

UNITED STATES OF AMERICA  
BEFORE  
THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

ROAD SPRINKLER FITTERS  
LOCAL UNION NO. 669, UNITED  
ASSOCIATION OF JOURNEYMEN AND  
APPRENTICES OF THE PLUMBING AND  
PIPE FITTING INDUSTRY OF THE UNITED  
STATES, AND CANADA, AFL-CIO,

Respondent,

NLRB Case 21-CE-374

and

COSCO FIRE PROTECTION, INC.,

Charging Party,

and

NATIONAL FIRE SPRINKLER ASSOCIATION,  
INC.,

Party in Interest,

and

FIRETROL PROTECTION SYSTEMS, INC.,

Party in Interest.

**RESPONDENT'S BRIEF IN OPPOSITION TO  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respondent Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669" or "the Union"), by its undersigned counsel, respectfully submits its Brief to the National Labor Relations Board ("NLRB") in opposition to the Exceptions to Administrative Law Judge William G. Kocol's decision by the General Counsel and

Charging Party Cosco Fire Protection, Inc. (“Cosco” or “the Charging Party”), and in support of Judge Kocol’s decision recommending dismissal of the Complaint.

### **INTRODUCTION**

The General Counsel’s Complaint alleges that the Union violated Section 8(e) of the National Labor Relations Act (“NLRA” or “the Act”) by “entering into and maintaining” a clause within Addendum C to the 2007- 2010 national, multi-employer bargaining agreement between the Union and the National Fire Sprinkler Association (“NFSA”) -- an authorization card check clause that the NFSA and the Union agreed upon to be applicable to “operations” that are “establish[ed] or maintain[ed]” by an employer signatory to the 2007-2010 national agreement “to perform work of the type covered by [the] agreement within the Union’s territorial jurisdiction.” See G.C. Exh. 5 at pp. 50-51.<sup>1</sup>

The General Counsel contends that the foregoing authorization card check/neutrality clause violates NLRA Section 8(e) “on its face” because it requires “employer-members [of the NFSA] ... not to do business with any other employer or person,” although the language of the provision in question contains no such requirement. Tr. 9; G.C. Exh. 1(g), ¶9(c); G.C. Exh. 5 at pp. 50-51.

The General Counsel has conceded that the remainder of Addendum C is entirely lawful, and the Complaint does not allege that the Union has in any other way violated the NLRA, *i.e.* by obtaining, or by attempting to enforce or apply the provision at issue. ALJD at 5 and n.3; G.C. Exh. 1(g), ¶¶ 9, 10.

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<sup>1</sup> References to the decision of the Administrative Law Judge are indicated herein as (“ALJD at \_\_\_”); the transcript of the hearing is cited as (“Tr. \_\_\_”) or, where appropriate, by witness (“Gettler \_\_\_”); exhibits are cited as (“G.C. Exh. \_\_\_”). Emphasis is supplied herein unless otherwise indicated.

Following a brief hearing on September 22, 2008, Judge Kocol issued his decision on November 3, 2008, recommending dismissal of the Complaint in its entirety. ALJD at 6. Judge Kocol rejected all of the General Counsel's contentions and ruled that the clause at issue applies to "business entities that "perform unit work," has a lawful "work preservation objective," "applies only to unit work," "clearly may be read to satisfy the 'right to control' test," and therefore is not "... 'clearly unlawful on its face.'" ALJD at 5-6, quoting Heartland Industrial Partners LLC (United Steelworkers of America), 348 NLRB 1081, 1084 (2006) (emphasis in original).

As an independent legal basis for dismissing the Complaint, Judge Kocol further ruled that, like the authorization card check provision in Heartland, the language at issue here does not "require any cessation of business between the employer and ... [related] business entities and therefore did not violate Section 8(e)." ALJD at 6.

The General Counsel and Charging Party have filed Exceptions to Judge Kocol's recommended dismissal of the Complaint, primarily on the legal contention that the authorization card check clause in the Local 669/NFSA national agreement violates Section 8(e) "on its face" under NLRB "anti-dual shop" decisions such as Southeast Ohio District Council of Carpenters (Alessio Construction Co., Inc.), 310 NLRB 1023 (1993), and Iron Workers (Southwest Materials), 328 NLRB 934 (1999). G.C. Brief at 1, 5-9; C.P. Brief at 8-16.

As we show below, the "anti-dual shop" contract clauses in Alessio, Southwest Materials and like cases are categorically different from the authorization card check clause at issue here. The clause at issue here, by its terms, only pertains where "the

Employer” has “established or maintained operations ...to perform work of the type covered by the agreement within the Union’s territorial jurisdiction;” only applies *after* the affected employees have been afforded the opportunity to voluntarily determine for themselves, by uncoerced majority vote, whether or not they want to be included in the Union’s national multi-employer bargaining unit; is required by its terms to be applied in a lawful manner; and does not in any way require “the Employer” to “cease doing business” with any non-signatory contractor or authorize an arbitrator to direct such a result. ALJD at 6; G.C. Exh. 5 at pp. 50-51.

Moreover, the NLRB has rejected the “anti-dual shop” cases relied upon by the General Counsel and the Charging Party as “different” from and inapplicable to determining the validity of authorization card check clauses under NLRA Section 8(e). Heartland, 348 NLRB at 1083-84.

In prosecuting the instant Complaint, the General Counsel has closed its eyes to what we understood to be the most fundamental principles of national labor policy under the Act: to afford employees their statutory right to obtain union representation under NLRA Section 9(a) through a voluntary authorization card process, NLRB v. Gissel Packing Co., 395 U.S. 575, 595-600 (1969), and to hold employers and unions to their collective bargains by “requiring the Board to respect the integrity of collective-bargaining agreements.” Kroger Co., 219 NLRB 388, 388-89 (1975); Pall Biomedical Products Corp., 331 NLRB 1674, 1677 and n.9 (2000), enfment den. 275 F.3d 116 (D.C. Cir. 2002), citing Retail Clerks Local 455 v. NLRB, 510 F.2d 802, 807 (D.C. Cir. 1974).

For these and other reasons stated below, Judge Kocol's recommended dismissal of the Complaint should be sustained.

### **STATEMENT OF FACTS**

The following facts were found by the Administrative Law Judge and/or are undisputed:

1. Local 669 is a national local union representing construction workers in the fire protection industry, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO. Gettler 25-26, 44-45.

2. Local 669 engages in collective bargaining with the NFSA on a national, multi-employer basis, most recently for the 2007-2010 national multi-employer agreement ("the 2007-2010 national agreement"). G.C. Exh. 5; ALJD at 2. The bargaining unit work covered by the current agreement is described in Article 18 (G.C. Exh. 5, pp. 24-25), and the Union's nationwide territorial jurisdiction, encompassing forty-six (46) states and the District of Columbia, is set forth at Articles 6 and 7. *Id.*, pp. 7, 9-10.

3. Charging Party Cosco is one of the approximately 125 fire protection contractors who are members of, and are represented by the NSFA in its national multi-employer collective bargaining negotiations with Local 669 (Gettler 25-26) and, as a designated representative on the NFSA Negotiating Committee, Cosco participated directly in the negotiation of the authorization card check/neutrality provision in Addendum C. Gettler 35; ALJD at 2. Cosco is owned by Consolidated Fire Protection, Inc. ("Consolidated"), a "holding company" that also owns Firetrol Protection Systems ("Firetrol"). Fielding 49-53. It is undisputed that Firetrol, like Cosco, performs bargaining

unit work covered by the 2007-2010 national agreement, and within the territorial jurisdiction covered by that Agreement, but does so on a non-union basis. Fielding 55-56; ALJD at 2.

4. The preceding (2005-2007) national multi-employer collective bargaining agreement between Local 669 and the NFSA (G.C. Exhibit 3) contained the following language, formerly at Article 3 and now included as part of Addendum C of the 2007-2010 national agreement:

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. 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 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 his Article be the exclusive source of rights or remedies which the parties may have under State or Federal Laws.

ALJD at 2-3; G.C. Exhibit 3, pp. 2-3; G.C. Exh. 5, at pp. 50-51.

The General Counsel does not dispute that the preexisting contractual provision “has a lawful and primary object” (ALJD at 3; G.C. Exh. 1(n), Exhibit B at p. 1), and the provision consistently has been held to be primary, lawful, and enforceable by the General Counsel, the NLRB, and by the Courts.<sup>2</sup>

5. Language was added to Addendum C during the course of the negotiation of the 2007-2010 national agreement, in addition to the above-referenced language formerly located at Article 3, providing, *inter alia*, for authorization card check-based recognition:

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 has not been 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

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<sup>2</sup> See Virginia Sprinkler Co. v. Road Sprinkler Fitters Local 669, 868 F.2d 116, 121 (4<sup>th</sup> Cir. 1989); Road Sprinkler Fitters Local 669 v. Cosco Fire Protection, Inc., 363 F.Supp. 2d 1220, 1225-26 (C.D. Cal. 2005); Road Sprinkler Fitters Local 669 v. Northstar Fire Protection Co., 644 F.Supp. 851, 853-54 (N.D. Tex. 1986). See also Road Sprinkler Fitters Local 669 (Cosco Fire Protection, Inc.), Case No. 21-CE-370-1, Decision of the Office of Appeals, March 23, 2005. G.C. Exh. 1(j), Attachment 3.

become applicable to and binding upon such operations at such time as a majority of 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, pursuant to applicable NLRB standards, or in the event of a good faith dispute over the validity of the authorization cards, 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 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.

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. The Special Arbitrator shall also have authority to confirm that the Union has obtained an authorization card majority as provided in the preceding paragraph.

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*.

ALJD at 3-4; G.C. Exh. 5, pp. 50-51.

The 2007-2010 national agreement further requires, at Article 31, that:

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*.

G.C. Exh. 5, p. 41. No grievances have been filed to date under Addendum C of the 2007- 2010 national agreement, nor has the authorization card check clause been invoked by Local 669 with respect to Cosco, Firetrol, or any other contractor. See ALJD at 5, n.3.

6. During its year-long consideration of Cosco's July 10, 2007 unfair labor practice charges (G.C. Exh. 1(a)), the General Counsel took the position "...that

Addendum C is unlawful because facially the clause evinces a secondary object, and has a cease doing business effect.” G.C. Exh. 1(n), Exhibit B. See also G.C. Exh. 1(g), ¶ 9(c). On July 15, 2008, the Union transmitted an unconditional disclaimer of any such “cease doing business” objective to the NFSA. Gettler 45; Resp. Exhibit 1.

## **ARGUMENT**

### **Legal Frame of Reference**

The General Counsel’s case turns on a single question of law: whether or not the General Counsel sustained *its* burden of establishing that authorization card check clause constitutes an unlawful “... agreement in which the NFSA and its employer-members, including Cosco, have agreed not to do business with any other employer or person,” as alleged in the Complaint (Tr. 9, 12; Exhibit 1(g), ¶ 9(c)), and is therefore is “*clearly* unlawful on its face” under NLRA Section 8(e). Heartland, 348 NLRB at 1084, quoting General Teamsters Local 982 (J.K. Barker Trucking Co.), 181 NLRB 515, 517 (1970) , aff’d 450 F.2d 1322 (D.C. Cir. 1971) (emphasis in original). Where the General Counsel fails to establish that the provision is “*clearly* unlawful on its face,” the clause is held to be lawful under the NLRA and “to require no more than what is allowed by law.”

Id.<sup>3</sup>

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<sup>3</sup> During the hearing, the General Counsel and the Charging Party attempted to assert factual allegations that were extrinsic and irrelevant to their facial challenge to the provision at issue, but their efforts were rejected by Judge Kocol. While Judge Kocol admitted a prior arbitration decision between Cosco and the Union into evidence, he did so only on the condition that the issues in that decision are “not ... relevant to this proceeding ... which [only relates to] facial validity of the clause.” Tr. 20. As Judge Kocol noted, the disposition of the Complaint does not require the adjudication of any extrinsic “facts” beyond the four corners of the 2007-2010 national agreement, and such “facts” are irrelevant to the case. ALJD at 5. Central Pennsylvania Regional Council of Carpenters (Novinger’s Inc.), 337 NLRB 1030, 1030 (2002) (where contract language is alleged to violate NLRA Section 8(e) on its face, it is unnecessary for the Board to

The authorization card check clause in question -- as negotiated by the NFSA and Cosco -- provides a contractual process by which unrepresented sprinkler fitters employed by a non-signatory entity, the "operations" of which have been "establish[ed] or maintain[ed]" by "the Employer" signatory to the 2007- 2010 agreement to perform work "covered by the Agreement," can voluntarily determine for themselves, by lawful uncoerced majority vote, whether or not they wish to be represented by the Union and covered by the terms of the 2007-2010 national agreement. ALJD at 3-4, 6; G.C. Exh. 5, Addendum C, pp. 50-51.

The language of the 2007-2010 national agreement "on its face" requires that *all* of the provisions of that agreement "be interpreted and construed in a manner that is consistent with all applicable Federal and state laws," and that the challenged provision be applied *only* to the "... extent permitted by law." G.C. Exh. 5, pp.41, 50-51. And, as noted, the Union also unconditionally disclaimed the unlawful "cease doing business" object alleged by the General Counsel. Resp. Exh. 1.

#### **Card Check/Neutrality Clauses under NLRA Section 8(e)**

Authorization card check clauses are one of several categorically different types

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address contextual factual issues); Carpenters Local 112 (Summit Valley Industries), 217 NLRB 902, 902 n.5 (1975). Although Judge Kocol's ruling rejecting their attempts to introduce such collateral evidence was not the subject of Exceptions, the General Counsel and the Charging Party have continued to improperly attempt to rely upon the 2006 arbitration decision involving Cosco and Local 669 issued under language of Article 3 of the previous 2005-2007 national agreement. G.C. Exh. 4; G.C. Br. at 3-4, 8; C.P. Br. at 2-5, 11-12. Their efforts are also legally unavailing because the validity of a work preservation clause is determined by whether "the contracting employer ... [has] the power to give the [union] employees the work in question" (NLRB v. Int'l Longshoremens Ass'n, 447 U.S. 490, 504-505 (1980)), *not* by whether the signatory and non-signatory entities may *also* be a single or joint employer under the NLRA. Painters District Council 51 (Manganero Corp.), 321 NLRB 158 (1996) at 167, n.33, citing Teamsters Local 560 (Curtin Matheson Scientific, Inc.), 248 NLRB 1212 (1980).

of contract clauses that are evaluated by the Board under different NLRA Section 8(e) rules of construction:

- Subcontracting clauses prohibit or limit a signatory employer's subcontracting of bargaining unit work, and raise issues under NLRA Section 8(e) including whether they were consummated through collective bargaining; whether they are confined to "onsite" construction work; whether they are union signatory or union standard clauses; whether they allow "self-help" enforcement; and whether they are permissible under the proviso to Section 8(e) of the Act. See, e.g., Woelke & Romero Framing v. NLRB, 456 U.S. 645, 666 (1982).
- So-called "anti-dual shop" clauses (such as the preexisting portion of Addendum C to the national Local 669/NFSA agreement that the General Counsel concedes to be lawful) govern or limit a signatory contractor's ongoing relationships with commonly owned/controlled, non-signatory affiliates; they are evaluated under Section 8(e) based on whether they preserve bargaining unit work or are unlawfully "calculated to cause [the Employer] to sever its ownership relationship with affiliated firms that seek to remain nonunion or to forebear from forming such relationships with such firms." "Anti-dual shop" clauses are generally *not* protected by the proviso to Section 8(e), at least under current Board law. Alessio, 310 NLRB at 1025-29.
- Authorization card check clauses, like the provision at issue here, are more prevalent outside the construction industry, provide for voluntary,

majority-based authorization card recognition, and employer “neutrality” during that process. Kroger Co., 219 NLRB at 388-89; Snow & Sons, 134 NLRB 709 (1961), enf’d 308 F.2d 687 (9<sup>th</sup> Cir. 1962), as cited in NLRB v. Gissel Packing Co., 395 U.S. at 593. See Goodless Electric Co., 332 NLRB 1035, 1038 (2000), rev’d 285 F.3d 102 (1<sup>st</sup> Cir. 2002)(describing status of Kroger-type clauses in the construction industry under NLRA Section 8(f)). Such authorization card check clauses are lawful, mandatory subjects of bargaining where, as here, they are confined to the existing bargaining unit. Pall Biomedical Products Corp., 331 NLRB at 1675-77. Authorization card check clauses are *not* governed by the “anti-dual shop” Section 8(e) case law and do not embody a “cease doing business” object as proscribed by NLRA Section 8(e). Heartland, 348 NLRB at 1083-84.

Judge Kocol correctly analyzed the clause at issue first under the “anti-dual shop” clause cases such as Alessio cited by the General Counsel and the Charging Party, and then under the applicable authorization card check precedents, such as Heartland, and concluded that, under either analysis, the General Counsel had failed to demonstrate that the clause was “clearly unlawful on its face” under NLRA Section 8(e). ALJD at 4-6.

**The Authorization Card Check Clause in Addendum C Does Not Violate NLRA Section 8(e)**

As Judge Kocol correctly ruled, the general standards for determining the legality of contractual provisions under NLRA Section 8(e) are all satisfied here:

- The authorization card check provision in Addendum C was negotiated in the

context of a collective bargaining relationship. ALJD at 4; Gettler 25-26, 35. Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 633 (1975). Compare Glens Falls Building and Construction Trades Council (Indeck Energy Services of Corinth, Inc.), 350 NLRB No. 42 (2007) (slip op. at 4-5).

- The provision, by its express terms, is confined to and “preserves” bargaining unit work to be performed at the construction site and within the trade and national territorial jurisdiction of the Local 669/NFSA national multi-employer bargaining unit. ALJD at 5; G.C. Exh. 5, pp. 9-10, 24-25; Gettler 44-45; Fielding 55-56. ILA I, 447 U.S. at 505; National Woodwork Mfrs. Ass’n v. NLRB, 386 U.S. 612, 644-45 (1967).
- The provision applies, again by its express terms, only where the “Employer” has “established or maintained,” “operations” to perform work covered by the 2007-2010 agreement and, as the Administrative Law Judge noted, at the very least “can be read to satisfy the ‘right to control’ test.” ALJD at 5, 6. The General Counsel and the Charging Party have strained to invent an unlawful interpretation of the operative contractual language (G.C. Brief at 7-10; C.P Brief at 2-4, 8-16), but the issue is not whether the clause can, in theory, be contrived to be read as overbroad but whether that is the *only* possible contract interpretation; otherwise it is to be interpreted as “to require no more than what is allowed by law.” Heartland, 348 NLRB at 1084.<sup>4</sup>

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<sup>4</sup> Cases such as Alessio and Southwestern Materials -- even if applicable to authorization card check clauses contrary to the Board’s decision in Heartland -- are distinguishable on their facts. Alessio, 310 NLRB at 1025-26; Southwestern Materials,

- The General Counsel’s contention that the clause at issue is overbroad and should be read to necessarily extend beyond the signatory employer’s “right to control” is further precluded by the language in the agreement that affirmatively requires that it be interpreted and applied in a manner “consistent with all applicable Federal and state laws,” and only to the “extent permitted by law.” G.C. Exh. 5, pp. 41, 50-51. See Virginia Sprinkler Co., *supra*, 868 F.2d at 121 (“...the district court correctly held that Article 3 could be interpreted in a manner consistent with governing law. The court’s conclusion was especially reasonable in light of the ‘savings clause’ in [current Article 31] of the collective bargaining agreement ...”).

Judge Kocol correctly determined that the provision at issue is independently lawful under the Board’s authorization card check decisions such as Heartland, holding that such clauses lack a proscribed “cease doing business” object and, for that independent reason, the provision at issue is plainly lawful on its face (ALJD at 6):

- The provision does not contain one word affirmatively evidencing a proscribed “cease doing business” object as alleged. G.C. Exh. 5, pp. 50-51; Complaint, Exhibit 1(g), ¶ 9(c). As the Board recently held in Heartland, authorization card check/neutrality clauses *do not* violate the “cease doing business” prohibition in NLRA Section 8(e). In this regard, the provision is more plainly lawful than the clauses at issue in Heartland and Kroger because the signatory entity in

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328 NLRB at 936. In the latter cases, in contrast to the provision here, “the clause [was] ... triggered merely by the fact of an affiliation, subsidiary and parent relationship, or ownership short of majority ownership.” Manganero, 321 NLRB at 164-65; Southwestern Materials, 328 NLRB at 936 (“... the fact that the signatory employer owns another business entity would not, without more, establish that the signatory employer had control over the assignment of the work performed by the other entity.”).

Heartland was an “investment firm” and not an employer of any kind let alone “an employer in the construction industry” under Section 8(e) (Heartland, 348 NLRB at 1081); because, in neither Heartland nor Kroger was there an existing national multi-employer bargaining unit to protect; because the clause in Kroger did not affirmatively require majority support of unit employees (219 NLRB at 388-89); and because there was no language in Heartland or Kroger that “can be read to satisfy the ‘right to control’ test” (ALJD at 5, 6),<sup>5</sup> nor any of the language present here requiring the clauses in those cases be applied in a lawful manner. G.C. Exh. 5, pp. 41, 50-51. Virginia Sprinkler Co., *supra*, 868 F.2d at 121.

- Nor does the provision vest an arbitrator with any authority to require a cessation of business between signatory and non-signatory entities. G.C. Exh. 5, pp. 50-51. Compare Heartland, 348 NLRB at 1084 and n. 6, citing Manufacturers Woodworking Association of Greater New York, 345 NLRB 538, 541 (2005).
- The provision cannot conceivably be read to impose an implicit “cease doing business” object by inflicting “onerous conditions” upon a signatory employer. Heartland, 348 NLRB at 1085-87 (Chairman Battista dissenting). The General Counsel has admitted that such “onerous conditions” are entirely hypothetical here (G.C. Exh. I (n), Exhibit B, at p. 2 (“... signatory Cosco has not indicated that its requirements are not onerous but rather filed the instant charge”)), and

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<sup>5</sup> Contrary to misstatements by both the General Counsel and the Charging Party that the Board had determined that Heartland maintained the “right to control” its subsidiaries (G.C. Brief at 9; C.P. Br. at 16-17), the Board concluded that the authorization card check/neutrality clause in Heartland was a primary and lawful provision under Section 8(e) without even considering whether or not the Heartland investment firm maintained a “right to control” over its current or future subsidiaries. Heartland, 348 NLRB at 1085.

the General Counsel failed to even attempt to adduce testimony or other evidence on that subject from the witnesses called at the hearing, or to even advance such an argument in support of Exceptions.<sup>6</sup>

- It is undisputed that the Union formally and unconditionally disclaimed any “cease doing business” object to the NFSA -- as the representative of all of the affected signatory contractors that maintained the contractual right to “... participate in any grievance involving [contractor members] who [have] given the [NFSA] authority to negotiate this Collective Bargaining Agreement.” Resp. Exh. 1; G.C. Exh. 5, Article 1, p. 3.

The authorization card check provision in question is protected under the NLRA on at least two additional legal bases that Judge Kocol did not address (ALJD at 6):

- The provision at issue is protected by the construction industry proviso to Section 8(e), enacted in 1959 to maintain the existing “state of the law” and “pattern of collective bargaining” in the construction industry. Woelke & Romero Framing, 456 U.S. at 656 (citing legislative history). Although anti-dual shop clauses are not within the Section 8(e) proviso, according to the Board majority in Alessio, 310 NLRB at 1029, authorization card check-based recognition was part and parcel of the “state of the law” and of the “pattern of collective bargaining” in the construction industry in 1959 and are therefore within proviso to Section 8(e).

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<sup>6</sup> The only “onerous conditions” imaginable are the very terms and conditions of the 2007-2010 national collective bargaining agreement that were negotiated by the NFSA and Cosco themselves (Gettler 35) to govern the terms and conditions of employment throughout Local 669’s territorial jurisdiction -- terms and conditions that can lawfully be applied to bargaining unit work performed by any non-signatory construction contractor under NLRA Section 8(f) even in the absence of the authorization card majority showing required by Addendum C.

Dana Corp., 351 NLRB No. 28 (2007), slip op. at 3 (“Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it.”); Consolidated Builders, Inc., 99 NLRB 972, 1007 (1952) (“[A]s the Board has frequently held, [NLRB] representation elections are not the only means of establishing a [construction] union’s majority.”) See also H & W Construction Co., Inc., 161 NLRB 852, 853 (1966).

- As Judge Raymond Green determined in Heartland -- on a question the Board reserved in that case and that Judge Kocol declined to address here -- the clause at issue here cannot violate the “cease doing business” prohibition in NLRA Section 8(e) because a transaction by which a signatory contractor “establish[es] or maintain[s]” a related nonunion entity to perform unit work does not constitute a “business” transaction within the meaning of the “cease doing business” prohibition in Section 8(e). 348 NLRB. at 1083, n.5, 1091-92 (citing authorities).<sup>7</sup>

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<sup>7</sup> The General Counsel’s overreaching in this case is exemplified by the remedy sought in the Complaint: “an order requiring that Respondent rescind and give no effect to Addendum C of the 2007-2010 Agreement” (G.C. Br. at 10) -- a rescission of Addendum C *in its entirety* and including preexisting contractual language that the General Counsel has not alleged as unlawful, and has admitted is entirely lawful under the NLRA. See G.C. Exh.1(n), Exhibit B, at p. 1 and authorities cited at footnote 2 above. Even if the General Counsel could invent a hyper technical defect in that portion of Addendum C that is actually alleged to be unlawful in the Complaint, the *only* remedy would be a narrow order requiring that the parties “[c]ease and desist from ... enforcing [the new clause] *to the extent that the clause is illegal.*” Food and Commercial Workers Local 1442 (Ralph’s Grocery), 271 NLRB 697, 700-701 (1984); Associated General Contractors of California (California Dump Truck Owners Assoc.), 280 NLRB 698, 704 (1986); Plumbers District Council 16 (Jamco Development), 277 NLRB 1281, 1284 (1985). The General Counsel’s untenable position on the issue of remedy was no oversight as the issue was previously been brought to the General Counsel’s attention but to no effect. G.C. Exh.1(j), at pp. 13-14; G.C. Exh.1(n), at pp. 1

**CONCLUSION**

For the reasons stated above, at the hearing and previously, the Complaint should be dismissed.

Dated: January 19, 2009

Respectfully submitted,

  
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Road Sprinkler Fitters Local 669

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2009, I served RESPONDENT'S BRIEF IN OPPOSITION TO EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE to the Office of the Executive Secretary of the National Labor Relations Board via the electronic filing portal of the Board's website and, after notifying the parties via telephone, I served a copy of Local 669's Brief on each of the following via fax and UPS Overnight Delivery:

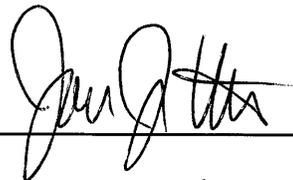
John Viniello, President  
National Fire Sprinkler Association  
40 Jon Barrett Road  
Patterson, NY 12563

James F. Small  
Regional Director, Region 21  
National Labor Relations Board  
888 South Figueroa Street  
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Firetrol Fire Protection  
Attn: Blake Vance, Chief Financial  
Officer  
10725 Sandhill Road, Suite 105  
Dallas, TX 75238

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Counsel for Cosco Fire

Pursuant to the Board's requirements for electronic filing, given that the foregoing Brief exceeded 15 pages, the original and eight copies were also sent today via UPS Overnight Delivery to the Office of Executive Secretary of the National Labor Relations Board, 1099 14<sup>th</sup> Street NW, Washington DC.



Jason J. Valtos