

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

TRIPLE A FIRE PROTECTION, INC.,

Respondent.

and

CASE NO. 15-CA-11498

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

Charging Party.

**TRIPLE A FIRE PROTECTION, INC.'S MOTION TO RECONSIDER BOARD'S
SECOND SUPPLEMENTAL DECISION AND ORDER AND SUPPORTING BRIEF**

Pursuant to Board Rules & Regulations Sec. 102.48(d)(1), Respondent Triple A Fire Protection, Inc. ("Triple A") moves the National Labor Relations Board ("Board") to reconsider its Second Supplemental Decision and Order of August 26, 2011. In support of its motion, Triple A respectfully states the Board erred in its Second Supplemental Decision and Order because (i) its calculation of the backpay owed fails to address the wage differential between apprentice and journeyman pay rates; (ii) its summary disposition of *Arandess* case fails to address or acknowledge that the Board's Supplemental Decision and Order impermissibly creates, in the first instance, several individual's interest in a pension fund; and (iii) the operative liability period for Triple A ended on or before April 16, 1999, when Triple A and the Union reached a veritable impasse, or at which point the Union ceased to bargain in good faith. Respondent Triple A incorporates by reference its Answer to the Third Amended Compliance

Specification and its January 5, 2009 Motion for Summary Judgment, and further represents to the Board the following:

Apprentice Wage Differential

The Board's Second Supplemental Decision and Order affirms the Administrative Law Judge's findings regarding Specification 7 of the Board's Third Amended Compliance Specification and Notice of Hearing ("Specification") namely that

7. An appropriate measure of the backpay (wages) due the 423 employees identified in the Specifications' appendices is the number of hours worked times the wage differential (i.e., the difference between the contractual hourly wage rate of \$15.47 and the reduced rate paid by the Respondent).

The rate for Journeymen is set out in Article 7 of the expired Collective Bargaining Agreement effective March 1, 1988 to March 3, 1991 ("CBA"), and applies only to a Journeyman, and not to an Apprentice. The Apprenticeship rates are lodged at Article 16 and require only a percentage of the rates Journeyman are paid, ranging from 35% to 85%. Article 16 also states that "Pension fund contributions required under Article 20 of this Agreement shall not be required for Grade 1 Apprentices." Neither the Administrative Law Judge's decision nor the Board's Second Supplemental Decision and Order accounts for those provisions, therefore the lodestar calculation of wage times hours worked is overstated and inaccurate. *See, e.g., Edward Cooper Painting*, 297 NLRB 627, 629 (N.L.R.B. 1990)("With respect to those employees the Respondents allege were apprentices either for some or all the backpay period, factual issues are raised both as to their status *and* the amounts of backpay due. If apprentice status is confirmed regarding those employees, the backpay amounts alleged in the amended compliance specification may need to be recalculated based on the applicable apprentice wage rate, if any.") Furthermore, Respondent's general denial on Specification 1 asserting the

exclusion of certain employees from the bargaining unit “is sufficient to raise a factual issue regarding the *status* of those [] groups.” *Id.* at 628.

It is not a foregone conclusion that each of the 423 employees listed in the Board’s Second Supplemental Decision and Order was eligible for Journeyman pay, nor were any such employees eligible for Pension Fund contributions in their Grade 1 Apprenticeships. It is a manifest injustice to charge Respondent with liabilities in those amounts without verifying the accuracy and propriety of the claimed figures.

Although Respondent has argued, (see, e.g., 3rd Defense to the original Compliance Specification), ad infinitum that the Union Security provisions in Article 4 of the CBA do not and did not survive the expiration of the Agreement (See *Industrial Union of Marine and Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3rd Cir. 1963); *Litton Business Systems v. NLRB*, 501 U.S. 190, 198-199 (1991); Ala. Code (1975) §§ 25-7-1, 6, 9, 30-35), the Board has consistently ignored those arguments. If these and other provisions of the CBA survived, then so did the Apprenticeship provisions governing the percentage wage requirements, as well as the language quoted above relieving Respondent of its obligation to make Pension Fund contributions for new Apprentices. (See also Respondent’s Second and Eleventh Defenses to its Answer to the Third Amended Compliance Specification for facts and evidence already submitted regarding such distinctions). Respondent respectfully requests the Board reconsider its Second Supplemental Decision and Order on those numbers, and insists that the General Counsel has not carried its burden of proof. See *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007).

The Arandess Case

The Board's Second Supplemental Decision and Order conflicts with its holding in *Arandess Management Co.*, 337 NLRB 245 (2001) regarding benefit contributions in summary fashion, stating it is distinguishable because (1) it involved relief owed to individual employees, rather than to benefit funds; and (2) it involved 2 sets of employees for one set of jobs requiring benefit contributions. Neither stated rationale invalidates the holding and its applicability to this case. Whether the relief was owed to the Fund itself, or to the Fund on behalf of the individuals is immaterial to this calculus; as stated succinctly in the holding:

[W]here the entirety of an individual's interest in a pension fund would be created in the first instance by Board-ordered contributions, it is self-evident that the individual has no preexisting interest in that fund sufficient to warrant ordering contributions in the first place..."

Id. at 249.

Absent a determination that each of the 423 persons listed in the Board's Second Supplemental Decision and Order possessed a non-speculative interest in the Pension Fund, the Board's creation of such an interest "in the first instance by Board-ordered contributions" runs contrary to law and basic fairness. Nor did the Board address the vesting issues associated with the Pension Fund that figured so prominently in the *Arandess* decision, as well as the other issues raised in Respondent's Tenth and Eleventh Defenses in its Answer to the Third Amended Compliance Specification. The Board's treatment of this holding presumes a vested interest and eligibility for the Pension Fund without proof or deliberation on those issues, and it ignores the real benefits conferred on Respondent's employees by Respondent's own fringe benefit plans.

This elevation of form over substance is manifestly unjust, and ignores the Eleventh Circuit's direction to consider Triple A's defense that "payments to the fringe benefit plans would not benefit any employee of Triple A, would result in a windfall to the funds, and would

be punitive in nature,” as also raised in Respondent’s Tenth Defense. See *N.L.R.B. v. Triple A Fire Protection, Inc.*, 169 LRRM 3172, 3173, 3176 (11th Cir. 2002). Respondent respectfully submits the Board erred in its summary disregard of the holding in the *Arandess* case, as well as the issues raised in its Tenth and Eleventh Defenses.

Respondent and Union Reached an Impasse AFTER Cessation of Payments

Respondent respectfully maintains that Respondent’s liability for the violations found in the underlying unfair labor practices proceeding ceased upon the impasse of the parties on or before April 16 of 1999. It is undisputed that respondent stopped paying fringe benefit payments on April 22, 1991. Respondent has put evidence before the Board (see chronology at Respondent’s Seventh and Twelfth Defense in its Answer to the Third Amended Compliance Specification) that makes clear that the Union’s failure to provide a complete contract – including Apprenticeships standards – thereby ceasing negotiations initially in early 1992, and the Union virtually admits this in its response to Respondent’s 1999 request for same, stating on April 16 of that year: “We cannot engage in a resumption of meaningful good faith bargaining with Triple A unless and until Triple A has complied with the NLRB’s Order and remedied its unfair labor practices.” (Respondent’s Seventh Defense in its Answer to the Third Amended Compliance Specification).

Board law, however, does not require this. See *N.L.R.B. v. Cauthorne*, 691 F.2d 1023, 1025, 222-223 U.S.App.D.C. 390, 392 (C.A.D.C.,1982)

On this score, we reject any presumption that an employer's unfair labor practice automatically precludes the possibility of meaningful negotiations and prevents the parties from reaching a good faith impasse. Not only is such a presumption highly speculative, *see Rayner v. NLRB*, 665 F.2d 970, 978 (9th Cir. 1982), but it is also an impermissibly punitive justification for continuing liability when good faith negotiations between the parties have exhausted the prospects of concluding an agreement. *Cf. id.* at 976-78 (rejecting Board's conclusion that bargaining against a background of unremedied unfair labor practices would have been “an

exercise in futility”).

□

We hold, therefore, that where an employer and a union have bargained in good faith, despite the employer's prior unilateral changes in wages or conditions of employment, the employer's ongoing liability for the unlawful unilateral changes terminates on the date when the parties execute a new agreement or reach a lawful impasse.

Id. See also *Dependable Maintenance Co.*, 274 NLRB 216 (1985); *L & L Wine and Liquor Corporation*, 323 NLRB No. 151, 848 (1997). As noted in Respondent’s Answer to the Third Amended Compliance Specification, the Board found *Dependable Maintenance* controlling on this issue (*Triple A*, 315 NLRB at 417 (1994)), and the Eleventh Circuit directed the Special Master to consider Respondent’s defense that “the Union refused to bargain with Triple A.” *NLRB v. Triple A Fire Protection, Inc.*, 169 LRRM 3172, 3173, 3176 (11th Cir. 2002). (See Respondent’s Seventh Defense, Answer to Third Amended Compliance Specification). The Board has consistently ignored the fact that the Union’s conduct can and did affect the obligations of the parties, and has consistently disregarded Board precedent on that issue.

The Union’s unwillingness to negotiate and piecemeal negotiating, for which Triple A filed charge 15-CB-3753 on January 15, 1992 – but clearly by April 16, 1999 – created a lawful impasse between the parties, or, in the alternative, shows the Union’s failure to negotiate in good faith. (See also Respondent’s Eighth Defense, Answer to Third Amended Compliance Specification, detailing the Union’s January 17, 1992 order to Gerald J. Andrews not to report to work). Respondent’s ongoing liability terminated on that date. Indeed, the Board must “guard against a union’s effort to falsely make it appear that bargaining progress is just around the corner.” *Grinnel Fire Protection Systems Company*, 328 NLRB 585 (1999) *enfd.* *Grinnel Fire*

Protection Systems Company, 236 F.3d 187 (2000), *cert denied*, 534 U.S. 818 (2001), Hurtgen dissenting). Respondent respectfully states the Board has not done this, and requests the Board reconsider its Second Supplemental Decision and Order as to the duration of Respondent's liability, which cannot continue indefinitely if one party to the negotiation refuses to submit counter proposals, or if one party refuses to bargain.

Technical Flaws in the Third Amended Compliance Specification

Under the Board's own Rules & Regulations Sec.102.55, the Board is required to state with great specificity the Respondent's alleged failure of compliance. The Third Amended Compliance Specification is deficient in at least the following ways:

The Union Security Agreement in relevant part provides –

If the Union is unable to furnish men to the Employer, and the Employer employs men not members of the United Association, these employees shall be paid the Journeyman's rate provided in the Agreement and contributions shall be made on the such employees to the various fringe benefit funds as provided in this Agreement.

1. The compliance specification did not allege and there is no evidence that Respondent requested employees from the Union under the Union Security Provision, as restated above.

2. The compliance specification did not allege and there is no evidence that the Union failed or refused to furnish Respondent with any employees.

3. The compliance specification did not allege that Respondent employed any person not a member of the United Association. Indeed, it appears that at least two of the employees hired by AAA after April 22, 1991, were members of the United Association, including Phillip Alan Thames and later, Richard Beckham.

WHEREFORE, Respondent Triple A Fire Protection, Inc. respectfully requests the Board grant its Motion to Reconsider the matters discussed above.

Respectfully submitted,

/s/ Edward A. R. Miller
Edward A. R. Miller
Counsel for Respondent Triple A Fire
Protection, Inc.
Jones, Walker, Waechter, Poitevent,
& Denegre L.L.P.
254 State Street
Mobile, AL 36603
Tel: (251) 432-1414
Fax: (251) 433-4106
emiller@joneswalker.com

CERTIFICATE OF SERVICE

I certify that on October 7, 2011, I served Respondent Triple A Fire Protection, Inc.'s Motion to Reconsider the Board's Second Supplemental Decision on the following parties using the electronic mail addresses indicated below:

Beauford Pines, Esq.
Regional Counsel for NLRB
(504) 589-6395
bpines@nlrb.gov

Natalie Moffett, Esq.
Counsel for United Association Of Journeymen
And Apprentices Of The Plumbing And
Pipefitting Industry Of The United States
And Canada, Road Sprinkler Fitters Local Union No. 669, AFL-CIO
Osborne Law Offices, P. C.,
4301 Connecticut Ave NW Suite 108
Washington, DC 20008-2304
(202) 243-3200
nmoffett@osbornelaw.com

/s/ Edward A. R. Miller
Edward A. R. Miller