UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AUSTIN FIRE EQUIPMENT, LLC	*	
Respondent	*	
and	*	**JD (ATL) – 32-11**
	*	**Case No. 15-CA-19697**
ROAD SPRINKLER FITTERS LOCAL	*	
UNION NO. 669, U.A., AFL-CIO	*	
Union	*	
	*	
* *		

RESPONDENT'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS

Respondent Austin Fire, LLC respectfully submits this Brief in Support of its Cross-Exceptions, pursuant to Rule 102.46(e) of the Rules and Regulations of the National Labor Relations Board.

STATEMENT OF THE CASE

Respondent, Austin Fire Equipment, L.L.C. (hereafter "Austin Fire" or "Company"), with its main office located in Prairieville, Louisiana, is engaged in the service and installation of industrial sprinkler systems. Respondent is a construction industry employer primarily engaged in the building and construction industry. (Stipulation No. 1, Joint Ex. 1). Russell Ritchie (hereafter "Ritchie") is the owner and president of Respondent. (Stipulation No. 1, Joint Ex. 1).[1]

Charging Party, Road Sprinkler Fitters Local Union No. 669, U. A., AFL-CIO (hereafter the "Union") is a labor organization within the meaning of Section 2(5) of the Act. (Stipulation No. 2, Joint Ex. 1). Tony Cacioppo is business agent for the Union, and Donnie Irby is a Union organizer responsible for membership development. (Tr. 219, 432).

[1] Exhibits introduced at the hearing are cited as "Ex.___." Testimony is cited by witness and transcript page number(s). The Administrative Law Judge's decision is cited to as "ALJD, page __, lines ___."

The Union filed Charge No. 15-CA-19697 on July 29, 2010, alleging that Austin Fire had violated Section 8(a)(1) and (5) by: (i) failing to bargain in good faith for a new collective bargaining agreement since April 1, 2010; (ii) refusing to provide information necessary to bargaining since May 5, 2010; and (iii) refusing to bargain since July 13, 2010. (G.C. Ex. 1(a)). The Union filed an Amended Charge on August 4, 2010, additionally alleging that since a specific time unknown, Respondent made unilateral changes to the terms and conditions of employment by changing wage rates and the employees' health care plan and pension plan with the Union. (G.C. Ex. 1(d)). On November 30, 2010, the Union filed a Second Amended Charge (i) specifying that the alleged unilateral change in terms and conditions of employment had occurred since on or about February 4, 2010; and (ii) setting forth in more detail the Union's request for information. (G.C. Ex. 1 (g)).

A Complaint and Notice of Hearing ("Complaint") issued on January 31, 2011, alleging that Respondent had violated Section 8(a)(1) and (5) of the Act (i) by failing to continue in effect all the terms of a collective bargaining agreement since February 4, 2010; (ii) by failing to recognize and bargain with the Union as the exclusive bargaining representative of unit employees since April 1, 2010; (iii) by withdrawing recognition of the Union on July 13, 2010; and (iv) by failing and refusing to provide certain information requested by the Union since May 5, 2010. The Complaint alleged that the bargaining relationship between the parties, as well as the collective bargaining agreement itself, was based upon the Union's Section 9(a) collective bargaining representative status since July 8, 2008. (Complaint, paragraphs 9 and 10, G.C. Ex. 1(j)).

STATEMENT OF FACTS

Initial Dealing Between Respondent And The Union

Respondent's initial dealing with the Union occurred in early June, 2007, as a result of Respondent having obtained a job in Minden, Louisiana, several hours from its Prairieville, Louisiana base. (Tr. 242). Tony Cacioppo, business agent, and Donnie Irby, organizer, had previously solicited Ritchie, offering to supply Respondent with labor. (Tr. 242). In order to avoid having to send employees out of town for an extended period of time, Ritchie contacted the Union regarding supplying two employees to man the Minden job. As a result, the parties signed a project agreement under which the Union would supply sprinkler fitters, and Austin Fire would agree to be bound by the 2007-2010 National Fire Sprinkler Association industry agreement (hereafter "NFSA agreement," "industry agreement," "agreement," "contract," or "CBA") (Joint Ex. 1 C; Tr. 230-31), with respect to work performed at the project. (Joint Ex. 1 A). Pursuant to the project agreement, the Union referred two employees to the job, which job lasted approximately six months, as expected. (Tr. 243; Joint Ex. 1 A).

The July 8, 2008 Agreement

Following completion of the work pursuant to the June 2007 project agreement, Cacioppo and Irby visited Ritchie at various times regarding the possibilities of other work. (Tr. 245). By the early summer of 2008, Respondent obtained a large sprinkler installation construction job for the Valero Refinery in Krotz Springs, Louisiana. (Tr. 101, 245). The Valero job required at least twelve sprinkler fitters and was expected to last six months. (Tr. 72, 246-47). Respondent contacted the Union and discussed the need for twelve sprinkler fitters for the Valero job. (Tr. 247). Ritchie met with Cacioppo and Irby at Respondent's office, at which time Ritchie indicated his desire for another project agreement. (Tr. 251). Ritchie was told that

the Union could not do any more one-job project agreements, but that the Union was willing to enter into a one-year agreement. (Tr. 107, 251). In critical need of skilled sprinkler fitters for the Valero job and with no manpower to spare, Ritchie agreed to "try this out for a year." (Tr. 250). Also discussed was the Union's requirement that existing Austin Fire sprinkler fitters would have to be covered by the contract and join the Union. In order to obtain the Union's referrals for Valero, Ritchie agreed to include his fourteen current sprinkler fitters (hereafter "core employees" or "core sprinkler fitter employees") under the contract and to require that they join the Union but was not willing to include approximately 24-26 sprinkler fitters employed by Respondent to service four near-by Dow Chemical customer sites. (Tr. 259-60). Cacioppo agreed to the exclusion of the approximate 24-26 sprinkler fitters working for Respondent at near-by Dow Chemical facilities. (Tr. 423). This verbal modification excluding Dow-assigned sprinkler fitters from coverage under the contract as well as the verbal modification excluding inspectors from coverage under the contract (Tr. 145, 260) was not put into the written agreement (Tr. 427-28), but was the basis of the recognized unit. (Complaint, paragraph 8, G.C. Ex. 1(j)). Based on these understandings, the parties scheduled another meeting for July 8, 2008 to sign the contract. (Tr. 251).

Prior to the scheduled July 8, 2008 meeting, Ritchie met with his sprinkler filter employees and informed them that he was considering signing a contract with the Union in order to man the Valero job. (Tr. 259). Ritchie had been told by the Union that any employee doing work under the contract had "to be working as a Union person." (Tr. 259-60). All of the employees he spoke to, except for one, were against joining the Union. (Tr. 261). Nevertheless, Ritchie told his core sprinkler fitter employees that they would have to join the Union in order to continue to work for Respondent. (Tr. 77-79, 259-60, 298-99). Ritchie also told his core

sprinkler fitters that the agreement would only be good for a year: "[w]e're going to try this out for a year, we're going to see how this goes." (Tr. 259).

At the July 8, 2008 meeting to sign the agreement, the Union presented Ritchie with the April 1, 2007 industry agreement (National Fire Sprinkler Association, Inc. – Local 669) (Tr. 103-04, 252; Joint Ex. 1 C), effective through March 31, 2010. Ritchie pointed out to the Union that this agreement was for eight months more than the one year term that had previously been agreed to by the parties (Tr. 103, 252, 254-56). To obtain Ritchie's agreement for the longer one year and eight month term, the Union showed Ritchie the agreement's "good till 3/31/10" language (Tr. 97-98, 252, 254) and told Ritchie that the agreement had to run through the time of the NFSA-Local 669 Agreement (March 31, 2010), that "it just needs to be done that way." (Tr. 254). The Union encouraged Ritchie to go along with the longer term by telling him that the Union would supply him with qualified sprinkler fitters and help Austin Fire get prevailing wage work. (Tr. 250, 265). Even though it was not what had been previously agreed, Ritchie said he would "go ahead and sign up for the year and eight months. I'll try this out for a year and eight months in lieu of one year." (Tr. 254). Ritchie was presented with a two page signatory document, and told "[i]f you want the 13 [12] people [for the Valero job], you have to sign here" (Tr. 255). Ritchie signed the signatory agreement. (Joint Ex. 1 B; Tr. 256).

After Ritchie signed the signatory agreement, the Union presented him with another document the Union had prepared, entitled "Acknowledgement of the Representative Status of Road Sprinklers Fitters Local Union 669, U.A., AFL-CIO" (hereafter the "Acknowledgement"). (G.C. Ex. 4). Ritchie testified that he recalled signing a second document, even though he did not recognize the Acknowledgement as the second document he had signed; Ritchie did agree that the Acknowledgement contained his signature. (Tr. 257). Ritchie had been told by the

Union that "if [he] wanted to do this - create this relationship, [he] needed to sign these documents [Acknowledgement]." (Tr. 257). *No explanation was given to Ritchie regarding the true purpose or significance of the Acknowledgement.* (Tr. 257). Ritchie was told by the Union that he had to sign this document [Acknowledgement] in order to have all the signature pages needed for the CBA, to get the people he needed." (Tr. 257). Moreover, Ritchie was *not* given even a copy of the Acknowledgement. (Tr. 257-58). Even in September 2008, when the Union mailed Ritchie his copy of the executed signatory page to the 2007-2010 NFSA industry agreement, the Union *conspicuously* failed to include a copy of the Acknowledgement. (Respondent Ex. 3). Thus, Respondent did not even have a copy of this document [Acknowledgement] in its files. (Tr. 258).

It is *undisputed* that prior to and at the time of the July 8, 2008 signing, the Union had *never* presented Ritchie with *any* evidence that any Austin Fire employee had authorized the Union to represent *any* Austin Fire employee. (Tr. 261). Moreover, the Union did *not* make *any* offer to present Ritchie with *any* evidence that a majority of Respondent's current sprinkler fitters were represented by the Union or desired to be represented by the Union. (Tr. 76-77). To the contrary, just prior to signing the Agreement and Acknowledgement, all but one of Respondent's sprinkler fitters had expressed to Ritchie opposition to joining the Union, a sentiment that continued until the agreement was repudiated in May 2009. (Tr. 261).

After the July 8, 2008 signing, Ritchie again met with his fourteen core sprinkler fitter employees who had been placed under the Union's contract. (Tr. 77, 259, 261). Ritchie told his core sprinkler fitters that Austin Fire had signed up with the Union, and that the employees "needed to go Union." The employees *again* expressed their opposition to joining the Union. (Tr. 261). Despite the opposition of his employees, Ritchie instructed his fourteen core sprinkler

fitter employees to contact Cacioppo so that they could each sign to become Union members. (Tr. 259). Thereafter, Respondent's core (sprinkler fitter) employees signed up with the Union in the Company's conference room. (Tr. 334-35, 344-47).[2]

Respondent's Repudiation Of The Agreement As To Its Core Employees

By late April 2009, Ritchie was well aware that the representations made by the Union to induce him to sign the contract were not being fulfilled. In particular, Respondent did not receive a single job that the Union had promised he would obtain as a Union contractor. (Tr. 265-66). Due to the high labor costs called for under the agreement, Respondent was losing hundreds of thousands of dollars, had incurred huge debt, and was in dire financial condition. (Tr. 265-66).[3]

On April 29, 2009, Ritchie phoned Cacioppo to discuss Respondent's dire financial predicament. Ritchie told Cacioppo that "he [Ritchie] *needed to get out of his contract."* (Tr. 380). Cacioppo claims he told Ritchie during that call (but *not* thereafter) that he could not get out of his contract. (Tr. 380). Ritchie followed the call with an e-mail on April 30, 2009 (at 5:30 a.m.) in which Ritchie again stated his need to be relieved of the contract. (Tr. 266-67; Respondent Ex. 1). In the April 30, 2009 e-mail, Ritchie also forwarded Cacioppo profit and loss financial statements for October 2008 through April 2009 to verify Respondent's dire financial condition. (Tr. 284-85; Respondent Ex. 1). Ritchie pointed out in his April 30, 2009 e-mail that he had a ten year investment and all of his personal assets in his business, and that despite the Union's incentive payment, he was at a point where he would have to make decisions to protect his business from bankruptcy. Ritchie also indicated in his April 30, 2009 e-mail a

[2] Ritchie testified that although he had heard the term "right-to-work", he did not know what it meant. (Tr.71-72).

[3] While the Union had provided Respondent financial assistance through an industry assistance program, the assistance was insufficient to prevent the huge financial losses Respondent was experiencing as a Union contractor. (Tr. 297-98, 310-11).

willingness to do project agreements to cover employees referred to him by the Union. (Respondent Ex. 1). Ritchie requested that the Union meet with him *soon* to discuss his *dire* financial situation. (Respondent Ex. 1). Cacioppo forwarded a copy of Ritchie's email to several high-ranking Union officials at the "national office" who, according to Cacioppo, "needed to know we had a contractor . . . having some trouble – *pretty serious when a contractor's talking about . . . wants to be out of the contract."* (Tr. 384-85; Respondent Ex. 4).

As requested by Ritchie, Respondent and the Union met soon thereafter at a Chili's Restaurant in Baton Rouge, Louisiana on May 5, 2009. (Tr. 271). Present at the meeting were Ritchie, his then wife Karen and Union representatives Cacioppo and Irby. (Tr. 324, 386, 433). At the meeting, Ritchie reiterated the *dire* financial predicament of the Company, and stated that the Company was failing financially because of the agreement he had entered into with the Union. (Tr. 271-72). *Ritchie then stated that he was going to remove ("take back") his core employees from the Union, and place his core employees back in the Company's insurance and benefit plans*. (Tr. 272).[4] Karen Ritchie (legally separated from Ritchie for some time by the time of the June 22-23, 2011 hearing in this matter) testified that Ritchie said *"he was pulling our employees out of the Union."* (Tr. 326). Cacioppo testified that Ritchie said at this meeting that "he [Ritchie] really needed to get out of the contract." (Tr. 387).

As to the Union's response to Ritchie's announcement that he was going to take his core employees out of the contract, Ritchie testified that Cacioppo said that "they would look the other way." (Tr. 272). Karen Ritchie testified that Cacioppo said: "do what you have to do, we are here to help you." (Tr. 326). Cacioppo testified that he had "earlier" told Ritchie that "there was no way to let him out of the contract" (Tr. 387) but he did *not* deny that he told Ritchie at the

[4] Of the original fourteen "core" employees *forced* into the bargaining unit, there were ten remaining who Ritchie was "taking out" of the Union's contract. (Tr. 275).

May 5, 2009 meeting that he would let him out of the contract, *nor* did he deny that he had said he would "look the other way" or "do what you have to do." Irby testified that he told Ritchie at the May 5, 2009 meeting that "if you don't have any people working . . . it shouldn't cost you that much." (Tr. 434). Irby also testified that he told Ritchie he would "look at the industry advance fund," but Irby was evasive as to whether he took any such steps after the meeting "as Ritchie had already been helped." (Tr. 434, 438-39).[5]

Prior to the May 5, 2009 meeting, Ritchie had met with his core employees and told them that he would be taking them out of the Union's contract. (Tr. 299). Ritchie also discussed with his core sprinkler fitter employees the effects of the change to the Company's health insurance coverage, and advised his core sprinkler fitters that their pay would be adjusted so that they would not be taking home any less than they had under the Union's contract. (Tr. 299-300).

Post-Repudiation Events

Prior to the May 5, 2009 repudiation of the contract -- as to the remaining ten core sprinkler fitters employees -- all pay and fund contributions were made in accordance with the Union's contract. (Tr. 263-64). The repudiation process was complete once the remaining core sprinkler fitters could be transferred back to Respondent's insurance plan, effective July 1, 2009. (Tr. 288, 318). Respondent continued to follow the terms of the Union's contract as to all sprinkler fitters referred by the Union to Respondent's jobsites. (Tr. 289).

Cacioppo *never* called Respondent after the May 5, 2009 Chili's meeting to question or challenge the fact that fringe benefits and pay rates pursuant to the contract were no longer being paid to or on behalf of the then ten core sprinkler fitter employees taken out of the Union's

[5] While denying that anyone had said "they would look the other way" or "do what you have to do" (Tr. 434), Irby *failed* to testify that either he or Cacioppo told Ritchie at the May 5, 2009 meeting that the Union could not agree to let him out of the contract.

contract. (Tr. 278-79). Moreover, records were available to the Union that showed non-compliance with apprenticeship requirements and that showed dues and fringe benefit contributions *not* being paid on behalf of Respondent's core sprinkler fitters. (Tr. 397-98). Monthly records for fringe benefit payments submitted by Respondent reflected that by July 2009, Respondent began omitting information regarding hours worked by its core sprinkler fitters. (Respondent Ex. 6). Thereafter, Respondent began to denote on the records zero hours worked by its core sprinkler fitters. (Respondent Ex. 6).

When a former Austin Fire employee reported to the Union that an Austin Fire sprinkler fitter (Brendan Clements) was not being paid in accordance with the Union's contract, Cacioppo admitted that he could have checked records to determine whether this was true but did not do so. (Tr. 396-97). According to William Pahulla, the Union's Assistant Business Manager for the Southern Region, it was Cacioppo's responsibility for "checking on jobs, checking on employees, and knowing what was going on in the unit." (Tr. 127). Also, it was Cacioppo's responsibility to report to Pahulla compliance or non-compliance with the contract. (Tr. 127-28). According to Pahulla, Cacioppo advised Pahulla *only* that there were "rumors" that Respondent was not paying the employees per the Union's contract. (Tr. 128).

Shortly after Respondent repudiated the contract as to its remaining ten core sprinkler fitter employees, Cacioppo phoned sprinkler fitter helper Bryan Harris "right after we were going Company," and asked Harris whether he [Harris] was "going to stay with Russell [the Company's president] or come with the Union." (Tr. 337-38). Harris testified that he responded by asking Cacioppo about the availability of work through the Union, and was told by Cacioppo that the Union's work was out of town. (Tr. 337-38).[6] Cacioppo testified that he did not recall

[6] Harris had just bought a house and didn't want to leave his residence for work. (Tr. 338).

talking to Harris around this timeline (Tr. 393) but Cacioppo did *not* deny the above conversation.

Within a week or two after being told by Respondent that the then core sprinkler fitters were going "non-union," Shannon Rogers, a core sprinkler fitter, contacted Cacioppo (Tr. 357). Rogers had entered the Union's apprenticeship program, and called to ask Cacioppo whether he could finish the program even though Austin Fire "was going nonunion". (Tr. 351, 357, 359-60). Cacioppo told Rogers that "as long as his dues were being paid", and if the Company was agreeable to allowing him to stay in the Union and continue paying Union dues through the Company, he could remain in the apprenticeship program. (Tr. 351, 357-58). Cacioppo did *not* deny that this conversation took place. Cacioppo *only* recalled a conversation in September 2009 (several months later) during which Rogers supposedly advised Cacioppo that he [Rogers] was going to become an inspector and therefore would be leaving the apprenticeship program. (Tr. 389-90).

Another employee who was in contact with Cacioppo after Respondent had withdrawn its core employees from the Union was Henry Fajardo. Fajardo had been referred to Respondent by the Union after Austin Fire had entered into the contract. (Tr. 166-67). Fajardo had just spoken to another employee, Angelo Arnone, who also had been referred by the Union. Arnone told Fajardo that he [Arnone] had quit Austin Fire because "he didn't want to deal with Austin [Fire] going non-union." (Tr. 169). Fajardo testified that he called Cacioppo after his conversation with Arnone, told Cacioppo that the Austin Fire employees were going non-union, and asked Cacioppo what he [Fajardo] should do. (Tr. 170-71). Fajardo's concern was that he did not want to be in violation of the Union's rules by working with non-union employees. (Tr. 170). Fajardo testified that Cacioppo told him to "just keep on working." (Tr. 171). Thereafter, while working

on Respondent's Coast Guard construction job with non-union sprinkler fitters, Fajardo again called Cacioppo to ask if it was legal for him to be working with non-union employees. Cacioppo told Fajardo "to keep on working." (Tr. 172-73). Cacioppo testified but *failed* to refute the testimony of Fajardo.

Finally, Ritchie testified that a month or two after Respondent hired employee Brendan Clements on June 3, 2009, he received a call from Cacioppo. (Tr. 273-74). Ritchie testified that Cacioppo requested that he fire Clements "because he's running his mouth to other Union members about [Respondent] having non-union people working for [Ritchie]". (Tr. 273, 320). Clements was not fired by Ritchie, but rather worked an additional six to eight weeks until the job he was working on was complete. (Tr. 321). While Cacioppo testified,[7] Ritchie's account remains *unrefutted*.

The 2010 "Negotiations"

On December 4, 2009, the Union notified Respondent of its intent to terminate the contract as of March 31, 2010, and negotiate a new agreement. (Joint Ex. 1 D). At the expiration of the contract on March 31, 2010, Ritchie believed that any obligation based upon the contract had ended (Tr. 91). This was consistent with Ritchie's intent to "try it out" and with the intent of the parties that the obligation was limited to the March 31, 2010 term of the Agreement. (Tr. 97-98, 121, 124, 250-52); Stipulation No. 7, Joint Ex. 1). Ritchie did not know what 9(a) meant, and believed that he had no further obligation to negotiate with the Union. (Tr. 91). Ritchie was relieved that "[t]his thing's over." (Tr. 91).

[7] Cacioppo testified that he spoke to Ritchie after he heard that Clements was not being paid according to the contract. Both Cacioppo and Irby testified that Ritchie told them during September 2009 that Clements was getting ready to be laid off at the end of the job. (Tr. 389). Despite the claimed purpose for their visit, there was *no* follow-up by either Cacioppo or Irby to check whether Clements was being paid according to the contract. (Tr. 397, 408, 440-41).

Thereafter, on April 16, 2010, the Union sent a letter to Respondent requesting available dates for negotiation of a new agreement (Stipulation No. 16, Joint Ex. 1; Joint Ex. 1 E). Ritchie had no interest in meeting with the Union, but did so when the Union told him that there would be litigation if he did not meet. (Tr. 82). Despite Ritchie's belief that he had no duty to bargain with the Union, Ritchie met with the Union on May 13, 2010 in view of the threat of litigation. (Tr. 82; Stipulation No. 17, Joint Ex. 1). Even though the contract had already expired on March 31, 2010, Ritchie thereafter presented the Union with a letter stating his intent to "terminate participation of the Collective Bargaining Agreement within 60 days." (G.C. Ex. 6).[8]

William Puchulla stated at the beginning of negotiations that the parties had to negotiate a contract in good faith or reach impasse. (Tr. 221). The parties had three additional meetings following the May 13, 2010 meeting: June 15, 2010, June 29, 2010 and July 13, 2010. (Stipulation No. 17, Joint Ex. 1). During the meetings, Ritchie indicated that his interest would be in entering into agreements on a project by project basis. (Tr. 223). The Union's position was that they would *only* agree to a contract that covered all work falling under Section 18 of the NFSA industry agreement. (Tr. 224-25). Also, the Union's position was that project agreements were *not* an available option to which the Union would agree. (Tr. 224, 227, 233-34). On June 29, 2010, Ritchie presented the Union with a "proposal" that the negotiations for a new collective bargaining agreement end, that the "existing bargaining agreement be terminated July 2, 2010, and that future agreements be handled on a job agreement basis. (G.C. Exhibit 7). Ritchie testified that he had prepared the May 13, 2010 letter and the June 29, 2010 proposal

[8] Ritchie was being educated by the Union as to collective bargaining, and was relying on the Union's representation that the expired contract was "still going on." (Tr. 99).

because he had "become aware that the contract was still going on and that [he] was [bound] by it," a conclusion he "figured it out through the Union." (Tr. 99.)[9]

By letter dated May 5, 2010, the Union requested certain information. (Stipulation No. 18, Joint Ex. 1; Joint Ex. 1 F). Respondent provided the Union with a copy of the employee handbook; a profit and loss statement; documents reflecting employees' names, wages paid, and hours worked; and time by Job Detail lists for jobs requested by the Union. (Tr. 114-16; G.C. Exs. 8 - 10). There was *no* showing that any information requested was necessary and *no* showing that the Union was impacted by any information not received.

The parties did not reach agreement. Following the last meeting of July 13, 2010, neither party contacted the other party to schedule a meeting, and there were no further meetings or requests for information. (Stipulation No. 19, Joint Ex. 1).

THE ADMINISTRATIVE LAW JUDGE'S DECISION

On November 29, 2011, the Administrative Law Judge issued her decision in this case. The ALJ concluded at the outset that the parties were in the construction industry. (ALJD, p. 2, lines 27-30). She also concluded that, based upon the language in the pertinent documents and the relevant extrinsic evidence, the record as a whole established that Respondent and the Union entered into an 8(f) agreement on July 8, 2008. (ALJD, p.21, lines 33-34). Accordingly, the ALJ found that Respondent had *no* bargaining obligation with the Union following the expiration of the 8(f) agreement on March 31, 2010. (ALJD, p. 27, lines 17-20). The ALJ therefore dismissed all allegations in the complaint that alleged violations of 8(a)(5) subsequent to March 31, 2010. (ALJD, p. 26, lines 29-31; ALJD, p. 27, lines 17-21).

The ALJ also found that during the last two months of the 8(f) agreement, from February 4, 2010 through the March 31, 2010 expiration of the agreement, Respondent violated Section

[9] *Supra.*

8(a)(5) by failing to maintain in effect the terms of the agreement with respect to its core employees. (ALJD, p. 22, lines 14-19). In doing so, the ALJ rejected Respondent's evidentiary showing that it provided clear and unequivocal notice to the Union in early May, 2009 of its repudiation of the agreement as to its core employees, and that the Section 10(b) period had begun to run at the time of repudiation such that the Union's August 4, 2010 charge was *untimely*. (ALJD, p. 26, lines 5-7).

In her decision, the ALJ also recommended that a new burden shifting scheme proposed by Counsel for the Acting General Counsel be adopted in the construction industry to determine the 8(f) or 9(a) status of the agreement in lieu of the current evidentiary paradigm set forth in *Staunton Fuel & Material* (*Central Illinois Construction*), 335 NLRB 717 (2001).

In these cross-exceptions, Respondent primarily excepts to (i) the failure of the ALJ to determine that Respondent provided the Union with clear and unequivocal notice in May, 2009 (outside of the 10(b) period) of its repudiation of the CBA as to its core employees; and (ii) the recommended new burden shifting scheme to determine 8(f) or 9(a) status in the construction industry (although Respondent agrees that the evidentiary rules in *Staunton Fuel & Material* should be modified or abandoned).

ARGUMENT

I. The ALJ Erred In Failing To Find That Respondent Gave Clear And Unequivocal Notice (Outside Of The 10(b) Period) To The Union Of Its Intent To Repudiate The Agreement As To Its Core Employees.

A. The CBA Was Repudiated By Respondent As To Its Core Employees.

When an unfair labor practice may be characterized as contract repudiation, the unfair labor practice occurs at the moment of the repudiation. *A & L Underground*, 302 NLRB 467 (1991). Where repudiation occurs, as here, the Section 10(b) period begins to run when the Union has clear and unequivocal notice of the repudiation. *Vallow Floor Coverings, Inc*., 335

NLRB 20 (2001). Repudiation can occur when an employer gives clear and unequivocal notice that it is refusing to apply a collective bargaining agreement to employees in a disputed classification. *St. Barnabas Medical Center*, 343 NLRB 1125, 1127 (2004) ("the Union was acutely aware, long before 6 months prior to the filing of the charge, of each element of the alleged unfair labor practice – the existence of employees in classifications allegedly covered by the contract and the Respondent's refusal . . . to apply the collective bargaining agreement to them."). The Section 10(b) limitations period begins to run when the charging party has clear and unequivocal notice, either actual or constructive. *Leach Corp*, 312 NLRB 990-91 (1993), *enf'd*. 54 F.3d 802 (D.C. Cir 1995). A party is charged with constructive knowledge of an unfair labor practice where it *could* have discovered the unfair labor practice through the exercise of *reasonable diligence*. *St. Barnabas Medical Center*, *supra* at 1126-27; *Moeller Bros. Body Shop,* 306 NLRB 191, 193 (1992) ("While a union is not required to [ ] police its contracts aggressively . . . it cannot with impunity ignore an employer or a unit . . . and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes."). Section 10(b) begins to run when the aggrieved party *knows or should know* that statutory rights have been violated. *St. Barnabas Medical Center*, *supra* at 1127.

B. The Union Had Clear And Unequivocal Notice Of Repudiation.

At the May 5, 2009 meeting, Ritchie clearly and unequivocally notified the Union that he was no longer going to be following the contract with respect to the core sprinkler fitters that had been employed by Respondent at the time the contract was signed. Ritchie explained that the decision was based upon dire financial conditions that he attributed to the high costs of the fringe benefits required by the CBA, and declared that he was going to remove the core sprinkler fitters

from the Union and take back the employees and return them to the Company's insurance and benefit plans.

Also, after the May 5, 2009 meeting, the Union had conversations with and received information from employees which demonstrate that the Union was *fully* aware that the Respondent no longer was applying the contract with respect to its core sprinkler fitters. Cacioppo himself called employee Bryan Harris and asked him if he was going to "stay with Russell [Austin Fire's president] or come with the Union." (Tr. 337-38). Shannon Rogers, a core employee, called Cacioppo to ask if he could finish the apprenticeship program even though Respondent "was going non-union." (Tr. 351, 357, 359-60). Cacioppo told Henry Fajardo to "just keep on working" after Fajardo expressed concern with working with the Austin Fire employees after they had gone "non-union." (Tr. 171). Although Cacioppo testified, the testimony of employees Harris, Rogers and Fajardo remains *unrefutted.*

Cacioppo also called Ritchie during the summer of 2009 and asked Ritchie to fire Brandan Clements "because [Clements was] running his mouth to other union members about [Ritchie] having non-union people working for [Respondent]. (Tr. 273, 320-21). Notwithstanding the Union's claim to be concerned with whether this *expelled* member was somehow not being paid per the contract, Cacioppo made *no* effort to check to see if this was the case even though such records were available to him (Tr. 397, 406-08, 440-41), all of which supports Ritchie's account that Cacioppo's interest in Clements was Clements' spreading word that Ritchie was working non-union and *not* whether Clements was being paid per the contract.

Thus, based upon the May 5, 2009 repudiation meeting (discussed *infra* at pp. 8-9), together with the conversations that occurred immediately following the May 5, 2009

repudiation meeting, the record *clearly* reflects that the Union had clear and unequivocal notice that Respondent was repudiating the contract as to its core sprinkler fitters.[10]

C. The ALJ'S Misapplication Of The Law

The ALJ relied upon the fact that Respondent continued to apply the contract to non-core employees (employees referred by the Union) to base her finding that repudiation did not occur. However, there has been *no* requirement that the refusal to apply the contract must extend to all bargaining unit employees. Thus, in *St. Barnabas Medical Center*, 343 NLRB 1125 (2004), repudiation was found to have occurred when the employer gave clear notice that it would not apply the terms of the contract to certain disputed employees, while it continued to apply the agreement to all other unit employees. *Id*. at 1129-30.

Likewise, the ALJ's reliance on *Adobe Walls, Inc.*, 305 NLRB 25 is misplaced. In *Adobe Walls*, the refusal to adhere to *a provision* of the CBA was insufficient to "[amount] to a repudiation of the contract, much less clear notice of such repudiation." Here, there was clear notice of repudiation of the entire contract as to Respondent's core sprinkler fitters.

The ALJ also based her refusal to find repudiation in part upon her finding that "it is not realistic to believe that the Union representatives specifically agreed to allow Respondent to abandon the contract." (ALJD p. 25, lines 20-24). Whether or not the Union agreed to Respondent's expressed intent to cease applying the contract to its core sprinkler fitters is *not* the test; Respondent's announced intent to remove its core sprinkler fitters from the unit and the Union's failure to take any action to enforce the contract when Respondent did so is more than sufficient to establish repudiation.

[10] It is *undisputed* that Respondent continued to comply with the contract for *non-core* employees, *i.e.* employees referred to Respondent by the Union during the term of the contract.

D. The Failure To Pay Wages And Benefits As A Result Of The Repudiation Is Time-Barred By Section 10(b).

The Union was placed on clear and unequivocal notice at the May 5, 2009 meeting, and confirmed through subsequent conversations within a few weeks of the May 5, 2009 meeting, that Respondent was *no* longer applying the contract to its core sprinkler fitters. Certainly, the Union knew or should have known that Respondent's core sprinkler fitters had become "non-union", and that Respondent was *no* longer applying the contract to its core employees.

It was not until August 4, 2010, some fifteen (15) months after the Union received notice of Respondent's repudiation of the contract as to its core employees, that the Union filed an Amended Charge alleging for the *first* time that Respondent had unilaterally made changes to the terms and conditions of employment by changing wage and benefit contributions. (G.C. Ex. 1(d)). The Union's November 30, 2010 Second Amended Charge alleged that Respondent made the unilateral changes since on or about February 4, 2010. (G.C. Ex. 1(g)). February 4, 2010 corresponds with the six month period preceding the August 4, 2010 filing of the Amended Charge in which unilateral change was first alleged. The Complaint itself alleged in paragraph 11 that since on or about February 4, 2010, Respondent had failed to continue in effect all terms and conditions of the contract as to certain named employees. (G.C. Ex. 1(j)).

The Complaint characterized Respondent's refusal to apply the contract to its core employees as a "failure to continue in effect all terms and conditions" of the collective bargaining agreement. This allegation suggests that Counsel for the Acting General Counsel sought to characterize Respondent's refusal to apply the terms of the CBA as a breach of the CBA resulting in an alleged unlawful unilateral change. To the contrary, Respondent refusal to continue to apply the CBA to its core employees constituted a *repudiation* of the CBA as to its core employees.

Board law recognizes a distinction between repudiation of an agreement and the mere breach of its provisions. When repudiation occurs, the Section 10(b) period begins to run when the Union has clear and unequivocal notice of the repudiation. The subsequent failure or refusal to honor the terms of the contract does not constitute an unfair labor practice. *Vallow Floor Coverings, Inc., supra*. If the repudiation occurs outside the Section 10(b) period, all subsequent failures to honor the agreement are deemed consequences of the initial repudiation for which the Union may not recover. *St. Barnabas Medical Center, supra* at 1127.

Here, the Union was on notice that Respondent was no longer applying the CBA to its core employees. This is not a case where there was a mere breach of one or more provisions of a contract. Respondent's core employees were completely pulled out of the contract, and the Union was fully aware of Respondent's action. Once the Union was on notice that Respondent was refusing to apply the contract to its core employees, this constituted a repudiation for which the Section 10(b) period began to run. *See St. Barnabas Medical Center, supra*. Since the Union did not file its charge alleging unilateral change until August 4, 2010, some fifteen months after the repudiation occurred, the allegations for any such violations are time-barred and must be dismissed. *A&L Underground, supra*.[11]

II. While Agreeing That *Central Illinois* Should Be Modified Or Abandoned, Respondent Excepts To The ALJ's Recommended Burden Shifting Paradigm.

The ALJ's finding that the agreement between the parties in this case was an 8(f) agreement was arrived at using and consistent with existing Board precedent. However, in order to avoid future cases where unjust results are reached based upon language obtained by a union

[11] Following repudiation, Respondent paid its core employees so that they would not have any net loss in wages, and Respondent reinstated its core employees in the Company's paid health care and 401 (k) benefit programs. Therefore, any remedy in this case for unilateral changes would require Respondent to make back pay contributions to third party benefit trusts. This, of course, would be a windfall for the trusts, which had no corresponding obligation to provide benefits to Respondent's core employees.

from either an unsuspecting (as in this case) or complicit employer, Respondent agrees with the recommendation of Counsel for the Acting General Counsel and the ALJ that the evidentiary rule set forth in *Central Illinois* regarding determination of Section 8(f) or Section 9(a) status should be modified or abandoned. Respondent does not agree, however, and therefore excepts, to the proposed burden shifting paradigm recommended by the ALJ.

Central Illinois holds that the presumption that a bargaining relationship in the construction industry is governed by Section 8(f) may be *conclusively* rebutted based *solely* upon language contained in the parties' collective bargaining agreement. Moreover, it has been argued by the Union that *Central Illinois* has been interpreted to *require*, rather than merely *permit*, that such conclusive 9(a) majority status be found where the requisite contract language is present, without consideration of any extrinsic evidence to the contrary.

This approach was criticized by the court in *Nova Plumbing v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). The court recognized that a rule which allows contract language alone to establish the existence of a Section 9(a) relationship created an opportunity for construction companies and unions to circumvent Section 8(f) protections at the expense of the rights of employees and the rival unions representing employees. *Id*. at 536-37. In *Nova Plumbing*, the court made particular note of the fact that the boilerplate recitations in the contract regarding the union's majority status were not supported by proof or an explanation of its absence. Rejecting the Board's *Central Illinois* rule that contract language alone could be conclusively dispositive in determining 9(a) status, the court opined that contract language, intent, and evidence of actual majority status were all relevant factors which should be considered in making such determination.

In the instant case, the ALJ found that the contractual language relied upon by the Union, if viewed alone, "not only misrepresented the truth but also disregarded the desires and expectations of the employees affected by such language." (ALJD, p. 28, lines 45-46; p. 29, lines 1-2). Thus, in her decision, the ALJ recommended adoption of a new burden shifting paradigm proposed by the Acting General Counsel which would allow for consideration of extrinsic evidence to determine whether a union actually enjoys majority status at the time a construction industry employer is purported to grant 9(a) recognition:

> . . . [T]he 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 have been deemed to have successfully established that the parties do not have a 9(a) relationship.
>
> 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.

ALJD, page 28, lines 13-34.

While Respondent agrees that a modification or elimination of the *Central Illinois* rule would serve the interests of justice, Respondent believes that a less complex and more appropriate approach would be to adopt a "totality of the evidence" standard suggested by the

court in *Nova Plumbing.* Under such an approach, the trier of fact would simply look at all of the relevant evidence, including contract language, evidence of majority support or lack thereof, and evidence of the intent of the parties, in determining whether the *Delewka* presumption of an 8(f) relationship has been rebutted.

A fundamental shortcoming of the ALJ's recommended analysis is that it does not provide for the consideration of extrinsic evidence of the parties' intent with respect to their intended relationship. Rather, it only allows for consideration of contract language and evidence of majority support or lack thereof. For example, in the instant case, there was substantial evidence independent of the recitals in the Acknowledgement form that Respondent never intended on entering into anything other than an 8(f) relationship.

Of course, under either analysis, the Board should continue its precedent that Section 10(b) does not preclude a finding that a construction industry relationship is not a 9(a) relationship.

CONCLUSION

Based upon the foregoing, Respondent requests that its cross-exceptions be granted, and that the Board find that (i) Respondent gave the Union clear and unequivocal notice in May, 2009 that it was repudiating the collective bargaining agreement as to its core employees; and that (ii) the charge filed by the Union on August 4, 2010 alleging unilateral change as a result of that repudiation was time-barred under Section 10(b) of the Act. As a result, Respondent further requests that the Amended Complaint be dismissed in its entirety.

Additionally, Respondent requests that the Board modify or abandon its evidentiary analysis set forth in *Central Illinois*, and instead adopt a "totality of the evidence" approach consistent with *Nova Plumbing*.

Respectfully submitted, this 7th day of February, 2012.

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CERTIFICATE OF SERVICE

I certify that on this 7th day of February, 2012, a copy of the foregoing Respondent's Brief In Support of Cross-Exceptions has been E-filed and served via e-mail upon all counsel of record.

I. HAROLD KORETZKY

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