United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

REVISED DATE: March 13, 2013

TO: Wanda Pate Jones, Regional Director
Region 27

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Road Sprinkler Fitters Local 669 (Firetrol)
Case 27-CC-091349

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The Region submitted this case for advice regarding whether the Union violated Section 8(b)(4)(ii)(A) and (B) of the Act by pursuing a grievance and a lawsuit to compel arbitration against MX Holdings US, Inc. ("MX"), and three MX subsidiaries—Cosco Fire Protection, Inc. ("Cosco"), Firetrol Protection Systems, Inc. ("Firetrol"), and CFP Fire Protection, Inc. (CFP)—to enforce a facially lawful work preservation clause ("Addendum C") in the Union's labor agreement with Cosco. We agree with the Region that the Union's enforcement efforts have an unlawful secondary object and thereby violate Section 8(b)(4)(ii)(A) and (B) of the Act.

FACTS

Background

Cosco, Firetrol, and CFP are wholly-owned subsidiaries of MX. On July 18, 2012, Road Sprinkler Fitters Local 669 ("Union") filed a grievance against MX, Cosco, Firetrol, and CFP to enforce Addendum C of the Union's collective-bargaining agreement with the National Fire Sprinkler Association ("NFSA"), of which Cosco—but none of the other related entities—is a member. Addendum C states, in relevant part:

> Should the Employer establish or maintain operations that are not signatory to this Agreement, under its own name or another or through another related business entity to perform work of the type covered by this Agreement within the Union's territorial jurisdiction, the terms and conditions of this Agreement shall become applicable to and binding upon such operations at such time as a majority of the

> employees of the entity (as determined on a state-by-state, regional, or facility-by-facility basis consistent with NLRB unit determination standards) designates the Union as their exclusive bargaining representative on the basis of their uncoerced execution of authorization cards . . . The Employer and the Union agree not to coerce employees or to otherwise interfere with employees in their decision whether or not to sign an authorization card and/or to vote in a third party election . . .

The Union filed its July 18 grievance because Firetrol closed its Denver, Colorado facility after the Region directed a representation election for a unit of sprinkler fitter employees at that facility.[1] The grievance alleged that the decision "to transfer, contract out or otherwise discontinue the operations of the Firetrol facility in Denver" was in retaliation for the employees "designat[ing] the Union as their bargaining representative by signing authorization cards," and thereby violated Cosco, MX, Firetrol, and CFP's obligation under Addendum C not to "coerce or to otherwise interfere with employees in their decision whether or not to sign authorization cards . . ." The remedy sought by the Union in the grievance is restoration of the Firetrol facility and a "make whole" remedy for the affected employees.

After the Union filed the grievance, Cosco affirmed that it would proceed to arbitration, but MX, Firetrol, and CFP refused. The Union then filed a lawsuit against Cosco, MX, and CFP in federal district court to compel all parties to arbitrate the Union's July 18 grievance. The Union's amended complaint in the lawsuit asserts that MX is the corporate parent of Cosco and Firetrol; that Cosco, Firetrol, and MX are single and/or joint employers; that Cosco is the agent of MX; and that MX exercises its single and/or joint employer status as to Cosco and Firetrol through CFP. This lawsuit is currently pending before the district court.

Relationship Between Cosco and Firetrol

The issue of whether Cosco and Firetrol are single and/or joint employers has long been a subject of dispute between the Union and the parties. In 2004, the Union filed a grievance against Cosco claiming that the work performed by Firetrol was under the operation and control of Cosco, and that the Firetrol employees were therefore part of the Cosco bargaining unit. After the Union filed this grievance, Cosco filed a UC petition with Region 21 seeking to clarify that the Firetrol

[1] The Union initially filed a charge alleging that Firetrol violated the Act by closing the Denver facility. The Region conducted an investigation and concluded there was no merit, and the Union withdrew its charge.

employees were not part of the Cosco bargaining unit. The Region issued a Decision and Order clarifying that the Cosco bargaining unit excluded Firetrol employees.

In 2006, the Union filed a grievance against Cosco alleging that it was a single or joint employer with Firetrol and that Cosco violated the collective-bargaining agreement by failing to apply the contractual wages and benefits to work performed by Firetrol employees. At the time of the 2006 arbitration, Cosco and Firetrol operated in separate states and maintained separate headquarters, did not share any corporate officers, and separately managed their labor relations (aside from a few instances where Firetrol's HR manager consulted with Cosco's HR manager for guidance and coordinated changes to health insurance plans). Following a hearing, the arbitrator determined that the evidence failed to establish that Cosco and Firetrol were single or joint employers and, accordingly, Cosco did not violate the contract by not applying the contractual wages and benefits to work performed by Firetrol employees. The Union's argument that Cosco and Firetrol were single and/or joint employers had largely relied upon the conduct of the national accounts program administered by CFP.

CFP maintains a network of over 1,000 independent service providers to provide fire safety services to national accounts customers such as Home Depot, Public Storage, Walgreens, CVS, and Staples. CFP does not employ sprinkler fitters, technicians, or inspectors to perform the fire safety work, but instead subcontracts the work to other service providers, two of which are Cosco and Firetrol. In 2006, CFP gave Cosco and Firetrol apparently preferential treatment when subcontracting national accounts service work, as reflected by the fact that approximately 60% of CFP's national accounts work was assigned to Cosco, about 20% assigned to Firetrol, and about 20% to all other vendors. The arbitrator found that about 80% of the fire protection work was performed by Cosco and Firetrol through the CFP national accounts program in 2006, but this was still insufficient to show an integration of Cosco and Firetrol's operations.

After 2006, Cosco, Firetrol, and CFP transitioned to different corporate ownership. Specifically, in 2010, MX purchased the stock of Cosco, Firetrol, CFP, and three other subsidiaries and Consolidated Fire Protection, LLC (the former parent company of Cosco, Firetrol, and CFP) was merged into MX. The sole purpose of MX is to own the stock of its six subsidiaries. Under MX's ownership, Cosco and Firetrol still do not share any corporate officers. And contrary to Cosco and Firetrol's relationship in 2006, when they occasionally collaborated in labor relations matters, there is no evidence that they continue to do so. Moreover, CFP no longer gives Cosco and Firetrol apparently preferential treatment when subcontracting national accounts service work, but instead subcontracts this work to them on the same arm's-length basis as other service providers. In fact, approximately 66% of the national accounts service work is presently subcontracted

to service providers other than Cosco and Firetrol, compared to approximately 20% of that work in 2006.

ACTION

We conclude that the Union's effort to enforce Addendum C over the closure of Firetrol's Denver facility has an unlawful secondary object, because the Union does not have a colorable claim that Cosco controls Firetrol, and thereby violates Section 8(b)(4)(ii)(A) and (B) of the Act.

Section 8(b)(4)(ii)(A) prohibits a union from threatening, restraining, or coercing an employer with an object of forcing or requiring it to enter into a Section 8(e) agreement, wherein the employer agrees to cease doing business with any other person. Similarly, Section 8(b)(4)(ii)(B) prohibits such conduct to force or require any person to cease doing business with any other person, or to force or require "any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . ."

The Board has held that a union's prosecution of a reasonably-based contract claim, by itself, is not coercion within the meaning of Section 8(b)(4)(ii).[2] The legality of grievance processing is generally determined under the principles of the Supreme Court's decisions in *Bill Johnson's Restaurant v. NLRB*[3] and *BE & K Construction Co. v. NLRB*.[4] That is, a grievance is not unlawful unless it is both objectively baseless and filed with a retaliatory motive, or it has an unlawful

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[2] *See*, *e.g.*, *Teamsters Local 483 (Ida Cal Freight Lines, Inc.)*, 289 NLRB 924, 925 (1988) (no 8(b)(4)(ii)(A) violation where union grieved and sought to compel arbitration over whether owner-operators were "employees" covered by labor agreement, because union's contentions were reasonable, the union did not strike or picket, and there had been no prior adjudication of the owner-operators' status); *Teamsters Local 83 (Cahill Trucking)*, 277 NLRB 1286, 1290 (1985) (grievance to enforce a colorable contract claim is not coercion within meaning of Section 8(b)(4)(ii)(A) or (B)); *Heavy, Highway, Building and Construction Teamsters, et al.*, 227 NLRB 269, 274 (1976) (same).

[3] 461 U.S. 731, 743-45 (1983).

[4] 536 U.S. 516, 531-32 (2002). *See Longshoremen ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB 89, 93 (1988) (applying *Bill Johnson's* to determine that the filing of an arguably meritorious grievance is not 8(b)(4)(ii) coercion), *review denied* 892 F.2d 130 (D.C. Cir. 1989); *Manufacturers Woodworking Assn. of Greater New York, Inc.*, 345 NLRB 538, 540 (2005) (applying *Bill Johnson's* to an employer's demand for arbitration under a contractual grievance/arbitration provision).

objective.[5] Applying these principles, the Board has found that a union violates Section 8(b)(4)(ii)(A) and (B) if it files a grievance based on a contractual interpretation that would convert a facially lawful clause into an unlawful Section 8(e) agreement.[6]

Section 8(e) makes it an unfair labor practice for a labor organization and an employer "to enter into any contract or agreement, express or implied, whereby such employer . . . agrees to . . . cease doing business with any other person. . . ." Section 8(e) does not prohibit agreements to preserve bargaining unit work for bargaining unit employees.[7] Rather, Section 8(e) prohibits only those agreements with a secondary purpose, i.e., agreements directed at a neutral employer or entered into for their effect on another employer. The principal characteristic distinguishing whether a union's efforts are lawful primary or unlawful secondary activity is whether that activity "is addressed to the labor relations of the contracting employer vis-à-vis his own employees" or instead is "calculated to satisfy union objectives elsewhere."[8]

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[5] *Bill Johnson's Restaurant v. NLRB*, 461 NLRB at 737 n.5; *BE & K Construction Co.*, 351 NLRB 451, 458 (2007).

[6] *See, e.g., Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095 (1988) (union violated Section 8(b)(4)(ii)(A) by filing grievance over suspension of employee who refused to pass through a neutral reserved gate because the Board concluded the union's interpretation would require primary employer acquiescence in any work stoppage by its employees in support of the union's dispute with a neutral employer), *enforced*,. 902 F.2d 1297 (8th Cir. 1990); *Service Employees Local 32B-32J (Nevins Realty)*, 313 NLRB 392, 392 (1993) (union's arbitration claim over employer's selection of cleaning subcontractor violated 8(b)(4)(ii)(B) because Board found unlawful work acquisition objective where cleaning work had always been contracted out and union had never represented cleaning employees), *enforced in pertinent part*, 68 F.3d 490 (D.C. Cir. 1995); *Sheet Metal Workers Local 27*, 321 NLRB 540, 540 (1996) (union violated Section 8(b)(4)(ii)(B) because its grievance sought to have employer cease doing business with another employer); *Newspaper and Mail Deliverers (New York Post)*, 337 NLRB 608, 608-09 (2002) (finding union's attempted enforcement of union signatory subcontracting clause violative of Section 8(b)(4)(ii)(A) and (B) because union sought to prevent subcontracting to nonunion company).

[7] *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 635 (1967).

[8] *Id*. at 644-45 (1967). *See also Retail Clerks Local 1288 (Nickel's Pay-Less Stores*), 163 NLRB 817, 819 (1967) ("provisions are secondary and unlawful if they have as their principal objective the regulation of the labor policies of other employers and not the protection of the unit"), *enforced in pertinent part*, 390 F.2d 858, 861-62 (D.C. Cir. 1968).

Here, the Board recently found Addendum C lawful on its face because the phrase "establish or maintain" limits the effect of Addendum C to those entities controlled by signatory employers, and does not apply to all commonly-owned entities.[9] However, as discussed above, the Union would violate Section 8(b)(4)(ii)(A) and (B) if it seeks to enforce Addendum C by effectively converting it into an agreement prohibited by Section 8(e). Thus, the appropriate question here is whether the Union is seeking to apply Addendum C to an entity—Firetrol—that is not controlled by Cosco, a signatory employer.

Companies that are bound only by common ownership generally are found to be neutrals with respect to each other's labor relations, and not a single-employer; on the other hand, ostensibly separate entities that constitute a "single employer" under the Act are not considered neutrals.[10] In determining whether employing entities constitute a single employer, the Board looks to four factors: common ownership, common management, interrelatedness of operations, and common control over labor relations. No single factor is controlling, and the single-employer inquiry turns on the presence or absence of an arm's length relationship between nonintegrated entities.[11]

As discussed above, the relationship of Cosco and Firetrol has long been an issue contested by the Union. However, the evidence has consistently indicated that Cosco and Firetrol are separate employers. For example, in the 2006 arbitration, the evidence disclosed that Cosco and Firetrol were not single or joint employers, although they shared the same corporate parent, they collaborated in some HR/labor relations matters, and CFP awarded both entities a significant amount of subcontracted national accounts service work on a preferential basis.

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[9] *Road Sprinkler Fitters Local 669 (Cosco Fire Protection)*, 357 NLRB No. 176, slip op. at 3-4 (December 30, 2011). *Compare Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023, 1023, 1025-26 (1993) (anti-dual-shop provision requiring application of collective-bargaining agreement when "partners, stockholders or beneficial owners of the" signatory employer "form or participate in the formation of another company" performing bargaining unit work within the union's jurisdiction "would reach companies performing work that was not within the signatory's 'right of control'").

[10] *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766, 771 (1989), *enforced in part,* 905 F.2d 417 (D.C. Cir. 1990).

[11] See *The Dow Chemical Co.*, 326 NLRB 288 (1998) (citing *Radio Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255 (1965)). We note that in *Cosco*, above, since only the facial validity of Addendum C was at issue, the ALJ did not permit litigation as to whether Cosco and Firetrol were a single employer. 357 NLRB No. 176, slip op. at 10 n.3.

We note that there have been some changes to the corporate structure involving Cosco and Firetrol since the 2006 arbitration. Significantly, in 2010, MX purchased the stock of Cosco, Firetrol, and CFP. But the Union's claim that Cosco and Firetrol are single employers continues to be based almost entirely on the facts that Cosco and Firetrol are under common ownership and that some of the fire protection service work performed by Cosco and Firetrol is administered through a common national program (CFP). In the 2006 arbitration, the evidence disclosed that Cosco and Firetrol were not sufficiently interrelated to demonstrate single and/or joint employer status, even though CFP subcontracted approximately 80% of its national account service work to Cosco and Firetrol on a preferential basis. Now, any interrelation of Cosco and Firetrol operations through the national accounts service program is significantly less, since CFP no longer gives them preferential treatment when assigning national account work. Instead, CFP now subcontracts national accounts service work to Cosco and Firetrol on the same arm's-length basis as it does with other service providers—a change reflected by a drastic reduction in the percentage of national accounts service work that CFP contracts to Cosco and Firetrol compared to 2006.

Based on this evidence, we conclude that the Union does not have a colorable claim that the two companies constitute a single-employer or that Cosco controls Firetrol—a non-signatory to the labor agreement at issue. Therefore, we agree with the Region that, although Addendum C is facially lawful, the Union's efforts to apply it to Firetrol, where no signatory employer controls Firetrol, would effectively convert the clause to the type of provision that the Board has found unlawfully interferes with non-single employer ownership relationships. Thus, the Union's enforcement efforts are unlawfully coercive because they effectively seek an interpretation of Addendum C that would convert that facially lawful clause into an unlawful Section 8(e) agreement with a secondary "cease doing business" object.[12] Additionally, based on the discussion above and in agreement with the Region's analysis, the Union's grievance and lawsuit against Cosco have an unlawful secondary objective of compelling Firetrol to recognize and bargain with the Union because the grievance specifically seeks to bind Firetrol to the contract and, in particular, to Addendum C.[13]

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[12] *See, e.g.*, *Long Elevator*, 289 NLRB at 1095; *Nevins Realty*, 313 NLRB at 397. *See also Iron Workers (Southwestern Materials)*, 328 NLRB 934, 936 (1999) (anti-dual shop clause requiring application of collective-bargaining agreement to "any person, firm or corporation owned or financially controlled by" signatory employer had secondary purpose); *Alessio Construction*, 310 NLRB at 1025-26 (unlawful secondary object could be inferred based on the fact that the application of contract provisions would reach companies performing work not within the signatory's right of control).

[13] *See UFCW Local 1996 (Visiting Nurse Health System),* 336 NLRB 421, 428 (2001) (union has recognitional object violative of Section 8(b)(4)(ii)(B) where: (1) the

Accordingly, absent settlement, the Region should issue a Section 8(b)(4)(ii)(A) and (B) complaint, and seek a Section 10(l) injunction requiring the Union to withdraw its grievance and lawsuit seeking to compel arbitration.

/s/
B.J.K.

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union threatens, coerces, or restrains any person engaged in commerce or in an industry affecting commerce; (2) an object of the coercion is to force or require another employer to recognize it as the representative of its employees; and (3) the union is not certified as the Section 9 representative of the "other employer's" employees).