

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

ROAD SPRINKLER FITTERS, UNITED
ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING
AND PIPE FITTING INDUSTRY OF
THE UNITED STATES AND CANADA,
AFL-CIO, LOCAL 669

and

Case 21-CE-374

COSCO FIRE PROTECTION, INC.

and

NATIONAL FIRE SPRINKLER
ASSOCIATION, INC.

Party in Interest

and

FIRETROL PROTECTION SYSTEMS, INC.

Party in Interest

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Submitted by
Cecelia Valentine
Counsel for the General Counsel
National Labor Relations Board, Region 21
888 S. Figueroa Street, Ninth Floor
Los Angeles, CA 90017
Telephone (213) 894-6145
Facsimile (213) 894-2778
cecelia.valentine@nrlrb.gov

Table of Contents

I. Overview.....1

II. Issues Presented.....1

III. Statement of Facts.....2

 A. Addendum C, as it existed prior to the 2007-2010 collective-bargaining agreement, was formerly known as Article 3.....2

 B. Respondent files and, in 2006, loses a grievance filed against Charging Party Cosco under then-Article 3.....3

 C. Modification of Article 3, which becomes Addendum C, is a priority for the Respondent during negotiations for the 2007-2010 Agreement.....4

 D. Cosco challenges Addendum C as facially unlawful under Section 8(e).....5

IV. Argument.....6

 A. Legal Standard.....6

 B. On its face, Addendum C has an unlawful secondary objective.....7

 C. Addendum C does not require the “right of control.”.....8

 D. *Alessio Construction*, not *Heartland Industrial Partners*, is closely analogous to Addendum C.9

 E. Addendum C is unlawful and is not protected by the construction-industry proviso to Section 8(e)10

V. Conclusion.....10

VI. Remedy.....10

Table of Authorities

<i>Carpenters Dist. Council of Northeast Ohio (Alessio Construction)</i> , 310 NLRB 1023 (1993).....	8, 9, 10
<i>Connell Construction Co. v. Plumbers and Steamfitters</i> , 421 U.S. 616 (1975).....	7
<i>Heartland Industrial Partners</i> , 348 NLRB 1081 (2006).....	9
<i>Iron Workers (Southwestern Materials & Supply)</i> , 328 NLRB 934 (1999).....	7
<i>NLRB v. Longshoremen ILA</i> , 447 U.S. 490 (1980).....	6
<i>Painters Dist. Council No. 51 (Manganaro Corp.)</i> , 321 NLRB 158 (1996).....	7, 8
<i>Woelke & Romero Framing v. NLRB</i> , 456 U.S. 645 (1982).....	7

I. Overview

The underlying complaint alleges that Respondent, Road Sprinkler Fitters, United Association of the Plumbing and Pipefitting Industry of the United States and Canada, ALF-CIO, Local 669, violated Section 8(e) of the Act by entering into and maintaining Addendum C of the 2007-2010 collective-bargaining agreement between the Respondent and the National Fire Sprinkler Association (herein, NFSA).

On November 3, 2008, following a hearing on the above allegations, Administrative Law Judge William G. Kocol (herein, ALJ) issued his decision (herein, ALJD) in the matter. Therein, the ALJ concluded that the Respondent did not violate Section 8(e) by entering into and maintaining this contractual provision, and dismissed the complaint in its entirety.

II. Issues Presented

- A. Whether Addendum C, has, on its face, a secondary, unlawful object.
- B. Whether Addendum C requires, on its face, that a signatory employer to whom it may be applied has the “right of control” over any non-signatory entity to which the Respondent might seek to apply the terms of the collective-bargaining agreement.
- C. Whether the precedent of *Alessio Construction* or *Heartland Industrial Partners* is more analogous to, and thus, governs the facts in this case.
- D. Whether the construction-industry proviso to Section 8(e) would otherwise render Addendum C lawful.

III. Statement of Facts

A. Addendum C, formerly known as Article 3, as it existed prior to the 2007-2010 collective-bargaining agreement.

The 2000-2005 collective-bargaining agreement between the NFSA and the Respondent contained a provision entitled Article 3. (GCX 3¹ at pp. 2-3). The language of Article 3 in collective-bargaining agreements at least as far back as 1985 was remarkably similar to that in the 2000-2005 agreement. (Tr. 43, CPX 2). Article 3 of the 2000-2005 agreement read, in relevant part, as follows:

In order to protect and preserve for the employees covered by this Agreement all work historically and traditionally performed by them, and in order to prevent any device or subterfuge to avoid the protection or preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any work of the type covered by this Agreement *as a single or joint Employer* (which shall be interpreted pursuant to applicable NLRB and judicial principles) *within the trade and territorial jurisdiction of Local 669*, under its own name or under the name of another, as a corporation, sole proprietorship, partnership, or any other business entity including a joint venture, wherein the Employer (including its officers, directors, owners, partners or stockholders) *exercises either directly or indirectly* (such as through family members) controlling or majority ownership, *management or control* over such other entity, the wage and fringe benefit terms and conditions of this Agreement shall be applicable to all such work performed on or after the effective date of this Agreement. The question of single Employer status shall be determined under applicable NLRB and judicial principles, i.e., whether there exists between the two companies an arm's length relationship as found among unintegrated companies and/or whether *overall control* over critical matters exists at the policy level.² A joint Employer, under NLRB and judicial principles is two independent legal entities that share, codetermine, or meaningfully affect labor relations matters.

Should the Employer establish or maintain such other entity within the meaning of the preceding paragraph, the Employer is under an affirmative obligation to notify the Union of the existence and nature of and work performed by such entity and the nature and extent of its relationship to the signatory Employer. The supplying of false, misleading, or incomplete information (in response to a

¹ Citations to the General Counsel's exhibits will be identified herein as "GCX," followed by the number of the exhibit. Similarly, the Respondent's and Charging Party's exhibits will be identified, respectively, as RX and CPX. Citations to the hearing transcript will be identified as "Tr." followed by the transcript page number. Citations to the ALJ's decision will be referred to as "ALJD," followed by the appropriate page and line numbers(s).

² The ALJ erroneously includes after this sentence, "The parties hereby incorporate the standard adopted by the Court in Operating Engineers Local 627 v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975) and affirmed by the Supreme Court, 425 U.S. 800 (1975), as controlling." This just-quoted sentence was **not** part of Article 3 as it existed prior to the 2007-2010 CBA. (GCX 3, GCX 5, ALJD 3: 9-11).

request by the Union) shall not constitute compliance with this section. The Union shall not unreasonably delay the filing of a grievance under this Article.

Particular disputes arising under the foregoing paragraphs shall be heard by one of four persons to be selected by the parties (alternatively depending upon their availability) as a Special Arbitrator. The Arbitrator shall have the authority to order the Employer to provide appropriate and relevant information in compliance with this clause.

It is the intention of the parties hereto that this clause be enforced to the fullest extent permitted by law and that, because this conforms with the parties' original intent, it shall apply to all pending and future grievances.

It is not intended that this Article be the exclusive source of right or remedies which the parties may have under State or Federal Laws.
(emphasis added) (GCX 3 at pp. 2-3).

This precise language was considered by Region 21 in 2005, in a previous case, 21-CE-370, alleging an 8(e) violation. In that case, it was determined that Article 3, *as the provision existed in the 2000-2005 CBA*, had a valid work-preservation object, and did not violate Section 8(e) on its face. (GCX 1(j), Attachment 3).

B. Respondent files and, in 2006, loses a grievance filed against Charging Party Cosco under then-Article 3.

It was stipulated at the hearing that Charging Party Cosco Fire Protection, Inc. (herein, Cosco) and Firetrol Protection Systems, Inc (herein, Firetrol) are both currently owned by holding company Consolidated Fire Protection, LLC (herein, CFP). (Tr. 50, 52-53). Both Cosco and Firetrol perform similar work in different geographic areas within the Respondent's 48-state jurisdiction. (Tr. 53-56). Cosco is signatory to a variety of collective-bargaining agreements, including the one between the Respondent and the NFSA. (Tr. 54). Firetrol, on the other hand, has never been a member of the NFSA and is not a party or signatory to any collective-bargaining agreements. (Tr. 24, 55).

On or about September 4, 2004, the Respondent filed a grievance against Cosco under Article 3 of the 2000-2005 collective-bargaining agreement, alleging, inter alia, that Cosco violated Article 3 by maintaining a relationship with Firetrol, whose employees performed bargaining unit work at terms and conditions of employment below

those set forth in the then-applicable Agreement. (GCX 4,³ Tr. 21). Following a 3-day hearing, Arbitrator Ira Jaffee issued an arbitration award on April 6, 2006, in which he denied Respondent's grievance to the extent that he found that there was not a single-or joint-employer relationship between Cosco and Firetrol. (Tr. 21, GCX 4 at p. 70, 77-94). According to NFSA Vice President of Industrial Relations and Director of Human Resources Alexander Gettler (herein, Gettler), that grievance was the only Article 3 grievance that the Respondent has *ever* lost. (GCX 3 at 22-23; GCX 5 at 34-35; Tr. 23, 31).

The issue of whether Cosco and Firetrol are currently separate employers was not litigated at the hearing, as ordered by the ALJ.

C. Modification of Article 3, which becomes Addendum C, is a priority for the Respondent during negotiations for the 2007-2010 Agreement.

On or around January 25, 2007, negotiations for the 2007-2010 collective-bargaining agreement between the NFSA and Respondent began. (Tr. 36). Prior to this date Gettler had a discussion with Bradley Karbowsky who was, at that time, Respondent's Business Manager. Mr. Karbowsky, who later served as the Respondent's chief spokesperson during the negotiations for the 2007-2010 agreement, told Gettler that Article 3 was one of two issues that were very important to Respondent in the upcoming negotiations. (Tr. 31, 33, 35).

During the negotiations, for which Gettler served as the chief spokesperson for management, approximately 15 contractor-members had representatives at the bargaining table, including Cosco. (Tr. 35). By the time the negotiations ended in a complete agreement, on or about April 14, 2007, the Article 3 language had changed to that now found in Addendum C. (GCX 3 at 2-3; GCX 5 at 4, 50-51; Tr. 36, 37-38). The preexisting Article 3 language continues to provide, among other things, that Respondent is the 9(a) representative of certain employees of the signatory contractors. The *new*

³ Counsel for the General Counsel renews its prior motion, not decided by the ALJ, to correct errors in the transcript as follows: page 19, line 14 should read "General Counsel Exhibit 2" instead of "General Counsel Exhibit 19"; page 27, line 6 should read "filed" instead of "fled"; page 39, lines 12 and 13 should both read "8(e)" instead of "8(a)"; page 9, line 14 should read "8(e)" instead of "8(d)", and at lines 19 and 25, "2000" instead of "2002"; and page 10, line 1, "pursuing" instead of "pursing."

Article 3 language, now located in **Addendum C of the 2007-2010 agreement**, provides, in relevant part:

...In the event that the Union files, or in the past has filed, a grievance under Article 3 of this or a prior national agreement, and the grievance was not sustained, the Union may proceed under the following procedures with respect to the contractor(s) involved in the grievance:

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, ...or...pursuant to a secret ballot election under the supervision of a private independent third party to be designated by the Union and the NFSA within thirty (30) days of the ratification of this Agreement. 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....

Because the practice of double-breasting is a source of strife in the sprinkler industry that endangers mutual efforts to expand market share for union members and union employers, it is the intention of the parties hereto that this clause be enforced to the fullest extent permitted by law...(emphasis added). (GCX 5 at 50-51).

Also contained within the 2007-2010 Agreement is Article 31, entitled "Savings Clause," which provides, in part:

In accordance with the intent and agreement of the parties, the provisions of this Collective Bargaining Agreement shall be interpreted and construed in a manner which is consistent with all applicable Federal and State laws....(GCX 5 at 41).

D. Cosco challenges Addendum C as facially unlawful under Section 8(e).

Within a few months of the consummation of the 2007-2010 Agreement, Cosco filed an unfair labor practice charge⁴ with Region 21 of the NLRB alleging that the new contract contained an anti-double breasting provision which was facially unlawful

⁴ The ALJD erroneously states the dates the first amended charge was filed and the date the complaint was issued. The correct dates are July 24, 2008 and July 29, 2008, respectively.

because it sought to regulate the labor relations of separate and independent business entities, in violation of Section 8(e). (GCX 1(a)).

During the Region's investigation and consideration of Cosco's charge, the Respondent sent a letter to Mr. Gettler at the NFSA in which it (1) denied having a "cease doing business" object in negotiating the new Addendum C language, (2) assured that the clause, to the contrary, simply offered the option of a card-check to unrepresented employees of non-signatory contractors affiliated with signatory contractors, and (3) agreed that it would not advance any different interpretation *for the duration of the current agreement*. (emphasis supplied). This letter was sent only to Mr. Gettler at the NFSA, with copies sent to other Union officials and the Union's attorney. (RX 1). Two weeks later, on July 29, 2008, Region 21 issued a complaint alleging that by entering into and maintaining a contract containing Addendum C, the Respondent violated Section 8(e). (GCX 1(g)).

IV. Argument

A. Legal Standard

A contractual provision in which an employer agrees to **cease doing business** with another person and which has a **secondary objective** violates Section 8(e) of the Act. *NLRB v. Longshoremen ILA*, 447 U.S. 490, 504 (1980). Among the primary, lawful objectives is the preservation of work traditionally done by the very employees whose terms and conditions of employment are governed by the collective-bargaining agreement. *Id.*, citing *NLRB v. Pipefitters*, 429 U.S. 507(1977). An agreement will be held to be a lawful work-preservation provision if (1) under the totality of the circumstances, the Union's objective is shown to be the preservation of work for bargaining unit employees; and (2) the signatory employer has the "right of control" to give the work in question to the employees of the non-signatory employer. *NLRB v. Longshoremen ILA*, 447 U.S. at 504.

If the signatory employer has no power to control or assign the work in question, there is no **right of control** and it may be inferred that the provision has the secondary

object of satisfying union objectives elsewhere, namely to influence whomever *does* have control over the work in question. *Iron Workers (Southwestern Materials & Supply)*, 328 NLRB 934, 936 (1999).

If a contractual provision has a cease doing-business object and a secondary object, it may yet be saved by the **construction industry proviso** of Section 8(e), which provides, “nothing in this subsection [Section 8(e)] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction....” The Supreme Court considered the meaning of this proviso and determined that it must be considered in light of the statutory setting and circumstances surrounding its enactment. *Connell Construction Co. v. Plumbers and Steamfitters*, 421 U.S. 616, 628 (1975). Consideration of this statutory and historical setting indicates that the proviso was intended to preserve the types of agreements which existed in 1959 [the year the Act was amended to include Section 8(e)] -- those which concerned the subcontracting of unit work. *See Woelke & Romero Framing v. NLRB*, 456 U.S. 645 (1982).

B. On its face, Addendum C has a secondary, not a primary objective.

Addendum C, which purports to exist to “protect and preserve for the employees covered by this Agreement all work historically and traditionally performed by them” makes reference to operations established or maintained “to perform work of the type covered by this agreement within the Union’s territorial jurisdiction.” The ALJ compares the latter language to that in the clause found to have a lawful work preservation object in *Painters Dist. Council No. 51 (Manganaro Corp.)* and concludes that Addendum C, too, has a primary, work-preservation objective. 321 NLRB 158 (1996). The General Counsel respectfully submits that the ALJ erred in his analysis because he failed to adequately consider, in its totality, the language of Addendum C.

Contrary to the ALJ’s finding, Addendum C’s language referring to “work of the type covered by this agreement within the Union’s territorial jurisdiction” is insufficient

to establish a work preservation object. Indeed, in *Carpenters Dist. Council of Northeast Ohio (Alessio Construction)*, the Board found similar language (“formation of another company which engages or will engage in the same or similar type of business enterprise in the jurisdiction of this Union”) insufficient to establish a work preservation object. 310 NLRB 1023, 1026 (1993). In *Alessio*, the Board explicitly found that referring to the “type” of work was not a reference to unit work, in the absence of any reference clarifying that the clause was “limited in application to companies that are performing work that was diverted from signatory employers.” *Id.* Moreover, Addendum C also refers to “expand[ing] market share for union members and union employees,” which explicitly indicates a secondary **work-acquisition**, not a primary work-preservation object.

Contrary to the ALJ’s finding, the fact that Addendum C only applies if Respondent loses a grievance under Article 3 only further demonstrates its secondary objective. A grievance is lost under former Article 3 where an arbitrator finds that the entity to which the Respondent seeks to apply the terms of the agreement through the “work preservation clause” is not in fact a single or joint employer with a signatory entity. Thus, Addendum C only applies where an arbitrator has found no single or joint employer relationship exists. Addendum C is therefore clearly intended to apply to nonunion entities with whom the signatories are not in a single employer relationship. The new procedure set forth in Addendum C is far more than “an ordering of the grievances to be filed,” but is a parallel procedure that applies only for the purpose of applying the terms of the collective-bargaining agreement to nonunion entities with whom the signatories are not in a single or joint employer relationship.

C. Addendum C does not require the “right of control.”

The ALJ concludes that Addendum C satisfies the “right of control” test because it only applies where the signatory “establishes or maintains” operations that perform “unit work.” Contrary to the ALJ’s finding, this language, on its face, is insufficient to establish a “right of control.” Addendum C, unlike the language at issue in *Manganaro*

[“exercises directly or indirectly (including but not limited to management, control, or majority ownership through family membership) management, control, or majority ownership”], **does not even mention the word “control.”** 321 NLRB at 161-62. The words “maintain” and “establish” do not mean or in any way suggest “control” over labor relations. *See Alessio*, 310 NLRB at 1025-26 (formation or participation in formation resulted in common ownership, not control of labor relations). It is therefore impossible to read Addendum C as satisfying the right of control test.

D. Alessio Construction, not Heartland Industrial Partners, is closely analogous to Addendum C.

The ALJ erroneously concluded that Addendum C is more analogous to the clause found lawful in *Heartland Industrial Partners* [348 NLRB 1081 (2006)] than that found unlawful in *Alessio Construction*. The clause in *Heartland*, unlike Addendum C, applied only to business entities controlled by the signatory employer. 348 NLRB at 1081, 1084. As noted above, Addendum C does not meet the “right of control” test as “establish or maintain” is not equal to the power to assign work or effect the labor relations of another employer. Indeed, Addendum C is far more analogous to the clause found unlawful in *Alessio*, as it would apply “on the basis of common ownership alone, and is not limited to cases in which common control or diversion of work is demonstrated,” indeed it will apply in cases where the signatory does “not have the power to assign the disputed work to unit employees.” 310 NLRB at 1026.

In sum, the ALJ erroneously found that Addendum C has a lawful primary work preservation object. Because Addendum C has a secondary object and a cease doing business object, it violates Section 8(e) unless it can be salvaged by the construction-industry proviso.

E. Addendum C is unlawful and is not protected by the “construction-industry proviso” to Section 8(e)

Having determined that Addendum C was not facially unlawful, the ALJ did not even consider the construction-industry proviso to Section 8(e). As is noted above, Addendum C *does* violate Section 8(e), making inquiry into the proviso necessary.

As noted above, the construction-industry proviso refers explicitly to the subcontracting of unit work and was intended to preserve the pattern of collective-bargaining that existed in the construction industry in 1959. The clause found unlawful in *Alessio* was not protected by the proviso because the Board held that this type of anti-dual shop clause, which seeks to bind entities in a horizontal relationship, as opposed to a vertical relationship, with one another. 310 NLRB at 1029. As Addendum C is analogous to the unlawful clause in *Alessio*, it also is not saved by the construction-industry proviso.

V. Conclusion

The record evidence and Board law establish that the Respondent, in entering into and maintaining Addendum C, violated Section 8(e). The General Counsel respectfully requests that the Board grant the General Counsel’s exceptions and enter an order to that effect.

VI. Remedy

It is respectfully submitted that the following remedy be ordered:

A. That Respondent Road Sprinkler Fitters, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 669, its officers, agents, successors, and assigns, be ordered to:

1. Rescind and give no effect to Addendum C of the 2007-2010 collective-bargaining agreement between Respondent and the NFSA, in its entirety.

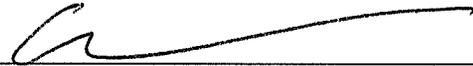
2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Within 14 days after service by Region 21, post, at its National Office located at 7050 Oakland Mills Road, Suite 200, Columbia, Maryland, and in all other Regional and District Offices in conspicuous places, including all places where notices to members are customarily posted, copies of a Notice setting forth the violations found.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply with this Order.

DATED AT Los Angeles, California, this 19th day of December, 2008.

Respectfully submitted,



Cecelia Valentine
Counsel for the General Counsel
National Labor Relations Board, Region 21

STATEMENT OF SERVICE

I hereby certify that our office contacted the following parties by telephone on the 19th day of December, 2008. We informed each party in this case that Counsel for the General Counsel's Exceptions and Brief in Support of Exceptions to the Administrative Law Judge's Decision would be submitted by E-Filing to the Executive Secretary of the National Labor Relations Board and that each party would be served with a copy of the same documents by overnight mail.

I hereby certify that a copy of the Counsel for the General Counsel's Exceptions and Brief in Support of Exceptions to the Administrative Law Judge's Decision was served by overnight mail on the 19th day of December, 2008, on the following parties:

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

William W. Osborne, Jr., Attorney at Law
Jason Valtos, Attorney at Law
Osborne Law Offices
4301 Connecticut Avenue NW, Suite 108
Washington, DC 20008

Laurence S. Zakson, Attorney at Law
Reich, Adell & Cvitan
3550 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90010-2314

Alan R. Berkowitz, Attorney at Law
Bingham McCutcheon LLP
Three Embarcadero Center
San Francisco, CA 94111

Firetrol Protection Systems, Inc.
Michael Westover, Director of Human Resources
400 Garden Oaks Boulevard
Houston, TX 77018

John Viniello, President
Alexander Gettler, Vice President of Industrial Relations and Director
of Human Resources
James F. Lynch, Assistant Vice President of Industrial Relations and
General Counsel
National Fire Sprinkler Association
40 Jon Barrett Road
Patterson, NY 12563

DATED at Los Angeles, California, this 19th day of December, 2008.



Cecelia Valentine
Counsel for the General Counsel
National Labor Relations Board