would be to turn a blind eye to established case law in which the Board has refused to defer to arbitration because, as here, a contract's language might compel an arbitrator to reach a result that is contrary to law or where, also as here in the case of Firetrol, an arbitrator would not have jurisdiction over or be able to order relief against a third-party. *Daniel I. Burk Enterprises*, 313 NLRB 1263 (1994); *Masters, Mates & Pilots*, 220 NLRB 164 (1975).

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4831-5182-4147, v. 2

PROOF OF SERVICE

Case Name: Road Sprinkler Fitters Local Union 669, UA., AFL-CIO (Firetrol Protection Systems, Inc.)

Case No.: 27-CC-091349

I, Cheryl Cleary, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 50 California Street – 9th Floor, San Francisco, CA 94111; I am over the age of eighteen (18) years and am not a party to this action.

On April 23, 2013, I served the attached **Letter in Opposition to Respondent's Motion for Summary Judgment, dated April 23, 2013, from Mark S. Ross to Gary Shinners, Executive Secretary**, in this action as follows:

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[✓] BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, clearyc@jacksonlewis.com, to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 23, 2013, at San Francisco, California.

Cheryl Cleary

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