UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

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| ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U. A., AFL- CIO, | |
| Respondent, | NLRB Case No. 27-CC-091349 |
| FIRETROL PROTECTION SYSTEMS, INC., | |
| Charging Party, | |
| and | |
| COSCO FIRE PROTECTION, INC., | |
| MX HOLDINGS, INC., | |
| and | |
| CFP FIRE PROTECTION, INC., | |
| Parties in Interest. | |

## BRIEF IN OPPOSITION TO FIRETROL'S CROSS-EXCEPTIONS

Pursuant to the NLRB Rules and Regulations §102.69, the Union submits the following answering brief to Firetrol's Cross-Exceptions to the ALJ's Decision in the above-referenced case.

Firetrol filed cross-exceptions to nine findings/recommendations by the ALJ. These cross-exceptions fall into three categories:

### 1. **The ALJ's Failure to Consider Evidence**

Firetrol faults the ALJ for failing to "note and presumably consider" and/or "draw an adverse inference from" several aspects of the record: (i) the Region's investigative determination (Firetrol Br. n. 8); (ii) the Union's failure to provide evidence as to the remedy it would seek from Cosco in an arbitration (Firetrol Br. ns. 14, 35); and (iii) the District Court's Order granting the motion to dismiss the Union's First Amended Complaint (Firetrol Br. n. 21).

First, there is no evidence that the ALJ failed to consider any of the referenced evidence in her analysis. *See Highland House Nursing Ctr., Inc*., 222 NLRB 134, 134 (1976) (dismissing Respondent's allegations that the ALJ failed to consider issues raised in respondent's brief where "Respondent has not alleged, and we have no reason to believe, that the Administrative Law Judge did not consider Respondent's brief."). In any event, the evidence that Firetrol faults the ALJ for failing to note is irrelevant to the issues in this case.

Local 669 filed unfair labor practice charges with the NLRB over the closure of the Denver Firetrol office, but subsequently withdrew the charges and decided to proceed instead with the pending grievance. The NLRB did not make any final determination regarding the Union's charges. ALJD 3, n. 9; Jt. Exh. 1 (Stipulation), para. 3.

Firetrol's suggestion that a Union's withdrawal of charges is evidence of bad faith, is unsupported by case law and undermines the purpose of having these Board procedures in the first instance. *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1166 (7th Cir. 1984) ("All that happened is that the General Counsel of the Board decided not to bring an unfair labor practice proceeding against the union. This was not an adjudication by the Board; indeed, it was nothing more than an exercise by the General Counsel of his prosecutorial discretion, and as such is entitled neither to be given collateral estoppel effect nor to be treated as an exercise of the Board's primary jurisdiction.") (citing *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275, 1279-80 (9th Cir. 1982)) (citations omitted).

As for the remedy sought by the Union's grievance, the grievance was explicit with respect to the remedy; as the parties stipulated, the remedy sought was a "restoration of the *status quo*" and that the terminated employees be "made economically whole." ALJD 4; Jt. Exh. 1 (Stipulation), para. 4. Arbitrators and the Board alike have agreed that where the closing of a facility can be proven to be discriminatorily motivated, a restoration of the *status quo* by restarting operations can be an appropriate remedy. *Fibreboard Paper Prods. Corp*., 379 U.S. 203, 209 (1964); *Coronet Foods v. NLRB*, 981 F.2d 1284 (D.C. Cir. 1993), *enfg.* 305 NLRB 79 (1991); *Reno Hilton Resorts*, 326 NLRB 1421 (1998); *Lear Siegler, Inc*., 295

NLRB 857 (1989); *United Elec. Radio & Machine Workers v. Honeywell, Inc*., 522 F.2d 1221, 1226 (7th Cir. 1975) ("courts repeatedly have upheld awards requiring companies to return operations and equipment which had been moved to other locations in violation" of the CBA)(citing *Selb Mfg. Co. v. Int'l Assn*., District 9, 305 F.2d 177 (8th Cir. 1962)); *Atomic Uniform Corp. v. ILGWU*, 86 L.R.R.M. 2331 (S.D.N.Y. 1973); *Joint Bd. of Cloak, Skirt & Dressmakers Union v. Senco, Inc.*, 289 F. Supp. 513 (D. Mass. 1968)).

**2. <u>The ALJ's Failure to Admit GC Exhibit 23 into Evidence</u>**

Firetrol's objection to the ALJ's exclusion of GC Exhibit 23, a 2006 arbitration decision, is addressed in the Union's Brief in Opposition to the General Counsel's Cross-Exceptions.

**3. <u>The ALJ's Failure to Apply the Appropriate Remedy</u>**

Finally, Firetrol has excepted to the ALJ's Decision on the basis that it fails to recommend an extraordinary posting remedy, including posting notice on the Union's website, purchasing advertisement to post in a widely read industry publication, and mailing notice to its members and all employers signatory to the NSFA agreement. Firetrol Br. 44-45. These cross-exceptions fall similarly flat.

The ALJ's suggested remedy would require the Union to "Post at its business office copies of the attached notice..." ALJD 9. Any additional requirements would be entirely unnecessary. *Europa Auto Imports, Inc*., 357

NLRB No. 114, slip op. at 3, fn. 6 (2011) ("We deny the request [to post to employer's website] because the Union has not shown that the Board's traditional remedies are insufficient to remedy the Respondent's violations.") (citing *Bruce Packing Co.*, 357 NLRB No. 93 slip op. at 1, n. 4 (2011); *First Legal Support Servs.*, 342 NLRB 350, 350, n. 6 (2004)). *See also Int'l Union of Operating Eng'rs, Local No. 12*, 284 NLRB 246, 246 (1987) ("Because posting of a Board notice usually provides adequate notification to all who have been adversely affected by a respondent's illegal conduct, the extraordinary remedy of publication is normally not necessary. Under the circumstances of this case, and particularly in light of our finding that a broad order is not warranted, we agree with the judge that publication of the Order or notice would not effectuate the purposes of the Act.") (citing *Elec. Workers IBEW Local 3 (N. Telecom)*, 265 NLRB 213 (1982), *enfd.* 730 F.2d 870 (2d Cir. 1984)).

Moreover, even the decisions relied on by the ALJ did not impose the extraordinary remedies requested by Firetrol. *See Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1098-99 (1988) (traditional posting remedy ordered); *Iron Workers (Southwestern Materials)*, 328 NLRB 934, 937 (1999) (same).

The cases cited by Firetrol are readily distinguishable. Unlike the cases Firetrol cites to, traditional notice posting remedy is sufficient where parties have not alleged any facts that show the Union has (i) improperly instructed its

members; (ii) demonstrated a proclivity to violate the Act; (iii) heavily publicized an unlawful application of Addendum C, or where the General Counsel has not requested a broad order. *See Sheet Metal Workers Int'l, Local 15 (Brandon Reg'l Med. Ctr.)*, 346 NLRB 199, 208 (2006) (Union ordered to publish notice in its own publication where it had instructed bargaining unit employees not to perform assigned work, in violation of §8(b)(4)(i)(B)); *Int'l Union of Elevator Constructors, Local 91 (Otis Elevator Co.)*, 345 NLRB 925, 930 (2005) (Union ordered to mail notice to all members where it had violated the Act by encouraging workers to strike); *Sheet Metal Workers Local No. 91 (Schebler Co)*, 294 NLRB 766, 776-77 (1989) (finding a violation of 8(e) on the CBA's face and that notice to signatory employers was "particularly important because the International has heavily publicized and recommended the Integrity Clause to all of its local unions"); *N. Telecom*, 265 NLRB 213, 218-19 (1982) (Board ordered notice be sent to employers, all union members, and publication in work stoppage case where Board specifically asked for a broad order and there was a "proclivity or general scheme to violate the act" and it was thus "reasonable to anticipate future violations"); *Gen. Serv. Employees Union Local No. 73*, 240 NLRB 462, 462, n. 3 (1979) (Board ordered publication where Union had violated Act by instructing its members to picket). Firetrol has not even attempted to show that the Board's

traditional notice posting is insufficient and thus the Board should deny its cross-exceptions calling for extraordinary remedies.

For these reasons as well as those listed in the Union's Exceptions to the ALJ's Decision, we respectfully submit that the Cross-exceptions be dismissed.

Respectfully submitted,

/s/ William W. Osborne, Jr.
William W. Osborne, Jr.
Natalie C. Moffett
Sarah L. Nash
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 Respondent
Road Sprinkler Fitters Local
Union 669, U.A., AFL-CIO

Counsel for Local 669

## CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014, I filed Local 669's Brief in Opposition to Firetrol's Cross-Exceptions to the ALJ's Decision with the Executive Secretary via the NLRB's e-filing portal and also forwarded a copy by electronic mail to the following:

Wanda Pate Jones, Regional Director
Region 27, National Labor Relations Board
600 17th Street
7th Floor-North Tower
Denver, CO 80202-5433
wanda.jones@nlrb.com
(By Electronic Mail)

Kristyn Myers, Counsel for the Acting General Counsel
Region 27, National Labor Relations Board
600 17th Street
7th Floor-North Tower
Denver, CO 80202-5433
kristyn.meyers@nlrb.com
(By Electronic Mail)

Micky Devitt, Counsel for the Acting General Counsel
Region 27, National Labor Relations Board
600 17th Street
7th Floor-North Tower
Denver, CO 80202-5433
michelle.devitt@nlrb.gov
(By Electronic Mail)

Mark Ross
Jackson Lewis LLP

199 Fremont Street
10th Floor
San Francisco, CA 94105
mark.ross@jacksonlewis.com
Counsel for Charging Party Firetrol
(By Electronic Mail)

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
(By Electronic Mail)

/s/ William W. Osborne, Jr.
William W. Osborne, Jr.