

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:)
)
G & L ASSOCIATED, INC.,)
d/b/a USA FIRE PROTECTION,)
)
Respondent,)
)
and) NLRB Case No. 10-CA-38074
)
ROAD SPRINKLER FITTERS LOCAL UNION)
NO. 669, UNITED ASSOCIATION OF)
JOURNEYMEN AND APPRENTICES)
OF THE PLUMBING AND PIPEFITTING)
INDUSTRY OF THE UNITED STATES AND)
CANADA, AFL-CIO,)
)
Charging Party.)

CHARGING PARTY LOCAL 669'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE

Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669" or "the Union"), respectfully submits these Exceptions to the Decision of the Administrative Law Judge in this case, pursuant to Rule 102.46(b)(1) of the Rules and Regulations of the National Labor Relations Board.¹

Charging Party Local 669 specifically excepts to the following:

¹ Citation to the ALJ's decision in this matter will be designated by the abbreviation "ALJD, p. ____," and will include page and line numbers where relevant. The grounds for each exception, including reference to the record and supporting legal authorities and argument, have been set forth in the supporting brief filed along with these Exceptions.

1. The ALJ's failure to find that the collective bargaining relationship between Local 669 and USA Fire Protection ("USA" or "Respondent") in this matter is governed by Section 9(a) of the National Labor Relations Act ("NLRA" or "the Act"). ALJD, p. 5-6.

2. The ALJ's failure to find that USA's challenge to its grant of exclusive Section 9(a) representative status to Local 669 was time-barred by Section 10(b) of the Act, as well as by long-standing United States Supreme Court and NLRB precedent, as USA did not challenge its grant of recognition to Local 669 within six months after recognition was granted. ALJD, p. 5-6.

3. The ALJ's failure to sustain Local 669's objection to the introduction of evidence relating to the grant of Section 9(a) recognition in this case, as the Respondent did not challenge its recognition of Local 669 within six months after recognition was granted, as required by Section 10(b) of the Act, as well as by long-standing United States Supreme Court and NLRB precedent. ALJD, p. 4-7.

4. The ALJ's failure to find that the recognition agreement that USA signed on November 24, 2008 was unambiguous. ALJD, p.6, lines 34-35.

5. The ALJ's failure to find that the November 24, 2008 recognition agreement, standing alone, created a Section 9(a) relationship between USA and Local 669. ALJD, p.6, lines 22-45.

6. The ALJ's failure to find that it was unnecessary to consider evidence beyond the November 24, 2008 recognition agreement in order to determine whether the parties in this case intended to create a Section 9(a) relationship. ALJD, p. 6, lines 43-45; p. 7, lines 1-6.

7. The ALJ's consideration of extrinsic evidence beyond the recognition agreement that USA signed on November 24, 2008 in order to determine whether the parties in this case intended to create a Section 9(a) relationship. ALJD, p. 4-7.

8. The ALJ's failure to reject Respondent's argument that its relationship with Local 669 was governed by Section 8(f) of the Act as a post-hoc justification for its unlawful actions.

9. The ALJ's failure to find that USA's repeated acknowledgments that Local 669 was the exclusive collective bargaining representative of its sprinkler fitter employees, and that its relationship with Local 669 was governed by Section 9(a) of the Act independently barred the Respondent from challenging the exclusive nature of its relationship with Local 669.

10. The ALJ's failure to find that Dale Young was a bargaining unit employee.

11. The ALJ's failure to find that the parties' collective bargaining agreement also contains a provision in which the parties unequivocally acknowledged that their collective bargaining relationship was governed by Section 9(a) of the Act.

12. The ALJ's finding that a determination of whether the parties created a Section 9(a) relationship "turns on an interpretation of the language used by the parties in the recognition agreement and contract they signed on November 24, 2008." ALJD, p.1.

13. The ALJ's misapplication of the precedents in *Central Illinois Construction*, 335 NLRB 717 (2001), *Casale Industries, Inc.*, 311 NLRB 951 (1983), *Novo Plumbing*, 336 NLRB 633 (2001), *enf. denied*, 330 F.3d 531 (D.C. Cir. 2003),

Madison Industries, 349 NLRB 1306 (2007), and *Triple A Fire Protection, Inc.*, 312 NLRB 1088, 1089 (1993), *enf'd* 136 F.3d 727 (11th Cir. 1998). ALJD, p. 5, lines 30-45; p. 6, lines 4-45.

14. The ALJ's finding that where the parties' agreement does not conclusively establish that they intended to create a Section 9(a) relationship, it is appropriate to consider extrinsic evidence relating to what type of relationship they intended to create. ALJD, p. 6, lines 13-16, 43-45.

15. The ALJ's finding with respect to a written agreement granting Section 9(a) recognition "... that the Board in *Central Illinois* and subsequent cases indicated that it is not enough to read such language in isolation. Rather, the agreement must be examined 'in its entirety.'" ALJD, p. 6, lines 29-32.

16. The ALJ's finding that the preamble to the separate collective bargaining agreement that USA signed, along with the recognition agreement in this case, "looking to the future, seems to suggest the parties intended to establish a prehire agreement." ALJD, p. 6, lines 35-37.

17. The ALJ's finding that the recognition agreement in this case was ambiguous.

18. The ALJ's finding that, because the parties' recognition agreement was "ambiguous," the extrinsic evidence offered by Respondent "regarding the circumstances surrounding the signing of the agreement should be considered to determine the nature of the relationship." ALJD, p. 6, lines 35-40.

19. The ALJ's finding that it was proper to look beyond the voluntary recognition agreement that USA signed on November 24, 2008 and also

examine the parties' separate collective bargaining agreement in order to determine whether they intended to establish a Section 8(f) prehire agreement or a Section 9(a) agreement in this case. ALJD, p.6, lines 35-40, n. 7.

20. The ALJ's finding that because "the parties' agreement, in its entirety, did not conclusively establish that the parties intended to establish a Section 9(a) relationship, I shall consider the extrinsic evidence offered by the Respondent." ALJD, p. 6, lines 43-45.

21. The ALJ's consideration and crediting of Respondent's evidence concerning its grant of recognition to Local 669 in this case, including Linda Duncan's testimony that "Respondent was in the process of starting a business when it recognized the Union, that it did not yet have a license to perform work covered by the agreement and in fact had no work, and that the only 'employee' other than the corporate officers, was a statutory supervisor." ALJD, p. 3, lines 15-20; p. 7, lines 1-5.

22. The ALJ's finding that, "[c]onsidering the language of the parties' agreement in its entirety and the extrinsic evidence, I find that the parties intended to, and in fact did, create a Section 8(f) collective bargaining relationship." ALJD, p. 7, lines 4-6.

23. The ALJ's finding that, "[r]egardless of what the Charging Party may believe, the parties' 'agreement' on November 24 consists of the 'Agreement' adopting the NFSA collective bargaining agreement itself, as well as the 'Acknowledgment of Representative Status.'" ALJD, p.7, n.8, lines 40-43.

24. The ALJ's finding that, because the parties' collective bargaining agreement "contains a union security clause requiring employees to join the Union 7 days after hiring[,] [s]uch language is indicative of a Section 8(f) rather than 9(a) agreement. At least one Board member indicated that such a provision, while not dispositive, would suggest that intends to create an 8(f) relationship." ALJD, p. 6, n. 7, lines 47-51.

25. The ALJ's finding that "[a]s previously noted, the fact that the parties had a Section 8(f) relationship..." ALJD, p. 7, line 9.

26. The ALJ's finding that USA repudiated "...it's Section 8(f) collective bargaining agreement on September 8, 2009." ALJD, p.7, line 29.

27. The ALJ's consideration of Respondent's argument that "because the Union failed to demonstrate majority status when it sought recognition on November 24, the collective bargaining agreement was void *ab initio*..." ALJD, p. 7, n. 9, lines 44-51.

28. The ALJ's conclusion of law that Respondent withdrew recognition from Local 669 "...during the term of its Section 8(f) collective bargaining agreement with the Union..." ALJD, p. 8, lines 9-10.

29. The ALJ's recommended Remedies that only include remedies consistent with a Section 8(f) relationship, but do not include remedies consistent with a finding that the relationship between Local 669 and USA was governed by Section 9(a) of the Act, including:

- a. The ALJ's failure to require USA to bargain with the Union as the exclusive representative of its sprinkler fitter employees concerning their terms and conditions of employment. ALJD, p. 8.
- b. The ALJ's failure to require USA to resume participation in the Union's fringe benefit funds. ALJD, p.8.
- c. The ALJ's conclusion that "[b]ecause I have found that the parties relationship is governed by Section 8(f) rather than Section 9(a), the Respondent had the right to terminate its relationship upon expiration of that agreement on March 30, 2010." ALJD, p. 8, lines 20-23.
- d. The ALJ's conclusion that any continuing obligations USA may have towards the Union are dependent upon whether the Respondent "in fact gave the Union timely notice of its desire to terminate the bargaining relationship upon the contract's expiration." ALJD, p.8, lines 22-27.
- e. The ALJ's limitation of the make-whole remedies, including attendant backpay period, to the term of the 2007-2010 agreement and any subsequent contract that may have automatically renewed if Respondent did not timely notify the Union of its termination of the agreement. ALJD, p. 8, lines 15-27.

30. The ALJ's failure to include liquidated damages, in addition to interest, in his recommended remedy, as computed in accordance with *Meriwether Optical*

Co., 240 NLRB 1213 (1979), regarding any delinquent contributions that Respondent owes to Local 669's fringe benefit funds. ALJD, p. 8, lines 37-40.

31. The ALJ's recommended Order that only includes remedies consistent with a Section 8(f) relationship, but does not include remedies consistent with a finding that the relationship between Local 669 and USA was governed by Section 9(a) of the Act, including:

- a. Only requiring Respondent to cease and desist from withdrawing recognition from the Union during the term of the parties' collective bargaining agreement. ALJD, p. 9, lines 8-11.
- b. Only requiring Respondent to honor the terms and conditions of employment set forth in the parties' 2007-2010 collective bargaining agreement until its expiration, and any automatic renewal of the agreement. ALJD, p. 9, lines 15-20.
- c. Only requiring Respondent to recognize and bargain in good faith with Local 669 "... regarding the terms of an agreement to succeed the 2007-2010 collective bargaining agreement unless the Respondent has effectively withdrawn recognition from the union upon expiration of that contract." ALJD, p. 8, lines 24-28.
- d. Failing to require Respondent to cease and desist from withdrawing recognition from Local 669 as the exclusive collective bargaining representative of its sprinkler fitter employees. ALJD, p.9.
- e. Failing to require Respondent to recognize and bargain in good faith with the Union as the exclusive collective bargaining

representative of USA's sprinkler fitter employees concerning terms and conditions of employment. ALJD, p. 9.

- f. Failing to require Respondent to restore the terms and conditions of the parties' collective bargaining agreement and make whole bargaining unit employees accordingly. ALJD, p. 9.
- g. Failing to require Respondent to resume participation in and make contributions to the fringe benefit plans to which it is legally ceased participating in and to make them whole for any losses. ALJD, p. 9.
- h. Failing to require Respondent to rescind any or all changes in wage rates for new employees which were unilaterally implemented. ALJD, p. 9.

32. The ALJ's recommended Notice to Employees to the extent that it only includes remedies consistent with a Section 8(f) relationship, but does not include remedies consistent with a finding that the relationship between Local 669 and USA was governed by Section 9(a) of the Act, including:

- a. The proposed posting language that Respondent will not withdraw recognition from Local 669 during the term of the parties' collective bargaining agreement. Appendix to ALJD.
- b. The proposed posting language that the Respondent will honor its collective bargaining agreement with Local 669 "...until it expires, and any automatic renewal or extension of that contract..." Appendix to ALJD.

- c. The proposed posting language that "WE WILL, to the extent required under Section 8(f) of the Act, recognize and, upon request, bargain in good faith with the Union regarding the terms of an agreement to succeed the 2007-2010 collective bargaining agreement." Appendix to ALJD.
- d. The failure to include proposed posting language to the effect that "WE WILL recognize and bargain with Road Sprinkler Fitters Local Union 669 as the Section 9(a) exclusive bargaining representative of our employees with respect to terms and conditions of employment." Appendix to ALJD.
- e. The failure to include proposed posting language to the effect that "WE WILL not withdraw recognition from Road Sprinkler Fitters Local Union 669 as the Section 9(a) exclusive bargaining representative of our sprinkler fitter employees." Appendix to ALJD
- f. The failure to include proposed posting language to the effect that "WE WILL restore the terms and conditions of the parties' collective bargaining agreement and make whole the affected bargaining unit employees and the Union's fringe benefit funds." Appendix to ALJD
- g. The failure to include proposed posting language to the effect that "WE WILL, on request by the Union, resume participation in and contributions to the benefit funds that we unilaterally stopped contributing to." Appendix to ALJD.

h. The failure to include proposed posting language to the effect of
“WE WILL, on request by the Union, rescind any or all changes in
wage rates for employees which we unilaterally implemented.”

Appendix to ALJD.

33. The proposed posting language to the extent it fails to include language
whereby the Employer must pay liquidated damages in addition to interest to the
Union's fringe benefit funds as part of any make whole remedy in this case.

Appendix to ALJD.

Respectfully submitted,

/s/

Dated: August 4, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2010, I electronically filed Local 669's Exceptions with the Executive Secretary of the National Labor Relations Board via the e-filing portal on the NLRB's website, electronically served a copy via the e-filing portal on the NLRB's website with Region 10, and also forwarded a copy by electronic mail to the Parties as listed below:

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