

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

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**AUSTIN FIRE EQUIPMENT, LLC,**

**Respondent,**

**and**

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

**Charging Party.**

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**Case No. 15-CA-19697**

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**CHARGING PARTY LOCAL 669'S  
BRIEF IN SUPPORT OF EXCEPTIONS**

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BRIEF IN SUPPORT OF EXCEPTIONS**

The following brief is submitted on behalf of Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (“Local 669” or “the Union”), in support of its Exceptions to the Decision of the Administrative Law Judge.

As we show below, the Administrative Law Judge erroneously concluded, first, that Respondent Austin Fire Equipment, LLC (“Austin Fire”) be permitted to defend the refusal to bargain allegations in the Complaint by retroactively challenging the validity of its voluntary National Labor Relations Act (“NLRA”) Section 9(a) recognition of the Union three years earlier, and well beyond the NLRA Section 10(b) limitation period, contrary to long-settled NLRB precedent; and, second, that the parties NLRA Section 9(a) recognition agreement merely

established “a Section 8(f) pre-hire agreement,” contrary to the plain language of the recognition agreement itself as previously construed by the Board.

**I. Statement of the Case**

The facts of this case are for the most part undisputed.<sup>1</sup> Except as specifically provided below, the following statement of facts conforms to the findings of the Administrative Law Judge.

Austin Fire, an employer primarily engaged in the construction/fire protection industry, is owned by its President Russell Ritchie (“Ritchie”). JX1.

Local 669 is a national labor organization representing construction workers known as sprinkler fitters, who install and maintain fire protection systems in forty-eight (48) states and the District of Columbia. JX1C; Cacioppo 234.

On June 5, 2007, Austin Fire and the Union entered into a “One Job Project Agreement” for the Meadowview Health & Rehab facility in Minden, LA. JX1(A). The “One Job Project Agreement” did not purport to establish any recognitional or other ongoing relationship between the parties, but did require that Austin Fire pay its employees working on that particular project in accord with Local 669’s existing National Agreement. JX1; Cacioppo 229-231.

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<sup>1</sup> References to the transcript of the June 22-23, 2011, hearing are cited herein by witness and page, *i.e.*, “(Cacioppo \_\_)” ; exhibits are referenced as “(GCX \_\_).” Emphasis is supplied herein unless otherwise indicated.

A year later, on July 8, 2008, Austin Fire expressly recognized Local 669 as the exclusive bargaining representative of its fire protection employees pursuant to Section 9(a) of the NLRA by voluntarily entering into an agreement memorializing that Section 9(a) recognition. GCX4; Ritchie 74-76. As the Administrative Law Judge found, Austin Fire owner Ritchie claimed that he did not remember the recognition agreement, but Ritchie conceded that he had in fact signed it. ALJD 4. The Section 9(a) recognition agreement was a separate, stand-alone document that did not in any way cite, refer to, or incorporate any other document. GCX4.<sup>2</sup>

The parties' Section 9(a) recognition agreement stated, in clear and unambiguous terms, that "[t]he Employer executing this document...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 [the Union],*" and that "[t]he 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." GCX4; Ritchie 74.

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<sup>2</sup> The parties agreed that Austin Fire employees working at a separate Dow Chemical jobsite unrelated to this case would be excluded from the bargaining unit covered by the NLRA Section 9(a) recognition agreement. Cacioppo 423-424; Ritchie 273.

The language in the parties' recognition agreement has repeatedly been recognized by the Board as sufficient to establish NLRA Section 9(a) recognition, as the Administrative Law Judge acknowledged. ALJD 15. *Triple A Fire Protection*, 312 NLRB 1088, 1088-1089 (1993), *enf'd*, 136 F.3d 727 (11th Cir. 1998), *cert. denied*, 544 U.S. 948 (2005); *MFP Fire Protection*, 318 NLRB 840, 842 (1995), *enf'd*, 101 F.3d 1341 (10th Cir. 1996); *American Automatic Sprinkler Systems, Inc.*, 323 NLRB 920, 920-921 (1997), *enf'ment denied in part*, 163 F.3d 209 (4th Cir. 1998), *cert. denied*, 528 U.S. 821 (1999).

Ritchie further admitted that, *prior to* voluntarily executing the NLRA Section 9(a) recognition agreement, he had advised his existing sprinkler fitter work force that they would be required to join the Union (Ritchie 78-79), although Union membership was *not* a requirement of the National Agreement. Cacioppo 415; JX1(C), Art. 4 at 4 ("A person not a member of the United Association shall be acceptable for employment as a Journeyman only after he has produced for the Employer sworn affidavits of five (5) years experience in the Sprinkler Industry.").

By July 11, 2008, three days after the NLRA Section 9(a) recognition agreement was signed by Austin Fire, a majority of its thirteen (13) sprinkler fitters had submitted membership applications to the Union and, by July 21, they had all done so. GCX23(a)-(m).

Also on July 8, 2008, Austin Fire voluntarily elected to become bound to the Local 669 national collective bargaining agreement (“the National Agreement”) which expired on March 31, 2010. Ritchie 251, 254; JX1(B),(C).<sup>3</sup> The National Agreement, and the signatory page thereto, constituted one agreement that did not in any way refer to or incorporate Austin’s Section 9(a) recognition agreement -- although the National Agreement did expressly reconfirm the Union’s status “as the sole and exclusive bargaining representative for all Journeymen Sprinkler Fitters and Apprentices in the employ of [Union signatory] Employers...pursuant to Section 9(a) of the National Labor Relations Act.” JX1(C), Art. 3 at 4.

At no time during the three (3) years from July 8, 2008, until the July 2011 hearing in this matter did Austin Fire ever attempt or even propose to modify or revoke its NLRA Section 9(a) recognition agreement with the Union (Ritchie 100-101, 103), or attempt or propose to modify or discontinue any of the terms of the National Agreement. Ritchie 97-98, 100-101, 300-302.

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<sup>3</sup> The Union provided Austin Fire with a \$100,000 Regional Incentive Grant upon signing the National Agreement in July 2008. The grant was intended to help transition non-signatory contractors into signatory contractors by temporarily subsidizing and thereby offsetting the costs of paying union scale wages and benefits on jobs where those amounts were not previously bid. Cacioppo 377-378; Ritchie 297-298, 310-311. Sometime in January 2009, Austin requested that the Regional Incentive Grant be accelerated so that they would receive the funds faster. Business Agent Tony Cacioppo and Organizer Donnie Irby requested special assistance for Austin from Local 669’s National Officers to accelerate the grant. Cacioppo 379; Ritchie 311.

Austin Fire made hourly contributions to the National Automatic Sprinkler Industry (“NASI”) Funds pursuant to Articles 19-22 of the National Agreement beginning as of July 2008. GCX5; RX6. Austin Fire continued to pay into the Funds until Ritchie notified the Union, at a June 29, 2010, meeting, that he was terminating the contract as of July 2, 2010. Ritchie 84; GCX7; RX6; ALJD 12.

Sometime in April 2009, during the national recession, Ritchie contacted Cacioppo to request a meeting to discuss Austin Fire’s deteriorating financial situation and to see if the Union could provide any additional assistance similar to the Regional Incentive Grant. Cacioppo 380-381; Ritchie 268; ALJD 6.

Cacioppo and Ritchie met on April 27, 2009, in Baton Rouge, at which time Ritchie proposed to Cacioppo that Austin Fire pull its “original” employees who worked at Austin prior to the signing of the National Agreement in July 2008 and that he would cease paying them according to the contract, including paying into the NASI benefit funds on their behalf. Cacioppo 381-382. As the Administrative Law Judge found, Cacioppo told Ritchie in no uncertain terms that this proposal was a non-starter and would be a violation of the National Agreement and an unfair advantage to other signatory contractors. ALJD 6-7.

Ritchie did not disclose to Cacioppo at the meeting (as he later admitted at the hearing) that he had already approached bargaining unit employees on an individual basis, prior to the April 2009 meeting, and entered into agreements to

increase their wages by \$2.00/hr. and to exclude them from the NASI benefit funds required by the National Agreement. Ritchie 299-300, 310. Such direct dealing is also strictly forbidden by the National Agreement. JX1(C), Art. 8 (“The Employer and the Union agree not to enter into any Agreement or Contract with members of the bargaining unit individually or collectively, which in any way conflicts with the terms and provisions of this Agreement.”).

The parties met again a week later on May 5, 2009, with Ritchie, his wife Karen, Cacioppo, and Organizer Donnie Irby. Cacioppo 386. Ritchie told the Union again his dire financial situation, and they again told him that the proposal to pull certain employees from the unit was not an option. Cacioppo 386; Irby 434. Once again, Ritchie failed to disclose that he had already dealt directly with some of his “original” employees to notify them that he was going to pull them from participation in the NASI benefit funds in exchange for more pay. Ritchie 310-311; ALJD 7-8.

Ritchie also admitted, for the first time at the hearing, to having discontinued benefit contributions on behalf of many of his employees in July 2009 without notice to the NASI Funds or to the Union. Ritchie 317-319. Although Austin Fire suggested at the hearing that its monthly reports to the NASI Funds should have put the Union on constructive notice that it had determined to discontinue contributions on behalf of at least some of its employees (Ritchie 278), the

Administrative Law Judge correctly determined that the monthly reports actually camouflaged Austin Fire's failure to pay NASI contributions by falsely reporting that certain of the employees had worked "0" hours in the month reported when in fact they had worked many hours without making the contractually-required NASI contributions on their behalf. Ritchie 312-316; GCX22; ALJD 8.

Ritchie also admitted at the hearing that Austin Fire had failed to pay all of its sprinkler fitter employees in accordance with the National Agreement. Ritchie 299-300; JX1; Joint Stipulations at 208-218.

In September 2009, Business Agent Cacioppo learned that Austin may have worked one employee as a sprinkler fitter without paying him at the proper wage rate according to the National Agreement. Cacioppo 388; Irby 435. Cacioppo and Organizer Irby met with Ritchie to discuss the situation as was the practice among the Union and its signatory contractors. Cacioppo 388-389; Ritchie 316-317. At the meeting Ritchie admitted that Clements was employed by Austin but claimed he would be getting laid off as of the ensuing Friday. Cacioppo 389; Irby 436-437. Cacioppo told Ritchie that he was only requesting that he be paid according to the parties National Agreement, *not* that he be laid off. ALJD 8-9.

On December 4, 2009, the Union sent a certified notice to Austin Fire of its intent to terminate and renegotiate the terms of the National Agreement as of

March 31, 2010, and to renegotiate new terms and conditions of employment for the bargaining unit employees. JX1 (D).

On April 16, 2010, the Union faxed Austin Fire a letter requesting dates to meet to bargain over the terms of a new contract. JX1E. The parties' first meeting was on May 13, 2010. Thereafter, the parties met to negotiate on June 15, 2010, June 29, 2010, and July 13, 2010. ALJD 10-11.

Austin Fire made it clear from the start of negotiations that it was not interested in negotiating a new collective bargaining agreement with the Union. Puhalla 121, 155; Ritchie 82, 91, 100. In addition, at the May 13, 2010, meeting, Ritchie gave the Union representatives a letter stating his intention to terminate the contract within 60 days. GCX6; ALJD 11.

On May 5, 2010, the Union requested information in advance of negotiations. JX1(F). Austin Fire provided the Union with a copy of the employee handbook and a profit and loss statement but failed to provide any of the remaining information requested. Puhalla 114-115; ALJD 11.

On May 17, 2010, the Union sent Austin Fire a letter requesting that it provide the remainder of the requested information by the next meeting. GCX16. Austin provided a list of employees at the June 29, 2010, meeting but continued to refuse to provide all of the requested information. Puhalla 115; ALJD 11-12. This list and Ritchie's assertions at the parties' first meeting in May 2010 alerted the

Union for the first time that a number of Austin Fire employees had not been paid according to the National Agreement. Puhalla 120-121.

At the June 29, 2010, meeting Ritchie gave the Union a proposal to end negotiations between the parties. The proposal stated that Austin would continue to honor the terms of the expired CBA until July 2, 2010. GCX7; Ritchie 99-100; ALJD 12-13.

At the fourth negotiations meeting between the parties, on July 13, 2010, Ritchie indicated that he wanted to reach impasse, that he no longer wanted to be part of a collective bargaining agreement, and that the time had passed since he gave his 60-day notice. Ritchie told Irby and Cacioppo that he would not attend any additional meetings and that he was not going to continue to negotiate. Cacioppo 219; ALJD 12.

On July 29 and August 4, 2010, the Union filed unfair labor practice charges alleging that Austin refused to bargain in good faith and made unilateral changes to terms and conditions of employment. On January 31, 2011, a Complaint was issued against Austin Fire. The hearing in this matter was held on June 22 and 23, 2011.

The Administrative Law Judge issued her decision on November 29, 2011, in which she found all of the facts recited above to be true, but nevertheless allowed Austin Fire to retroactively repudiate its written NLRA Section 9(a)

recognition agreement three years after the fact (GCX4), and concluded that Austin Fire's explicit and unconditional Section 9(a) recognition of the Union was, in reality, only "an 8(f) agreement" between the parties, and that Austin Fire therefore had no continuing duty to bargain with the Union. ALJD 21.

## **II. Argument**

### **A. Introduction**

The Administrative Law Judge's decision that Austin Fire should be permitted to repudiate its July 2008 express NLRA Section 9(a) recognition of the Union, three years later, and to retroactively convert the parties' Section 9(a) relationship into "an 8(f) agreement" by, in effect, confessing to a time-barred unfair labor practice in violation of Section 8(a)(2) of the NLRA, is premised upon a misreading of the explicit language of the parties' agreements and a misapplication of well-settled principles of NLRA precedent. Specifically, the Administrative Law Judge erred in ruling that an employer can defend a refusal to bargain charge by claiming that its three-year-old Section 9(a) recognition of the Union was unlawfully established; that the Section 9(a) agreement in this case (GCX4) and the National Agreement (JX1(B),(C)) were parts of a single integrated agreement whose terms were inconsistent with Section 9(a) recognition (ALJD 17); and that the language in the preamble to the signature page of the National Agreement was inconsistent with the language of the parties' NLRA Section 9(a)

recognition agreement. ALJD 17-19. The Administrative Law Judge further erred by ruling that the parties entered into a Section 8(f) agreement in 2008 (ALJD 21), contrary not only to the undisputed facts and the plain language of the relevant documents, but also to the statutory language of Section 8(f) itself.

But for the Administrative Law Judge's erroneous NLRA Section 9(a) ruling, this would be a straightforward NLRA Section 8(a)(5) case where an employer has unlawfully withdrawn recognition previously granted the union, refused to provide information, and made unilateral changes in terms and conditions of employment without bargaining in good faith, all in violation of NLRA Section 8(a)(5) under well-settled Board precedent. ALJD 21.

Indeed, Austin Fire has *admitted* to the facts underlying all of these violations, including its refusal to bargain (Ritchie 82, 91, 100; GCX 7); its refusal to provide complete and accurate information in response to the Union's information requests (Ritchie 85; Joint Stipulations at 208-218); its implementation of unilateral changes to the terms and conditions (Ritchie 275-276, 299-300; Joint Stipulations at 208-218); and its direct dealing with employees. Ritchie 272, 299-300.

As its primary defense to the allegations in the Complaint, Austin Fire has attempted to create *post hoc* justifications for this conduct, specifically by attempting to re-write the express NLRA Section 9(a) recognition agreement that it

voluntarily executed by on July 8, 2008, by claiming that the recognition agreement was somehow invalid -- a defense the Administrative Law Judge erroneously adopted. ALJD 21.

**B. Austin Fire's Post Hoc Challenge to Its Section 9(a) Recognition of the Union is Time-Barred**

Contrary to the Administrative Law Judge's conclusion, Austin Fire's attempt to retroactively invalidate its grant of NLRA Section 9(a) recognition to the Union is time-barred by NLRA Section 10(b).

Under settled Board precedent, Section 10(b) precludes an employer's challenge to its previous Section 9(a) recognition of a union where the grant of recognition occurred more than six months before the filing of the unfair labor practice charge raising the issue. *E.g., Alpha Associates*, 344 NLRB 782, 782 (2005); *Cauthorne Trucking*, 256 NLRB 721, 722 (1981). This axiom rests on Supreme Court precedent that is over fifty years old. *Local Lodge 1424 v. NLRB (Bryan Mfg.)*, 362 U.S. 411, 419 (1960).

And the same principle has been repeatedly applied to preclude untimely challenges to Section 9(a) recognition in the construction industry, including challenges to the very same Section 9(a) recognition agreement that is at issue in this case. *Staunton Fuel & Material (Central Illinois)*, 335 NLRB 717, 719 n.10 (2001); *Oklahoma Installation*, 325 NLRB 741, 742 (1998); *Casale Industries*, 311 NLRB 951, 953 (1993); *Triple A Fire Protection*, 312 NLRB at 1088; *MFP*

*Fire Protection*, 318 NLRB at 842; *American Automatic Sprinkler Systems, Inc.*, 323 NLRB at 920. See also *Allied Mechanical Services*, 341 NLRB 1084, 1096 (2004).

The Board's policy in applying Section 10(b) to Section 9(a) recognitions in the construction industry has been aptly summarized by Board Member Hurtgen:

A contrary view would mean that stable relationships, assertedly based on Section 9(a) would be vulnerable to attack based on stale evidence. That is not permitted with respect to unions in non-construction industries. And under *John Deklewa & Sons*, 282 NLRB 1375 fn. 53 (1987), unions in the construction industry are not to be treated less favorably than unions in non-construction industries. Such an attack should not be permitted with respect to unions in the construction industry.

*Reichard Ceiling & Partition Co.*, 337 NLRB 125, 125 (2001) (Member Hurtgen concurring, citing *Bryan Mfg.*). And, again, the Board has only recently reconfirmed the application of *Bryan Mfg.* and Section 10(b) to preclude untimely challenges to recognition in the construction industry. *American Firestop Solutions*, 356 NLRB No. 71 (2011) (slip op. at 1).

By claiming its signed Section 9(a) recognition agreement in July of 2008 was not entered into with the necessary majority support among unit employees, Austin Fire has simply put itself in the same shoes of the employers in *Casale Industries*, *Triple A Fire Protection*, *MFP Fire Protection*, *American Automatic Sprinkler Systems*, *Allied Mechanical Services*, *Reichard Ceiling & Partition* and

*American Firestop Solutions*, whose belated legal challenges to Section 9(a) recognition of the union were all rejected by the Board as time-barred by Section 10(b).

**C. The Parties' Express and Unambiguous Section 9(a) Recognition Satisfies Established NLRA Standards**

Even if Austin Fire had raised a timely challenge to its NLRA Section 9(a) recognition of the Union, the result would have been the same. As the Administrative Law Judge acknowledged, the NLRB has over the past eighteen (18) years repeatedly concluded that the *same* NLRA Section 9(a) recognition agreement signed by Austin Fire in this case is sufficient to establish Section 9(a) recognition. ALJD 15. *Triple A Fire Protection*, 312 NLRB at 1088-1089 (1993); *MFP Fire Protection*, 318 NLRB at 842; *American Automatic Sprinkler Systems, Inc.*, 323 NLRB at 920-921.

This is so because, under settled NLRB precedent, the plain language of the parties' July 8, 2008, NLRA Section 9(a) recognition agreement expressly and conclusively established the nature of the parties' relationship. *Staunton Fuel & Material (Central Illinois)*, 335 NLRB at 720. Again, the NLRB has recently reaffirmed the Board's continuing adherence to *Staunton Fuel*. E.g., *American Firestop Solutions, Inc.*, 356 NLRB No. 71 (slip op. at 1); *J.T. Thorpe and Son*,

*Inc.*, 356 NLRB No. 112 (2011) (slip op. at 1, n. 5); *Diponio Construction Co.*, 357 NLRB No. 99 (2011) (slip op. at 1, n.3).<sup>4</sup>

Under the Board’s contractual standards for Section 9(a) voluntary recognition, a recognition agreement must reflect either “a contemporaneous showing of the union’s majority support among the employer’s employees, *or* a showing that the employer acknowledged and accepted that the union enjoyed majority support.” *Donaldson Traditional Interiors*, 345 NLRB 1298, 1299 (2005) (citing *H.Y Floors & Gameline Painting, Inc.*, 331 NLRB 304, 304 (2000) (“[A]n employer acknowledgment of such [majority] support is sufficient to preclude the employer from challenging majority status.”) (footnote omitted); *Oklahoma Installation Co.*, 325 NLRB 741, 741-42 (1998), *enf. denied* 219 F.3d 1160 (10th

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<sup>4</sup> The Administrative Law Judge’s suggestion that the Board adopt the United States Court of Appeals for the D.C. Circuit’s decision in *Nova Plumbing v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), and thereby overrule at least eighteen (18) years of contrary precedent and practice (ALJD 27-29), is unavailing here. First, the Board has never declined to adopt the D.C. Circuit’s decision in *Nova Plumbing* despite having several opportunities to do so, including as recently as 2011. And, in any event, application of the D.C. Circuit’s decision in *Nova Plumbing* would not produce a different result in this case. Assuming, for argument’s sake only, that the Board did hold in *Nova Plumbing* that a voluntary NLRA Section 9(a) recognition agreement is subject to a timely legal challenge in the face of “strong record evidence that the union may not have enjoyed majority support as required by Section 9(a)...,” 330 F.3d at 533, any consideration of a *Nova Plumbing* defense in this case would be precluded by the additional circumstance here that NLRA Section 10(b) bars *untimely* challenges to voluntary 9(a) recognition of the union, *Bryan Mfg.*, 362 U.S. at 419 -- an issue that was never addressed by the D.C. Circuit. *Nova Plumbing*, 330 F.3d at 538-39.

Cir. 2000) (“[W]e find no warrant to deny the legal effect of the express terms of the letter of assent because of the Union’s failure to submit additional evidence of its majority status...”); *Golden West Electric*, 307 NLRB 1494, 1495 (1992) (“[T]he...recognition agreement signed by the Employer by its terms unequivocally states that the union claimed it represented a majority of the employees and the Employer acknowledged that this was so.”).

The language in the parties’ NLRA Section 9(a) recognition agreement, on its face, plainly satisfies the Board’s standards. It provides that “[t]he Employer executing this *document 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 represented by the Union...*” (GCX4), and that language completely refutes the Administrative Law Judge’s jarring misreading of the recognition agreement (ALJD 18) -- that there was “nothing in the [recognition agreement] to show that the recognition was based on a contemporaneous showing or offer by the Union to show that the union had majority support....”<sup>5</sup>

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<sup>5</sup> Austin Fire’s further contention -- that it did not read or understand the documents it signed, and/or that it did not have complete copies of them, and/or that the Union representative initially said that the document meant something different -- not only strains credulity, but would not excuse its unfair labor practices in any event. *W.J. Holloway & Son*, 307 NLRB 487 n.1 (1992) (affirming ALJ’s decision that the terms of written agreement control, not alleged oral “modification,” and rejection of employer defense that it did not read the contract before signing).

Austin Fire’s voluntary execution of the NLRA Section 9(a) recognition agreement on July 8, 2008 (GCX4), three days before a majority of the Austin Fire bargaining unit fitters applied for Union membership (GCX 23(a)-(m)), may well have been premature; had Austin Fire waited for three (3) days to sign the NLRA Section 9(a) recognition agreement until July 11, 2008, the stated premises of the recognition agreement would have been satisfied: “that a clear majority of the sprinkler fitters in its employ have designated, are members of and are represented by [the Union].” GCX4. But Austin Fire’s premature execution of an NLRA Section 9(a) recognition agreement does not transform the nature or intended purpose of that recognition agreement but only affects its validity under the NLRA. *E.g., Special Service Delivery, Inc.*, 259 NLRB 993, 994 (1984) (premature grant of Section 9(a) recognition violated Section 8(a)(2)); *Komatz Construction Co.*, 191 NLRB 846, 850, 852 (1971), *enf’d in part*, 458 F.2d 317 (8th Cir. 1972) (same result in case arising in the construction industry). Challenge to the validity of that recognition agreement is, of course, time-barred by Section 10(b). *Bryan Mfg.*, 362 U.S. 411.

**D. Extrinsic Evidence is Inadmissible Where Language is Clear and Unambiguous**

The Administrative Law Judge further erred by attempting to create an ambiguity in the NLRA Section 9(a) recognition agreement, specifically by asserting (without record citation or support) that the parties’ NLRA Section 9(a)

recognition agreement was only one part of “the agreement entered into by the parties...comprised of three separate documents that were contemporaneously signed on July 8, 2008” (ALJD 17-19) -- the other two documents being the National Agreement and the executed signature page of the latter document. JX1(C),(D).

To the contrary, the NLRA Section 9(a) recognition agreement and the National Agreement (including its attached signature page) are each entirely independent of the other and do not reference or incorporate the terms of one another. And the NLRA Section 9(a) recognition agreement was not included as part of the National Agreement or even referenced in the parties’ stipulation but was only introduced later in the hearing as a separate exhibit. JX1(C),(D); GCX4.

The Administrative Law Judge’s attempt to retroactively discover an ostensible “ambiguity” between the language of the two documents is futile for two reasons: first, the language cited by the Administrative Law Judge from the signature page of the National Agreement is not in any way inconsistent with the parties’ declared NLRA Section 9(a) relationship,<sup>6</sup> and second, the latter point is

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<sup>6</sup> The boilerplate language cited by the Administrative Law Judge from the preamble to the signature page of the National Agreement is not in any way indicative of either a Section 9(a) recognition or a Section 8(f) agreement:

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

confirmed by the fact, overlooked by the Administrative Law Judge, that the National Agreement itself, by its plain language, independently restates the Union's *NLRA Section 9(a)* recognitional status (confirming the Union's status "as the sole and exclusive bargaining representative for all Journeymen Sprinkler Fitters and Apprentices in the employ of [Union signatory] Employers...pursuant to Section 9(a) of the National Labor Relations Act."). JX1C, Art. 3 at 4.

And the Administrative Law Judge's *post hoc* hypothesis of the parties' purported intentions in signing the NLRA Section 9(a) recognition agreement in July of 2008 (ALJD 18) is also stymied by her own finding that Ritchie could not recognize or recall signing the Section 9(a) agreement (ALJD 4) as well as by Ritchie's own uninformative testimony. Ritchie 75-76 ("I don't know what the document means, but I signed it.").

The Administrative Law Judge's "ambiguity" argument is also precluded by the principle that extrinsic evidence is admissible *only* where the terms of the written instrument in question are ambiguous or unclear; where, as here, there is a

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(con't)

and Apprentice Sprinkler Fitters;

NOW, THEREFORE, it is mutually agreed as follows:

The Administrative Law Judge's hypothesis, that the quoted language "would be the expectation for an 8(f) agreement" (ALJD 18), is no more than unsupported speculation and is disproven by the *express* Section 9(a) language in the National Agreement itself which the Administrative Law Judge overlooked. JX1(C), Art. 3 at 4.

clear written instrument, neither party can challenge or seek to modify the clear terms of that writing through oral testimony. *Quality Building Contractors, Inc.*, 342 NLRB 429, 430 (2004).

The Board has not hesitated to apply this rule in these same circumstances to preclude a party's claim that a collective bargaining agreement was only an NLRA Section 8(f) agreement based on oral discussions the employer claims to have had with the Union where, as here, the clear and unambiguous terms of the written contract provided otherwise. *Id.* (citing *NDK Corp.*, 278 NLRB 1035, 1035 (1983) ("National labor policy requires that evidence of oral agreements be unavailing to vary the provisions of a written collective bargaining agreement valid on its face.")). *See also Dutchess Overhead Doors*, 337 NLRB 162, 166 (2001) (Employer's testimony regarding the limited nature of a collective bargaining agreement rejected as inadmissible as parol evidence where agreement was not ambiguous); *SCC Contracting, Inc.*, 307 NLRB 1519, 1524-25 (1992) (same).

Because there is nothing in the terms of the parties' NLRA Section 9(a) recognition agreement that is even arguably ambiguous -- as the Board has previously recognized since at least 1993, *Triple A Fire Protection, MFP Fire Protection, American Automatic Sprinkler Systems, Inc.* -- extrinsic evidence of Ritchie's purported "intent" is inadmissible. *Madison Industries*, 349 NLRB 1306, 1308-09 (2007).

**E. The Administrative Law Judge’s Attempt to Retroactively Convert the Parties’ Section 9(a) Recognition Into a Section 8(f) Agreement Violates the Provisions of the Statute Itself**

The Administrative Law Judge’s conclusion that the parties’ express Section 9(a) recognition agreement was not supported by contemporaneous majority support among bargaining unit employees, and was therefore merely “a Section 8(f) agreement” (ALJD 18, 21), also violates the plain language of NLRA Section 8(f) itself, which excludes from its coverage any agreement that -- as the Administrative Law Judge found here (ALJD 18) – “established, maintained, or assisted by any action defined in Section 8(a) as an unfair labor practice.”<sup>7</sup>

Assuming the validity of Austin Fire’s claim, and the Administrative Law Judge’s finding, that Austin Fire prematurely executed the NLRA Section 9(a) recognition agreement three (3) days before a majority of its employees had designated the Union as their representative, an arguable violation of NLRA Section 8(a)(2) would have occurred. *Special Service Delivery, Inc.*, 259 NLRB at 994; *Komatz Construction Co.*, 191 NLRB at 850, 852. But that same result, as a matter of law, *precludes* the Administrative Law Judge’s attempt to retroactively

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<sup>7</sup> Section 8(f) states in relevant part: “It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their reemployment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members, (*not established, maintained, or assisted by any action defined in Section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice...*”

convert the parties' Section 9(a) recognition agreement into "a Section 8(f) agreement" which Austin Fire would then be free to repudiate upon its expiration (ALJD 21); under fifty-year-old NLRB principles, an unlawfully established recognition agreement *cannot* be converted into "a Section 8(f) agreement."

*Oilfield Maintenance*, 142 NLRB 1384, 1385-86 (1963); *Bear Creek Construction Co.*, 135 NLRB 1285, 1286 (1962). *See also Clock Electric*, 338 NLRB 806, 828 (2003); *Bell Energy Management Corp.*, 291 NLRB 168, 169 (1988).

### **III. Conclusion**

For the reasons stated, the Charging Party's Exceptions should be granted, the allegations in the Complaint should be sustained in all respects, and Austin Fire ordered to adhere to its NLRA Section 9(a) recognition of, and Section 8(a)(5) duty to bargain with the Union, to comply with the Union's request for information, and to make whole bargaining unit employees according to the terms of the National Agreement.

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Respectfully submitted,

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**Certificate of Service**

I hereby certify that on January 10, 2012, I electronically filed Local 669's Brief in Support Exceptions to the Decision of the Administrative Law Judge with the Executive Secretary of the National Labor Relations Board via the e-filing portal on the NLRB's website, and also forwarded a copy by electronic mail to the Parties as listed below:

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