

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

THE PAINTING CONTRACTOR, LLC

and

Cases 09-CA-248716
09-CA-250898

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, CLC, DISTRICT
COUNCIL 6

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT**

I. Introduction

On December 7, 2020, The Painting Contractor, LLC (Respondent) filed its motion moving for summary judgment. Counsel for the General Counsel opposes Respondent's motion for the reasons stated below. In short, Respondent's own motion and the pleadings themselves illustrate why a hearing in this matter is necessary.

II. The Complaint

The pleadings alone demonstrate that there are issues of material fact in this matter and that Respondent's motion should be denied as inappropriate. On September 30, 2020, the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) issued herein alleging that Respondent violated Section 8(a)(1) of the Act by threatening employees that they would need to work for a different employer if they wished to keep their current benefits under a union contract; and violated Section 8(a)(5) of the Act by failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees by refusing to adhere to the collective-bargaining agreement with the International Union of Painters and Allied Trades, AFL-CIO, CLC District Council 6 (the Union); by ceasing its contributions to the Drug Free Workplace program and Target Fund; by withdrawing from the

Southern Ohio Painters Health and Welfare Fund, and by ceasing participation in the IUPAT Union and Industry National Pension Fund. (See Complaint paras. 5, 7(f) and 8)

In its answer to the consolidated complaint (Answer), Respondent not only denies the legal conclusions pled in the Complaint, but also denies its factual allegations. The Complaint specifically alleges, that about October 28, 2019, Respondent, through its Chief Financial Officer Jack Varney, told employees that they would need to work for a different employer if they wished to keep their current union benefits under a union contract. Respondent specifically denies this allegation in its answer. (See Answer, para. 5) The Complaint further alleges that, at all material times, Respondent has been an employer-member of the Greater Cincinnati Painting Contractor's Association (the Association) and has authorized the Association to bargain collectively on its behalf with the Union concerning wages, hours, and other terms and conditions of employment of the Unit.^{1/} (See Complaint paras. 7(b) and (c)) Respondent specifically denies these allegations. (See Answer, paras. 7(b) and (c)) Furthermore, Respondent denies the complaint allegations that, about May 28, 2020, the Association and Union reached complete agreement on a collective-bargaining agreement covering the Unit, that about June 5, 2019, it executed the agreement and, that about May 30, 2019, the Union, in writing, requested that Respondent adhere to the collective-bargaining agreement reached with the Association. (See Answer, paras. 7(d) and (e)) Respondent claims it is not a party to the agreement reached between the Association and Union on May 28, 2019. Finally, Respondent denies that, about June 16, 2019, it ceased its contributions to the Drug Free Workplace program and reduced its contributions to the Target Fund. (See Answer, paras. 8(a)(i) and 8(a)(ii))

^{1/} The Unit consists of "All employees performing the work described, in the geographical locations described, in the Recognition and Coverage provision of the May 1, 2016 through May 1, 2019 collective bargaining agreement between the International Union of Painters & Allied Trades District Council #6, Local Unions #123 and #238, AFL-CIO and Greater Cincinnati Painting Contractors Association (the Association)."

Thus, the formal documents alone demonstrate the meritless nature of Respondent's motion. The General Counsel possesses, and will present, evidence at the unfair labor practice hearing to substantiate the allegations made in the Complaint. It is not required to do so prior to hearing as the Boards processes do not involve pre-trial discovery. ^{2/}

III. Respondent's Motion Should be Denied

Respondent has otherwise failed to provide a basis for granting its motion for summary judgment because such a ruling is only appropriate when there are no genuine issues of material fact and Respondent is entitled to a ruling in its favor as a matter of law. See, *e.g. Laborer's Local 721 (Hawkins & Sons)*, 294 NLRB 166 (1989). It is well settled that in ruling on a motion to dismiss (**what about summary judgment**), "the Board construes the complaint in a light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief." *Detroit Newspapers*, 330 NLRB 524 at fn. 7 (2000). In order to support a motion for summary judgment, Respondent must show an absence of genuine issues of material fact. *Regency Grande Nursing & Rehabilitation Center*, 347 NLRB 1143 (2006). Respondent has failed to meet its burden. To the contrary, the factual claims in Respondent's motion highlight why an administrative hearing before an Administrative Law Judge is necessary – namely, they show that there are factual disputes underlying the ultimate question of whether and when Respondent's purported attempt to withdraw from the Association took effect. The Board requires that such withdrawals be unequivocal. See, *Retail Associates*, 120 NLRB 388, 393–394 (1958) (employer's "decision to withdraw must contemplate a sincere abandonment, with

^{2/} The hearing in this case is scheduled for January 5, 2021.

relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis”).

There is a dispute over whether Respondent remained a member of the Association at, during, and subsequent to the May 28, 2019 negotiation session held between the Association and the Union and whether it ever it became bound to by any agreements, whether the extension and/or tentative agreement, reached during the meeting. Although Respondent undisputedly stated, in writing on May 17, 2019, that it intended to withdraw from the Association if there was a further extension of the parties’ collective-bargaining agreement, there is disputed evidence bearing on whether Respondent subsequently equivocated about such withdrawal, thereby failing to meet the Board’s requirement for validly withdrawing from the Association. See, e.g., *Dependable Tile*, 268 NLRB 1147, 1147 (1984) (concluding employer’s attempt to withdraw from multiemployer bargaining association was thwarted by its subsequent participation in group bargaining; employer “sought the ‘best of the two worlds’”), *enforced as modified sub nom. NLRB v. Hartman*, 774 F.2d 1376 (9th Cir. 1985) There is also disputed evidence bearing on whether Respondent was bound to any agreements reached by the Association and Union on May 28, 2019. Respondent highlights this rift in its motion, pointing out that “[t]he Union suggested that because a TPC representative was at the May 28, 2019 meeting where the Association agreed to the extension, that TPC agreed to the terms of the tentative agreement.” See Motion, p. 8 (*citing* Greenberg Aff., ¶ 10, Exh. C) Respondent then states that “TPC responded that TPC was not representing itself at the May 28, 2019 meeting since it was still part of the Association; its withdrawal did not occur until the Association and the Union executed the third extension” and, consequently, it was not bound to the tentative agreement reached that date. See Motion, p. 8 (*citing* Greenberg Aff., ¶ 11, Exh. D). Further illustrating the importance of

resolving the events of the May 28, 2019 meeting before an Administrative Law Judge is Respondent's admission in its brief that its withdrawal from the Association "did not occur until the moment the extension [of the collective bargaining agreement] was executed." See Motion, p. 13.

Thus, whether Respondent was bound by tentative agreement reached on May 28, 2019 and subsequently engaged in bad faith bargaining in violation of Section 8(a)(1) and (5) should be left to an Administrative Law Judge to decide following the presentation of evidence, not disposed of through a summary judgment motion.

IV. Conclusion

The Complaint raises factual and legal disputes necessitating a hearing on the merits. Respondent's motion only serves to further highlight those factual disagreements. Consequently, summary judgment is unwarranted, and the undersigned respectfully urges the Board to summarily deny Respondent's motion.

Dated: December 14, 2020

Respectfully submitted,

/s/ Jamie L. Ireland

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CERTIFICATE OF SERVICE

December 14, 2020

I hereby certify that I served Counsel for the General Counsel's Opposition to Respondent's Motion for Summary Judgment on this date on the following parties by electronic mail.

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