

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**LOU'S TRANSPORT, INC. and T.K.M.S., INC.,
a Single Employer and/or Joint Employers**

Respondents

and

Case 07-CA-102517

MICHAEL HERSHEY, an Individual

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO
RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

On January 27, 2014, Respondents filed a Motion for Summary Judgment in the above entitled matter (Attachment A). Pursuant to Section 102.24(b) and 102.50 of the Board's Rules and Regulations (Rules), Counsel for the General Counsel opposes this Motion for the following reasons:

1. The charge in this proceeding was filed by the Charging Party on April 11, 2013 and amended on May 29, and September 26, 2013. The Complaint and Notice of Hearing (Complaint) issued on July 18, 2013 (Attachment B). Hearing in this matter was scheduled for October 1, 2013, but postponed until February 24, 2014 due to the filing of a related case, T.K.M.S., Case 07-CA-113640. A Consolidated Amended Complaint and Notice of Hearing is pending issuance.
2. Respondents state that the NLRB lacks jurisdiction in this matter. Respondents incorrectly focus on its assertion that they do not engage in interstate

commerce directly and that they do not engage in interstate commerce for the Barton Malow Company across State lines. However, this is not the correct standard for jurisdiction.

3. The National Labor Relations Board's jurisdiction under the National Labor Relations Act extends to enterprises whose operations affect interstate commerce. The Board's jurisdiction has been construed to extend to all such conduct as might constitutionally be regulated under the commerce clause, subject only to the rule of de minimis. *NLRB v. Fainblatt*, 306 U.S. 601–607 (1939).

4. The Board's jurisdiction is asserted over all enterprises engaged in furnishing interstate transportation of freight, and all other enterprises which function as essential links in the transportation of commodities in interstate commerce, deriving at least \$50,000 annual gross revenues from such operations, or performing services valued at least at \$50,000 for enterprises over which jurisdiction would be asserted under any standard except one based on indirect outflow or indirect inflow. *HPO Service*, 122 NLRB 394 (1959)

5. Respondents filed their Answer to the Complaint and Notice of Hearing on July 31, 2013 (Attachment C). Respondents deny the allegations in the Complaint alleging joint and/or single employer (paragraphs 4 through 7), and while it admits, both individually and collectively that it provides services valued in excess of \$50,000 to other enterprises within the State of Michigan, including the Barton Malow Company (paragraphs 8 through 10), it denies, both individually and collectively that Barton Malow is directly engaged in interstate commerce. Consistently, Respondents deny individually and collectively that they individually or collectively constitute an Employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act (paragraph 11).

6. As a result of these denials, Counsel for the General Counsel issued a subpoena duces tecum to each Respondent (Attachments D and E) for documents reasonably related, inter alia, to jurisdiction. Counsel for the General

Counsel also issued a subpoena duces tecum to the Barton Malow Company for documents reasonably related to interstate commerce (Attachment F). The subpoenaed information¹ is due on the first day of the hearing, although we have requested that it be provided earlier so as not to delay the proceedings. Counsel for the General Counsel also sought, over many months, to resolve the jurisdiction issue through stipulations. Unfortunately, those efforts were unfruitful.

7. The Complaint alleges indirect commerce through the Barton Malow Company, or through other enterprises within the State of Michigan who are engaged in interstate commerce. It is undisputed that Respondents individually derived gross revenues in excess of one million dollars during fiscal year 2012. Respondents have also admitted that during calendar year 2012, they provided over fifty thousand dollars in services to the Barton Malow Company, as well as to other enterprises, which are located in the State of Michigan. The Barton Malow Company is a nationally known multi-million dollar company that builds stadiums and facilities across the United States, including Michigan. The evidence will clearly show that the Barton Malow Company is engaged in interstate commerce².

8. Although Counsel for the General Counsel will undoubtedly be able to prove that Barton Malow is engaged in interstate commerce, and thus, indirectly assert jurisdiction over Respondents, Counsel for the General Counsel believes that she will also be able to prove that Respondents have directly provided or purchased materials in excess of fifty thousand dollars to or from municipalities in Michigan, such as the city of Bloomfield Hills, and to utilities, such as DTE Energy Co., which are directly engaged in interstate commerce.

For all the foregoing reasons, Counsel for the General Counsel respectfully submits that Respondents' Motion for Summary Judgment be denied in its entirety

¹ Neither subpoena has been challenged by a motion to revoke, which would have been due five days after service thereof.

² The Barton Malow Company is a nationally known enterprise and indisputably engaged in interstate commerce, which can be readily ascertained by any reputable business publication including, but not limited to, Dun and Bradstreet.

and that the hearing in this matter be permitted to proceed as scheduled for February 24, 2014.

Dated in Detroit, Michigan, this 29th day of January 2014.

A handwritten signature in black ink, appearing to read "Donna M. Nixon", written over a horizontal line.

Donna M. Nixon
Counsel for the General Counsel
National Labor Relations Board
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226-2569
(313) 226-2817