

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

ROAD SPRINKLER FITTERS LOCAL
UNION NO. 699, U.A., AFL-CIO

and

Case 27-CC-091349

FIRETROL PROTECTION SYSTEMS, INC.

and

COSCO FIRE PROTECTION, INC.

(Party in Interest)

and

MX HOLDINGS US, INC.

(Party in Interest)

and

CFP FIRE PROTECTION, INC.

(Party in Interest)

**OPPOSITION OF THE ACTING GENERAL COUNSEL
TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 102.24 of the *Rules and Regulations* of the National Labor Relations Board, Counsel for the Acting General Counsel hereby submits the following opposition to Respondent Road Sprinkler Fitters Local 669's Motion for Summary Judgment in the above-captioned case:

I. INTRODUCTION

Respondent in this case has a labor dispute with the Charging Party, Firetrol Protection Systems, Inc. (Firetrol), based on Firetrol's decision to close its Denver, Colorado facility at the time that the Respondent was organizing its employees. The Respondent has a collective bargaining agreement with the National Fire Sprinkler Association, Inc. (NFSA), a multi-employer association. Cosco Fire Protection, Inc. (Cosco) is a NFSA member and signatory employer. Cosco, Firetrol, and CFP Fire Protection, Inc. (CFP) are subsidiaries of MX Holdings (MX). Firetrol is not and has never been signatory to Respondent's labor agreement with NFSA, and Cosco does not control Firetrol's labor relations.

The Complaint in this case alleges that by filing and maintaining both a grievance and a lawsuit to compel arbitration against Cosco, MX, and CFP wherein Respondent seeks to apply Cosco's labor agreement to Firetrol, Respondent has violated Section 8(b)(4)(ii)(A) and (B) of the National Labor Relations Act. Respondent's Motion for Summary Judgment seeks dismissal of the Complaint, primarily in reliance on a prior Board decision holding that the anti-dual shop clause (Addendum C) in the Cosco labor agreement, which is at issue in this case, is lawful on its face. *Road Sprinkler Fitters Local 669 (Cosco Fire Protection)*, 357 NLRB No. 176 (2011). Accordingly, the Respondent argues that it is entitled to continue to prosecute its grievance and lawsuit as a matter of law. For the reasons discussed below, the Respondent is in error. Further, the Complaint raises several factual questions that are material to a disposition of this case. Therefore, Counsel for the Acting General Counsel moves the Board to dismiss Respondent's Motion for Summary Judgment so that the material issues raised by the Complaint can be litigated at the expedited hearing set to commence on May 1, 2013.

II. FACTUAL BACKGROUND

The following facts are undisputed:

1. Respondent is the Section 9(a) representative of Cosco's fire sprinkler employees.
Respondent and Cosco, through its membership in the NFSA, have been signatory to a series of collective-bargaining agreements including the Agreement at issue in this case, which was effective through March 31, 2013.
2. On June 25, 2012, acting on a representation petition filed by the Respondent, the Regional Director in Region 27 directed an election to be held in a unit of sprinkler fitter employees at Firetrol's Denver, Colorado facility. Respondent subsequently withdrew this petition and an election was never held.
3. On June 26, 2012, Firetrol laid off all its Denver employees, closed that facility, and ceased serving clients in the Colorado market. Respondent filed an unfair labor practice charge over this matter and subsequently withdrew this charge.
4. On July 18, 2012, Respondent filed a grievance against Cosco, parent company MX (which it erroneously named as "Consolidated Fire Protection, LLC"), and Firetrol, alleging a violation of Addendum C of the Agreement with Cosco. The grievance alleged that the closing of Firetrol's Denver office violated Cosco's Agreement, and demanded restoration of the *status quo* and that the employees be "made economically whole."
5. On September 21, 2012, Respondent filed a lawsuit in the U.S. District Court for the Central District of California (Case No. CV-12-1596-GHK (JPRx)) against Cosco and MX (as Cosco's parent) to compel arbitration of its July 18, 2012 grievance.

6. On November 13, 2012, Respondent amended its complaint in the lawsuit to add CFP as a defendant. Respondent asserts in its amended complaint that MX is the parent of Cosco and Firetrol; that Cosco, Firetrol, and MX are single and/or joint employers; that Cosco is the agent of MX; and that MX exercises its single and/or joint employer status as to Cosco and Firetrol through CFP.
7. The lawsuit referred to in Paragraph 6 is still pending in the U.S. District Court for the Central District of California.

III. ARGUMENT

A. The Respondent Is Incorrect In Its Assertion That the Board Must Countenance This Grievance and Litigation As A Matter of Law

The Complaint essentially alleges that the Respondent's grievance and lawsuit run afoul of the Board's proscription of unlawful secondary boycotts under section 8(b)(4)(ii)(A) and (B). This proscription was designed to insulate neutral or secondary employers from labor disputes to which they are not a party. In this case, the Respondent may only lawfully exert pressure on primary employer Firetrol, because it is the employer with the "right of control" over the relevant employees and, thus, the ability to resolve the ongoing labor dispute over the closure of the Denver facility. *Teamsters Local 700 (U.S. Dep't of Defense)*, 288 NLRB 1224, 1225 (1988). The Complaint alleges that by maintaining a grievance and lawsuit against Firetrol, Cosco, MX, and CFP, Respondent is attempting to use its contractual relationship with Cosco to coerce neutral entities Cosco, MX, and/or CFP, Inc. to: (1) "cease doing business" with Firetrol or one another; and/or (2) pressure Firetrol to recognize or bargain with the Respondent, both of which are unlawful objects under Section 8(b)(4)(ii)(B). In addition, the Complaint alleges that the grievance and lawsuit, in effect, convert an otherwise facially lawful contract clause into an unlawful 8(e) agreement under Section 8(b)(4)(ii)(A).

Respondent essentially commits three legal errors in its attempt to argue that, as a matter of law, the Board must allow the pending grievance and lawsuit. First, the Respondent errs in insisting that the litigation establishing the facial validity of Addendum C of the Respondent's Agreement with Cosco also establishes the lawfulness of the Respondent's current legal action against Cosco, MX, Firetrol, and CFP under that clause. In the case cited by the Respondent, the Board held that Addendum C, an anti-dual-shop clause, did not have an unlawful "cease doing business" object on its face. *Road Sprinkler Fitters Local 669 (Cosco Fire Protection)*, 357 NLRB No. 176, slip op. at 4-5 (2011). However, regardless of its facial validity, Respondent is attempting to interpret and apply Addendum C to parties who are neutral to its labor dispute with Firetrol (namely Cosco, MX, and CFP, Inc.) with an unlawful secondary object. Indeed, the Board explicitly provided for the possibility of such an "as-applied charge" in the case relied upon by Respondent. *Id.* slip op at 6 n.11. Therefore, the prior Board case does not dispose of this case as a matter of law.

The second legal error committed by Respondent is its assertion that the Complaint is precluded by *BE&K Construction's* holding that "reasonably based" lawsuits are protected by the First Amendment and the Act. 351 NLRB 451, 456 (2007) (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983)). The Acting General Counsel does not dispute that "reasonably based" lawsuits normally enjoy Constitutional protection. However Respondent errs in asserting that the issue to be decided in this case is whether the litigation against MX, Cosco, and CFP, Inc., "is frivolous and/or a sham." (Mot. for S.J., p.11.) Instead, the issue to be decided is whether the grievance and lawsuit have an unlawful object under Section 8(b)(4) of the Act, and whether the lawsuit effectively converts the facially lawful clause into an agreement prohibited by Section 8(e). The Supreme Court in *Bill Johnson's* carved out

an exception for such litigation, which has an “*objective* that is illegal under federal law,” and may be enjoined. 461 U.S. at 731 n.5 (emphasis not in original). As the Federal Courts recognize, *BE&K* did not disturb this rule. See e.g., *Small v. Operative Plasters’ and Cement Masons’ Int’l Ass’n.*, 611 F.3d 483, 492 (2010) (“*Bill Johnson’s* holding that a lawsuit that has an illegal objective constitutionally may be enjoined was left undisturbed by *BE&K.*”); and *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003) (“*BE&K* did not affect the footnote 5 exemption in *Bill Johnson’s*). Therefore, this Complaint is not precluded by *BE&K* construction, as the Respondent asserts.

Respondent’s final error is its reliance on *Operative Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 179 (2011) as “analogous” to the present case. In reality, that case illustrates the necessity of trial in the instant case. In *Operative Plasters*, the Board granted summary judgment to an employer against a union that repeatedly violated Section 8(b)(4)(ii)(D) by bringing repeated grievances, arbitrations, and lawsuits to obtain work contrary to the Board’s prior 10(k) award of the work to another union. *Id.* slip op. at 5. In that case, the Board found that the union was simply attempting to re-litigate issues and factual findings that the Board had disposed of in three prior cases. *Id.* By contrast, as outlined in more detail below, the dispositive facts and legal issues in the present case have not yet been litigated. The facts underlying the ongoing labor dispute over Firetrol’s facility closure occurred only 9 months ago. Moreover, the Board has never found that MX, CFP, Firetrol, and Cosco are joint or single employers or that any of entity other than Cosco is bound by its Agreement with the Respondent. This case is therefore strikingly different from *Operative Plasters* and, unlike that case, should proceed to trial.

B. The Respondent Has Failed To Show that No Material Facts Remain in Dispute and That It Is Therefore Entitled to Judgment as a Matter of Law

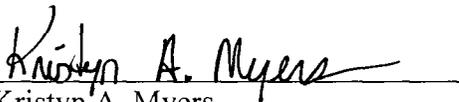
Summary judgment is improper in this case because there are several substantial and material issues to be determined at hearing. As mentioned above, the facts underlying Respondent's labor dispute with Firetrol have yet to be litigated. The Board must also make a factual finding regarding whether MX, CFP, and Cosco are secondary or neutral employers without the "right of control" to address the ongoing labor dispute in this case. A related factual issue to be determined at hearing is whether MX or CFP are bound by Cosco's Agreement with the Respondent, or whether they are also neutral or secondary employers as to the contract as well.

Once a fact finder determines which parties are neutral with regard to the labor dispute, the Board must determine whether the litigation is coercive, and whether it has either an unlawful cease doing business object and/or an unlawful recognitional object, all questions of fact. Indeed, the Respondent tacitly concedes that the "cease doing business" object remains to be decided. The Respondent asserts that the Acting General Counsel has not yet proffered its evidence of any "cease doing business" object of Respondent's grievance and lawsuit. (Mot. for S. J., p.7.) But given the pretrial posture of the case, this fact is self-evident. The Acting General Counsel has not yet had the opportunity to present evidence to litigate that factual question. Furthermore, the Board's Rules and Regulations do not require the Acting General Counsel to proffer evidence to the Respondent, but rather to proceed to trial and allow an administrative law judge to make findings of fact and conclusions of law. Thus, it is evident that there are several material factual issues that remain to be determined at hearing.

IV. CONCLUSION

Based on the foregoing, the Acting General Counsel opposes the Respondent's Motion for Summary Judgment. The Respondent has failed to satisfy the standard for summary judgment because it has failed to demonstrate that there are no material facts in need of resolution at a hearing. Furthermore, the Respondent has failed to show that, as a matter of law, it is entitled to judgment in its favor under either the prior *Sprinkler Fitters* litigation or under *BE&K Construction*. Therefore, Counsel for the Acting General Counsel requests that the Respondent's Motion for Summary Judgment be denied so that the May 1, 2013 hearing scheduled before an Administrative Law Judge can go forward.

Respectfully submitted,



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Dated at Denver, Colorado
This 23rd day of April, 2013

CERTIFICATION OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's **OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**, together with this Certificate of Service, was E-filed or E-Mailed, as indicated below, to the following parties on April 23, 2013:

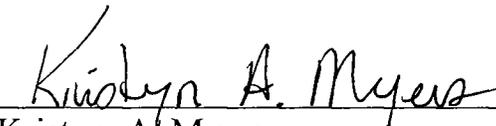
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