UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

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.	:	

……...:

REPLY TO THE ANSWERING BRIEFS
BY COSCO et al. AND FIRETROL

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TABLE OF AUTHORITIES

The Union submits this reply to the answering briefs by Cosco Fire Protection, Inc. and its corporate affiliates ("Cosco Br.") and Firetrol Protection Systems, Inc. ("Firetrol Br."). References to the Union's memorandum addressing the errors of fact and law in the decision of the Administrative Law Judge are cited as ("Union Br.").[1]

I. Reply to Cosco's Brief

A. Arbitrability of the Grievance

The Union has not asserted any "absolute right" to arbitrate any grievance. Cosco Br. 23, 26-27. The Union does have the First Amendment right to a judicial determination of whether these commonly-owned corporate affiliates should be ordered to jointly arbitrate the pending grievance as was required in the previous litigation, *Road Sprinkler Fitters Local Union No. 669 v. Cosco Fire Prot., Inc., et al.*, 363 F. Supp. 2d 1220, 1223-24 (C.D. Cal. 2005), and then to proceed to arbitration of the grievance should the Court so order. *Jones v. Road Sprinkler Fitters Local Union No. 669*, 197 LRRM 2083, 2085-86 (C.D. Cal. 2013) (invoking *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002)).

The Court can order the employers to jointly arbitrate on the same ground as it did previously, *i.e.*, that Cosco is contractually bound to arbitrate and the factual

[1] Many of the arguments in the submissions by Cosco *et al.* and Firetrol have been addressed in the Union's Reply to the Answering Brief of the General Counsel which to that extent is incorporated by reference herein.

issues regarding the relationship between the affiliated employers goes to the merits of the grievance and is therefore an issue for the arbitrator to decide. *Id*. *See UFCW Local 770 v. Geldin Meat Co.*, 13 F.3d 1365, 1368 (9th Cir. 1994) ("the Supreme Court has stated unequivocally that the courts have no business determining the merits of a grievance under the guise of deciding questions of arbitrability under a collective bargaining agreement") (citations omitted).[2] Or the Court might determine to consider the relationships between the employers, following discovery, before deciding whether the non-signatory employers should be compelled to arbitrate the grievance. Under neither scenario, however, is the arbitrability of the grievance an issue for the Board to resolve.

B. *Heartland* is Not Distinguishable

Cosco's attempt to distinguish the Board's decision in *Heartland Industrial Partners*, 248 NLRB 1081 (2006), *review denied sub nom. Kandel v. NLRB*, 265 Fed. Appx. 1 (D.C. Cir. 2008), is a failure. Cosco Br. 30-32.

[2] Contrary to Cosco's unsupported allegations (Cosco Br. 11-13, 35), Consolidated Fire Protection LLC *was* a party to the previous litigation and, together with Firetrol, ordered to *jointly* submit the earlier grievance to final and binding arbitration, under a different clause of the same contract provision. *Road Sprinkler Fitters Local Union No. 669 v. Cosco Fire Prot., Inc., et al.*, 363 F. Supp. 2d at 1223-24.

Cosco avers that *Heartland* and earlier NLRB decisions endorsing authorization card check neutrality clauses are only applicable where "the card check provision [is] enforced against the employer who signed it." Cosco Br. 34. There was no such precondition expressed by the Board in *Heartland*, and the facts of the case prove the contrary -- the signatory party to the neutrality clause was an investment firm, and not even "an employer," let alone *the same* employer who would later be bound to the clause. 348 NLRB at 1081. *See also Houston Div. of Kroger Co*., 219 NLRB 388, 388 (1975).

The clauses in the two cases are materially the same: both clauses require employer "neutrality" and union recognition based on authorization cards signed by a majority of unit employees and both are enforceable through arbitration. *Road Sprinkler Fitters Local 669 (Cosco Fire Prot.)*, 357 NLRB No. 176 (2011), slip op. at 1-2, 4; *Heartland*, 348 NLRB at 1081. And neither clause allows for a "cease doing business" remedy in arbitration. *Road Sprinkler Fitters Local 669*, slip op. at 4-5; *Heartland*, 348 NLRB at 1084.

However, in one significant respect, the clause in this case, as construed by the Board, is different from, and more narrowly tailored than the clause found to be lawful and enforceable in *Heartland*. The clause in *Heartland*, by its terms, was applicable in the alternative, where the purchased entity was owned "*or*" where Heartland "has the power … to direct the management and policies of the

enterprise" to be purchased by Heartland. *Heartland,* 348 NLRB at 1081 (quoting clause). As the Board ruled, enforcement of the instant clause, in contrast, *requires* an affirmative showing of "control." *Road Sprinkler Fitters Local 669 (Cosco Fire Prot.)*, slip op. at 4. Perhaps for this reason, the Board concluded in *Local 669* that a "cease doing business" object "would not be possible," a finding that was not made in *Heartland. Id*., slip op. at 5.

One of the Board's holdings in *Heartland* that Cosco neglected to cite is worthy of repetition here -- where, as in *Heartland* and this case, there is no "agreement to cease doing business with someone," there can be no finding of an unlawful secondary object. *Heartland*, 348 NLRB at 1085.

C. There is No "Single Employer" Component in the Neutrality Clause

The terms of the authorization card check neutrality clause language in Addendum C under which the pending grievance was filed do not incorporate the "single employer" standard in the preceding clause in the Addendum.[3] Cosco Br. 14-15, 38. The neutrality clause language in question reads: "Should the Employer

[3] Any issue of "single employer" status in the District Court case (Cosco Br. 37-38) would go to the arbitrability of the grievance within that legal forum, and *not* to the merits of a grievance filed under the Board-approved clause in Addendum C that requires only that the Union demonstrate that Cosco and/or Consolidated MC exercised "control" over Firetrol. *See Road Sprinkler Fitters Local 669 (Cosco Fire Prot.)*, slip op. at 3-4. Even so, the nature of the allegations in the District Court is unknown; there is no Amended Complaint pending at this preliminary state of that case.

establish or maintain such other entity within the meaning of the preceding paragraph…" and refers to the phrase in the preceding clause describing the Employer as "*including its officers, directors, owners, partners or stockholders...*." To attempt to incorporate a "single employer" requirement into the neutrality clause would render the authorization card check procedures unnecessary, redundant and superfluous. Not surprisingly, neither the ALJ nor the General Counsel has suggested such an interpretation.

Cosco is free to assert its novel interpretation of the language to the arbitrator, but the Board's policy is to decline to resolve such conflicting interpretations. *E.g., Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988) ("[w]here the issue is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the union, we will not seek to determine which of two equally plausible contract interpretations is correct.")[4]

D. *BE&K* is Controlling

The Board cannot preempt and defeat the arbitration process (Cosco Br. 24-26) unless and until the General Counsel proves that the Union "did not and could not reasonably have believed it could acquire through discovery or other means

[4] Similarly, Cosco's attempt to impose its own interpretation that Cosco itself must exercise control directly over Firetrol (Cosco Br. 14-15, 36, 38), another novel contractual interpretation, is contrary to the contract language as well as the ALJ's interpretation covering whether "neutral employers Cosco, CFP, and MX have control over primary employer Firetrol." ALJD 6-7. Notably, neither Cosco, nor any other party, has excepted to the ALJ's legal analysis on this issue.

evidence needed to prove" its claims, and "not simply that summary judgment would have been granted" to Cosco *et al*. in the pending suit to compel arbitration, but that the Union "would not have been able to present a colorable argument in opposition." *Milum Textile Servs.*, 357 NLRB No. 169 (2011), slip op. at 7. That is an unsustainable burden at the pre-discovery stage of the litigation. Union Br. 21-22, 31, 36.

Cosco's claim that the Board should intercede and protect the employers from the arbitration process because the Union's grievance is "incompatible" with a prior NLRB decision (Cosco Br. 34) is baseless and, indeed, the General Counsel formally disavowed that specific contention. Union Br. 26, n.8. The grievance is perfectly "compatible" with the NLRB's recent decision upholding the clause as primary, lawful and enforceable. *Road Sprinkler Fitters Local 669 (Cosco Fire Prot.)*, slip op. at 4.

E. The Union is Entitled to Discovery

As noted, the Union is entitled to full discovery in the pending suit and in arbitration regarding the relationships between Cosco and its corporate affiliates. Union Br. 35-36. The employers' refusal to comply with the Union's information request, appended to its grievance, is undisputed (Union Br. 13-14); there was an explicit agreement between counsel, on the record at the hearing, that the

information requested by the Union at the time the grievance was filed *had not* been produced. Union Br. 34; Tr. 471.

On the subject of non-disclosure, Cosco's brief provides a new and significant *admission* that "Firetrol submitted numerous materials to the Region regarding the financial problems… that drove [the] decision" to terminate the Denver employees and close that facility on the eve of the NLRB-directed election. These materials surely included information the Union had requested but which had been withheld by the employers *and* by the General Counsel who argued that the Union's grievance was not "reasonably based" (Cosco Br. 16, n.7; 45-46) -- demonstrating that both the General Counsel and the employers have withheld relevant information from the Union.[5]

Cosco's contention that the Union has not been denied discovery of the relevant facts because the Union could have issued an administrative subpoena to the employers in the NLRB proceeding (Cosco Br. 46 and n. 20) mistakes an administrative proceeding where *no* discovery is allowed, *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 315 NLRB 882, 882 (1994), *enfd. in part* 96 F.3d 1439 (4th

[5] The Union's information request for, *inter alia*, "Any and all documents relating to and/or memorializing the decision to discontinue the operation of the Firetrol facility in Denver, Colorado (including cost analyses, corporate decisions, correspondence, email and/or memoranda)," G.C. Exh. 11 at 2, would include the information the employers provided the NLRB that the General Counsel *did not* make available at the ULP hearing.

Cir. 1996), and a subpoena where the issuing party has *no* standing to enforce that subpoena in court, with full discovery in federal court including document requests, interrogatories and depositions -- discovery the employers are determined to avoid at all costs. *NLRB ex rel. Int'l Union of Elec. Workers v. Dutch Boy, Inc.*, 606 F.2d 929, 932 (10th Cir. 1979) (citing *Wilmot v. Doyle*, 403 F.2d 811, 1814-16 (9th Cir. 1968)).

II. Reply to Firetrol's Brief

Firetrol's answering submission is constructed upon an extensive and self-serving re-statement of Firetrol's defenses to merits of the pending grievance (Firetrol Br. 3-4), unaccompanied by any record citations; these assertions should be deferred to an arbitrator for resolution:

> We agree with the judge that the Respondent did not violate the Act by seeking to compel arbitration of its dispute with the Charging Party Employer …[P]arties should not be prohibited from pursuing their chosen dispute resolution mechanism, particularily where the [issue to be grieved] has not been previously determined by the Board. At present, the finding of a violation would be premature.

IATSE Local 695 (Vidtronics), 269 NLRB 133, 133 (1984) (dismissing §8(b)(1)(A) and (2) charges). *See also Ray Angellini, Inc.*, 351 NLRB 206, 209 (2007) (the Board determined to dismiss the Complaint and to thereby "stay its hand" in §8(a)(1) case because the lawsuit was not "plainly foreclosed as a matter of law or is otherwise frivolous"); *UFCW Local 540 (Pilgrim's Pride Corp.)*, 334 NLRB

852, 855 (2001) (dismissing §8(b)(1)(A) allegation and deferring to arbitration of dispute).

The Board decisions offered as support for Firetrol's argument that the Board should not defer to arbitration in this case are easily distinguished. Firetrol Br. 43. In *Novinger's*, the contract language under which the grievance was filed was determined to be clearly unlawful "on its face" and for that reason the grievance was not deferred to arbitration. *Carpenters (Novinger's, Inc.)*, 337 NLRB 1030, 1030 (2002). The same was true in *Carpenters (Mfg. Woodworkers Ass'n)*, 326 NLRB 321, 327 (1998) (violation for "entering into" unlawful contract), and *Masters, Mates & Pilots (Seatrain Lines)*, 220 NLRB 164, 168 (1975) (damage provision renders clause unlawful and unenforceable).

This case does not represent an attempt to enforce an unlawful clause against an "innocent" employer -- the Board only recently confirmed that the contract clause under which the pending grievance was filed is primary, lawful and enforceable and does not provide for any unlawful remedy. *Road Sprinkler Fitters Local 669 (Cosco Fire Prot.)*, slip op. at 4.

As previously stated, the ALJ's decision should be reversed and the Complaint dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014, I electronically filed Local 669's Reply to the Answering Briefs by Cosco *et al.* and Firetrol with the Executive Secretary of the National Labor Relations Board via the e-filing portal on the NLRB's website, and also forwarded a copy by electronic mail to the Parties as listed below:

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