

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AUSTIN FIRE EQUIPMENT, LLC

and

CASE 15-CA-19697

ROAD SPRINKLER FITTERS LOCAL
UNION NO. 669, U.A., AFL-CIO

Kevin McClue, Esq. and Catlin Bergo, Esq.,
for the General Counsel.

I. Harold Koretzky, Esq. and Stephen Rose, Esq.,
of New Orleans, Louisiana, for the Respondent.

William Osborne, Jr. Esq. and Natalie Moffett, Esq.,
of Washington, D.C. for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in New Orleans, Louisiana, on June 22 and 23, 2011. The charge was filed by Road Sprinkler Fitters Local Union No. 669, U.A., AFL—CIO (the Union) on July 29, 2010, and amended on August 4, 2010. A second amended charge was filed on November 30, 2010.¹ Based on the allegations contained in the charge and amended charges, the Regional Director for Region 15 of the National Labor Relations Board issued a complaint and notice of hearing on January 31, 2011.

The complaint alleges that based on Section 9(a) of the National Labor Relations Act (the Act) Austin Fire Equipment, LLC (Respondent) has been the exclusive collective-bargaining representative for an identified group of Respondent’s employees (the unit) since July 8, 2008. Based on the alleged 9(a) status, the complaint alleges that since February 4, 2010, Respondent has failed to continue in effect all the terms and conditions of an agreement; effective from April 1, 2007, to March 31, 2010. The complaint alleges that Respondent engaged in such conduct without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to such conduct and/or the effects of the conduct. Furthermore, the

¹ All dates are in 2010 unless otherwise indicated.

complaint alleges that since about April 1, 2010, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit and on or about July 13, 2010, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit. Finally, the complaint alleges that since on or about May 5, 2010, the Respondent has failed and refused to furnish to the Union certain information that is necessary for, and relevant to, the Union’s performance of its duties as the exclusive collective-bargaining representative of the unit.

On the last day of the hearing, counsel for the Acting General Counsel moved to amend the complaint to further allege that “since May of 2009, Respondent has been direct-dealing with employees.” The motion was based on testimony that Respondent’s owner met with certain employees and told them that he was giving them a wage increase contemporaneous with removing them from union benefits. I reserved ruling on the motion, giving the parties an opportunity to argue their positions in their posthearing briefs. In the posthearing brief, counsel for the Acting General Counsel asserts that after a review of the evidence in total, the allegation is withdrawn. Accordingly, I make no finding² with respect to the allegation of direct dealing and I grant the Acting General Counsel’s motion to withdraw this allegation.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Union, and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, with an office and place of business in Prairieville, Louisiana, and operations at construction jobsites at other Louisiana locations, has been engaged as a fire sprinkler contractor in the construction industry doing residential, commercial, industrial, and office construction. Annually, Respondent provides services valued in excess of \$50,000 for DOW Chemical Company, an enterprise directly engaged in interstate commerce. Respondent admits, and I find that Respondent is an employer within the meaning of the Act. The parties

² In brief, counsel for the Acting General Counsel submits that Respondent’s owner, Russell Ritchie, is not a credible witness and that his testimony is unreliable; even to prove a violation against Respondent; pointing out documentary evidence that contradicts Ritchie’s testimony. The Acting General Counsel also asserts that Respondent failed to produce records showing that 9 of the 10 employees who would have been affected by the direct dealing were in fact performing the requisite bargaining unit work to qualify for the increased wage as Ritchie testified. Counsel requests that I draw an adverse inference against Respondent for its failure to produced payroll documents and personnel records for the nine employees who would have been affected if Respondent had engaged in direct dealing as Ritchie’s testimony suggests. Counsel also contends that an adverse inference should be drawn against Respondent for failing to call the nine sprinkler fitters to testify in its case in chief. Inasmuch as the Acting General Counsel withdraws the allegation of direct dealing, and makes no assertion that the personnel documents or the testimony of the employees is necessary to prove any other allegations, I find no basis to draw the adverse inference as requested. Furthermore, although such records will be necessary for a compliance analysis to determine the total backpay amount owed to employees because of Respondent’s failure to adhere to contract terms, these records are not required to prove the underlying complaint allegations that necessitate a finding in this decision.

also stipulate and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

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A. Background

Russell Ritchie (Ritchie) is the owner and president of Austin Fire Equipment, LLC (Respondent); establishing the Company in September 1999. After receiving his professional engineering license in 2000, Ritchie expanded his business to include servicing all types of fire protection systems including sprinkler systems and clean agent systems. In 2006, Respondent secured a contract with DOW Chemical Company (DOW), providing work for Respondent at all DOW sites in Louisiana. By June 2007, Respondent employed approximately 40 employees and by July 2008, Respondent employed approximately 55 employees.

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B. Respondent’s First Agreement with the Union

On June 5, 2007, Ritchie, in his capacity as owner and president, entered into a one-job project agreement with the Union for work that would be performed in Minden, Louisiana; a jobsite located 2 to 3 hours away from Respondent’s Prairieville operation. Ritchie testified that at the time that he obtained the contract to do the work in Minden, he employed only three or four sprinkler fitters and he didn’t like to send his employees to work out of town and away from their families. Union Organizer Donnie Irby (Irby) and Union Business Agent Tony Cacioppo (Cacioppo) told Ritchie that they could supply two additional employees to him for the Minden job. Ritchie agreed and entered into the one-job project agreement. The agreement terms provided that the agreement would become effective on June 11, 2007, and would remain in effect through the completion of the project that was estimated to last approximately 6 months. The agreement additionally provided that the Union would supply sprinkler fitters and that Respondent would agree to be bound by the 2007—2010 agreement between the National Fire Sprinkler Association Inc.³ and the Union (NFSA agreement) with respect to the work performed on the Minden project. Ritchie testified that he understood that under the terms of the agreement, he was required to pay a specific rate. Pursuant to the agreement, Respondent paid the two employees referred by the Union the collective-bargaining agreement’s hourly rate and Respondent made fringe benefit payments to the Union on behalf of these two employees.

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C. Respondent’s Second Agreement with the Union

In May 2008, Respondent was awarded a contract with Valero Refinery. In order to perform the job, Ritchie would need at least 12 sprinkler fitters for a period of up to 6 months. Prior to July 8, 2008, Ritchie met with Cacioppo and Irby concerning his need for sprinkler fitters for the Valero Refinery job. Ritchie testified that while he asked about a one-job agreement, the union representatives told him that would not be possible. Ritchie testified that he told the union representatives that in lieu of hiring people off the street or putting an ad in the paper, he would be willing to sign a 1-year agreement with the Union. He contends that he told

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³ The National Fire Sprinkler Association, Inc. is an association of contractors who also work on codes and promote the fire industry

5 them that only after he tried it out, would he proceed beyond the first year of the agreement. He testified that both Irby and Cacioppo agreed to a 1-year agreement. Ritchie testified that after meeting with the Union and before signing an agreement, he told him employees that the company needed the Valero job and he was considering signing an agreement with the Union for only a year. No evidence was offered to rebut his testimony concerning what he told his employees in advance of signing the agreement.

10 Ritchie and his estimator met with Union Representatives Cacioppo, Irby, and Union Representative William Puhalla (Puhalla)⁴ on July 8, 2008, to sign the agreement. Ritchie testified that it was at that time that the union representatives gave him a copy of the NFSA agreement. The union representatives pointed out that the agreement covered all sprinkler work involving installation and maintenance and they also explained that the agreement covered the period between April 1, 2007, and March 31, 2010. Ritchie testified that it was at that point in the meeting that he reminded the union representatives that he had only discussed a year's agreement and the NFSA agreement presented to him was scheduled to continue for another year and 8 months. Ritchie contends that the Union told him that his agreement with the Union would have to continue through the entire period designated in the NFSA agreement, explaining that the agreement "just needs to be done that way." Ritchie recalls that he told them that while that was not what they had discussed, he nevertheless believed that the relationship with the Union would help his company to grow.

20 On July 8, 2008, Ritchie signed the two-page signatory agreement, agreeing to be bound by all the terms and conditions of the NFSA agreement. Respondent did not join the NFSA. At the time that Ritchie signed the signatory agreement, he was also given a document entitled "Acknowledgement of the Representative Status of Road Sprinkler Fitters Local Union No. 669, U.A. AFL—CIO" (the Acknowledgement). The document included the following wording:

30 The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ are members of, and are represented by Road Sprinkler Fitters Local Union No. 669, U.A., AFL—CIO, for the purposes of collective bargaining.

35 The Employer therefore unconditionally acknowledges and confirms that Local Union 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

40 Ritchie testified that the union representatives told him that if he wanted the 12 or 13 sprinkler fitters for the job, he would have to sign the documents given to him. He further testified that at that time he had no other employees that he could send to the Volero job. On direct examination, Ritchie testified that he did not recognize the signed Acknowledgement, however, he did not dispute that his signature appeared on the document. Ritchie testified that at the time that he signed the Acknowledgement none of the union representatives explained to him the need for his signing the document. They told him only that if he wanted to create a relationship with the Union he needed to sign the documents. Ritchie testified that while the Union gave him a copy

⁴ Puhalla is the assistant business manager for the Union's Southern Region.

of the signatory agreement the union representatives did not give him a copy of the signed Acknowledgement.

5 At the time that Ritchie signed the Acknowledgement, the Union did not present or offer to present evidence to Respondent that it represented a majority of Respondent's sprinkler fitters. The Union did, however, explain that all of the 14 existing sprinkler fitters would have to be covered by the agreement. After signing the agreement, Ritchie met with his employees and told them that they needed to join the Union if they wanted to continue employment with Respondent. Ritchie instructed them to contact Cacioppo to get the information that they needed
10 to become union members. Ritchie testified that he gave them this instruction because it was his understanding that anyone turning a wrench or touching a piece of pipe either underground or above ground had to be covered by the agreement and had to work as a union member. Ritchie testified that all of his employees with the exception of one were against joining the Union. Ritchie told them to trust him because it would be a good move for the Company.

15 The Union and Respondent also agreed that approximately 24—25 sprinkler fitters who serviced the Dow Chemical sites would not be covered by the agreement. Ritchie told the union representatives that there was no way that he could afford to pay the additional fringe benefits to include these employees in the agreement and the Union agreed. Cacioppo testified that Ritchie told the Union that the employees working at Dow performed work other than just fire protection or sprinkler work. Additionally, Respondent had a 3-year contract with Dow that provided for certain benefits that were not covered by the NFSA agreement. Cacioppo recalled that the Union agreed that these employees would be excluded from the agreement and the possibility of their inclusion would be revisited after the termination of the 3-year Dow contract.

25 ***D. The Operation of the Union Agreement***

30 After signing the July 8, 2008 signatory agreement, Respondent began paying the hourly rates and making the benefit contributions provided for in the master agreement. Once Respondent signed the 2008 agreement with the Union, employees were referred to Respondent by the Union. If employees independently contacted Respondent for work, Respondent contacted the Union informing the Union that Respondent wanted to employ the individual. The parties stipulated that 19 employees were referred by the Union and were employed for various lengths of employment after July 9, 2008, and during 2008, 2009, and 2010. One of the
35 employees remained in Respondent's employ at the time of the hearing. Five of these employees began working for Respondent by the end of July 2008. The parties also stipulated that Respondent employed six other employees during the period between October 20, 2008, and September 11, 2009, who were not referred by the Union. Respondent notified the Union that it hired each of the employees and all of the six employees completed an application to join the
40 Union either before they were hired or within approximately 6 weeks after they were hired. Furthermore, the parties stipulated that Respondent hired five additional employees between June 3, 2009, and December 29, 2010, and the Union maintains that these individuals were not referred by the Union.

E. The Union's Financial Assistance to Respondent

5 The Union maintains a program that provides regional incentive grants to certain
employers. The program is designed to assist the transition for nonsignatory contractors into
becoming signatory contractors. The program provides for the Union and the contractor to agree
on a specific amount that is paid to the contractor over a period of time. After signing the
signatory agreement, the Union agreed to give Respondent a total grant of \$100,000. The grant
was paid by the Union's remitting \$4 an hour for every hour worked by the bargaining unit
10 employees; and based on the information that Respondent provided to the Union's national
office in Maryland. The program is only available to a new contractor who is not already a
signatory contractor.

F. Respondent's Contacts with the Union in April 2009

15 Cacioppo recalled that during a January 2009 telephone call Ritchie told him that he was
having a hard time paying his bills. Ritchie told Cacioppo that while the regional incentive grant
had been helpful he was still having problems. Cacioppo and Irby approached the Union's
national office and asked if the grant money could be accelerated. As a result of their contact,
20 the grant remittance to Respondent increased to \$16 an hour. The grant was finally exhausted in
March 2009.

Ritchie testified that after signing the agreement, and until April 2009, he paid all the
bargaining unit employees everything that was required by the collective-bargaining agreement.
25 He testified that in April 2009, however, he found himself a half million dollars in debt and on
the way to bankruptcy. He recalled that the Union had told him that once he became a signatory
contractor the Company would grow and he would be able to get prevailing wage work. Ritchie
asserted, however, that Respondent did not get any of the jobs that the Union had promised him
as a union contractor. Furthermore because of the high labor costs, Ritchie believed that he was
30 about to lose his entire company.

In April 2009, Ritchie telephoned Cacioppo and told him that he was continuing to have
financial problems and he asked to talk with Cacioppo. When Cacioppo and Irby went to
Respondent's office, Ritchie told them that he really needed to get out of his contract with the
35 Union. Cacioppo testified that he told Ritchie that he was signatory to the contract and he could
not get out of the agreement. Cacioppo asserts that he discussed other options that might be
available to Respondent, including the use of another type of grant program. When Ritchie told
the union representatives that he was not going to bid any more construction work, Cacioppo and
Irby told him he would only have to pay a remittance for the employees that were working.
40 They suggested that if employees weren't working he would not have much remittance to pay.

Ritchie followed up the meeting with an email to Cacioppo on April 30, 2009. In the
email, Ritchie again stated his need to be relieved of the contract. Ritchie explained that he had
no choice at that point other than to request relief from the collective-bargaining agreement "for
45 the time being." He suggested that he could do job agreements for existing jobs and future jobs
to assure employment for the sprinkler fitters who had been referred by the Union. In support of

his request, Ritchie attached a copy of Respondent’s profit-and-loss financial statements for the period from October 2008 through April 2009. Ritchie requested that Cacioppo set aside some time to meet with him.

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G. The May 5, 2009 Meeting

On May 5, 2009, Russell Ritchie and his wife Karen Ritchie met with Irby and Cacioppo at a restaurant in Baton Rouge, Louisiana. Cacioppo was seated across the table from Karen Ritchie and Irby was seated across from Russell Ritchie. Ritchie recalls telling the union representatives that his company was failing because of the agreement that he signed with the Union. He went on to explain that his plan was to remove all of his core people from the contract and put them back on their previous pay rates as well as to put them back on Respondent’s benefit plan including their insurance and 401 (k) plan. Ritchie testified that he assured the Union that he would continue to pay the fringe benefits for the employees who had been referred by the Union for as long as he needed them. Ritchie testified that during this meeting the Union agreed to “look the other way.” Ritchie recalled that he also suggested that if “anything ever comes up on this” the Union could simply say that his employees taken out of the contract had gone to work at Dow where they would not have been covered by the agreement. Karen Ritchie also testified that Ritchie told Cacioppo and Irby that he was pulling his employees out of the contract coverage. She asserted that when Ritchie told them about his plans, Cacioppo responded, “[D]o what you have to do; we are here to help you.”

Cacioppo recalled that he did not talk with Ritchie very much during their lunch. He said that he talked “a lot” to Karen Ritchie and that she told him the same things that Ritchie had already said about not paying the contract rate and benefits to some of Respondent’s employees. Cacioppo recalled that Ritchie talked about his going bankrupt and his need to get out of the contract. Cacioppo testified that he had earlier told Ritchie that there was no way that the Union could let him out of the contract. Cacioppo recalled that he told Karen Ritchie that the Union could not agree to what Ritchie proposed because it would not be fair to all the signatory contractors.

Irby recalled that Ritchie talked about his financial troubles and the possibility that he would file for bankruptcy and Ritchie asked Irby to help him get out of the contract. Irby recalled that he had just listened to Ritchie and tried to be compassionate. He recalled telling Ritchie that if he didn’t have that many people working it shouldn’t cost him that much money under the contract. Irby testified that he told Ritchie that the Union could look at ways to help him through the Union’s industry advancement program or by prorating apprentices. He did not identify any assistance that was specifically offered to him during the meeting. Irby testified that because they were in a restaurant there was a lot of noise in the background and he didn’t really know what Cacioppo and Karen Ritchie were discussing. He testified without equivocation, however, that no one from the Union said that the Union would look the other way or told Ritchie to do what he had to do.

H. Respondent’s Treatment of the Agreement after May 2009

5 The record reflects that prior to May 2009 Respondent followed the terms of the contract
 for all the sprinkler fitters employed by the Respondent. As of April 30, 2009, Respondent
 employed 10 of the original 14 sprinkler fitters who joined the bargaining unit after Respondent
 signed the July 8, 2008 agreement. Ritchie testified that after his meeting with the Union in May
 2009 Respondent stopped paying his original sprinkler fitters in accordance with the collective-
 bargaining agreement. He testified that before doing so, he talked with each of these employees
 10 and told them that he was taking them out of the bargaining unit and that they would be paid
 equal pay to what they had received under the contract. Ritchie testified that he raised the salary
 of the original 10 sprinkler fitters in order to compensate them for any increase in their out-of-
 pocket insurance costs. Ritchie testified that he continued to pay wages and benefits pursuant to
 the contract for the employees who were referred by the Union under the agreement.

15 The fringe benefit funds report that Respondent provided to the Union’s Maryland office
 on April 1, 2009, reflects that 5 of the original 10 sprinkler fitters worked and received fringe
 benefits under the collective-bargaining agreement. The report dated May 1, 2009, shows that
 original sprinkler fitter R. Shannon worked 30 hours without any payment of fringe benefits.
 20 Although original sprinkler fitter A. Anderson is listed in the report, he is shown as having
 worked no hours. The fringe benefits fund report for June 1, 2009, shows that original sprinkler
 fitter S. Rogers worked 176 hours and was covered for fringe benefits. Thereafter, and for the
 period from July 2009 through June 2010, the only original sprinkler fitter who was shown to
 have worked and to have received fringe benefits under the contract was S. Rogers. None of the
 25 other original sprinkler fitters are shown to have worked any hours during that period of time.
 While many of the reports include some of the names of the original sprinkler fitters, their hours
 worked are shown as zero hours. Rogers is the only original sprinkler fitter listed in the reports
 as having hours worked and fringe benefits paid during July, August, and September 2009. No
 other hours for Rogers are recorded thereafter. In September 2009, Rogers was transferred to the
 30 nonbargaining unit position of inspector.

I. Evidence Concerning the Union’s Knowledge of Respondent’s Contract Repudiation

1. Employee Brendan Clements

35 On June 3, 2009, Respondent hired Brendan J. Clements (Clements) without notifying
 the Union. In September 2009, after hearing from Irby that Respondent had hired Clements and
 that Clements was not being paid according to the collective-bargaining agreement, Cacioppo
 contacted Ritchie. Ritchie testified that Cacioppo telephoned him and asked him to terminate
 40 Clements because Clements was “running his mouth to other union members” about
 Respondent’s employing nonunion employees. Cacioppo recalled that he and Irby met with
 Ritchie at Respondent’s office. Cacioppo further recalled that Ritchie confirmed that while
 Clements was working he was scheduled for a layoff the following Friday. Cacioppo testified
 that he did not tell Ritchie to lay off Clements; simply to pay him according to the collective-
 bargaining agreement. Cacioppo admitted that he was not sure if he actually asked Ritchie
 45 whether he was paying Clements according to the contract. He acknowledged that he did not

make an independent check to determine whether dues assessments or fringe benefits were being paid for Clements. He admitted that such information would have been available to him. The parties stipulated that the last date of employment for Clements was September 27, 2009.

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2. Employee Bryan Harris

10 Bryan Harris (Harris) began working for Respondent in July 2008 and shortly thereafter he joined the Union. Before he began working for Respondent, Harris did not have any experience in sprinkler fitting. He recalled that either Cacioppo or Irby told him that he would have to complete an apprenticeship program. Although Harris began the apprenticeship program, he later received notice from the Union informing him that if he did not timely submit his fees and complete the lessons he would “be kicked out of the Union.” Harris additionally recalled that soon after the Company “wasn’t going to be Union anymore,” Cacioppo telephoned him and asked whether Harris was going to “stay with Russell” or come with the Union. When 15 Harris asked Cacioppo about work availability, Cacioppo told him that while there would be union work, the work would be out of town. Cacioppo testified that he did not recall speaking with Harris around the April 2009 timeline.

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3. Employee Shannon Rogers

Shannon Rogers (Rogers) began working for Respondent in October 2007 and has continued to work for Respondent since that time. He recalled that in the summer of 2008 the Company “went union.” After Ritchie told the employees that he had signed with the Union, Rogers applied for union membership on July 23, 2008. When Rogers joined the Union, he was 25 told that 5 years’ experience was needed to become a journeyman sprinkler fitter. Because he only had 3 years’ experience, he began the Union’s apprenticeship program.

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Rogers could not recall the date when Respondent again became nonunion. He recalled however, that within 2 weeks of Ritchie’s announcement to the employees that the Company was going to be nonunion he telephoned Cacioppo. He asked Cacioppo if he could continue in the apprentice program and stay with the Union if Respondent “was going nonunion.” Rogers testified that Cacioppo told him that he could continue in the apprentice program as long as his dues were paid. Cacioppo added that if Ritchie would let him remain in the Union and continue to pay dues, he could finish his apprentice program. Cacioppo recalled that he spoke with Rogers in September 2009 when Rogers notified him that he was leaving the apprenticeship program and taking a job outside the bargaining unit. Cacioppo testified that Rogers “had the facts wrong” concerning their conversation. Cacioppo testified that his discussion with Rogers had involved Rogers’ qualifying as a registered apprentice rather than about Rogers staying in the Union.

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4. Henry Fajardo

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Henry Fajardo (Fajardo) and Angelo Arnone Jr. (Arnone) were both referred by the Union to work for Respondent and they began their employment on July 9, 2008. Although Fajardo continued to work for Respondent until July 1, 2010, Arnone left his employment in

May 2009.⁵ Fajardo testified that based on his discussion with Arnone, it was his understanding that Arnone left his employment with Respondent because he did not want to deal with Respondent’s becoming nonunion. Fajardo also spoke with some of the sprinkler fitters who had worked for Respondent before Respondent entered into the agreement with the Union. He learned that they were leaving the Union. During the same week that Fajardo spoke with Arnone, Fajardo telephoned Cacioppo. Fajardo told Cacioppo that other employees were going nonunion and he didn’t want to be in violation of the Union’s rules by working with nonunion employees. He asked Cacioppo what he should do. He recalled that Cacioppo told him to “just keep on working.” He recalled that Cacioppo mentioned that the Union was supposed to sit down and talk with Respondent and in the meantime, he could continue to work beyond the contract. Fajardo additionally testified that on one other occasion he contacted the Union when he was working on a job with all nonunion employees. When Fajardo asked what he should do, Cacioppo told him to just continue to work while “they” were sitting “on the table, talking about it.” Fajardo testified that none one from the Union ever called him back to let him know that he should stop working for Respondent.

J. The Expiration of the Collective-Bargaining Agreement

The agreement between the National Fire Sprinkler Association, Inc. and the Union was scheduled to expire on March 31, 2010. By letter dated December 4, 2009, the Union notified Respondent of its intention to terminate the exiting collective-bargaining agreement as of March 31, 2010, and to negotiate a new agreement to be effective April 1, 2010. In the letter, the Union’s business manager, John D. Bodine Sr, expressed his concerns that because the negotiations for a new agreement would not begin until a few months before the expiration of the contract the parties might not be able to reach a new agreement in a timely manner. Bodine explained that in order to avoid even the possibility of a work stoppage against independent contractors he was asking Respondent as a contractor to sign an Assent and Interim Agreement form. On April 16, 2010, Cacioppo sent Ritchie a letter asking for dates when Ritchie would be available to meet and to begin bargaining a successor collective-bargaining agreement.

Ritchie testified that although he met with Union’s representatives on May 13, 2010, he did not do so willingly. He testified that the Union’s representatives told him that if he wouldn’t meet with them he would be involved in litigation. Ritchie testified that because of the financial predicament of his company he did not want litigation. When he met with the Union on May 13, 2010, Ritchie presented a letter notifying the Union that he was providing written notice of his desire to terminate his participation in the collective-bargaining agreement within 60 days.

The parties met again on June 15 and 29 and July 13, 2010. Cacioppo testified that in all four of the meetings, Ritchie told the Union that he would be interested in a project-by-project agreement with the Union. Cacioppo testified that the Union told Ritchie that they were meeting in order to negotiate a whole new contract with him. Cacioppo clarified that because the Respondent was an independent contractor, the Union was not referring to a successor agreement

⁵ The parties initially stipulated that Arnone’s dates of employment were July 9, 2008, to May 6, 2009. During the hearing, counsel for the Acting General Counsel withdrew from this stipulation, asserting that Respondent’s records reflected that Arnone left employment on May 2, 2009. Neither the Respondent nor the Charging Party objected to May 2, 2009, as the last date of employment for Arnone.

with the NFSA, but rather a whole new agreement with Respondent. Puhalla testified that if a contractor is not a member of the NFSA, the contractor has the option of signing an Assent Interim Agreement in which the contractor agrees to be bound by the terms of the agreement between the Union and the NFSA. If the contractor does not sign the assent agreement, the Union will negotiate a new independent agreement with the contractor. Cacioppo also testified that while Respondent wanted to negotiate a project-by-project agreement, the Union did not consider that to be an option as the Union was seeking a contract that falls under article 18 of the collective-bargaining agreement between the Union and the National Fire Sprinkler Association, Inc.; the article that defines the jurisdiction of work to be performed by sprinkler fitters and apprentices.

K. The Union's Request for Information

Prior to the meeting with Ritchie on May 13, 2010, the Union sent Ritchie a letter requesting certain information. In the May 5, 2010 letter, Puhalla explained that certain information was requested for the purpose of bargaining for a new collective bargaining agreement. Specifically, the Union requested the names, dates of hire, job titles/and or classifications as well as the rates of pay and fringe benefits for all of Respondent's employees who had installed, repaired, or maintained fire protection systems since January 1, 2010. The Union also requested any changes in the rates of pay and the amounts of such changes as well as information on all current jobs and projects for Respondent. Finally, the Union requested copies of all company handbooks, policies, or rules instituted or maintained since January 1, 2010. Puhalla testified that when Ritchie met with the Union on May 13, 2010, he only inquired about the Union's need for the list of employees. Puhalla told Ritchie that the information was needed in order that the Union could look at wages for a new contract. Puhalla testified that while Ritchie provided the Union with a copy of the company handbook and a profit-and-loss statement during the May 13, 2010 meeting, he did not provide any of the other requested information.

On May 17, 2010, Puhalla sent another letter to Ritchie reminding him of the May 5, 2010 request for information. Puhalla stated in the letter that while Ritchie had provided some information during the May 13, 2010 meeting, the information was incomplete. Puhalla confirmed that he was including a copy of the May 5, 2010 letter and he requested that Respondent provide the information prior to the upcoming June meeting. Puhalla also asked that Respondent confirm a meeting date from one of the Union's proposed dates in June.

In a May 27, 2010 fax to Respondent, Puhalla confirmed a June 15, 2010 meeting date and renewed the request for the "missing information" that had not been provided. After the parties met on June 15, 2010, Puhalla sent another letter to Ritchie on June 25, 2010, confirming the next meeting for June 29, 2010, and renewing his request for the information that Respondent had not provided. During the meeting on June 29, 2010, Respondent provided a list of working employees and also a list of employees that were working on the U.S. Coast Guard project and the Marriott project. During the hearing, the parties stipulated, however, that the list of employees provided by the Respondent on June 29, 2010, did not include the names of all of the employees who were performing installation, maintenance, and repair of fire protection systems for the period of time included in the May 5, 2010 request. The parties also stipulated that

Respondent’s information provided on June 29, 2010, represent the Coast Guard and Marriott projects, but did not include all of Respondent’s fire protection jobs/projects, including service work and underground work that Respondent had during the period of time referenced in the Union’s May 5, 2010 request.

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Cacioppo testified that when the parties met for the last time on July 13, 2010, Ritchie announced that if Puhalla asked for any more information he would “throw up his hands.” Puhalla testified that other than the listing of employees and their rates of pay that were provided on June 29, 2010, Respondent never provided the remaining requested information concerning Respondent’s employees. Furthermore, Respondent did not provide the addresses for the employees or the addresses for the projects that were encompassed by the May 5, 2010 information request. No evidence was presented that Respondent provided any information concerning employee fringe benefits, changes in the pay rates or fringe benefits, or copies of any other policies or rules other than the company handbook that were covered by the May 5, 2010 information request.

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L. The Parties’ Negotiations in May and June 2010

The record reflects that the only proposal that Respondent made during the meetings in May and June 2010 was the proposal of June 29, 2010. The document was captioned “Proposal” and it included the following:

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I respectfully offer the following proposal to end negotiations with Austin Fire Equipment, LLC for signing a new collective bargaining agreement:

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The existing collective bargaining agreement made between Austin Fire and Local 669 will be terminated NLT July 2, 2010.

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Any work that Austin Fire Equipment receives where we determine a need for the Local 669 labor force to execute the job will be handled on a one time job agreement.

Ritchie testified that he had selected the July 2, 2010 termination date after he became aware that the earlier agreement “was still going” and that he was bound by it; a conclusion that he drew from the Union. He began reading through the Board’s guidelines and then came up with the date based on the literature and the Board’s guidelines. He testified that it was his intent to end the contract.

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The last meeting occurred on July 13, 2010. Cacioppo, Irby, and Ritchie were present. Cacioppo testified that when Ritchie came into the meeting he told them that he “wasn’t going to do this anymore” and he was not going to give them any more information. Cacioppo recalled that Ritchie also told them that he had an attorney and that he would take his chances with the Board. He told them that he wanted to reach impasse and did not want to negotiate any further. Cacioppo acknowledged that the term impasse had been used in previous sessions and that Puhalla had actually used the term during the first bargaining session when he stated that the parties had to negotiate a contract in good faith or reach impasse. The parties stipulate that since

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July 13, 2010, neither party has contacted the other party to schedule a meeting, and there have been no further meetings or requests for information.

III. ANALYSIS AND CONCLUSIONS

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A. Prevailing Legal Authority

Under Sections 9(a) and 8(a)(5) of the Act, employers are obligated to bargain only with unions that have been “designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes.” 29 U.S.C. § 159. There is, however, an exception to this majority support requirement for the construction industry. Under this limited exception, an employer may sign a “prehire” agreement with a union regardless of whether a majority of the employees support the union’s representation. 29 U.S.C. §158 (f). The exception was designed to accommodate the unique situation in the industry where contractors and subcontractors are in close relationship on the jobsite, employment is sporadic in nature, and the employers need a ready supply of skilled employees and advance information concerning labor costs. *Los Angeles Building & Construction Trades Council*, 239 NLRB 264, 269 (1978). Additionally, union organizing campaigns are complicated by the fact that employees frequently work for multiple companies over short, sporadic periods. *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534 (D.C. Cir. 2003).

As an 8(f) prehire agreement is not established by a showing of majority support, there is no presumption of majority status for the signatory union. *J & R Tile*, 291 NLRB 1034, 1036 (1988). In its decision in *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), enfd. sub nom. *Ironworkers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), the Board held that parties entering into an 8(f) agreement will be required by virtue of Section 8(a)(5) and Section 8(b)(3) to comply with the agreement during its term, in the absence of a Board-conducted election where employees vote to change or reject their bargaining representative. Following the expiration of an 8(f) agreement, however, the union enjoys no presumption of majority status and either party may repudiate the 8(f) bargaining relationship. *Id.* at 1377—1378. Thus, the distinction between a union’s representative status under Section 8(f) and under Section 9(a) is significant because an 8(f) relationship may be lawfully terminated by either the union or the employer upon the expiration of their collective-bargaining agreement. *Id.* at 1386—1387. By contrast, a 9(a) relationship and the derivative obligation to bargain continues after the contract expires, unless and until the union is shown to have lost majority support. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001).

As a general rule, the Board presumes that construction industry bargaining relationships are governed by Section 8(f) of the Act and that the union and the employer intended their relationship to be governed by Section 8(f), rather than 9(a). *Deklewa* at 1386—1387. Consequently, the Board imposes the burden of proving the existence of a 9(a) relationship on the party asserting that such a relationship exists. *Verkler, Inc.*, 337 NLRB 128, 129 (2001); *H.Y. Floors & Gameline Painting*, 331 NLRB 304 (2000); *Casale Industries*, 311 NLRB 951, 952 (1993). In *Deklewa*, the Board explained that the party could meet this burden by showing that a construction industry employer voluntarily recognized a union “based on a clear showing of majority support among the unit employees, e.g., a valid card majority.” *Id.* at 1387 fn. 53. In

a later decision in *J & R Tile*, 291 NLRB 1034, 1036 (1988), the Board went on to explain that to establish voluntary recognition, there must be positive evidence that a union unequivocally demanded recognition as the employees’ 9(a) representative and that the employer unequivocally accepted it as such.

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In recent years, the Board has also held that voluntary recognition under Section 9 (a) may also be established solely by the terms of a collective-bargaining agreement that meets certain minimum requirements. *Staunton Fuel & Material*, 335 NLRB 717, 719—720 (2001). In *Staunton Fuel & Material*, the Board explicitly adopted the standards set forth by the United States Court of Appeals for the Tenth Circuit in *NLRB v. Triple C Maintenance, Inc.*, 219 F. 3d 1147 (2000), and *NLRB v. Oklahoma Installation Co.*, 219 F. 3d 1160 (2000), denying enf. 325 NLRB 741 (1998). Specifically, the Board held that a recognition agreement or contract provision will be independently sufficient to establish a union’s 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer’s recognition was based on the union’s having shown, or having offered to show, evidence of its majority support. *Id.* at 720.

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Since the Board’s decision in *Staunton Fuel & Material*, the courts and the Board have continued to scrutinize the specific agreement or contract language to determine if the language independently establishes the 9(a) status relationship. In *Nova Plumbing, Inc., v. NLRB*, 330 F.3d 531, 536 (D.C. Cir. 2003), the employer argued that reliance on contract language alone directly contradicts *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961); a case in which the Court held that a 9(a) collective-bargaining agreement recognizing the union as the employees’ exclusive bargaining representative “must fail in its entirety” because at the time the agreement was signed, only a minority of the employer’s employees had actually authorized the union to represent their interests. *Id.* at 737. The Court determined that the contract language, the parties’ intent to form a binding section 9(a) agreement, and the parties’ good-faith belief of majority status could not overcome the fact that the union actually lacked majority status. In agreeing with the employer, the D.C. Circuit opined that the proposition that contract language standing alone can establish the existence of a 9(a) relationship “runs roughshod” over the principles established in *Garment Workers* because it completely fails to account for employee rights under Sections 7 and 8(f). The court also noted, however, that in reaching this conclusion, it did not mean to suggest that contract language and intent are irrelevant. The court added; “To the contrary, they are perfectly legitimate factors that the Board may consider in determining whether the *Deklewa* presumption has been overcome.” Furthermore, the court explained that standing alone; contract language and intent cannot be dispositive where the record contains strong indications that the parties had only an. 8(f) relationship. *Id.* at 537.

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In its 2007 decision in *Madison Industries*, 349 NLRB 1306, the Board again reviewed the parties’ rights and obligations under Sections 8(f) and 9(a) with respect to contract language. Referring to both the Tenth Circuit’s decision in *Oklahoma Installation Co.*, 219 F.3d 1160 (2000), and its earlier decision in *Staunton Fuel & Material*, the Board held that in determining whether the presumption of an 8(f) status has been rebutted, the Board will first consider whether the agreement, examined in its entirety, conclusively notifies the parties that a 9(a) relationship is intended. If it does so, the presumption of Section 8(f) has been rebutted. If the parties’

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agreement does not do so, the Board considers any relevant extrinsic evidence bearing on the parties’ intent as to the nature of their relationship. *Id.* at 1308.

B. Whether the Parties’ Agreement Established an 8(f) or a 9(a) Relationship

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Complaint paragraph 10 alleges that at all material times since July 8, 2008, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit. In support of this allegation, the Acting General Counsel submits that the acknowledgement form that Respondent signed on July 8, 2009, satisfies each element of the test set forth by the Board in *Staunton Fuel & Material*. Furthermore, counsel for the Acting General Counsel contends that in two cases⁶ that preceded *Staunton Fuel & Material*, the Board found identical acknowledgement language to create a 9(a) relationship with the signatory employers, and that by proffering the acknowledgement to the Respondent, the Union made an “unequivocal demand” for 9(a) recognition that Respondent “voluntarily and unequivocally granted.” Although these two cases cited by the Acting General Counsel involve the Union’s use of similar language in other agreements, the circumstances of the two cases are significantly different from those in the current case.

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The acknowledgement form signed by the respondent in *Triple A Fire Protection*, above at 1088, contains the following language:

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The Employer executing this document below has, on the basis of objective and reliable information confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, Road Sprinkler Fitters Local Union No. 669, U.S., AFL—CIO for purposes of collective bargaining.

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The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

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Thus, not only is the language identical to the language involved in this case, the language is proffered by the very same labor organization. The similarity however, stops there. In *Triple A Fire Protection*, the union and the employer had been parties to successive national collective-bargaining agreements at the time that the respondent signed the acknowledgement form. By letter, the union requested that the employer sign the form recognition agreement for the purpose of soliciting the respondent’s cooperation in minimizing any possible disruption to their relationship that might otherwise arise because of the Board’s *Deklewa* decision. Furthermore, the union also included with the letter a list of the employees who constituted the basis for its assertion that it represented a majority of the employees. In finding that the respondent employer granted recognition to the union as the 9(a) representative, the Board specifically noted that the union proffered documentary evidence which was purported to support the union’s claim of majority status. Additionally, the Board asserted that it would not entertain the respondent’s claim that a majority status was lacking at the time of recognition as the

⁶ *Triple A Fire Protection, Inc.*, 312 NLRB 1088 (1993), and *MFP Fire Protection*, 318 NLRB 840 (1995).

respondent had voluntarily recognized the union as a 9(a) representative in 1987 and then waited 4 years to object.

In *MFP Fire Protection*, there was no dispute that the relationship between the union and the employer began as an 8(f) prehire agreement. The issue before the Board was whether the relationship was converted to a 9(a) relationship after the employer later signed one or more written agreements containing acknowledgements that the union was the 9(a) representative of the employees. Additionally, over a period that began in November 1984 and continuing for a period of almost 10 years, the employer entered into successive agreements with the union and honored all terms and conditions established by successive association agreements. In October 1987 and during the term of the 1985—1988 association agreement, the employer signed a separate document; an acknowledgement of representative. This acknowledgement form contained identical language to that in issue in this case; affirming that the employer, “on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters” were members of, and represented by, the union. In finding that the agreement was converted to a 9(a) relationship in October 1987, the judge, who was affirmed by the Board, found the case to be identical and controlled by the Board’s decision in *Triple A Fire Protection*. Specifically, the judge analogized the circumstances before him to those in *Triple A Fire Protection*; noting the employer’s attempt to impeach the acknowledgement many years after the signing. The judge noted that not only did the employer fail to challenge the union’s majority status under Section 9(a) during the first 6 months, but the employer twice more in the next 4 years signed agreements confirming that it had verified the union’s status as a 9(a) representative.

Thus, while there may have been similarities in the acknowledgment language, it is apparent that the circumstances before the Board in both *Triple A Fire Protection* and in *MFP Fire Protection* were quite different than those in the instant case. In both cases, there was a significant bargaining history between the union and the employer at the time that the acknowledgment forms were signed. After signing the forms, both employers not only continued to honor the terms of the agreements they had already signed, but also entered into successive agreements with the union. Understandably, the employer’s late claims challenging the majority status was a significant factor in the Board’s rejection of the employers’ arguments against the establishment of a 9(a) relationship.

1. The agreement in its entirety

Noting the importance of employees’ statutory rights of self-organization and self-determination, the Board explained in *Madison Industries, Inc.*, 349 NLRB 1306, 1309 (2007), that extant Board law requires proof that an agreement “unequivocally demonstrates that the parties intended to be governed by Section 9(a) before 9(a) status may be found on the basis of contractual language. *Id.* at 1309. In its decision in *Madison Industries*, the Board found that the judge erred by limiting his analysis solely to the language of a contractual provision to find that the parties had established a 9(a) relationship. The Board pointed out that *Staunton Fuel & Material* requires an examination of the parties’ entire agreement to determine whether a 9(a) relationship was intended.

5 In the current case, the acknowledgment dated July 8, 2008, clearly states that the Respondent unconditionally acknowledges the Union as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the Act. The acknowledgement also states that in executing the document, the Respondent confirms that a clear majority of the employees are members of, and are represented by the Union. The total record evidence, however, contravenes that assertion.

10 As the Respondent points out, the agreement entered into by the parties was comprised of three separate documents that were contemporaneously signed on July 8, 2008. These documents were (1) the 2-page adoption agreement; (2) the 2007—2010 agreement between the NFSA and the Union to which Respondent agreed to adopt and to be bound; and (3) the Acknowledgement.

15 As discussed above, the Union and the Respondent entered into a one-job project agreement on June 5, 2007, for specific work scheduled in Minden, LA. After identifying the parties to the agreement and the date, the 2-page document begins with the wording:

20 WHEREAS, the said Employer is desirous of hiring and employing journeymen, sprinkler fitters and apprentices; and

WHEREAS, the Union has competent and skilled journeymen and apprentice sprinkler fitters;

25 NOW, THEREFORE, it is mutually agreed as follows:

30 The agreement then describes the Respondent’s obligation to be bound by the Union’s agreement with the NFSA, including the obligation to make the requisite contributions to the Union’s Health and Welfare Fund, as well as to the Education and Pension Trust Funds. There is no dispute that this agreement established an 8(f) agreement for the terms of the contract.

35 When Respondent signed the agreement with the Union on July 8, 2008, the “agreement” also initially set forth the names of the parties and the date and continued with the same language that had appeared a year earlier in the 2007 prehire agreement. Specifically, the language continued:

WHEREAS, the said Employer is desirous of hiring and employing Journeymen Sprinkler Fitters and Apprentices; and

40 WHEREAS, the Union has competent and skilled Journeymen and Apprentice Sprinkler Fitters;

NOW, THEREFORE, it is mutually agreed as follows:

45 As with the 2007 agreement, the 2008 agreement continued with a recitation of Respondent’s obligations under the NFSA agreement, as well as the obligations to contribute to the requisite Health and Welfare Funds and the Education and Pension Trust Funds. Consistent with the 2007

agreement, there is no reference to Section 9(a) of the Act or any reference concerning whether the Union represents a majority of Respondent’s employees. Rather than addressing Respondent’s current employees, the language addresses Respondent’s hiring of competent and skilled sprinkler fitters who can be referred by the Union, as would be the expectation for an 8(f) agreement. As Respondent also points out, the 2008 agreement requires the adoption of the very same 2007—2010 NFSA contract that Respondent previously adopted when Ritchie signed the 2007 agreement. Respondent asserts that by using the same agreement when entering into both the 2007 agreement and the 2008 agreement, there is inherent ambiguity in the agreement.

The Acting General Counsel maintains that the Acknowledgement language satisfies all of the elements of the *Staunton Fuel & Material* test. The Acknowledgment language, however, is not only inconsistent with the traditional “prehire” language contained in the agreement itself, but the language is false on its face. There is no record evidence to demonstrate that any of Respondent’s employees were members of the Union on July 8, 2008. The credited testimony of Ritchie, as well as employees Rogers and Harris, reflect that the employees joined the Union after Ritchie entered into the agreement with the Union. The parties stipulated that 14 named sprinkler fitters were employed by Respondent on July 8, 2008. The applications for union membership for each of these employees reflect that they joined the Union during a period of time between July 9 and July 23, 2008, and following Ritchie’s signing the Acknowledgement. Thus, despite the language of the Acknowledgement, it was impossible for the Union to have demonstrated that a majority of Respondent’s employees were members of, and represented by, the Union when none of the employees were members of the Union. Furthermore, there is nothing in the agreement or the Acknowledgement to show that the recognition was based on a contemporaneous showing or offer by the Union to show that the Union had majority support as required by *Staunton Fuel & Material*. *Staunton Fuel & Material*, above at 720. Moreover, there is nothing to show that the Union presented any evidence or offered to present any evidence of employees’ support at the time that Ritchie signed the agreement and the acknowledgement.

Thus, although the Acknowledgement that was given to Ritchie at the time that he signed the agreement contains the wording that “objective and reliable information” confirm the “majority” membership, such language is clearly ambiguous as it is not only factually false, but it is ambiguous when it is compared to the other language found in the agreement. Accordingly, the Acknowledgement language cannot be read in isolation and the agreement must be examined “in its entirety.” *Staunton Fuel & Material*, above at 720 fn. 15; *Madison Industries*, above at 1308.

2. Extrinsic evidence concerning the parties’ intent

Although the Board has found that a 9(a) relationship may be established solely on the basis of the parties’ contract language, the Board has also explained that it will continue to consider relevant extrinsic evidence bearing on the parties’ intent in cases where the contract’s language is not independently dispositive. *Staunton Fuel & Material*, above at 720 fn. 15. Furthermore, the Board has continued to consider extrinsic evidence of intent when the intent of the parties cannot be determined solely by the examination of the agreement in its entirety. *J. T.*

Thorpe & Son, Inc., 356 NLRB No. 112, slip op. at 3 (2011); *Allied Mechanical Services*, 351 NLRB 79, 82 (2007).

As discussed above, Respondent had a limited bargaining history with the Union. Prior to July 8, 2008, the only agreement that Respondent had ever had with the Union was a one-project agreement for a limited duration; which was indisputably an 8(f) agreement. Thus, prior to July 2008, Ritchie’s only experience with the Union involved 8(f) agreements. As the Board has noted, “the availability of 8(f) agreements in the construction industry ‘renders ambiguous’ a union’s demand to execute a collective-bargaining agreement, and as a result ‘an employer in the construction industry may not be certain whether a union, in requesting recognition or presenting a collective-bargaining agreement for execution, is seeking an 8(f) or a 9(a) relationship. The ‘ambiguity’ is exacerbated in the context of successive collective-bargaining agreements when the employer had previously established an 8(f) relationship with the union.” *James Julian, Inc.*, 310 NLRB 1247, 1254 (1993), citing *J & R Tile*, 291 NLRB 1034, 1036 (1988).

3. Record testimony

At the time that Ritchie signed the July 8, 2008 agreement, he had just received a large job and he did not have enough sprinkler fitters to do this large project. Ritchie was concerned about his reputation as a sprinkler contractor and he wanted to have the job manned with skilled labor. When his estimator suggested that he contact the Union, he did so.

Ritchie testified that when he contacted the Union he only wanted to enter into an agreement for a year. He contended that although he agreed that he would commit to the NFSA contract that was scheduled for another year and 8 months he did so because no one told him that the contract was binding beyond the contract period. He also testified that he signed the agreement with the Union because he didn’t want to ruin his reputation as a company by not having skilled and qualified people to do the work.

Ritchie testified that while he did not understand the meaning of the Acknowledgement, he signed it on July 8, 2008, because the union representatives told him that it was required. There is no dispute that at the time that he signed the Acknowledgement the Union did not present any evidence or offer to present any evidence that the Union represented a majority of his employees. At the time that Ritchie signed the agreement, he employed 14 sprinkler fitters and none of these employees were members of the Union prior to his signing the agreement. After his signing the agreement, Ritchie instructed his employees to join the Union because he had entered into the agreement with the Union.

Assistant Business Manager Puhalla confirmed that when the union representatives met with Ritchie on July 8, 2008, Ritchie told them that he had expected to sign an agreement for only a year’s period of time. When Puhalla told him that it would have to continue through the remainder of the NFSA agreement, Ritchie signed the agreement. Cacioppo also testified that in all four meetings with Ritchie in May, June, and July 2010 Ritchie continued to mention that he would be interested in a project-by-project agreement with the Union. Cacioppo testified that although the Union was meeting in 2010 to negotiate a new agreement with the Union Ritchie was only offering to do project-by-project jobs.

I find Ritchie’s testimony credible with respect to the circumstances of his signing the July 8, 2008 agreement. Aside from the fact that Ritchie’s testimony was consistent and plausible, it was essentially uncontroverted. It is apparent from his testimony that he sought out the Union to obtain skilled sprinkler fitters to work on the large project that was to begin in 2008. His knowledge of collective-bargaining agreements with the Union was limited to the prior 8(f) agreement that he had signed the previous year. There is no evidence that Ritchie ever discussed with the Union the possibility of his entering into an agreement that would bind him as a 9(a) employer. It is apparent from both Ritchie’s testimony, as well as Puhalla’s testimony, that Ritchie continued to seek only a project-by-project agreement even when he met with the Union in 2010.

Ritchie testified that the union representatives told him that he had to sign the Acknowledgement as a part of the agreement with the Union. He testified that he understood that if he did not sign all of the agreement documents he would not be able to get the Union’s referrals for skilled sprinkler fitters. Although Puhalla, Cacioppo, and Irby all testified, none of them contradicted Ritchie’s testimony concerning the circumstances of his signing the July 8, 2008 agreement. No union representative testified that the Acknowledgement was ever explained to Ritchie or that he was told anything about the significance or the meaning of 9(a) recognition and acknowledgement.

In the very recent decision in *J. T. Thorpe & Son, Inc.*, 356 NLRB No. 112, slip op. at 4 (2011), the Board found that the employer and the union established a 9(a) relationship by the inclusion of contract recognition language committing the employer to recognize the union as a 9(a) representative if, and when, the union proffered a showing of majority support during the contract term. Specifically, there was credited testimony establishing that after the employer was informed of the legal distinction between 9(a) and 8(f) recognition, the employer consulted with legal counsel regarding the proposed change in the pertinent contract language before signing the agreement. Clearly, the circumstances addressed by the Board in *J.T. Thorpe* are distinguishable from the facts in the instant case.

In an even more recent decision in *Diponio Construction Co.*, 357 NLRB No. 99 (2011), the Board affirmed the judge in finding that the recognition language in a collective-bargaining agreement converted an 8(f) relationship into a 9(a) relationship. In *Diponio*, however, there was not one, but three successive agreements that contained the same language confirming the employer’s recognition of the union as the exclusive bargaining representative and confirming that the union had submitted to the employer evidence of majority to the satisfaction of the employer. Footnote 3 of the decision confirms that Chairman Pearce and Member Becker agree with the judge that “very clear recognition language in all three of the parties’ collective-bargaining agreements supports the finding that the parties entered into a 9(a) relationship.” The footnote continues:

In *Nova Plumbing, Inc. v. NLRB* 330 F. 3d 521, 537 (D.C. Cir. 2003), the court held that “contract language and intent cannot be dispositive at least where, as here, the record contains strong indications that the parties had only a section 8(f) relationship.” As the judge here observed, ‘In *Nova*, there was substantial

extrinsic evidence concerning . . . the employees’ opposition and resistance to the [parties’] contractual relationship.” In the present case, by contrast, the record is devoid of any indication that the parties had only an 8(f) relationship or that the Union lacked majority support at any time during the parties’ years long relationship. Thus, Chairman Pearce and Member Becker would reach the same result in this case even applying *Nova Plumbing*.

I also note that the facts in *Diponio* further distinguish the case from those in the instant matter. In *Diponio*, there was no record testimony to explain how the recognition language came to be a part of the collective-bargaining agreement between the union and the multiemployer association. The respondent presented no representative of the multiemployer association or anyone else to testify concerning the origin or the intent of the recognition language that was included in the successive bargaining agreements. Although presenting no witnesses in support of its argument, the respondent essentially argued that the union must have surreptitiously inserted the recognition language into an agreement that affected not only the respondent but 26 to 29 other employers over the course of the successive agreements. Thus, the circumstances before the Board in *Diponio* are quite different from those in the instant matter. Unlike the respondent in *Diponio*, Ritchie’s credible testimony establishes that Respondent entered into the July 2008 agreement with the intent to establish nothing more than an 8(f) relationship. As evidenced by the Board’s decision in another recent case, such testimony is significant in determining the intent of the parties. Although the Board found that the recognition clause established a 9(a) relationship in *American Firestop Solutions*, 356 NLRB No. 71, slip op. at 1 fn. 1 (2011), the Board also found that the credited testimony of the respondent’s president provided extrinsic evidence that the parties had entered into a 9(a) relationship.

Accordingly, crediting Ritchie’s testimony and considering the undisputed record evidence, I find that Respondent entered into the agreement with the Union with the intent to be bound by an 8(f) agreement. There is no record evidence that supports a finding that Ritchie had any intent to enter into a 9(a) relationship with the Union. The only document that refers to a 9(a) relationship is the Acknowledgement that was signed without discussion or explanation and which was fallacious on its face.

Accordingly, the record as a whole supports a finding that Respondent and the Union entered into an 8(f) agreement on July 8, 2008.

C. Respondent’s Liability under the 8(f) Agreement

Although I have found that the parties had an 8(f) relationship, such a finding does not remove the Respondent from its responsibilities under the collective-bargaining agreement that was signed on July 8, 2008. There is no dispute that Respondent unilaterally changed the terms and conditions of employment of its employees during the term of the collective-bargaining agreement to which he had agreed to be bound. The parties stipulated that since February 2010 Respondent changed the wage rate of some of its sprinkler fitter employees, thus failing to follow the collective-bargaining agreement.

Although Respondent stipulated that since February 2010 Respondent changed the wage rate of some of its sprinkler fitter employees, Respondent does not contend that it bargained with the Union prior to making such changes. It has long been established that an employer may not unilaterally implement changes in terms and conditions of employment during the course of an existing collective-bargaining agreement. *Standard Oil Co.*, 174 NLRB 177, 177—178 (1969). Specifically, the Board has found that Section 8(d) of the Act imposes the requirement that when a collective-bargaining agreement is in effect and the employer seeks to modify the terms and conditions contained in the agreement, the employer must obtain the union’s consent before implementing the change. *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984). Consistent with my discussion below concerning the issue of contract repudiation, I do not find that Respondent sought the consent or obtained the consent for the unilateral changes made by Respondent.

There is no dispute that since February 4, 2010, Respondent failed to continue in effect all the terms and conditions of the July 8, 2008 agreement with respect to some of its employees. Because an employer may not unilaterally change terms and conditions for employees represented by a union, I find that Respondent has violated Section 8(a)(5) and (1) of the Act as alleged in paragraph 11 of the complaint. *NLRB v. Katz*, 369 U.S. 736 (1962).

D. Whether the Union is Barred by Section 10(b) of the Act

Respondent asserts that under an 8(f) relationship its obligation to comply with the terms of the CBA terminated on March 31, 2010. Respondent argues, however, that on May 5, 2009, it provided clear and unequivocal notice to the Union that it was no longer going to follow the contract with respect to the core employees who were employed by Respondent at the time the contract was signed. Respondent asserts that by its announcement and the subsequent failure to follow the contract Respondent repudiated the contract and, thus, the 10(b) period began to run upon the repudiation. Respondent thus argues that because the Union’s charge was not filed until 15 months after the May 2009 repudiation there is no remedy available for Respondent’s repudiation and subsequent failure to apply the contract.

1. The Board’s treatment of repudiation

Before addressing the issue of whether Section 10(b) of the Act precludes a remedy as asserted by Respondent, it seems appropriate to address the issue of the viability of contract repudiation. Certainly, the Board has recognized that in some situations a respondent can lawfully repudiate an 8(f) contract in midterm. Those instances, however, have normally involved circumstances significantly different from the one in the instant case. In *Garman Construction Co.*,⁷ 287 NLRB 88 (1987), the employer lawfully repudiated an 8(f) contract in midterm when there had never been more than one unit member in the respondent’s employ during the 3 years prior to the repudiation. The Board noted that had the unit been subject to fluctuations and only temporarily decreased in size to a single unit employee, the Respondent’s actions would have violated Section 8(a)(5) of the Act. In *Stack Electric, Inc.*, 290 NLRB 575 (1988), the Board also found that a respondent’s midterm repudiation of an 8(f) contract did not violate Section 8(a) (5) of the Act, however, again there was only one employee in the

⁷ Overruled by *E.S.P. Concrete Pumping, Inc.*, 327 NLRB 711 (1999), on other grounds.

bargaining unit. In *Seals Refrigeration Co.*, 297 NLRB 133, (1989), the Board again found no violation when the respondent repudiated the 8(f) agreement in midterm when there were no unit employees.

5 Thus, while there have been some unique exceptions, a respondent’s midterm repudiation of the collective bargaining agreement will typically violate Section 8(a)(5) of the Act. *South Alabama Plumbing*, 333 NLRB 16 (2001); *Adobe Walls, Inc.*, 305 NLRB 25, 27(1991); *Precision Striping, Inc.*, 284 NLRB 1110, 1111—1112 (1987)

10 **2. The application of Section 10(b)**

The law is clear that in order for a charging party to avoid the Section 10(b) timebar, it must file a charge “within six months of the receipt of clear and unequivocal notice of total contract repudiation.” *A & L Underground*, 302 NLRB 467, 468 (1991). Thus, a union must file
 15 its charge within 6 months of receiving clear and unequivocal notice of the repudiation or a complaint based on that conduct will be time-barred, even with regard to contract violations within the 10(b) period. *Vallow Floor Coverings, Inc.*, 335 NLRB 20, (2001).

In its decision in *St. Barnabas Medical Center*, 343 NLRB 1125, 1129—1130 (2004), the
 20 Board found that the complaint was time-barred under Section 10(b) of the Act because the union had clear and unequivocal notice outside the 10(b) period that the respondent repudiated the contract. The Board found that when an employer consistently fails to recognize the union or to abide by the terms of a collective-bargaining agreement, the union is put on notice that the employer has repudiated the agreement, thus triggering the commencement of the 10(b) period
 25 for filing a charge. *Id.* at 1127. Under an earlier decision in *A & L Underground*, 302 NLRB above at 469, the Board confirmed that if the repudiation occurs outside the 10(b) period, all subsequent failures of the respondent to honor the terms of the agreement are deemed consequences of the initial repudiation for which the union may not recover. *Id.* In contrast,
 30 however, cases not barred by Section 10(b) include cases in which a respondent has not given clear notice of total contract repudiation outside the 10(b) period, but has “simply breached provisions of the collective-bargaining agreement to a degree that rises to the level of an unlawful unilateral change in contractual terms and conditions of employment.” *St. Barnabas*, above at 1127. Applying this proposition to the facts before it, the Board found that the respondent’s refusal to apply “any” part of the contract to “any” of the employees whose unit
 35 inclusion was in dispute at “any” time after the respondent entered into the agreement constituted a total repudiation of the agreement. In finding that there was repudiation rather than simply a material breach of the contract, the Board noted that the respondent had never applied a single provision of the contract to certain employees that were arguably covered by the contract.

40 The Board distinguishes between a “simple failure to abide by the terms of a collective-bargaining agreement,” or “material breach violation” on the one hand, and an “outright repudiation of the agreement itself,” or “total repudiation” on the other hand. *Vallow Floor*, above at 20, citing *A & L Underground*, above at 469. Despite Respondent’s arguments that the Union had clear and unequivocal notice that the Respondent repudiated the contract, the record
 45 evidence reflects otherwise. In the instant case, Respondent did not unequivocally repudiate its obligation to abide by the contract inasmuch as it continued to apply the contract to those

employees referred by the Union. Respondent’s failure to abide by the contract involved only the original core employees who had been employed prior Respondent’s signing the July 8, 2008 agreement.

5 When an employer has not rejected a collective-bargaining agreement in its entirety, but
 has instead refused to apply one or more of its provisions to unit employees, such an action
 constitutes a breach of the contract’s terms. *St. Barnabas*, above at 1132. Under these
 10 circumstances, the Board has found that “each successive breach of the contract terms constitutes
 a separate and distinct unfair labor practice. *Id.* Consequently, even when a union has clear and
 unequivocal notice outside the 10(b) period that the respondent is failing to observe the terms of
 the contract, the complaint is not time-barred. Instead, the 10(b) period would serve only as a
 limitation on the remedy to the 6 months prior to the filing of the unfair labor practice charge.
Id. See also *Farmington Iron Works*, 249 NLRB 98, 99 (1980).

15 Despite Respondent’s assertion that the Union is barred relief by 10(b), I do not find
 Respondent’s analysis applicable to the present case. Interestingly, a similar argument was
 advanced by the respondent in *Adobe Walls*, above at fn. 1. In *Adobe Walls*, the respondent
 argued that it had clearly repudiated the 8(f) contract by ceasing to make fringe benefit fund
 20 payments and that the union acknowledged the repudiation by filing a grievance and picketing.
 The respondent further argued that because the repudiation began more than 6 months prior to
 the filing of the charge, the union was barred by Section 10(b) of the Act. In finding a violation
 the Board pointed out that “the respondent’s failure to comply fully with some of the provisions
 of the contract does not, standing alone, amount to the total contract repudiation.” The Board did
 not find the union’s actions to constitute an acknowledgement that the respondent had repudiated
 25 the agreement.

 Respondent’s assertion that there was a clear and unequivocal repudiation of the contract
 in May 2009 is not supported by the record evidence. In April 2009, 10 of the original 14
 30 sprinkler fitters were still employed by Respondent. Ritchie testified that after his meeting with
 the Union in May 2009 he stopped paying his original sprinkler fitters according to the terms of
 the collective-bargaining agreement and he raised their salary to compensate them for any
 increase in their out-of-pocket insurance costs that might result. Respondent did not, however,
 produce documentation to show the increase in the pay for these 10 sprinkler fitters. As counsel
 for the Acting General Counsel points out, Respondent did not produce any documentation to
 35 substantiate that 9 of these 10 sprinkler fitters were performing bargaining unit work or were
 even employed by the Respondent in the months that followed the May 5, 2009 meeting. The
 fringe benefit funds reports provided by the Respondent to the Union show, however, that
 original sprinkler Shannon Rogers continued to perform bargaining unit work and was paid
 according to the contract until September 2009 when he was transferred into a nonbargaining
 40 unit position.

 Thus, despite Respondent’s assertion that the Union received clear and unequivocal
 notice of Respondent’s repudiation of the contract, Respondent continued to follow the contract
 with respect to those employees referred by the Union after May 2009, as well as for a least one
 45 of the original sprinkler fitters while he continued to perform bargaining unit work. Ritchie
 admits that when he met with the Union’s representatives in May 2009 he assured them that he

would continue to pay the contract rate for the employees referred by the Union. Additionally, throughout the course of the agreement, there were always employees performing work on the DOW sites that were not covered by the contract. Irby recalled that during the meeting he told Ritchie that if he didn't have that many employees working, it should not cost Respondent "that much" under the contract.

Russell Ritchie and Karen Ritchie testified that when they met with Cacioppo and Irby on May 9, 2009, they made it clear that Respondent could not continue to follow the contract for the remainder of the agreement. They testified that the union representatives responded by indicating that the Union would look the other way. Cacioppo and Irby contend that they never told Russell and Karen Ritchie that the Union would look the other way and that they consistently told Ritchie that he could not simply just walk away from the agreement. Based on his testimony as a whole, I found Ritchie to be a credible witness. It is reasonable that he believed that the union representatives wanted to help him. After all, the Union had already given him assistance through their grant program. It is reasonable that Ritchie believed that after hearing about his additional financial problems the union representatives would simply give him the breathing room that he requested. It is apparent that Ritchie heard what he wanted to hear. Irby testified that the union listened to Ritchie's concerns and tried to be compassionate. The testimony of Russell Ritchie, Karen Ritchie, Cacioppo, and Irby all reflect that this was a cordial lunch without any angry words or accusations. While I have no doubt that the Ritchie's left the meeting believing that everyone was in agreement, Cacioppo and Irby's testimony would reflect otherwise. Although Cacioppo and Irby may have responded compassionately or kindly to Respondent, it is not realistic that the Union representatives specifically agreed to allow Respondent to abandon the contract. I credit Cacioppo and Irby's testimony in this regard.

In support of the alleged notice of repudiation, Respondent also presented the testimony of employees Harris, Rogers, and Fajardo to testify concerning their respective conversations with Cacioppo. Harris testified that during a telephone conversation with Cacioppo in April 2009 Cacioppo asked him if he were going to stay with Ritchie or "come with the Union." Harris recalls that Cacioppo then mentioned that there was of-of-town work available through the Union. Fajardo testified that during a telephone conversation with Cacioppo he told Cacioppo that some of the employees on the jobsite were going nonunion and he didn't want to be in violation of the Union's rules by working with nonunion employees.

Cacioppo testified without contradiction that Respondent's employees were not required to be union members. The fact that Harris and Cacioppo may have discussed Harris's interest in remaining in the Union and his interest in being referred to other jobs by the Union does not establish notice of contract repudiation. Fajardo recalled that when he spoke with Cacioppo, Cacioppo not only told him to continue to work, but he also indicated that the Union planned to meet with the Respondent and that he could continue to work "beyond the contract." Inasmuch as Respondent's employees were not required to be union members and Respondent's Dow employees were specifically excluded from the contract, Fajardo's interchange with Cacioppo does not establish notice of contract repudiation.

Employee Rogers testified that he asked Cacioppo if he could continue in the apprentice program if the Respondent became nonunion. Cacioppo told him that he could remain in the

apprentice program if he were allowed to remain in the Union and pay dues. The record reflects, however, that Rogers did not continue in the apprentice program as he took a job out of the bargaining unit.

5 Accordingly, the overall record does not support a finding that Respondent provided the Union with a clear and unequivocal notice of contract repudiation in 2009 and outside the 10(b) period.

E. Respondent’s Duty to Provide Information

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The underlying complaint alleges that the Union requested certain information from Respondent on May 5, 2010, that was necessary for, and relevant to, the Union’s performance of its duties as the exclusive collective-bargaining representative of Respondent’s employees. The complaint further alleges that Respondent failed to provide the information in violation of Section 8(a)(5) of the Act.

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In the posthearing brief, counsel for the Acting General Counsel requests that I find that Section 8(f) rather than Section 9(a) governs the relationship between the parties, despite the fact that Respondent may be found to have committed all of the violations alleged in the complaint. Consequently, the Acting General Counsel seeks a finding that Respondent only violated paragraphs 11, 12, and 19 (as 19 relates to pars. 11 and 12) of the complaint until the expiration of the collective-bargaining agreement. Therefore, the Acting General Counsel is not seeking a finding and corresponding remedy with respect to Respondent’s failure to provide the requested information to the Union. As discussed above, I find that the parties’ relationship is governed only by Section 8(f) of the Act. While an employer may have a duty to provide requested information to an 8(f) bargaining representative during the contract period, the 8(f) bargaining representative enjoys no presumption of majority status following the contract’s expiration and thus the employer is free to repudiate the bargaining relationship. *W. B. Skinner, Inc.*, 283 NLRB 989, 989 (1987). Inasmuch as the information was requested by the Union after the expiration of the contract period, Respondent was under no obligation to provide the requested information. Respondent’s failure to provide the information is not a violation of the Act.

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Accordingly, I recommend the dismissal of complaint paragraphs 15, 16, and 17 in their entirety.

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F. The Allegations Concerning Respondent’s Failure to Bargain and the Withdrawal of Recognition

Complaint paragraph 13 alleges that since about April 1, 2010, the Respondent failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. Complaint paragraph 14 alleges that on or about July 13, 2010, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit. In the posthearing brief, counsel for the Acting General Counsel discusses why such actions by an employer would be violative when the employer and the union have a 9(a) relationship. Counsel for the Acting General Counsel maintains that Respondent never met in good faith with the intent to negotiate a new agreement, pointing out that

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Respondent never made any proposals to the Union other than those proposals to terminate any bargaining relationship and that Ritchie repeatedly informed the Union that he only wanted to negotiate one-job agreements. As I have discussed above, it is this same consistent conduct by Ritchie that supports a finding that Respondent never had any intent to enter into a 9(a) relationship with the Union.

One of the unique features of this case, however, is the fact that regardless of the complaint allegations of Respondent’s unlawful failure to bargain and unlawful withdrawal of recognition, the Acting General Counsel does not seek a finding for these allegations. As referenced above, counsel for the Acting General Counsel requests that I find that the relationship between the parties was governed by Section 8(f) rather than Section 9(a). Therefore counsel submits that Respondent only violated the Act as alleged in complaint paragraphs 11, 12, and 19 (as related to pars. 11 and 12.)

Where the parties are bound by an 8(f) agreement and the union is not a 9(a) representative, there is no duty for the Respondent to bargain for a successor agreement. *Sheet Metal Workers Local 9 (Concord Metal)*, 301 NLRB 140 (1991). Inasmuch as I find that the parties entered into an 8(f) agreement on July 8, 2008, the Respondent was under no duty to bargain with the Union for a new contract and Respondent could lawfully withdraw its recognition at the expiration of the contract. Accordingly, I recommend that complaint paragraphs 13 and 14 be dismissed in their entirety.

G. The Acting General Counsel’s Requests for Specific Findings

1. The proposed finding concerning the application of *Staunton Fuel & Material*

Relying on the Board’s decision in *Staunton Fuel & Material*, counsel for the Acting General Counsel submits that the Acknowledgment contains contractual language sufficient for a conclusive finding of a 9(a) relationship between the Respondent and the Union. Despite this assertion, however, counsel urges that I modify the decision in *Staunton Fuel & Material* to the extent that the case precludes the Board from reviewing whether the Union actually enjoyed majority support at the time the Employer purported to grant it 9(a) recognition.

Counsel references the D.C. Circuit’s decision in *Nova Plumbing*, 330 F.3d 531 (D.C. Cir. 2003), that is cited and discussed above in this decision. Finding the record to contain “strong indications” that the parties had only an 8(f) relationship, the Circuit did not rely on contract language alone to establish a 9(a) relationship. The Circuit expressed its concern that by focusing exclusively on employer and union intent the Board has neglected its fundamental obligation to protect employee Section 7 rights.

In this case, the Acknowledgment form states that Respondent executed the document on the basis of objective and reliable information confirming that a clear majority of the sprinkler fitters in Respondent’s employ were members of and represented by the Union. As counsel for the Acting General Counsel points out, the statement is illusory in light of the absence of any evidence, or any assertion, that the Union ever made or offered to make such a showing. Despite the contract language, the Union demonstrated no majority support at the time Respondent

signed the Acknowledgment and the employees in fact joined the Union after the execution of the July 8, 2008 agreement.

5 Counsel for the Acting General Counsel asserts that by allowing contract language to create a Section 9(a) relationship, an opportunity is created for construction industry companies and unions to collude at the expense of employees who would be precluded from filing R-case petitions during the term of a 9(a) contract under contract bar rules. Counsel argues that employees’ Section 7 rights would be better served by a rule that would bind a respondent and a union to their bargain, unless either party comes forward with evidence that the union lacked majority support at the time of recognition, while permitting employees to challenge that union’s 9(a) status at any time through an RD petition.

15 Specifically, the Acting General Counsel proposes that contractual language that meets the standards set forth in *Staunton Fuel & Material*, would be sufficient to establish a rebuttable presumption of 9(a) status as to the employer who is a party to the contract. The Acting General Counsel submits, however, that the employer should be able to rebut the presumption of 9(a) status by presenting evidence that the union did not actually enjoy majority support at the time of the purported 9(a) recognition. Furthermore, the Acting General Counsel urges that if the employer presents such evidence, the union would then have the burden of presenting sufficient evidence to establish that it did in fact have majority support at the time. If the union is unable to rebut the employer’s contentions that it lacked majority support, the employer would be deemed to have successfully established that the parties do not have a 9(a) relationship.

25 The Acting General Counsel further proposes that because employees are not parties to a recognition clause, contractual language would not create a rebuttable presumption of 9(a) status when there are employee challenges. In the case of employee challenges, the union would be presumed to be an 8(f) representative, giving employees the freedom to file an appropriate representation petition during the term of the contract as contemplated by the Board’s decision in *John Deklewa & Sons*, 282 NLRB 1375, 1377—1378 (1987). In those instances when such a petition is filed, the burden of introducing evidence supporting the claim that the union did, in fact, have majority support at the time of recognition would be on the party alleging that a 9(a) relationship exists. The Acting General Counsel asserts that if that party is unable to meet this burden, the contractual language, standing alone, would be insufficient to establish such a relationship and the contract would not block the election.

35 Respondent also asserts that by neither introducing proof of majority status nor explaining its absence, the Union fails to demonstrate majority representation under the very boilerplate language on which it relies to overcome the *Deklewa* presumption of an 8(f) relationship. Citing the Circuit’s decision in *Nova Plumbing*, Respondent further argues: “if the Board considers contract language in determining Section 9(a) status, it must take such language seriously when a recognition clause indicates that there is a concrete basis upon which to assess support. Otherwise, unions and employers would be free to agree to such self-serving language with no threat of challenge.”

45 I not only find Respondent’s argument to be valid; but I also find the Acting General Counsel’s request to be compelling. This case represents a perfect example of how contract

language can not only misrepresent the truth, but also disregard the desires and expectations of the employees affected by such language. Borrowing from the language and the sentiment of the Circuit in its decision in *Nova Plumbing*, I agree that finding a 9(a) relationship solely on the basis of the Acknowledgment would “run rough shod” over the employees’ Section 7 rights. Clearly, not only did the Union fail to represent a majority of Respondent’s employees on July 8, 2008, there is no evidence that the Union represented any of the employees prior to the execution of the agreement. The record reflects that the employees only joined the Union because Ritchie told them that they had to join because he had signed the agreement with the Union.

Accordingly, I find that contract language should not preclude a review of whether a union actually enjoys majority support at the time the employer is purported to grant it 9(a) recognition and I recommend that the Acting General Counsel’s proposed rule be adopted by the Board in its entirety.

2. The proposed finding concerning challenges to a construction industry’s 9(a) status outside the 10(b) period

In *Casale Industries*, 311 NLRB 951, 953 (1993), the Board found that the employer and the union intended to enter into a 9(a) relationship rather than an 8(f) relationship. In large part, the Board relied on the fact that the parties agreed to hold an election that would have the same force and effect as one conducted by the Board in finding the 9(a) relationship intent by the parties. The Board further explained that even where parties intend a 9(a) relationship, that intention will be thwarted if the union does not enjoy majority status at the time of recognition. If the majority status is challenged within a reasonable time, and the majority status is not shown, the relationship will not be found to be a valid 9(a) relationship. The issue before the Board in *Casale* was whether to permit a challenge to majority status after 6 years of stability in a multiemployer relationship.

The Board noted that in nonconstruction industries it would not entertain a claim that majority status was lacking at the time of recognition if the employer had granted Section 9 recognition to a union and more than 6 months had elapsed. When the Board applied the same standard to the construction industry, the Board held that if 6 months have elapsed without a charge or a petition the Board should not entertain a claim that majority status was lacking at the time of the 9(a) recognition. *Id.* at 953.

Based on the Board’s ruling in *Casale*, counsel for the Acting General Counsel acknowledges that current Board law would preclude Respondent from actually challenging the Union’s 9(a) status because more than 6 months had passed before it withdrew recognition from the Union. Counsel proposes, however, that I reconsider the Board’s policy under *Casale* of treating voluntary recognition in the construction industry under the same 10(b) rules that apply to employers outside of that industry. Counsel for the Acting General Counsel submits that a better rule that is more tailored to the legal and practical realities of the construction industry bargaining would allow the Board to look beyond the 10(b) period to determine whether a union actually had majority support at the time it was recognized as a 9(a) representative. I agree and I find counsel for the Acting General Counsel’s rationale to be persuasive.

As the Fourth Circuit points out in its decision in *American Automatic Sprinkler Systems v. NLRB*, 163 F.3d 209 fn. 6 (4th Cir. 1998), a defense of invalid voluntary recognition is tantamount to a charge of unlawful conduct under the Act’s provisions that prohibit employers and nonmajority unions from entering into collective-bargaining agreements. The court points out that this is not the case in the construction industry where Section 8(f) establishes the legality of such relationships.

In support of her argument, counsel for the Acting General Counsel points to the Board’s earlier decision in *Brannan Sand & Gravel Co.*, 289 NLRB 977, 982 (1988), where the Board found that Section 10(b) as construed in *Machinists Local 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960), does not preclude finding that a construction industry bargaining relationship, whatever its age, is not a 9(a) relationship. The Board in *Brannon Sand* continued by stating that it would also find full 9(a) status with respect to all construction industry bargaining relationships only if the signatory union has been certified following a Board election or has been recognized on the basis of an affirmative showing of majority support. When the Board later denied the challenge to majority status because of the lapse of 6 months in *Casale*, the Board distinguished *Brannan Sand* by explaining that there was a showing that the parties intended a 9(a) relationship as compared to *Brannan Sand* where there had been no showing that the parties intended a 9(a) relationship.

As the Supreme Court pointed out in *Bryan Mfg.*, Section 10(b) of the Act does not prevent all use of evidence relating to events transpiring more than 6 months prior to the charge. The Court explained that where occurrences in the 10(b) period in and of themselves may constitute, as a substantive matter, unfair labor practices, “earlier events may be utilized to shed light on the true character of matters occurring within the limitations period.” *Id.* at 416.

In the instant case, there is no dispute that the Union did not represent a majority of Respondent’s employees at the time that Respondent entered into the collective-bargaining agreement on July 8, 2008. Clearly, I cannot resolve the allegations concerning unlawful withdrawal of recognition, failure to bargain, or failure to provide information without first determining Respondent’s responsibilities that were established by the collective-bargaining agreement. Consistent with the *Bryan Mfg.* analysis, evidence concerning the Union’s majority status is vital to “shed light on the true character of matters occurring within the limitations period.” Accordingly, it is imperative that the Board be able to look beyond the 10(b) period to determine whether a union actually had majority support at the time that it was recognized or purported to have been recognized, as a 9(a) representative and I recommend the Board’s adoption of such analysis.

CONCLUSIONS OF LAW

1. Respondent, Austin Fire Equipment, LLC, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Road Sprinkler Fitters Local Union No. 669, U.A., AFL—CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to adhere to all the terms and conditions of the agreement between the NFSA and the Union until its expiration on March 31, 2010, Respondent violated Section 8(a)(5) and (1) of the Act.

5 4. I do not find that Respondent violated the Act in any other manner.

REMEDY

10 Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

15 The Respondent shall make whole Kelly Cotton, Brian Dupuy, Bradley Guedry, Bryan Harris, Nathan Litton, Robert Long, Daryl Passman, Donny Nelson, and other employees who are similarly affected for any loss of earnings and other benefits since February 4, 2010, that they may have suffered by reason of Respondent’s failure to pay them at the prevailing wage rate prescribed in the collective-bargaining agreement that expired on March 31, 2010. Backpay shall be computed in a manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 20 1173 (1987). Such interest will be compounded on a daily basis in accordance with *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

25 The make-whole remedy includes an order to make all omitted fringe benefit payments since February 4, 2010, on behalf of employees Kelly Cotton, Brian Dupuy, Bradley Guedry, Bryan Harris, Nathan Litton, Robert Long, Daryl Passman, Donny Nelson, and any other employees so affected by Respondent’s failure to adhere to the collective-bargaining agreement that expired on March 31, 2010. Respondent shall also pay any additional amounts applicable to such delinquent payments as determined in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, the Respondent shall reimburse employees for any 30 expenses ensuing from its failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F2 940 (9th Cir. 1981); such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F2d 502 (6th Cir. 1971), with interest prescribed in *New Horizons*, supra, and *Kentucky River*, supra.

35 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:⁸

ORDER

40 The Respondent, Austin Fire Equipment, LLC, Prairieville, Louisiana, its officers, agents, successors, and assigns, shall

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing or refusing to continue in effect all the terms and conditions of the agreement between the National Fire Sprinkler Association, Inc. and the Road Sprinkler Fitters Local Union No. 669, U.A., AFL—CIO that expired on March 31, 2010.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole those employees, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent failure to continue in effect all the terms and condition of the agreement between the National Fire Sprinkler Association, Inc. and the Road Sprinkler Fitters Local Union No. 669, U.A., AFLCIO that expired on March 31, 2010.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copies, necessary to analyze the amount of backpay and other payments due under the terms of this Order.

(c) Post at its current jobsites within the geographical area encompassed by the appropriate unit herein and at its place of business in Prairieville, Louisiana, copies of the attached notice marked “Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director for Region 15 after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet, or an internet site, and/or other electronic means, if the Respondent customarily communicates wit its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 4, 2010.

⁹ If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(d) Within 21 days after service by the Region, file with the Regional Director, a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

5 Dated, Washington, D.C., November 29, 2011

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Margaret G. Brakebusch
Administrative Law Judge

APPENDIX

**NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to continue to the terms and conditions of the agreement between the Road Sprinkler Fitters Local Union No. 669, U. A., AFL—CIO and the National Fire Sprinkler Association, Inc. to which we agreed to be bound prior to the expiration of the agreement on March 31, 2010.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make employees whole for any losses suffered as a result of our failure to honor the collective-bargaining agreement between the National Fire Sprinkler Association, Inc. and the Road Sprinkler Fitters Local Union No. 669, U.A., AFL—CIO during the term of the agreement and prior to the expiration agreement on March 31, 2010.

AUSTIN FIRE EQUIPMENT, LLC
(Employer)

Dated _____ **By** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act, and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3413
(504) 589-6361, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFER, (504) 589-6389