UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

Case No. 21-CE-374

and

COSCO FIRE PROTECTION, INC.

and

NATIONAL FIRE SPRINKLER ASSOCIATION, INC.

Party in Interest

and

FIRETROL PROTECTION SYSTEMS, INC.

Party in Interest

CHARGING PARTY'S BRIEF IN REPLY TO THE OPPOSITION TO EXCEPTIONS FILED TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

In its Opposition, Respondent makes arguments which rely on the same circular reasoning used by the ALJ and, like the ALJ, fails to address the key issue in this case. Both Respondent and the ALJ assert the alleged 8(e) clause contained in Addendum C of the contract has a lawful work preservation object because it applies only where the employer has "established or maintained" operations to perform work covered by the contract. Both argue that

such language can be read to satisfy the right to control test required by the Board and the courts to make anti-double-breasting clauses lawful. (Opposition Brief, p. 13.) Both are wrong. Further, neither the ALJ nor Respondent directly address the fatal defect in the clause and the basis for the complaint in this case – that the challenged portion of Addendum C comes into play only after the Union has previously filed and lost a grievance based on the contention that the signatory employer is a single or joint employer with a non-signatory company or that the signatory company has the right to control the work of the non-signatory entity. The ALJ devotes one short paragraph to this issue and dismisses the arguments of the General Counsel and Charging Party with the unjustified conclusion that "the language simply reflects an ordering of the grievances to be filed." (ALJD, p. 5 : 42-47.) Respondent does not even attempt to support the ALJ's ill-considered conclusion but, rather, argues that the clause is lawful under various inapposite legal principles.

The key point that was ignored by the Administrative Law Judge and ducked by Respondent is that once a prior grievance determines that the signatory employer and its related company are separate entities and that the signatory has no right to control the work of its related corporate sister, the Union has no right to meddle with the labor relations of the non-signatory entity through its contract with the signatory employer. Moreover, by definition, if the signatory employer and its related company are separate, independent entities, the work of the non-signatory is by definition not bargaining unit work.

The ALJ failed to address these fundamental points and Respondent, apparently, chose to not address them in its Opposition Brief, presumably, because it could not. Below we address the various arguments that were advanced by Respondent in its Opposition.

- Respondent states, "It is undisputed that Firetrol, like Cosco, performs bargaining unit work ..." (Opposition Brief pp. 5-6.) That assertion is false. Whether the work performed by Firetrol is "bargaining unit work" is the issue in question in this case and is hotly disputed by the General Counsel and Charging Party.
- Respondent states, "While Judge Kocol admitted a prior arbitration decision between Cosco and Respondent 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." (Opposition Brief, p. 9, fn 9.) That statement is false. The trial transcript shows that the ALJ, with the agreement of the General Counsel and Charging Party, ruled only that he would make no finding based upon the arbitration award that Cosco and Firetrol are presently separate employers within the meaning of the Act. (Tr. 19-20.) All parties agreed that the present status of Cosco and Firetrol as separate employers was not an issue that should be litigated in this case. Nevertheless, the ALJ found the arbitration award to be relevant for the purpose of background and understanding the context of this dispute. (Tr. 30.)
- Respondent attempts to categorize the clause in question as an "authorization card check clause" even though the collective bargaining agreement captions it "Preservation of Bargaining Unit Work." (Opposition Brief, p. 10; GC Ex. 5, Addendum C.) But, however captioned or categorized, the issue to be decided herein is whether Respondent may use Addendum C of its contract with a signatory employer to effect the labor relations policies of another entity that has previously been determined to be independent and free from control by the

signatory. The answer is clearly "no." *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 (1993); *Painters District Council 51 (Manganaro Corp.)* 321 NLRB 158 (1996); *NLRB v. Longshoremen ILA,* 447 U.S. 490, at 504; *SC Pacific*, 312 NLRB 903, at 904 n.3 (1993); *Walter N. Yoder & Sons*, 270 NLRB 652, 656 n. 6 (1984).

- Respondent states"... 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.'" (Opposition Brief, p. 10, fn. 3.) We agree with this critical admission and point out that, as written, the second part to Addendum C (the card check procedures to be followed by the non-signatory entity) is not a valid work presentation clause because it comes into play only after it has been determined in a prior grievance procedure that the contracting employer does not have the right to control the work of the non-signatory entity.
- Incredibly, Respondent contends that the validity of a work preservation clause does <u>not</u> turn on whether the signatory and non-signatory entities are single or joint employers. (Opposition Brief, p. 10 fn. 3.) Respondent's contention is legally incorrect and contradicts the language of Addendum C which it drafted. Addendum C is premised on single or joint employer status. It starts with the proposition, "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) ... [emphasis added]", and then adopts the standard for determining single or joint employer status set forth in *Operating Engineers Local 627 v NLRB*, 518 F 2d 1040 (D.C.

Cir. 1975) affirmed by the Supreme Court, 425 U.S. 800 (1976). Respondent cannot be serious with this contention. It is clear that the Board and courts have used both the right to control test and the single employer doctrine to analyze whether anti-double-breasting provisions are lawful. Where two entities are found to be a single employer, by definition the work of each entity is commonly controlled. Similarly, where one entity has the right to control the work of another entity they are single employers, at least for the purposes of Section 8(e) of the Act. Under either analysis, if the signatory employer is neither a single employer with, nor has the right to control the work of, a related entity, that entity's work cannot be claimed as bargaining unit work.

- Respondent argues that card check clauses are not governed by "anti-dual shop" case law and further that they do not embody a cease doing business object. (Opposition Brief, p.12.) The Board has never made such a broad pronouncement. But nor does the argument address the real issue in the case. Neither the General Counsel nor the Charging Party argue that the card check procedure that Respondent seeks to impose on non-signatories is unlawful in itself. Rather, as Respondent well knows, the issue in this case is whether the Union has the right to impose any procedure -- lawful or not -- on a non-signatory employer that is neither a single employer with, or controlled by, a contracting entity. The answer is clearly "no" under well-established law. Indeed, Respondent does not dispute this proposition, nor could it. Instead, it argues that the language of Addendum C does not lead to this unlawful result. General Counsel and Charging Party disagree and point to the language of Addendum C

which carries the seeds of its own destruction. The card check procedures of the second part to Addendum C come into play only after a prior determination through the contractual grievance procedure that the signatory employer is not a single or joint employer with a non-signatory entity or that it does not have the right to control the work of the non-signatory entity. Once that determination is made, Respondent has no lawful basis for making any demands on the non-signatory entity through its contractual relationship with the contract signatory. In sum, in the face of a prior adverse determination on the "single employer" or "right to control" issue, Respondent cannot use its contract with a signatory employer to further attempt to control the labor relations policies of a non-signatory, separate and independent entity. This is black letter law under Section 8(e) and (b)(4) of the Act.

- Respondent attempts to support the Administrative Law Judge's erroneous conclusion that the second part to Addendum C "can be read to satisfy the 'right to control' test" because it applies only where the signatory employer "established or maintained" operations to perform work covered by the Agreement. (Opposition Brief, p. 13.) Respondent cites *Heartland Industrial Partners*, supra, to support this incorrect statement of the law. *Heartland* does not stand for that proposition and is, in any event, inapposite. The Board has consistently held that "established or maintained" language is not sufficient to establish the "right to control". *Southwestern Materials*, 328 NLRB 934 (1999); *Novinger Inc.*, 337 NLRB 1030 (2002). Indeed, that a signatory employer "established" a non-union entity, or that it "maintained" it shows no more than ownership which the Board

and Courts have consistently found insufficient to establish the "right to control". *Alessio Construction Co.*, 310 NLRB at 1023. Moreover, Respondent's contention is belied by the language of Addendum C. The original language of Addendum C, which Respondent points out was found to be lawful, in fact, contains the required "right to control" language. It states, "wherein the Employer ... exercised either directly or indirectly controlling or majority ownership, management or control over such other entity ..." But, in contrast, the newly added, second part to Addendum C containing the card check requirements does not contain this critically important language. As argued to the ALJ and in the exceptions filed herein, the absence of the required "right to control" language in the second part of Addendum C renders the clause unlawful on its face.

- Respondent argues that Addendum C cannot be found unlawful because it contains a requirement that it be interpreted and applied consistent with federal and state law. (Opposition Brief, p. 14.) But a "lawful interpretation" clause cannot immunize Respondent from liability where the clause is unlawful on its face. Respondent's further argument that there can be no violation of Section 8(e) herein because the Union disclaimed any "cease doing business" object is similarly unavailing. (Opposition Brief, p. 16.) The Union cannot disclaim an unlawful object while continuing to assert the validity of the clause that requires the very same unlawful result it purports to disclaim.
- Respondent argues that Addendum C is protected by the construction industry proviso to Section 8(e). (Opposition Brief, p. 16). Although Respondent concedes that the Board found in *Alessio*, supra, that "anti-dual shop" clauses are

not within the Section 8(e) proviso, it argues that Addendum C is simply a card check recognition clause and that as such is protected by the proviso. Addendum C is plainly an "anti-dual shop" clause. Virtually every sentence in Addendum C is directed to dual-shop situations. But if there were any doubt, the final paragraph eliminates it. It states, "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 ..." (Addendum C, GC Ex. 5.) The fact that this "anti-dual shop" clause uses the mechanism of card check to accomplish its unlawful objective does not give it proviso protection. It is still an "anti-dual shop" clause and is outside the proviso protection. Further, if the clause were a straight card check clause without "anti-dual shop" provisions, as was the case in *Heartland*, supra, there would be no need for Respondent to seek shelter from the 8(e) proviso because the clause would not violate Section 8(e) even without proviso protection.

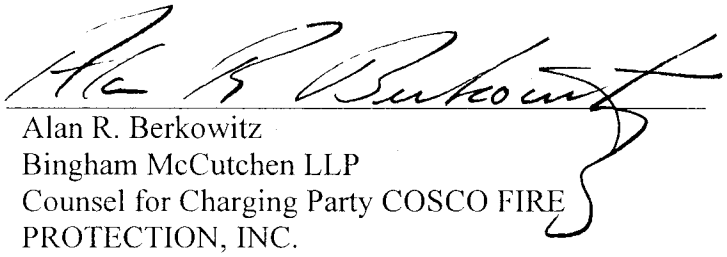
- Finally, Respondent argues that "the clause at issue herein cannot violate Section 8(e) because a transaction by which a signatory contractor 'establishes or maintain[s]' a related union entity to perform unit work does not constitute a 'business' transaction within the meaning of the 'cease doing business' prohibition of Section 8(e)", citing *Heartland*, supra at 1083, n.5, 1091-92. Again, Respondent incorrectly relies on *Heartland* for a proposition that it does not stand for. Indeed, the Board found it unnecessary to decide whether Heartland's acquisition of other business enterprises constituted "doing business"

for the purposes of Section 8(e). *Heartland*, n.5. Most significantly, the Board in *Heartland* goes to great lengths to distinguish the clause in that case, which did not require Heartland to cease doing business with anyone, from clauses that prohibit a signatory employer from being affiliated with a non-union contractor. The Board cites with approval, *Alessio Construction*, supra; *Sheet Metal Workers Local Union No. 91 (the Schebler Co.)*, 294 NLRB 766 (1989), enfd. in part 905 F.2d 417 (D.C. Cir. 1990); and *Operating Engineers Local 520 (Massman Construction)*, 327 NLRB 1257 (1999). Thus, none of the "anti-dual shop" cases, or the principles upon which they are based, were reversed or even eroded by *Heartland*. In sum, the Board found the clause in *Heartland* to be different from the "anti-dual shop" clauses found unlawful in *Alessio* and other cases. Respondent's reliance on that case is misplaced.

For the reasons set forth in the Exceptions and briefs in support of Exceptions filed by the General Counsel and Charging Party, it is respectfully submitted that the decision of the Administrative Law Judge must be reversed.

Dated: February 2, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2009, I caused copies of the **CHARGING PARTY'S BRIEF IN REPLY TO THE OPPOSITION TO EXCEPTIONS FILED TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** to be served on the following parties by Federal Express for overnight delivery:

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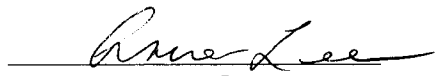

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