

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TRIPLE A FIRE PROTECTION, INC.)	
)	
Respondent,)	
and)	Case 15-CA-11498
)	
ROAD SPRINKLER FITTERS LOCAL)	
UNION 669, U.A., AFL-CIO)	
)	
Charging Party.)	
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**LOCAL 669’S BRIEF IN REPLY TO TRIPLE A’S BRIEF IN OPPOSITION TO
LOCAL 669’S CROSS-EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(h) of the National Labor Relations Board’s Rules and Regulations, Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO submits this brief in reply to Triple A’s Brief in Opposition to Local 669's limited Cross-Exceptions to the Administrative Law Judge's decision in this case. As we show herein, none of the four principal arguments that Triple A raised in its brief have any basis in law or in the record below, and they should therefore be rejected.

A. Triple A Was Not Denied Due Process of Law.

First, Triple A asserts that it was somehow denied due process of law because it claims that the Third Amended Compliance Specification did not “... include a demand for 12% interest and liquidated damages...[,]” and, from this assertion, Triple A argues that it was deprived “of an opportunity to be prepared for the new claims of...” liquidated damages and interest in this proceeding. Br. p. 2.

However, in making this assertion, Triple A ignores the fact that the Third Amended Compliance Specification alleged that:

(b) Payment to the fringe benefit funds in the amount set forth in "Total Fund Contributions" column of Appendix C. and any additional amounts owed with respect to these fund contributions pursuant to *Meriwether Optical Company*, 240 NLRB 1213 (1979), plus such further amounts due and owing which will continue to accrue until the Respondent resumes to payment of the fringe benefit contributions[.]” GC. Exh. 2(dd) at p.5.

This standard *Meriwether Optical* language placed Triple A on clear notice that the Third Amended Compliance Specification was affirmatively seeking liquidated damages and interest *in addition to* the delinquent NASI Fringe Benefit Fund contributions that Triple A owes as a result of its unfair labor practices in this case. Accordingly, this argument fails both as a matter of fact and law.

B. Liquidated Damages and Interest Are Well-Established, Non-punitive Remedies under Board Law.

Second, Triple A argues in conclusory fashion that it would be “punitive” to assess liquidated damages and interest against it in this case because “affirmative relief by the Board must be remedial, not punitive.” Br. p. 2; 6-7.

This argument overlooks the legal principle that where an employer unlawfully (and, here, admittedly) stops making contributions to a union's fringe benefit funds, as part of the attendant make-whole remedy running to those funds, the Board *routinely* requires offending employers to pay both liquidated damages and interest on their delinquent benefit fund contributions, where those additional payments are provided for in the benefit funds’ governing documents. *Merryweather Optical Co.*, 240 NLRB 1213, 1215 fn. 7 (1979); *GT Knight Co.*, 268 NLRB 468, 468 (1983); *American Thoro-Clean Ltd.*, 283 NLRB 1107, 1109-10 (1987); *Emsings Supermarket, Inc.*, 307 NLRB 421, 423 (1992); *Hooper's Chocolates*, 319 NLRB 437, 438 n.1 (1995); *Hawk of Connecticut, Inc.*, 319 NLRB 1213, 1213 (1995); *Harris Glass Industries, Inc.*, 317 NLRB 595, 595 (1995);

MFP Fire Protection, Inc., JD(SF)-51-03, 2003 NLRB LEXIS 464, **34-35 (Metz, 2003), *aff'd without exceptions*, NLRB Supplemental Order, Oct. 8, 2003, *enf'd*, No. 04-9504 (10th Cir. 2004); *Ryan Iron Works*, 345 NLRB 893, 895 (2005).¹

Here, the ALJ correctly concluded that both liquidated damages and interest were provided for in and required by the NASI Fringe Benefit Funds documents in this case. ALJD, p. 12-13. *See also* GC Exh. 3; CP Exh. 1, 2(a) and (b), 3 and 4; Charging Party's Answering Brief, p. 16-18; Charging Party's Cross Exceptions, p. 2-3. And, it should be noted that Triple A did not (i) introduce *any* evidence at the hearing to contradict these facts; (ii) try and prove that the additional amounts of liquidated damages and interest should, for whatever reason, not apply here; or (iii) establish that some alternative liquidated damages and interest calculation should be applied in this case instead of the formula prescribed in the NASI Benefit Fund Documents. Therefore, Respondent's arguments on this point must also fail.²

¹ Of course, the interest that Respondent is undisputedly responsible to pay under *New Horizons for the Retarded*, 283 NLRB 1173 (1987) on the backpay it owes to the discriminatees in this case is separate and distinct from the 12% interest Respondent owes to the NASI Benefit Funds on its delinquent fund contributions, as required by the governing Funds documents and *Meriwether Optical Co.*, 240 NLRB at 215 fn. 7. *See GT Knight Co.*, 268 NLRB 468, 469 (1983).

² Triple A's novel argument that the General Counsel and the Charging Party are also seeking to "triple dip" by attempting to recover both liquidated damages *and* interest on the delinquent NASI Benefit Fund contributions in this case is unfounded. As Michael Jacobsen, the long-time administrator for the NASI Benefit Funds testified at the hearing, both liquidated damages and interest are critical remedial tools that permit the Funds to collect "monies that are added to delinquent contributions as an attempt to recover difficult-to-quantify damages when contributions are not made on time, either with investment losses or costs of collection." Tr. 57. Thus, as a creature of contract between the Parties, these additional amounts are necessary to make the Funds in this case whole. *Id.* And, perhaps most importantly, the fact that Respondent chose not to challenge any of this evidence at the hearing precludes Triple A from doing so now. *Church Homes*, 349 NLRB 829, 838 (2007).

C. A Party to an Expired Collective Bargaining Agreement Cannot Unilaterally Change the Terms of That Agreement.

Third, Triple A asserts that Local 669 and the General Counsel's "...arguments are based upon the false assumption that the expired collective bargaining agreement between Triple A and Sprinkler Fitters was in full force and effect on April 21, 1991, when Triple A unilaterally created a new position of 'helper' with the minimum-wage rate of \$5.00 per hour..." Br. p. 3. While this argument appears to raise an issue beyond the scope of the limited Cross Exceptions in this case, we will briefly address it in case the reader of the record somehow concludes otherwise.

In making this assertion, Respondent ignores two well-settled principles of law: (i) an employer cannot unilaterally change the terms and conditions of an expired collective bargaining agreement without first bargaining to good faith impasse, *MBC Headwear, Inc.*, 315 NLRB 424, 424 n. 3 (1994) ("Contrary to the Respondent's arguments, we agree with the General Counsel that terms and conditions of employment that are part of an expired collective-bargaining agreement, including benefit fund plans and related reporting requirements, survive contract expiration and cannot be altered without bargaining."); and (ii) an employer such as Triple A that unilaterally changes the wage rates and stops making fringe benefit fund contributions as prescribed in the expired agreement without bargaining to impasse with the union commits a very serious unfair labor practice that will *preclude* impasse until such time as the employer's unlawful conduct is completely remedied. *Majestic Towers*, 353 NLRB No. 29, slip op at 1-2 (2008) (an employer violated 8(a)(5) by making unilateral changes, including reducing wages and halting payments to employee medical insurance, and that unremedied unfair labor practices were "so extensive and pervasive as to make it

practically impossible for the parties to have engaged in good-faith negotiations leading to impasse.”).

Accordingly, Triple A's arguments cannot overcome the fact that long-standing NLRB precedent fully supports the backpay and fringe benefit fund contributions, as well as the liquidated damages and interest on the delinquent fund contributions that the General Counsel sought in the Third Amended Compliance Specification.

D. The Board's Summary Judgment Decision In This Case Was Correct.

Finally, Triple A's contention that the Board should reconsider its January 30, 2009 Summary Judgment Decision in this case (*Triple A Fire Protection, Inc.*, 353 NLRB No. 88 (2009)) in light of the United States Supreme Court's recent decision in *New Process Steel, LP v. NLRB*, ___ U.S. ___ (June 17, 2010), is a red herring.

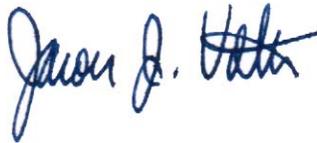
Indeed, the *New Process Steel* decision does not now excuse Respondent's tardy Motion for Reconsideration of the Board's Summary Judgment Decision, nor does it provide Triple A with a retroactive opportunity for a do-over of its August 18, 2008 Answer to the Third Amended Compliance Specification. GC Exh. 2(ii). Instead, should the Board reconsider its Summary Judgment Decision in this case, it must reconsider that decision based upon Respondent's Answer as it stood on January 30, 2009.

Of course, it is beyond dispute that Triple A's Answer improperly raised numerous affirmative defenses that had already been decided against the Respondent below; failed to adequately deny many of the allegations in the Third Amended Compliance Specification; and failed to set forth any alternative backpay calculations as required by Section 102.56(b) of the Board's Rules and Regulations. *See Triple A Fire Protection*, 353 NLRB Slip op. at 2-4; GC Exh. 2(ii). In other words, contrary to

Respondent's wishes, the *New Process Steel* decision does not afford Triple A the opportunity to go back in time to attempt to comply with the Board's Rules and Regulations. As such, even a cursory review of Triple A's Answer, Local 669's Motion for Summary Judgment, and Triple A's Response will confirm that the two member Board has already reached the correct conclusion on this issue.

Dated: July 6, 2010

Respectfully submitted,



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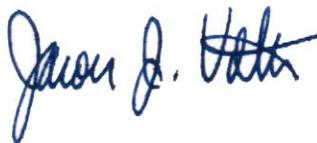
CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2010, I electronically filed Local 669's Brief in Reply to Triple A's Brief in Opposition to Local 669's Cross Exceptions with the National Labor Relations Board's Executive Secretary, and forwarded a copy of the brief by electronic mail to the Parties listed below:

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