

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 251**

And

**Cases 01-CB-219768
 01-CC-219536
 01-CC-219746**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 25**

and

DHL EXPRESS (USA), INC.

**GENERAL COUNSEL’S MOTION TO STRIKE LOCAL 25’S AFFIRMATIVE
DEFENSES**

On June 26, 2018, the Acting Regional Director for Region 1 issued an Order Further Consolidating Cases, Amending Consolidated Complaint and Notice of Hearing (“Complaint”) alleging that the International Brotherhood of Teamsters, Local 25 (“Local 25”) and the International Brotherhood of Teamsters, Local 251 (“Local 251”) violated the National Labor Relations Act (“Act”). On August 8, Local 25 filed an amended Answer pleading two affirmative defenses that assert certain allegations against Local 25 should be deferred to the grievance and arbitration process.¹ Counsel for the General Counsel (“General Counsel”) moves to strike Local 25’s affirmative defenses because they are insufficient as a matter of law.

¹ Although Local 25 asserts that it pled the affirmative defenses for the first time on August 8 in light of a memorandum from DHL Express (USA), Inc. (“DHL Express”) offered as General Counsel’s Exhibit 13 at hearing on August 2, Local 25 originally received this memorandum on May 1. Even though Local 25 had the memorandum and pursued the grievance and arbitration process with regard to the suspensions issued to DHL Express employees for the past three months; Local 25 never raised the issue of deferral during the unfair labor practice investigation or after issuance of the Complaint. Despite the fact that nothing has changed and Local 25 did not obtain any new information, Local 25 has pled the affirmative defenses now, more than halfway through the General Counsel’s case.

“An affirmative defense is not triable simply because it is asserted by a respondent in litigation; it must be recognized as warranting the dismissal of alleged complaint violations.” *Greyhound Lines, Inc.*, 319 NLRB 554, 556 (1995). Local 25’s affirmative defenses should be stricken because the Board does not defer allegations of Section 8(b)(4)(B) of the Act pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). *See Ironworkers Dist. Council of the Pac. Nw. (Hoffman Constr.)*, 292 NLRB 562, 578 (1989) (upholding an ALJ’s decision in which he explained that an arbitrator is not authorized to determine whether a union engaged in a secondary boycott). While specifically denying a union’s request for deferral, the Board has held that deferral is inappropriate for alleged 8(b)(4) violations because “allegations of secondary pressure under the Act . . . are not well suited to resolution by arbitration.” *See Road Sprinkler Fitters Local Union 669*, 365 NLRB No. 83, slip op. at 1 n.3 (May 23, 2017).

The Board does not defer such allegations because it does not defer issues that “involve[] the application of statutory policy, standards, and criteria, rather than only interpretation of the contract itself.” *Dist. Council of N.Y. and Vicinity (Mfg. Woodworkers Ass’n of Greater N.Y, Inc.)*, 326 NLRB 321, 322 (1998) (denying a request to defer an allegation regarding Section 8(e) of the Act because the resolution required application of the Act itself, rather than simply contract interpretation). In this case, Local 25 requests deferral on the issue of whether it engaged in secondary conduct and that is not susceptible to interpretation under the grievance and arbitration process.² The ultimate issue must be decided through application of the Act

² As discussed further below, Local 25 has not fully articulated its argument with regard to deferral. To the extent Local 25 is interpreting a contractual provision such as Article 8, Section 1 in a manner that would make it a hot cargo provision, any apparent violation of Section 8(e) of the Act is another basis to find deferral is inappropriate. *See Int’l Union of Elevator Constructors (Long Elevator & Mach. Co.)*, 289 NLRB 1095, 1095 (1988); *see also Int’l Org. of Masters (Seatrains Lines, Inc.)*, 220 NLRB 164, 168 (1975) (holding that the issue of whether the demand for arbitration constitutes a violation of Section 8(e) of the Act cannot be deferred because the demand itself is an affirmation of the allegedly unlawful contractual clause).

because even if Local 25's interpretation of the contract is accepted by an arbitrator it cannot resolve the statutory issue of whether the secondary conduct is lawful. Thus, Local 25's affirmative defenses fail as a matter of law because the Complaint allegations concerning secondary picketing under Section 8(b)(4)(B) of the Act are not appropriate for deferral.

Furthermore, deferral is not appropriate when only some of the unfair labor practice allegations can be dealt with through the grievance and arbitration process. *See Ironworkers Dist. Council of the Pac. Nw.*, 292 NLRB at 578; *see also Dist. Council of N.Y. and Vicinity*, 326 NLRB at 322 (denying a request for deferral where an allegation for which deferral is sought is inextricably linked to another allegation for which deferral is not sought). In addition to the fact that Local 25 does not request that the other Complaint allegations be deferred, the remaining allegations are certainly not suitable for deferral. Similar to the Board's policy that it will not defer alleged violations of Section 8(a)(4) of the Act to "protect the integrity of the statutory rights granted [to] employees," Local 25's alleged interference with an employee witness should not be deferred. *See United Food & Commercial Workers Union, Local 1776*, 325 NLRB 908, 908 n.2 (1998). Moreover, the allegations against Local 251 cannot be handled through the arbitration process because Local 251 does not have a collective-bargaining agreement with DHL Express that covers the Complaint allegations. Thus, the fact that the entire dispute cannot be disposed of through the grievance and arbitration process is further reason why the Section 8(b)(4)(B) allegations against Local 25 must be resolved through the unfair labor practice proceeding.

If the General Counsel's motion to strike is denied, the General Counsel moves for a Bill of Particulars to be filed by Local 25 to provide sufficient detail regarding the affirmative defenses. With regard to affirmative defense #1, Local 25 does not specify the provisions of the

collective-bargaining agreement that purportedly cover the Complaint allegations nor does it specify how the allegations are encompassed by the terms of the collective-bargaining agreement. With regard to affirmative defense #2, Local 25 does not identify any provision in the agreement that purportedly bars DHL Express from filing an unfair labor practice charge. Without more information, the General Counsel cannot prepare a response to these affirmative defenses.

For the reasons set forth above, the General Counsel submits that both of Local 25's affirmative defenses should be stricken. In the alternative, the General Counsel respectfully seeks an Order requiring Local 25 to file a Bill of Particulars so that she can more adequately respond to Local 25's affirmative defenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I e-filed this document through the Agency's website and e-mailed a copy to Marc Gursky, Esq. at mgursky@rilaborlaw.com, Robert Fisher, Esq. at RFischer@seyfarth.com, and Michael Feinberg, Esq. at maf@fczlaw.com on the 10th day of August, 2018.

Respectfully submitted,

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