

**UNITED STATES OF AMERICA**

**NATIONAL LABOR RELATIONS BOARD**

LOU'S TRANSPORT, INC. and  
T.K.M.S., Inc., a single employer and/or  
Joint Employers,

Case No. 07-CA-102517

Respondents

and

MICHAEL HERSHEY, an Individual

Charging Party

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**BRIEF IN SUPPORT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

The National Labor Relations Board ("NLRB") has asserted jurisdiction in this matter based upon Section 2(2), Section 2(6), and Section 2(7) of the National Labor Relations Act ("the Act"), 29 U.S.C. §152. The NLRB has alleged that Lou's Transport, Inc. ("Lou's") and T.K.M.S., Inc. ("TKMS"), based upon their business relationship with Barton Malow Company ("Barton Malow"), are employers engaged in commerce within the meaning of the above cited sections of the Act. Neither Lou's nor TKMS, either independently or through their relationship with Barton Malow, engage in interstate commerce or affect commerce as defined in the Act. As such, the NLRB does not have jurisdiction over this matter and summary judgment in favor of Respondents is appropriate.

**II. PROCEDURAL HISTORY**

The NLRB filed an initial charge against Lou's and Local 164, International Brotherhood of Teamsters (the "Union") on April 11, 2013. With respect to this charge, it was alleged that Lou's discharged Michael Hershey ("Mr. Hershey") for engaging in union protected activity, and

that the Union acted in bad faith by failing and refusing to file and pursue a grievance contesting Mr. Hershey's discharge. On May 21, 2013, Lou's submitted its Position Statement and evidence to the NLRB regarding the initial charge, and Lou's submitted its Questionnaire on Commerce Information to the NLRB on or about May 31, 2013. The Union also submitted a Position Statement to the NLRB in response to the charge filed against it. The NLRB approved the Union's request for withdrawal of the charge against the Union on May 30, 2013.

Also on May 30, 2013, the NLRB submitted an Amended Charge to Lou's and TKMS, whereby TKMS was added as a charged party, and the allegations within the Amended Charge were vastly different than those in the initial charge. The Amended Charge alleged that Mr. Hershey received a verbal warning on January 7, 2013, and on March 27, 2013 was discharged in retaliation for him engaging in protected concerted activities. The Amended Charge also alleged that on January 7, 2013, Lou's "encouraged employees to resign because of their protected concerted activities."

On June 6, 2013, Lou's and TKMS provided the NLRB with additional evidence and information and answered some additional questions posed by the NLRB. On June 21, 2013, Lou's and TKMS submitted their Position Statement with respect to the Amended Charge filed by the NLRB, and TKMS submitted its Questionnaire on Commerce Information to the NLRB on or about July 11, 2013.

A formal Complaint was filed by the NLRB against Lou's and TKMS on July 18, 2013. Lou's and TKMS filed their Answer and Defenses on July 31, 2013. The NLRB subsequently filed a Second Amended Charge Against Employer on September 26, 2013, which counsel for Respondents did not receive until November 1, 2013. The Second Amended Charge added allegations with respect to a former Lou's employee Mr. Timothy Pledger ("Mr. Pledger"), and

the NLRB requested a response to the allegations which pertained to Mr. Pledger. Lou's and TKMS provided its response to the Second Amended Charge on November 26, 2013.

An Order Rescheduling Trial was entered by the NLRB on November 26, 2013, whereby the trial in this matter was moved to Monday, February 24, 2014.

### **III. STANDARD OF REVIEW**

NLRB Rules and Regs Sec. 102.39 state that the rules of civil procedure for the district courts of the United States control where practicable.

Federal Rule of Civil Procedure 56 states that a court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact." Fed. R.Civ.P.56(a). Rule 56(c) provides that summary judgment is appropriate when the record shows that there is no genuine dispute or that an adverse party cannot produce admissible evidence to support a material fact. Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact as to the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Martin v. Ohio Turn Pike Comm'n*, 968 F.2d 606, 608 (6th Cir. 1992), *cert denied*, 506 U.S. 1054 (1993); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party carries its initial burden of demonstrating that no genuine issues of material fact are in dispute, the burden shifts to the nonmoving party to present specific facts to prove that there is a genuine issue for trial. *See Lucas v. Leaseway Multi Transp. Serv., Inc.*, 738 F. Supp. 214, 217 (E.D. Mich. 1990), *affirmed*, 929 F.2d 701 (6th Cir. 1991).

To avoid summary judgment, the nonmoving party must "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477-1479 (6th Cir. 1989). To demonstrate a genuine issue of material fact,

the nonmoving party must present sufficient evidence to justify a jury in reasonably finding in favor of the non-movant; presentation of a mere scintilla of evidence is insufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Because there is no material question of fact that Lou's and TKMS do not engage in interstate commerce and do not affect commerce and, as such, the NLRB does not have jurisdiction over this matter, summary judgment should be entered in favor of Respondents Lou's and TKMS.

#### **IV. STATEMENT OF FACTS**

The facts giving rise to the unfair labor practice charges and formal Complaint filed against Lou's and TKMS are not relevant to the issue of jurisdiction as set forth in the NLRB's Complaint. While Lou's and TKMS adamantly deny the unfair labor practice allegations presented in the charges and Complaint, the facts related to those allegations will not be set forth below since they are not germane to the issue of jurisdiction.

With respect to the issue of jurisdiction, as alleged by the NLRB, Lou's and TKMS are both trucking companies which haul construction "commodities" (dirt, sand, gravel, broken concrete, etc.) within the State of Michigan. (*See Ex. 1, Aff. of Mr. Dan Israel*). Neither Lou's nor TKMS operate or provide trucking services outside the State of Michigan. *Id.* (*See also Exs. 2 and 3, Commerce Questionnaires for Lou's and TKMS.*) Further, while Barton Malow is one of Lou's/TKMS's customers, with whom they provided services in excess of \$50,000 during the fiscal year ending December 29, 2012, (*Exs. 1-3*), all of Lou's and TKMS's business and operations with Barton Malow occurred within the State of Michigan. (*See Ex. 1.*) While Barton Malow may or may not conduct operations outside the State of Michigan, absolutely none of the work or services provided to Barton Malow by Lou's and TKMS occur outside of the State of Michigan, either directly or indirectly. Lou's and TKMS, when conducting its trucking

operations on behalf of Barton Malow, haul or transport construction materials from point A within the State of Michigan to point B within the State of Michigan. *Id.*

V. **ARGUMENT**

To establish jurisdiction, the NLRB alleged the following:

9. In conducting its operations during the fiscal year ending December 29, 2012, Respondent Lou provided services valued in excess of \$50,000 to other enterprises within the State of Michigan including Barton Malow Company, an enterprise within the State of Michigan and directly involved in interstate commerce.

10. In conducting its operations during the fiscal year ending December 29, 2012, Respondent TKMS provided services valued in excess of \$50,000 to other enterprises within the State of Michigan including Barton Malow Company, an enterprise within the State of Michigan and directly involved in interstate commerce.

11. At all material times, each Respondent individually, and Respondents collectively have been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

July 18, 2013 Complaint filed by the NLRB against Respondents, p. 2.

The NLRB has asserted jurisdiction over this matter under various portions of the Act, one of them being related to the definition of commerce. Under the Act,

The term "**commerce**" means trade, traffic, commerce, **transportation**, or communication **among the several States**, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, **or between points in the same State but through any other State** or any Territory or the District of Columbia or any foreign country.

NLRA Sec. 2(6); 29 U.S.C. §152 (6) (emphasis added). Neither Lou's nor TKMS, either with Barton Malow or with any other company with whom it does business, transports materials "among the several States" or transports materials "between points in the same State but through

any other State." Any work performed by Lou's or TKMS on behalf of Barton Malow occurs within the State of Michigan's boundaries, and the materials stay within the State of Michigan, as Lou's and TKMS are merely taking materials from one Michigan project or site and transporting them for use or disposal at another Michigan project or site. Mr. Israel's Affidavit (Ex. 1) corroborates this fact, and there is no evidence to the contrary that the NLRB can present, as no such evidence exists. If an adverse party cannot produce admissible evidence to support a material fact, then summary judgment is appropriate in favor of the moving party. (*See* FRCP 56(c).)

To illustrate Lou's and TKMS's operations, in conjunction with their relationship with Barton Malow, a realistic example may be helpful. Let's say that a commercial developer is building a new office complex in Detroit, Michigan. Barton Malow has been hired to act as the general contractor for the project, and Barton Malow hired Lou's to serve as the trucking service for either a particular phase of the project or the entire project. Early in the project, the foundation has been dug, and now there is a large amount of dirt which needs to be hauled away from the site. Lou's, as the trucking company on the project, would haul and transport the dirt from the site in Detroit, Michigan and dispose of it somewhere else in Michigan, perhaps a project in another Michigan city which needed dirt or a designated dump site in Michigan frequently used by Lou's in its operations. The second possible scenario would be that Barton Malow needed dirt or gravel brought to the site for a portion of the project. In that instance, Lou's would obtain the needed materials from a quarry, yard, or site within the State of Michigan and deliver it to the project site in Detroit. That "to and from" is the extent of Lou's and TKMS's operations and relationship with Barton Malow.

Given the above, Lou's and TKMS's operations do not constitute commerce as defined in the Act. The Court of Appeals held that:

The scope of the National Labor relations Act, 29 U.S.C.A. § 151 et seq., and the jurisdiction of the Board in its administration are limited to interstate and foreign commerce, to the exclusion of operations which are essentially intrastate in character and which do not have an effect upon interstate commerce. Where federal control is sought to be exercised over activities which, separately considered, are intrastate in nature, it must appear that there is a close and substantial relation to interstate commerce in order to justify federal intervention for its protection. Unless these facts exist, the Board has no jurisdiction in a controversy between employer and employees.

*Southern Colorado Power Co. v. N.L.R.B.*, 111 F.2d 539, 542 (10th Cir. 1940). All of Lou's and TKMS's activities are intrastate in nature. Further, Lou's and TKMS, neither independently nor through their relationship with Barton Malow, have a "close and substantial relation to interstate commerce," and there is no justification for the NLRB's assertion of jurisdiction.

The other portion of the Act at issue, as raised by the NLRB in its Complaint, is the section which states that:

The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

NLRA Sec. 2(7); 29 U.S.C. §152(7). Lou's and TKMS's operations do not "affect commerce." Barton Malow does not take the materials hauled to or from one of its sites by Lou's/TKMS and then use it at a project or site in another state. There simply is no burdening or obstructing commerce or the free flow of commerce with respect to Lou's and TKMS's operations on behalf of Barton Malow. Nothing that Lou's or TKMS hauls or transports on behalf of Barton Malow goes outside of the State of Michigan. With the absence of interstate commerce or "affecting

commerce", the NLRB's claim of jurisdiction over Lou's and TKMS is unsubstantiated. As such, summary judgment in favor of Lou's and TKMS is warranted.

The NLRB's jurisdiction, based upon commerce, is not a "given." The United States Court of Appeals held that:

While the standard which the Board must meet to establish jurisdiction is extremely liberal, and the Board's jurisdiction extremely broad, "it is not indeterminate, and must appear from the record; it cannot be presumed. In an enforcement proceeding, the burden of demonstrating jurisdiction is upon the Board."

*N.L.R.B. v. Peninsula Ass'n for Retarded Children and Adults*, 627 F.2d 202, 203 (9th Cir. 1980), citing *N.L.R.B. v. Clark*, 468 F.2d 459, 466-467 (5th Cir. 1972). The Court of Appeals went on to explain that the NLRB, in asserting jurisdiction, did not contend that the Respondent itself (Peninsula Association) was directly engaged in interstate commerce but, rather, that one of the companies with which Respondent did business (Thrift Village) engaged in interstate commerce. However, the Court found that there was nothing in the record to support jurisdiction on that basis; that the Respondent's "link to interstate commerce is too attenuated to support jurisdiction;" and that there were too many may or may nots which "would require an act of faith for us to conclude that (the Association's sales to Thrift Village) 'effect commerce' within the meaning of the Act." *Id* at 204, *Clark, supra*, 468 F. 2d at 467.

There is nothing in this record to support a finding of jurisdiction based upon Lou's and TKMS's relationship with Barton Malow. There is nothing in the record to link the relationship to interstate commerce or to having an affect on commerce. The Affidavit of Mr. Israel demonstrates that Lou's and TKMS's relationship with Barton Malow does not create the link needed for the NLRB to adequately and properly establish jurisdiction. With the record being

devoid of any genuine issue of material fact, summary judgment in favor of Lou's and TKMS is proper.

**VI. CONCLUSION AND RELIEF REQUESTED**

WHEREFORE, Respondents Lou's and TKMS respectfully request that this Board grant its Motion for Summary Judgment and dismiss the Complaint against them.

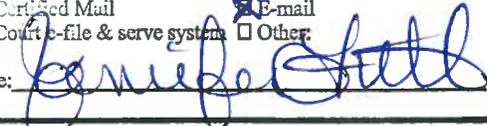
Respectfully submitted,

**STEVEN A. WRIGHT, P.C.**



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Dated: January 27, 2014

PROOF OF SERVICE		
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on <u>1-27-2014</u>		
By:	<input type="checkbox"/> U.S. Mail	<input type="checkbox"/> Fax
	<input type="checkbox"/> Hand Delivered	<input type="checkbox"/> Overnight Courier
	<input type="checkbox"/> Certified Mail	<input checked="" type="checkbox"/> E-mail
	<input checked="" type="checkbox"/> Court e-file & serve system	<input type="checkbox"/> Other:
Signature:		

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**AFFIDAVIT OF DAN ISRAEL**

I, Dan Israel, being first duly sworn, deposes and says:

1. I make this Affidavit from personal knowledge and could competently testify if called upon to do so.
2. I am the owner of Lou's Transport, Inc. ("Lou's") and T.K.M.S., Inc. ("TKMS")
3. Lou's and TKMS are trucking companies which haul and transport various construction items such as dirt, sand, gravel, etc.
4. Barton Malow is a customer of Lou's and TKMS.
5. All business and operations conducted on behalf of Barton Malow by Lou's and TKMS occur solely within the State of Michigan.
6. Lou's and TKMS do not haul or transport any items outside the State of Michigan for Barton Malow or for any of Lou's and TKMS's other customers. The transportation of items by Lou's and TKMS, on behalf of Barton Malow and all of Lou's and TKMS's customers, only go to and/or from different points within the State of Michigan.

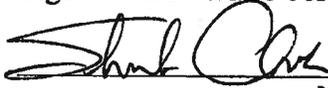


**FURTHER AFFIANT SAYETH NAUGHT.**



DAN ISRAEL  
OWNER

Signed and sworn to before me in OAKLAND County, Michigan on January 27, 2014.



, Notary Public

State of Michigan, County of

My Commission Expires: 2-12-18

Acting in the County of OAKLAND

<p><b>SHEILA CLINK</b> Notary Public, State of Michigan County of Oakland My Commission Expires Feb. 12, 18 Acting in the County of <u>OAKLAND</u></p>
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