UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

B&C FIRE PROTECTION	:	
	:	
Employer,	:	
	:	
And	:	
	:	
ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO,	:	**Case No. 10-RC-15801**
	:	
Petitioner.	:	

BRIEF IN SUPPORT OF LOCAL 669'S EXCEPTIONS TO THE REPORT AND RECOMMENDATION ON CHALLENGED BALLOTS ISSUED BY THE REGIONAL DIRECTOR FOR REGION 10

Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669" or "the Union"), by undersigned counsel, submits this Brief in Support of its Exceptions to the Report and Recommendation on Challenged Ballots, issued by the Regional Director for Region 10 on October 28, 2010. For the reasons shown below, the Region's decision to sustain the challenges should be reversed.

I. Factual Background

Ron Parker was hired by B&C Fire Protection ("B&C" or "the Employer") on June 27, 2010, as a sprinkler fitter after he was recommended by former B&C employee, Jack White. Parker started at B&C at a rate of $15/hour and was given a raise to $20 after approximately 39 hours of work. Parker referred Bob Massey

for work at B&C in early August after B&C owner, Larry Boyd, told Parker he needed extra help. Massey began work on August 5, 2010. Parker and Massey signed authorization cards on or about August 5, 2010. There was one other employee of B&C working during this time, Umberto Diaz. Boyd would also work with the men in the field.

Local 669 filed a petition for an election on Tuesday, August 10, 2010. At the time the petition was filed, Local 669 had authorization cards signed for a majority of B&C's employees. On August 11, 2010, Larry Boyd, owner of B&C, called Parker and asked him if he had been talking to anyone with the Union. Boyd also threatened Parker that he would have to shut the doors if the company "went union." On August 20, 2010, the parties signed a stipulated election agreement which stated that an election would be held on September 23, 2010.

On or about August 20, 2010, the Employer removed Parker and Massey from the church job which had several more days of work remaining and, to the best of the Union's knowledge, subcontracted out the remaining work. After removing Parker and Massey from the church job, the Employer moved them to a juvenile detention facility job which they had worked on prior to the church. Parker and Massey remained on that job for three days until August 27, 2010, when they were laid off by Boyd, who claimed they were being laid off for lack of work. At the time they were laid off, Parker and Massey still had 3-4 more days to

"rough in" the pipe and then would have had to return at some point to do "finish work" after the ceiling had been installed. At *no time* did Boyd indicate that either of them performed unsatisfactory work.[1]

On August 24, 2010, the Union filed unfair labor practice charges alleging that B&C unlawfully interrogated and threatened Parker and Massey upon learning of the Union's filing of a petition for an election.

On September 2, 2010, the Union filed an unfair labor practice charge alleging that B&C violated the Act by unlawfully laying off Parker and Massey for their union activities but requested that the Region proceed with the scheduled election.

The election was held on September 23, 2010. Parker, Massey and Jack White, a former employee, voted. All three votes were challenged by the Employer on the entirely new grounds that the employees had been permanently laid off with no expectation of recall due to "poor work performance."

On October 27, 2010, the Region dismissed the 8(a)(3) charge determining that the Employer had established that it would not have recalled Parker and

[1] Indeed, the Unemployment Claims Examiner for the Georgia Department of Labor awarded Mr. Parker his unemployment benefits finding that "you were let go by your employer because there was no work to do. You are unemployed due to lack of work." Exhibit 1. This reasoning is quite different from the Employer's later reasoning after the September 23, 2010, election in which they change the reason for the layoff for the first time to "poor performance."

Massey to other jobs in the future even in the absence of their support for the Union.[2]

II. Argument

At no time during the discussion in which they were laid off, nor in their unemployment claims process, nor in the critical period before the election did B&C ever indicate that Parker and Massey had been laid off for poor performance. In fact, this new reason for the layoff came conveniently in the Employer's explanation for the challenged ballots of Parker and Massey *after* the September 23, 2010, election.

Not only is this shifting reason for the layoff in and of itself sufficient to question the Employer's true motive (*see Scott Lee Guttering Co*., 295 NLRB 497, 508 1989)) ("Shifting reasons for discipline, in the presence of a prima facie case, are evidence of, and support, a finding of an unlawful motive"), but poor performance was *never* an issue with these journeymen sprinkler fitters with over forty years in the trade between them. Indeed, Parker was given a raise after a short time there and was asked to refer another employee shortly thereafter.

In fact, if they were performing poorly, why did Employer lay them off and not terminate them? And why did the Employer give the reason for layoff as "lack of work" to the state unemployment office in September 2010? The Union submits

[2] The Union has submitted an appeal of the dismissal of that charge in Case No. 10-CA-38560.

that the new reasoning for the layoffs of Parker and Massey, manufactured after the election on September 23, 2010, was intended to keep them out of the unit permanently. *Okla-Inn d/b/a Holiday Inn of Henryetta*, 198 NLRB 410, 417 (1972) (Finding that "alleged reduction in force was merely a guise to achieve this unlawful objective" of discharging employees for their union activities). Indeed, there was no question of the Employer's anti-union animus as described in the 8(a)(1) charges simultaneously filed with the Region and which were found to be meritorious.

Though the Region followed up with an investigative subpoena after the Employer submitted evidence of a letter from the General Contractor which indicated that "the crew you have on the [church] job does not appear to be capable of completing the project in the timeframe we discussed," the Region did not further follow-up with Parker and Massey on the other key facts to which they had sworn in their affidavits that contradicted the Employer's belated and shifting defense. Some of these conveniently missing facts included, *inter alia*, that the job was four months behind when Parker and Massey were transferred to it on August 11, 2010, that the blueprints were drafted incorrectly causing significant delays and corrections to the installation, and perhaps most significantly, that the letter from the General Contractor was dated August 23, 2010, three days after Parker and

Massey had been transferred off the project and the remaining work subcontracted to three other workers.

Furthermore, Parker and Massey were never told nor warned of their poor performance by Boyd, calling into question the legitimacy of this after-the-fact explanation for their sudden layoff. *Cf. GHR Energy*, 294 NLRB 1011, 1012-13 (1989) (finding that employer had shown a reasonable basis for terminating employees based on their severe misconduct which could have caused injury to other employees and damage to the plant). The Region's explanation that B&C had no past practice of issuing discipline for poor performance because of the size and relative short history of the business is insufficient to justify the Employer's unlawful behavior in this instance where Parker and Massey were never told that "poor performance" was the reason for their layoff. We submit that this failure to inform them that their layoffs were permanent and based on "poor work performance" is further evidence that it was not the true reason for their layoff – rather, B&C had no intent of recalling two known union supporters and needed a way to invalidate their votes in the September 23, 2010, election. The small size and minimal past practice of the Employer is no excuse for their unlawful antiunion motivation in laying off Parker and Massey.

III. Conclusion

For the foregoing reasons, Local 669 respectfully requests that the Board grant its Exceptions, set aside the Regional Director's Report and Recommendation on Challenged Ballots, and remand this matter to the Region for further proceedings.

Dated: November 29, 2010

Respectfully submitted,

/s/ Natalie C. Moffett
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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2010, Local 669's Exceptions to the Report and Recommendation of the Regional Director along with Local 669's Brief in Support was electronically filed and served on Region 10 via the e-filing room of the NLRB's website and were also served on the following by electronic mail:

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GEORGIA DEPARTMENT OF LABOR
CLAIMS EXAMINER'S DETERMINATION

SSN ***-**-9807

BYB 08/30/10

CWB 08/29/10

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3400 7000
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2943 NORTH DRUID HILLS RD
ATLANTA, GEORGIA 30329
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CLAIMANT	EMPLOYER
JAMES R PARKER 2996 HILLTOP DRIVE CHAMBLEE GA 30341	B+C FIRE PROTECTION 3728 BOWLINE CIRCLE ACWORTH GA 30102

SECTION I - CLAIM DETERMINATION

Benefits are allowed as of 08/29/10.

SECTION II - LEGAL BASIS FOR DETERMINATION

Section 34-8-194 (2)(A) of the Employment Security Law says that you cannot be paid unemployment benefits if you were fired from your most recent employer for not following your employer's rules or orders. In addition, you may not be paid unemployment benefits if you were fired for failing to perform the duties for which you were hired, if that failure was within your control. You also cannot be paid benefits if you were suspended for any of these same reasons. The law says that your employer has to show that discharge or suspension was for a reason that would not allow you to be paid unemployment benefits. If you cannot be paid unemployment benefits under this section of the law, you may qualify at a later time. To do this, you must find other work and earn wages covered under unemployment law. The covered wages must be at least ten times the weekly amount of your claim. If you then become unemployed through no fault of your own, you may reapply for unemployment benefits.

SECTION III - REASONING

You were let go by your employer because there was no work to do. You are unemployed due to a lack of work. You can be paid unemployment benefits.

SECTION IV - ACCOUNT CHARGEABILITY

NOTICE TO EMPLOYER:

SECTION V - APPEAL RIGHTS

NOTE: This determination will become final unless you file an appeal on or before 09/30/10. If you file an appeal you must continue to report on your claim as instructed, or you will not be paid if you win your appeal. Refer to the Claimant Handbook booklet or contact an office of the Georgia Department of Labor for more details.

Georgia Department of Labor	09/14/10	09/15/10
Claims Examiner	Date of Interview	Mail Date

Exhibit 1