

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

CB&I, INC.

and

Case 06-CA-083397

MID ATLANTIC COUNCIL OF CARPENTERS-
WV DISTRICT

and

Case 06-CA-089693

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS,
FORGERS AND HELPERS, LOCAL LODGE 667, AFL-CIO, CLC

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

Counsels for Respondent having filed a Motion for Summary Judgment in the above-captioned matter on August 30, 2013 pursuant to Section 102.24, 102.26 and 102.50 of the Board's Rules and Regulations, Series 8 as amended, and Counsel for the General Counsel having received said Motion, Counsel for the General Counsel hereby respectfully requests that Respondent's Motion for Summary Judgment be denied on the grounds that there are significant issues of material fact that would best be resolved at a hearing.

In support of this Opposition, Counsel for the General Counsel states as follows:

1. Respondent's contentions that the amendment to Case No. 06-CA-083397 was improper should be summarily rejected. Respondent bases its arguments on the fact that the amendment occurred while the Region's dismissal of the charge, inasmuch as it alleged a violation of Section 8(a)(3) of the Act, was pending disposition by the Office of Appeals. While pending appeal, new previously undiscovered evidence of animus in the form of unlawful statements was introduced to support the appeal. It is this new and previously undiscovered evidence that resulted in the filing of the amended charges to allege independent violations of

Section 8(a)(1) of the Act. Because the charge in Case 06-CA-083397 had not been finally disposed of before the filing of the amended charge, it was a pending charge. The Board has stated that it will apply its traditional test “to determine if the untimely allegation is factually and legally related to the allegations of the timely charge, without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed.” *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988); *Seton Co.*, 332 NLRB 979, 983 (2000). It is abundantly clear that at the time the amended charge was filed, the timely filed allegation that Respondent unlawfully refused to hire certain job applicants was pending in the Office of Appeals. In *Children’s National Medical Center*, 322 NLRB 205 (1996), the Board held that the underlying charge could be reinstated without running afoul of Section 10(b) limitations period where a Regional Director reversed his decision to dismiss the charge and revoked a dismissal during the period that a timely appeal of the charge was pending. *Children’s National Medical Center*, *ibid.* Accordingly, the amendment to the charge in Case 06-CA-083397 was proper and Respondent’s arguments are without merit.¹

2. Respondent’s main contention is that the amended charges are not closely related to the timely-filed charges, and thus, pursuant to Section 10(b) of the Act, the complaint should be summarily dismissed without the necessity of a hearing. Respondent thus argues that a motion for summary judgment will be appropriate in those cases where there are no issues of material fact in dispute. See *Xtezo, Inc. t/a Flood City Brass and Pump Company*, 296 NLRB No. 28 (1989); *General Split Corp.*, 284 NLRB 418 (1987), *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989); *John Morrell & Co.*, 304 NLRB 896 at fn. 5 (1991). The “closely related” test necessarily requires a close examination of facts that, due in part to the lack of pre-trial discovery in Board proceedings, are not fully disclosable until the hearing before an administrative law judge. As such, Respondent’s Motion for Summary Judgment is clearly not

¹ Respondent has not raised this argument with respect to the amendment of the charge in Case 06-CA-089693.

the appropriate vehicle to decide whether the otherwise untimely filed amended charges upon which the consolidated complaint is based are “closely related” to the initial timely-filed charges. Accordingly, Respondent’s Motion must be denied.

More specifically, to determine whether unfair labor practice charges are legally and factually “closely related”, the Board examines:

- (1) whether the otherwise untimely allegations involve the same legal theory as the timely charge;
- (2) whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge; and
- (3) whether a respondent would raise the same or similar defenses to both charge allegations. *Redd-I, supra*, at 1116.

It is clear from a plain language reading of the second and third prongs of the *Redd-I* test that the resolution of these components of the closely related test is overwhelmingly dependent upon a fact-driven analysis. Briefly, at issue herein is whether otherwise untimely filed allegations of the amended charge that certain of Respondent’s supervisors made unlawful statements, including statements that Respondent would not hire any job applicant sent by the Union and that Respondent did not hire “union,” are “closely related” to the timely filed allegations that Respondent unlawfully failed to hire Union adherents. Although Respondent asserts that the supervisors alleged to have made the unlawful statements are not involved in the hiring process, the Region’s evidence to be presented at the unfair labor practice hearing indicates that at least one of these supervisors had a role in Respondent’s hiring process. Moreover, Respondent claims that one of its sources for job applicants was recommendations from field management or current employees. Under these circumstances, the alleged unlawful statements by Respondent’s field supervisors are not so plainly unrelated to the timely filed refusal to hire allegation so as to grant Respondent’s Motion for Summary Judgment. To the contrary, these alleged unlawful statements can be seen as a manifestation of Respondent’s

animus towards union members. As such, the statements are relevant evidence in the determination of whether Respondent employed an overall scheme to avoid hiring “union.” Additionally, the mere fact that Respondent determined it was necessary to submit a Respondent-prepared affidavit from its Staffing Manager Louis Widemire, to support its Motion for Summary Judgment demonstrates that there are significant issues of material fact in this matter which would be best resolved after a hearing before an Administrative Law Judge. It is noteworthy that Widemire’s testimony proffered in this affidavit has not been subject to cross-examination nor has his demeanor been examined, both of which are necessary to resolve issues of credibility.

Finally, it is equally telling that Respondent has not cited any case where the Board has granted a motion for summary judgment in circumstances where a resolution of the closely-related test is required. See *The Carney Hospital*, 350 NLRB 627 (2007); *WGE Federal Credit Union*, 346 NLRB 982 (2006); *SKC Electric, Inc.*, 350 NLRB 857 (2007); and *Canned Foods, Inc.*, 332 NLRB 1449 (2000). Likewise, after a reasonable amount of legal research, Counsel for the General Counsel has not found a single Board case law where a pre-trial motion for summary judgment was granted based upon a contention that an otherwise untimely filed amended charge was not closely related to a timely filed charge. In short, Respondent’s Motion for Summary Judgment is an inappropriate vehicle to resolve the disputes raised therein,

particularly in the instant matter. Accordingly, it is respectfully requested that Respondent's Motion for Summary Judgment be denied in its entirety.

Dated at Pittsburgh, Pennsylvania, this 12th day of November 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Emily M. Sala", is written over a solid horizontal line.

Emily M. Sala
Counsel for the General Counsel

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AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I, the undersigned employee of the National Labor Relations Board, state under oath that on November 12, 2013, I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

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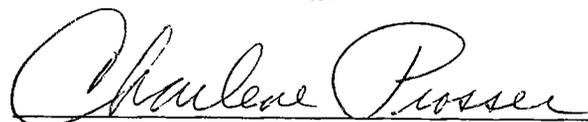
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