

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

ROAD SPRINKLER FITTERS	:	
LOCAL UNION NO. 669, UNITED	:	
ASSOCIATION OF JOURNEYMEN AND	:	
APPRENTICES OF THE PLUMBING AND	:	
PIPE FITTING INDUSTRY OF THE UNITED	:	
STATES AND CANADA, AFL-CIO,	:	
	:	
Respondent,	:	NLRB Case No. 27-CC-091349
	:	
	:	
FIRETROL PROTECTION SYSTEMS, INC.,	:	
	:	
Charging Party,	:	
	:	
	:	
COSCO FIRE PROTECTION, INC.,	:	
	:	
MX HOLDINGS, INC.,	:	
	:	
and	:	
	:	
CFP FIRE PROTECTION, INC.,	:	
	:	
Parties in Interest.	:	
.....	:	

**LOCAL 669’S REPLY TO THE ACTING GENERAL COUNSEL’S OPPOSITION TO
UNION’S MOTION FOR SUMMARY JUDGMENT**

Respondent Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (“Local 669” or “the Union”) respectfully submits this memorandum in reply to the Opposition by the Acting General Counsel to Local 669’s Motion for Summary Judgment (“G.C. Opp.”).¹

¹ Given the expedited hearing in this case, currently scheduled for **May 1, 2013**, we respectfully request the Board’s timely consideration of this matter.

The Acting General Counsel's opposition to the Motion *concedes* that there is *no* affirmative evidence to support the "refusal" and/or "cease doing business" allegations in paragraphs 11 (a) and (b) of the Complaint and, given the *undisputed* evidence and governing precedent refuting those allegations submitted in support of the Motion, the Complaint should be dismissed on summary judgment. Further, where, as here, there is not even an allegation, let alone any showing that the Union is acting for an "illegal object," the NLRB's longstanding policy favoring, and deferring to the parties' grievance/arbitration process provides an independent legal basis for rejecting the Acting General Counsel's attempt to preempt the Union's pending and arguably meritorious grievance.

I. UNDISPUTED MATERIAL FACTS

1. The Acting General Counsel has not challenged a single one of the undisputed facts recited in support of the Union's Motion for Summary Judgment ("Local 669 Motion") 3-7.

2. The Acting General Counsel has instead set forth its own statement of undisputed facts (G.C. Opp. 3-4) which are *not* in any material respect contrary to the Union's statement of facts.²

3. The Union has cited undisputed evidence and controlling legal precedent showing: (i) that there is no evidence that the pending grievance had any proscribed "cease doing business" object; (ii) that the contractual language does not evidence any such object nor any language that would vest an arbitrator with such remedial authority; (iii) that the Union formally *disclaimed*

² The Union takes only marginal exception to the Acting General Counsel's statement of undisputed facts, in particular at paragraph 3. G.C. Opp. 3. It is our understanding that the employees were terminated and not "laid off," and that Firetrol's corporate affiliates continue to perform the same work in the Denver area that was previously performed by Firetrol prior to the closure of that office. However, as discussed below and in the Union's Motion, those factual issues are to be determined by an arbitrator not by the Acting General Counsel.

any such object over five (5) years ago; and (iv) that the Board has ruled that the clause had no such object and that such an object “would not be possible.” *Road Sprinkler Fitters Local 669 (Cosco Fire Protection)*, 357 NLRB No. 176 (2011) (slip op. at 4-5) (citing *Heartland Industrial Partners*, 348 NLRB 1081, 1085 (2006)). Local 669 Motion 5-7.

In response, the Acting General Counsel has recognized that the alleged existence of a proscribed “cease doing business” object is an issue of fact in this case, and that the Union’s grievance in this case seeks no such remedy. G.C. Opp. 3, para. 4.

The Acting General Counsel has further *conceded* the absence of any “genuine issue” with respect to any “cease doing business” object in this case by failing to dispute *any* of the facts and precedent cited by the Union and by then simply declaring that the “cease doing business” issue “remain[s] to be determined at hearing.” G.C. Opp. 4.

The Union’s properly supported summary judgment submission cannot be evaded on that basis, and given the Acting General Counsel’s failure to establish a “genuine issue” with respect to the “refusal” and/or “cease doing business” allegations, they should be dismissed.³

II. UNCONTROVERTED LEGAL PRINCIPLES

³ The Acting General Counsel has also failed to cite *any* facts *or* precedent in support of its recently “clarified” legal theory that the Union’s grievance was secondary and unlawful because it had a “recognitional” object. Local 669 Motion 11, n.4. The Acting General Counsel has *admitted* that the grievance in this case seeks no such remedy (G.C. Opp. 3, para. 4) and such an “object” cannot be unlawful because the very purpose of any typical and lawful authorization card check neutrality clause is union recognition, *e.g.*, *Houston Division of Kroger Co.*, 219 NLRB 388 (1975); *Pall Biomedical Products Corp.*, 331 NLRB 1674 (2000); *Heartland Industrial Partners*, 348 NLRB 1081 (2006). Moreover, in contrast to the clauses in the latter cases, the undisputed language of the authorization card check neutrality clause in *Road Sprinkler Fitters Local 669* does not explicitly impose union *recognition* as even a potential remedy but is a “union standards” clause imposing only “the terms and conditions” of the Local 669 national agreement. 357 NLRB No. 176 (slip op. at 1-2) (quoting language).

As an independent legal basis for its Motion, the Union cited the longstanding NLRB policy against interference with the processing of arguably meritorious grievances under the established contractual arbitration process. *BE&K Construction Co.*, 351 NLRB 451, 456 (2007) (reasonably based lawsuits and grievances are protected by the First Amendment and the NLRA and may not be subject to unfair labor practice proceedings); *UFCW Local 540 (Pilgrim's Pride Corp.)*, 334 NLRB 852, 855 (2001) (union grievance over dues check off authorization); *ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89, 92 (1988), *enf'd* 892 F.2d 130 (D.C. Cir. 1989) (grievance processed *before* NLRB issued §10(k) decision lawful); *Hotel and Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939, 940 (1987) (union grievance over alleged single employer status of companies not violative of the NLRA because not contrary to Regional Director's unit determination). Under settled NLRB principles, the Board should dismiss the Complaint and "defer processing of unfair labor practice charges while the parties present the dispute to an arbitrator." *Pilgrim's Pride Corp.*, 334 NLRB at 855. Local 669 Motion 11-13.

The Acting General Counsel does *not* dispute that the Union's grievance is "arguably meritorious" at the very least (G.C. Opp. 3), and for that reason alone the grievance cannot constitute "coercion" for Section 8(b)(4) purposes. *E.g., Laborers (Vernon Construction)*, 298 NLRB 797, 798 n. 4 (1990) (arguably meritorious grievance not "coercion" under § 8(b)(4)); *ILWU Local 151 (Port Townsend Paper Corp.)*, 294 NLRB 674, 674 (1989) (same).

The Acting General Counsel has not attempted to distinguish the case law cited by the Union (Local 669 Motion 11-12; G.C. Opp. 5-6) and, while acknowledging its burden of establishing that the grievance has an "illegal object," then completely fails to do so. G.C. Opp. 6. *Compare Sheet Metal Workers Local 27 (E.P. Donnelly)*, 357 NLRB No. 131 (2011) (slip op.

at 2) (“illegal object” found because grievance contrary to prior NLRB Section 10(k) decision); *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160 (2011) (same); *Allied Trades Council (Duane Reade)*, 342 NLRB 1010, 1012 (2004) (grievance contrary to prior Regional Director unit determination). The one case the Acting General Counsel does cite only further illustrates the Union’s point. *Operative Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 179 (2011) (“illegal objective” found where union grievance was contrary to NLRB’s prior §10(k) decision). The Union’s grievance is not contrary to a prior NLRB decision, it is on all fours with *Road Sprinkler Fitters Local 669*, a case involving the same parties holding that the clause at issue here is lawful and enforceable.

III. CONCLUSION

For the reasons stated, Local 669 requests that the Complaint be dismissed.

Dated: April 25, 2013

Respectfully submitted,

/s/ William W. Osborne, Jr.
William W. Osborne, Jr.
Natalie C. Moffett
Osborne Law Offices, P.C.
4301 Connecticut Avenue, N.W., Suite 108
Washington, D.C. 20008
Telephone: (202) 243-3200
Facsimile: (202) 243-3207

Counsel for Road Sprinkler Fitters Local
Union 669, U.A., AFL-CIO

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2013, I served Local 669's Reply to the Acting General Counsel's Opposition to Union's Motion for Summary Judgment with the Executive Secretary of the National Labor Relations Board via the electronic filing portal on the Board's website. Copies of the Motion were also sent via electronic mail to the following parties:

Wanda Pate Jones, Regional Director
Kristyn Myers, Field Attorney
Region 27, National Labor Relations Board
600 17th Street
7th Floor-North Tower
Denver, CO 80202-5433
wanda.pate-jones@nlrb.gov
kristyn.myers@nlrb.gov

Mark Ross
Jackson Lewis LLP
199 Fremont Street
10th Floor
San Francisco, CA 94105
mark.ross@jacksonlewis.com
Counsel for Charging Party Firetrol

James Severson
Bingham McCutchen, LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
james.severson@bingham.com
Counsel for Parties in Interest Cosco, Consolidated and CFP

/s/ Natalie C. Moffett
Natalie C. Moffett