

U.S. NATIONAL LABOR RELATIONS BOARD
REGION 32

PARAMEDICS PLUS/PATIENTS
Employer,

Case No. 32-RC-102941

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, SEIU LOCAL 5000
Petitioner

and

NATIONAL EMERGENCY MEDICAL SERVICES
ASSOCIATION
Intervenor

PETITIONER'S SUPPLEMENT TO OPPOSITION TO INTERVENOR'S
REQUEST FOR SPECIAL PERMISSION TO APPEAL

In its May 22, 2013 Opposition to Intervenor's Request for Special Permission to Appeal, Petitioner National Association of Government Employees (NAGE) stated that it has taken the position that it will not agree to mediate or arbitrate its dispute with Intervenor National Emergency Medical Services Association (NEMSA) regarding NEMSA's material breach of its Affiliation Agreement with NAGE. NAGE respectfully submits this supplemental filing to further educate the Board regarding the current posture of its dispute with NEMSA regarding the Affiliation Agreement and to clarify its position with respect to the likely forum in which that dispute will be heard.

A. On April 5, 2013, NAGE gave notice to NEMSA that, effective April 8, 2013, it was terminating its Affiliation Agreement with NEMSA due to NEMSA's failure to pay approximately \$281,000 out of a total of \$456,000 owed to NAGE under that agreement as well as under a Servicing Agreement between NAGE and NEMSA.

On April 11, 2013, NAGE brought suit against NEMSA, as well as against its Executive Director Torren K. Colcord, in the U.S. District Court for the District of Massachusetts, Case No. 1:13-cv-10854-JLT. The suit alleges breach of contract claims against NEMSA, as well as tort claims and a breach of contract claim against Colcord under a separate employment agreement that does not contain an arbitration clause. In conjunction with the Complaint, NAGE also filed a Motion for Approval of Attachment on Trustee Process (“Trustee Process Motion”), through which NAGE seeks to obtain security for NAGE’s eventual judgment against NEMSA in the form of an attachment of funds belonging to NEMSA that are in the hands of an employer, American Medical Response. Under Mass. R. Civ. P. 4.2, a trustee process motion requires that a hearing be held prior to the issuance of a summons to a named trustee, and that the trustee be given an opportunity to answer the summons. To date, no hearing has been set for the Trustee Process Motion.

B. On May 1, 2013, NEMSA filed an arbitration demand with NAGE with the American Arbitration Association, invoking the arbitration provision in its terminated Affiliation Agreement with NAGE. On May 3, 2013, NEMSA and Colcord filed in the federal lawsuit a Motion to Dismiss or, in the Alternative, Motion for Stay and an Order Compelling Arbitration (“Motion to Dismiss”). In that motion, NEMSA and Colcord requested that the court dismiss NAGE’s claims against NEMSA and Colcord in their entirety, without entertaining NAGE’s Trustee Process Motion, on the basis that all of NAGE’s claims should be subject to arbitration. *See* NEMSA’s and Colcord’s Brief in Support of Motion to Dismiss, 8-9, Case No. 1:13-cv-10854-JLT (D. Mass.).

On May 24, 2013, NAGE filed its response to NEMSA’s Motion to Dismiss. In that filing, NAGE has argued that the court should entertain its Trustee Process Motion prior to

deciding NEMSA's motion to dismiss, and that NEMSA's motion to dismiss should be denied because the claims against Colcord are not subject to arbitration. NAGE has also stated in that filing—and its position is—that while it believes that it should be excused from arbitrating its disputes with NEMSA due to NEMSA's material breach of its agreements with NAGE, NAGE nonetheless acknowledges that whether it should be required to arbitrate with NEMSA at all is a matter for an arbitrator to decide in the first instance, in light of NEMSA's decision to invoke the arbitration provisions of NAGE's agreements with it. *See generally Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) (explaining that an arbitration provision is “severable from the remainder of the contract,” and “unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.”).

The court has not set a date for hearing or resolution of either NAGE's or NEMSA's motions.

C. The fact that the question of enforceability of the arbitration clause in the Affiliation Agreement is itself an arbitrable issue supports the analysis of the Regional Director in his decision denying NEMSA's request and NAGE's analysis in its May 22 opposition brief. This is so for two reasons.

First, it remains the case that the Affiliation Agreement as a whole has been terminated due to NEMSA's material breach, and NAGE continues to take the position that the no-raid provision in that agreement is no longer operative as a result. Thus, even if under the severability principle described in *Cardegna* the parties are required to arbitrate, rather than litigate, the question of whether the arbitration provision of the Affiliation Agreement remains enforceable, by the same principle, the *non*-arbitration provisions are, at this time, non-operative.

Thus, the Regional Director's conclusion that there is no recognized voluntary no-raiding agreement between the parties to which the Board can defer continues to be correct.

Second, the fact that the threshold question for arbitration is enforceability of the arbitration provision with respect to NEMSA serves to confirm the conclusion of the Regional Director that the date for ultimate resolution of the disputes between NAGE and NEMSA is uncertain and unlikely to happen in the near future. Any arbitration between NAGE and NEMSA will have to begin with a determination of this threshold issue, and an arbitrator may conclude that NAGE is entitled to have its claims against NEMSA heard in court. Moreover, there is no reason to believe that the District Court in Massachusetts will act quickly regarding the motions pending before it. The likely next proceeding in the federal court case, which must occur before any question goes to arbitration, is a hearing on NAGE's Motion for Trustee Process. The hearing has not yet been scheduled.

Dated: May 25, 2013

Respectfully submitted,

National Association of
Government Employees,

s/s Jean E. Zeiler
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Certificate of Service

I certify that the Petitioner's Supplement to Opposition to Special Request for Appeal has been served electronically or by email on May 25, 2013, on the following:

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