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	*	
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RESPONDENT'S ANSWERING BRIEF IN OPPOSITION TO CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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AUSTIN FIRE EQUIPMENT, LLC

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Respondent Austin Fire, LLC (hereafter "Respondent" "Austin Fire" or "Company") respectfully submits this Answering/Opposition Brief to Charging Party's Exceptions to the Decision of the Administrative Law Judge, pursuant to Rule 102.46(d) of the Rules and Regulations of the National Labor Relations Board.

STATEMENT OF THE CASE

Respondent, 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" or "Local 669") is a labor organization within the meaning of Section 2(5) of the

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

Act. (Stipulation No. 2, Joint Ex. 1). Tony Cacioppo is business agent for the Union, and Donnie Irby is an Union organizer responsible for membership development. (Tr. 219, 432).

The Union filed Charge No. 15-CA-19697 on July 29, 2010, alleging that Austin Fire had violated Sections 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 the Union's request for information. (G.C. Ex. 1 (g)).

A Complaint and Notice of Hearing issued on January 31, 2011, alleging that Respondent had violated Sections 8(a)(1) and (5) of the Act by: (i) failing to continue in effect all the terms of a collective bargaining agreement since February 4, 2010; (ii) failing to recognize and bargain with the Union as the exclusive bargaining representative of unit employees since April 1, 2010; (iii) withdrawing recognition of the Union on July 13, 2010; and (iv) 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)).

THE ADMINISTRATIVE LAW JUDGE'S DECISION

On November 29, 2011, the Administrative Law Judge issued her decision. The ALJ concluded at the outset that the parties were in the construction industry, and based on 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 toward the Union following the expiration of the 8(f) agreement on March 31, 2010. (ALJD, p. 26, lines 29-34). The ALJ therefore dismissed all allegations in the Complaint alleging violations of Section 8(a)(5) subsequent to March 31, 2010.

The ALJ also found that during the term of the 8(f) agreement, from February 4, 2010 through the March 31, 2010 expiration of the agreement, Respondent violated Section 8(a)(5) by failing to continue in effect all the terms of the agreement with respect to its original (pre-Union) sprinkler fitters ("core employees"). (ALJD, p. 22, lines 14-19). In doing so, the ALJ rejected Respondent's contention that it provided clear and unequivocal notice to the Union in 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. (ALJD, p. 26, lines 5-7).

UNION'S EXCEPTIONS

The Union has excepted to the ALJ's determination that the relationship and agreement between the parties on July 8, 2008, was governed by Section 8(f) of the Act. Also, the Union has excepted to the ALJ's failure to conclude that Section 10(b) of the Act barred challenge to the validity of an alleged Section 9(a) recognition of the Union by Respondent.

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 the two employees needed 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. (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 thereafter 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 at least 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 ("core 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 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 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 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 that had previously been agreed upon (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 it 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 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 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]

ANALYSIS AND ARGUMENT

I. Section 10(b) Does Not Preclude A Finding That A Construction Industry Relationship And Contract Is Governed By Section 8(f).

The Union excepts to the ALJ's failure to conclude that Respondent was barred by Section 10(b) from challenging the validity of its Section 9(a) recognition of the Union. (Union's Exception. No. 7). The Union argues in its brief that Respondent "should not 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 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". Union's Brief, p 11).

These are both incorrect characterizations of the facts of the case and the decision of the ALJ. The Union *incorrectly* states that Respondent did not (i) challenge the invalidity of the contract; (ii) attempt to retroactively convert the agreement into an 8(f) agreement; and (iii) confess to a time-barred unfair labor practice in violation of 8(a)(2). Rather, Respondent maintained that the contract and the parties' relationship were at all times governed by Section 8(f). Likewise, the ALJ did not permit repudiation or conversion of a 9(a) agreement "three years later". Rather, The ALJ made a determination that the relationship and agreement were intended to be governed by a Section 8(f) agreement at *inception*.

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

The Union essentially argues that Section 10(b) bars consideration of evidence relating to the formation of the relationship and signing of the contract because those events occurred more than six months prior to the filing of any charge. This is an *incorrect* statement of the law.

In *Local Lodge 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 419 (1960), the Supreme Court held that if an employer voluntarily grants Section 9(a) recognition to a union and more than six months elapse, the Board should not entertain a claim that majority status was lacking at the time of the recognition. The rationale behind this Section 10(b) interpretation is to prohibit the use of a time-barred unfair labor practice to serve as a defense to enforcement of a 9(a) collective bargaining agreement which would otherwise be enforceable. The rule only applies, however, where a 9(a) agreement has been established and the evidence of lack of majority status could itself be evidence of a time-barred unfair labor practice. *Bryan*, 362 U.S. at 416-18. Section 10(b) has *not* been used to prohibit evidence relevant to determining whether an 8(f) or 9(a) relationship had been formed at the time an agreement was signed. *See Brannon Sand and Gravel Co*., 289 NLRB 977, 979 (1988) ("Section 10(b) as construed in [*Bryan Mfg*.], does not preclude finding that a construction industry bargaining relationship, whatever its age, is not a 9(a) relationship."). In *Brannon*, NLRB, *supr*a at 982, the Board stated: "Nothing in *Bryan* precludes inquiry into the establishment of construction industry relationships outside the 10(b) period." *See also Nova Plumbing, Inc. vs. National Labor Relations Board*, 330 F. 3d 531, 539 (D.C. Cir. 2003) ("The fundamental issue at the heart of this case is whether the 1995 contract was subject to 8(f) or 9(a); only if the parties found a Section 9(a) relationship in 1995 did *Nova* commit an unfair labor practice in 1977 and thereby trigger the six-month time limit."); and *Am. Automatic Sprinkler Sys.*, 163 F.3d 209, 218 at n. 6 (concluding that Section 10(b) cannot

reasonably be interpreted as barring an employer from challenging evidence forming the basis of the Board's complaint).[3]

Here, the issue in dispute is whether the contract and relationship formed by Respondent and the Union was subject to 8(f) or 9(a). The evidence presented by Respondent is relevant to the fact that Respondent did *not* intend to enter into a 9(a) majority status relationship, and that the 8(f) presumption has *not* been rebutted. Far from trying to prove that an unfair labor practice was committed when the contract was signed outside the 10(b) period, Respondent submits that the evidence of the surrounding circumstances shows that no unfair labor practice was committed when the contract was signed because it was intended to be under 8(f). This type of evidence, including the Union's clear lack of majority status at the time of signing, shows that a 8(f) relationship was intended by the parties. *See Brannon Sand and Gravel Co*., *supra* ("Going back to the beginning of the parties' relationship here simply seeks to determine the majority or non-majority based nature of the current relationship . . .").

The Union's reliance on *Reichenbach Ceiling & Partition Co*., 337 NLRB 125 (2001) (Chairman Hurtgen concurring) is particularly misplaced. There, a finding was made in a representation proceeding that the construction industry parties had entered into a 9(a) relationship at its inception. Having found that a 9(a) relationship existed, only then did the Board conclude that 10(b) would not permit an untimely attack on the majority status of the union in a 9(a) relationship, whether in the construction industry or not. The Board reached a

[3] Where the Board has applied Section 10(b) in construction industry cases, it has done so only after the relationship was determined to be under 9(a). See, *e.g*., *Casale Industries, Inc*., 311 NLRB 951, 953 (1993); *Triple A Fire Protection, Inc*., 312 NLRB 1088, 1089 (1993), *enf'd* 136 F.3d 727, 736-37 (11th Cir. 1998); *MFP Fire Protection, Inc*., 318 NLRB 840, 842 (1995); *Reichenbach Ceiling & Partition Co*., 337 NLRB 125 (2001); *American Firestop Solutions Inc*., 356 NLRB No.71 (2011). In each case, evidence regarding the formation, circumstances, majority support or lack thereof, bargaining history, and/or intent of the parties at the time the relationship began (*i.e*., outside the 10(b) period) was considered in making the determination regarding 8(f) or 9(a) status.

similar conclusion in *Casale Industries*, *supra.* Neither of these cases, however, suggests that 10(b) would preclude consideration of evidence outside the six month period, including whether the union actually had majority support, to determine whether construction industry parties intended an 8(f) or 9(a) relationship.

Thus, consistent with *Bryan Mfg*. and *Brannon Sand and Gravel*, the ALJ correctly considered evidence beyond the 10(b) period concerning the formation of the parties' relationship, including evidence of the Union's majority status, in determining that the relationship of the parties was 8(f) at the time the contract was signed.

II. The ALJ Correctly Determined That The Agreement And Relationship Between Respondent And The Union Was Governed By Section 8(f) Of The Act.

For the reasons relied upon by the ALJ, the ALJ *correctly* determined that the Union and the Company entered into a relationship governed by Section 8(f). This determination is also supported by reasons not specifically relied upon by the ALJ.

A. The Burden Is On The General Counsel To Establish That The Parties Intended A 9(a) Relationship.

Section 8(f) of the Act represents Congress' objective to "lend stability to the construction industry while fully protecting employee free choice principles." *John Deklewa & Sons*, 282 NLRB 1375, 1386-87 (1987), *enf'd sub nom, Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert denied* 488 U.S. 889 (1988). In the construction industry, employers have a need to be able to access skilled workers on a project by project basis with known labor costs. Construction industry employees also tend to work for multiple employers for short, sporadic periods. *Deklewa* at 1380.

Section 8(f) was designed to facilitate agreements in the construction industry that would otherwise be illegal if entered into before union majority status is established. *Deklewa* at 1390,

n. 44. Thus, the Board presumes that a bargaining relationship in the construction industry is governed by Section 8(f). *Deklewa* at n. 41 1387; *Casale Industries, Inc*., 311 NLRB 951, 952 (1993).

The burden is on the party who seeks to show the contrary, *i.e.*, that the parties intended a Section 9(a) relationship. *Casale Industries* at 952. This burden could be met, and a construction industry union with an 8(f) bargaining relationship could achieve 9(a) status, either through a Section 9(a) certification proceeding or "from voluntary recognition accorded by the employer of a stable work force that recognition is based on a clear showing of majority support among unit employees." *Deklewa* at 1387, n. 54; *Madison Industries, Inc*., 349 NLRB 1306, 1308 (2007).

A union can prove voluntary recognition by a construction industry employer by showing "its express demand for, and an employer's voluntary grant of recognition to the union as bargaining representative based on a contemporaneous showing of union support among a majority of employees in an appropriate unit." *Golden West Electric*, 307 NLRB 1494 (1992); *Allied Mechanical Service*, 351 NLRB 79, 82 (2007).

More recently, the Board has held that voluntary recognition under Section 9(a) *may* be established by the terms of a collective bargaining agreement. *Staunton Fuel and Material (Central Illinois)*, 335 NLRB 717, 719-20 (2001). The language must unequivocally establish that (i) the union requested recognition as the majority or 9(a) representative of the unit; (ii) the employee granted such recognition; and (iii) the employee's recognition was based on the union's showing, or offer to show, evidence of majority support. *Central Illinois*, *supra*, at 1155-56. Subsequently, in *Madison Industries*, 349 NLRB 1306, 1308, the Board stated:

> [i]n determining whether the presumption of an 8(f) status has been rebutted, the Board first considers whether the agreement, examined in its entirety

> 'conclusively notifies the parties that a 9(a) relationship is intended'. [ ] Where it does so, the presumption of 8(f) status has been rebutted [ ]. Where the parties' agreement does not do so, the Board considers any relevant extrinsic evidence bearing on the parties' intent as to the nature of their relationship [ ]"

(citations omitted.) *See also Allied Mechanical Services*, 351 NLRB 79, 81-82 (2007).

In determining whether an agreement unambiguously establishes that a 9(a) relationship was intended, it is not sufficient to read any particular language in isolation, but rather the agreement must be examined "in its entirety." *Madison, supra* at 1308. If the contract language in its entirety is *ambiguous* or otherwise is not independently dispositive, extrinsic evidence bearing on the parties' intent should be examined. *Central Illinois* at 720, n. 15. In either case, the intent of the parties is paramount.

B. All Circumstances Surrounding The Signing Of The Agreement Establish That An 8(f) Relationship Was Intended.

The ALJ *correctly* determined that the total record evidence surrounding the formation of the relationship establishes that it was the parties' intent to enter into an 8(f) relationship.

Russell Ritchie's initial dealing with the Union in 2007 resulted in a project agreement that provided him with skilled sprinkler fitters to man a particular job in Minden, Louisiana. (Tr. 242). There was never any issue that the 2007 project agreement, containing the same first three paragraphs as the signatory agreement [Joint Ex. 1 B] and adopting the same 2007-2010 NFSA industry agreement that was adopted on July 8, 2008 (Joint Ex. 1 C), was an 8(f) agreement. (Joint Ex. 1 A). Thus, prior to July 2008, Ritchie's only experience with the Union involved an 8(f) agreement.

It is *undisputed* that Ritchie again approached the Union in the summer of 2008 for the sole purpose of obtaining skilled sprinkler fitters for six months to staff the Valero Refinery job. (Tr. 72, 246-47). While the Union rejected Ritchie's offer to enter into a project agreement (Tr.

107, 251) and insisted on a one year contract that was later changed to twenty months (Tr. 97-98, 252, 254), the record clearly reflects that Ritchie was entering into the agreement for the primary purpose of having access to individuals that would be sent to him by the Union *in the future* to man the Valero job. (Joint Ex. 1 B).

Also, it is *undisputed*[4] that Ritchie viewed the Union arrangement he was entering into to be a finite, limited relationship, as opposed to a more permanent, indefinite relationship. (Tr. 107, 251). Ritchie told the Union that if they were unwilling to enter into a project agreement, he would "try this out for a year and eight months." (Tr. 250, 254). He told his current employees "[w]e're going to try this out for a year; we're going to see how this goes." (Tr. 259). When the contract expired at the end of twenty months, Ritchie believed that any remaining obligation toward the union was over. Clearly, it was Ritchie's expressed intent to enter into a limited relationship which would end at the expiration of the contract. Moreover, the Union *readily* acknowledges that this limited duration was Ritchie's understanding of the limited duration of the parties' contract and the Union admittedly made *no* effort to dissuade Ritchie of this notion. (Tr. 121, 124). There is *no* evidence that Ritchie ever discussed with the Union the possibility of his entering into an agreement that would bind him as an 9(a) employer. The documents comprising the parties' agreement and the conduct of the parties are totally consistent with an 8(f) relationship, and inconsistent with a 9(a) relationship.

Also of critical importance is the fact that there is *no* evidence to suggest that either Ritchie or the Union believed that the Union represented a majority of Respondent's employees before or at the time the July 8, 2008 agreement was signed.[5] There is *no* evidence that the

[4] Ritchie's entire testimony regarding the formation of the relationship was *not* disputed by the Union; Cacioppo and Irby offered *no* testimony rebutting or challenging Ritchie's account.

[5] Union membership applications signed by core employees on dates **after** the July 8, 2008 contract signing has *no*

Union was in fact supported by a majority of employees, or that the Union offered to show Respondent evidence of majority support. (Tr. 76-77). In fact, the evidence establishes just the opposite: that the Union did not represent any employee, much less a majority of employees, when the July 8, 2008 contract was signed. Just days earlier, when Ritchie met with his core employees to inform them he was considering signing a contract with the Union, all but one of the fourteen employees expressed at that time (and consistently thereafter) that they were against joining the Union. (Tr. 261). These "facts on the ground" are totally contrary to the formation of a 9(a) agreement, and are exactly the circumstances for which 8(f) was enacted. Furthermore, given the fact that the Union had *no* evidence that it enjoyed majority status at the time it entered into the agreement, *the only lawful intent the Union could have had was that it was entering into an 8(f) agreement*.

It is also a general principle of contract interpretation that "[i]f an agreement is capable of a construction that will make it legal and enforceable, that construction will be given to it." *NLRB v Local 32B-32J Service Employees International Union*, 353 F.3d 197, 202 (2d Cir. 2003); *See also International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW*, 733 F. Supp. 938, 949, (E. D. Pa. 1990) ("The law prefers a permissible interpretation that gives reasonable, lawful, and effective meaning to a contract provision over an interpretation that leaves a provision unreasonable, unlawful, or of no effect.") In view of the fact that neither Respondent nor the Union had reason to believe the Union represented a majority of employees at the time the July 8, 2008 agreement according

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relevance whatsoever as to employee support of the Union at the time of the July 8, 2008 recognition. The fact that these applications were signed at the specific direction of Ritchie, who had been informed by the Union that his core employees were required to join the Union because of the Union contract, further renders these applications meaningless. There simply was *no* voluntary expression of support from the employees and the signing took place *post-recognition*.

recognition was signed, the parties should be presumed to have intended to enter into a lawful 8(f) agreement rather than an unlawful 9(a) agreement.

Thus, there are two well established principles of contract interpretation applicable to this case: (i) the presumption that these construction industry parties intended an 8(f) agreement; and (ii) the presumption that where a contract can be construed as a lawful 8(f) agreement or an unlawful 9(a) agreement at its inception, the law strongly prefers the interpretation that the parties intended to enter into a lawful 8(f) agreement.

C. The Agreement In Its Entirety Does Not *Unambiguously* Establish That The Parties' Intent Was To Enter Into A 9(a) Relationship.

Counsel for the Acting General Counsel and the Union argued that the recitals in the Acknowledgement form, standing alone, conclusively establish that Respondent intended to enter into a 9(a) relationship. Respondent submits that the ALJ *correctly* determined that the agreement, when examined in its entirety, did *not* unambiguously establish that a 9(a) relationship was intended.

Initially, the ALJ correctly observed that the entering into an agreement in the construction industry is an inherently ambiguous situation for an employer because there may not be certainty as to whether the union is seeking an 8(f) or a 9(a) relationship. This ambiguity is exacerbated where, as here, the employer had a previously established 8(f) relationship with the union. See *James Julian, Inc*., 310 NLRB 1247, 1254 (1993), citing *J & R Title*, 291 NLRB 1034, 1036 (1988). Moreover, there is a complete absence of testimony from any of the three testifying Union officials that the Union's intent at the time of the signing was to enter into a 9(a) relationship.

In this case, the "agreement" entered into by the parties was made up of three documents signed contemporaneously on July 8, 2008. They were (i) the two page adoption agreement; (ii)

the 2007-2010 NFSA-Local 669 agreement to which Respondent agreed to adopt and be bound; and (iii) the Acknowledgement. These documents comprising the entire agreement must be reviewed in their entirety to inform of the parties' intent.

The Adoption Agreement

The adoption agreement (Joint Ex. 1 B) makes no reference to Section 9(a). However, the first sentence in the preamble of the adoption agreement states the entire premise of the agreement: The Employer "is desirous of having and employing Journeyman Sprinkler Fitters and Apprentices," and the Union "has competent and skilled Journeymen and Apprentice Sprinkler Fitters" that it wishes to refer to Respondent. This language is *forward looking* to the *future hiring* of employees which is *consistent* with the establishment of an 8(f) relationship. *See G & L Associated, Inc. d/b/a USA Fire Protection*, 2010 WL 3285412 (NLRB Div. of Judges, JD (ATL) 14-10 (6/21/10)). This *ambiguity* alone calls for the consideration of extrinsic evidence regarding the circumstances surrounding the signing of the agreement to determine the intent of the parties.

The 2007-2010 NFSA-Local 699 Industry Agreement

By signing the two page adoption agreement, Respondent signed onto the 2007-2010 NFSA-Local 669 industry agreement. (Joint Ex. 1 C). The 2007-2010 NFSA-Local 669 industry agreement was the same agreement adopted by Respondent in June 2007, when the same parties entered into their initial 8(f) agreement. Even though the industry agreement does contain 9(a) verbiage in Article 3, the same agreement was used by Local 669 when signing up this employer to an 8(f) agreement. The fact that Local 669 used the exact same industry agreement when signing Respondent to an 8(f) agreement in 2007 certainly creates a confusion and *ambiguity* as to the parties' intent and understanding when the July 8, 2008 agreement was

signed. In short, when the Union uses the same agreement when entering into both 8(f) and 9(a) relationships, ambiguity is inherent in that agreement.[6]

Verbal Modification Of The Unit

It is *undisputed* that even though Section 18 of the industry agreement sets forth the scope and applicability of work covered by the agreement, the parties agreed to a verbal modification to exclude inspectors as well as 24-26 employees performing sprinkler fitter work for Respondent at various near-by Dow Chemical facilities. In view of this modification of the unit by a verbal, extrinsic understanding between the parties, it would be illogical not to consider other extrinsic evidence to determine the parties' intent as to the agreement as a whole.

The "Acknowledgement"

Counsel for the Acting General Counsel and the Union rely *solely* upon the Acknowledgement signed by Respondent in an attempt to argue that a 9(a) relationship was intended. This position must be rejected.

First, as discussed above, the form Acknowledgement should not be viewed in isolation, but rather must be examined along with the other contemporaneously signed documents making up the entire agreement. *See Madison Industries*, 349 NLRB at 1308. Here, when examined in its entirety, there is sufficient *ambiguity* to turn to the relevant extrinsic evidence available to determine intent. *See Central Illinois*, 335 NLRB at n. 15 ("[W]e will continue to consider

[6] Furthermore, the industry agreement contained a union security clause (Article 4) requiring employees to join the Union seven (7) days after hire. This type of union security clause is indicative of language found in 8(f) agreements. *G & L Associated, Inc.* at n. 7; *Madison Industries*, 349 NLRB at n. 11. Even though this clause would not have been enforceable in light of Louisiana's right to work statute, it would have become effective and enforceable had Louisiana's right to work statute been changed at any time during the term of the agreement. In any event, for purposes of determining intent, a seven day union security clause is indicative of an 8(f) agreement. In *G & L Associated, Inc.,* the events took place in Tennessee, a right to work state as is Louisiana, and the union security clause (Article 4) in the very *same* agreement as in the instant case was nevertheless considered in determining 8(f) status. *See also Madison Industries, supra.*

relevant extrinsic evidence bearing on the parties' intent where we find that the contract's language is not independently dispositive.").

Moreover, the manner in which the "Acknowledgement" came to be prepared and signed is highly suspect. The Acknowledgement was drafted by the Union and presented to Ritchie on the day of the signing as something else that he "had to sign" in order for the collective bargaining agreement to be signed. (Tr. 257). The document itself states that "[t]he 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 the [Union] for purposes of collective bargaining." (G. C. Ex. 4). It is clear from the evidence that these recitals of Union majority status could not have been confirmed by Respondent as such recitals were patently *untrue*, and that the Union knew them to be untrue when they handed Ritchie the Union-prepared form to sign. Regardless of why Ritchie signed the Acknowledgement (because he was told he had to sign it in order for the CBA to be signed), the absolute falsity of the statements contained in the document undermines any credence or probative value that could be afforded the Acknowledgement as to Respondent's intent.[7] The ALJ correctly found that "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." (ALJD, p. 18, lines 30-34).

The ALJ also correctly distinguished cases relied upon by the Union wherein the same or similar contract language as used in the Acknowledgement was found to support a determination that the parties had intended an 9(a) agreement. (ALJD, pp. 20-21). See *J.T. Thorpe & Son*, 356 NLRB No. 112 (2011) (recognition language was supported by extrinsic evidence of union's

[7] While provided a copy of the industry agreement and later mailed a copy of the signed adoption agreement, it is very telling that Ritchie was *never* provided a copy of the signed Acknowledgement upon which the Union rests its entire case. (Tr. 257-58).

actual proffer of authorization cards; significance of language and intention of union was discussed by parties and reviewed by counsel); *Diponio Construction Co*, 357 NLRB No. 99 (2011) (recognition language appeared in three consecutive contracts; absence of evidence that union lacked majority support; and absence of extrinsic evidence that contradicted the contractual language); *American Firestop Solutions* 356 NLRB No. 71 (2011) (in addition to language, credited testimony of the respondent's president provided extrinsic evidence that the parties had entered into a 9(a) relationship; language remained in several successive contracts before union's status was challenged). *Triple A Fire Protection* 312 NLRB 1088 (1993) (acknowledgement form was submitted to employer along with documentary evidence of majority support); *MFP Fire Protection*, 318 NLRB 840 (1995) (recognition language was contained in successive contracts over a ten year period during which the employer repeatedly verified the union's majority status).

Also, in considering the Acknowledgement, it cannot be viewed in isolation, but rather must be examined along with the other contemporaneously signed documents. *See Madison Industries*, 349 NLRB at 1308. Here, when examined along with the adoption agreement and the industry agreement, for the foregoing reasons, the ALJ correctly determined that there was sufficient *ambiguity* to warrant examination of the abundant extrinsic evidence available to determine intent. *See G & L Associated, Inc*., *supra*; *Central Illinois*, 335 NLRB, *supra* at 720, n. 15 ("[W]e will continue to consider relevant extrinsic evidence bearing on the parties' intent where we find that the contract's language is not independently dispositive"). In *G& L Associated, Inc*., *supra*, the exact same (three) documents which comprised the "agreement in its entirety" in both *G & L Associated* and this case were found by the ALJ in *G & L Associated* to be *ambiguous*, thereby requiring examination of extrinsic evidence.

The record contains overwhelming extrinsic evidence that the parties did *not* intend to enter into a 9(a) agreement. Such extrinsic evidence includes: (i) the prior 8(f) relationship of the parties; (ii) Respondent's desire to man an upcoming construction job with individuals to be *referred* by the Union *in the future*; (iii) the *uncontradicted* testimony of Ritchie that he would "try out" the proposed twenty month agreement to see "how things worked out"; (iv) the use of the same industry agreement to which the parties had previously used as a basis for their *undisputed* 8(f) relationship; (v) the absence of any evidence that the Union offered to show, did show, or could have shown that it was a legitimate representative of a majority of Respondent's sprinkler fitters at the time the agreement was signed; and (vi) the absence of any testimony on the part of the Union (and silence on the part of the Union officials that did testify) that it intended to enter into a 9(a) agreement at the time of signing.

As the ALJ correctly found, the totality of the circumstances surrounding the formation of the relationship evidenced an intent to establish a lawful Section 8(f) relationship/agreement, and *not* an unlawful 9(a) relationship/agreement. At the very least, the Union failed to overcome the presumption of an 8(f) agreement. [8]

D. Alternatively, *Central Illinois* Permits But Does Not Require A Finding Of A 9(a) Relationship.

Counsel for the Acting General Counsel and the Union argue that the Acknowledgement contains recitals that satisfy *Central Illinois*, and that a 9(a) relationship should be found based upon the Acknowledgement alone. Respondent submits that this argument misreads *Central Illinois*. Even assuming *arguendo* that the agreement is unambiguous, *Central Illinois* holds *only*

[8] Should it be determined that the agreement is not ambiguous and that *Central Illinois* somehow requires a finding of a 9(a) relationship based on the contract language standing alone, despite extrinsic evidence to the contrary, Respondent respectfully joins the request of Counsel for the Acting General Counsel that the presumption shifting in *Central Illinois* be modified. See Respondent's Brief In Support of Cross-Exceptions for a complete briefing of Respondent's position on this issue.

that such evidence *can* be a basis upon which to base 9(a) status without consideration of any other extrinsic facts, but **does not require** such a finding.

The Board stated in *Central Illinois*:

> A recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of 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 offered to show, evidence of its majority support.

Central Illinois, 335 NLRB at 719-20. *Central Illinois* does *not* state that such evidence **will or must** establish 9(a) status; it states *only* that such evidence *may* be **sufficient** to establish 9(a) status. This "sufficient to establish" language implies that contract language can be sufficient to support a finding of 9(a) status, but does not state that such a finding is required. The Board goes on to clarify by stating:

> We decide here **only** that it is possible for us to determine that a 9(a) relationship was established solely on the basis of the parties' contract language, provided that language meets the criteria we adopt here.

335 NLRB at 720, fn 15 (emphasis added). Thus, *Central Illinois* was *not* intended to establish a mandatory presumption, but rather set forth a minimum standard upon which a 9(a) finding could be supported without consideration of other extrinsic evidence. *Central Illinois* was *not* intended to tie the hands of the Board where, as here, the totality of the evidence points to the opposite conclusion. Nothing in *Central Illinois* precludes or prohibits Board consideration of the totality of the circumstances in determining the intent of the parties.

This interpretation of *Central Illinois* is supported by a review of Board cases since *Central Illinois* was decided. In almost every case where the Board has found a 9(a) relationship based upon *Central Illinois* criteria, there has been extrinsic evidence that supported such a finding. *See American Firestop Solutions*, 356 NLRB No. 71 (2011) (extrinsic evidence

supported 9(a) relationship); *Allied Mechanical Services, Inc*., 351 NLRB 79, 82 (2007) (parties entered into settlement agreement granting 9(a) recognition; union had demanded recognition as majority representative and offered proof of majority status); *Nova Plumbing, Inc*., 336 NLRB 633, 635 (2001), *enf. den*. 330 F.3d 531(D.C. Cir. 2003) (union represented that certified public accounting firm had verified that union in fact represented a majority of employees). *See also Diponio Construction Company, Inc*., 357 NLRB No. 99 (2011) (parties had a forty year bargaining relationship; absence of extrinsic evidence to contradict or rebut clear recognition language in three successive contracts).

Thus, *Central Illinois* permits, but does *not* require, the Board to find a 9(a) relationship based upon unsubstantiated recitals in a contract. Nor does *Central Illinois* state that consideration of extrinsic evidence is precluded even where contract language standing alone is sufficient to meet minimum requirements. Here, when all of the facts surrounding the formation of the relationship outweigh the unsubstantiated recitals in an agreement, the presumption of 8(f) status has *not* been rebutted.[9]

CONCLUSION

The issues in this case are predominately governed by the Board's determination of the relationship of the parties—whether it was 8(f) or 9(a).

Despite the fact that an 8(f) relationship is presumed by law, and the great weight of the evidence supporting a finding that Respondent intended an 8(f) relationship when the relationship was formed, Acting General Counsel and the Union argue that a single

[9] *Central Illinois* was called into question and rejected by the D.C. Circuit in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir 2003). While recognizing that contract language could be a legitimate factor in determining whether the *Deklewa* presumption has been overcome, the U.S. Court of Appeals for the D.C. Circuit stated in *Nova Plumbing* as follows: "Standing alone, however, 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". *Id*. at 537.

Acknowledgement document prepared by the Union and signed by an unsophisticated employer in terms of labor relations, under at best *unconscionable* circumstances, somehow requires a finding of 9(a).

The ALJ correctly concluded that the Acknowledgement document -- which is "fallacious on its face" – did not unambiguously establish the intent of the parties to establish a 9(a) relationship. Rather, in order to determine the intent of the parties, the ALJ properly considered all relevant extrinsic evidence regarding the formation of the relationship. Once extrinsic evidence is examined, the totality of the evidence overwhelmingly supports a finding that a lawful 8(f) agreement (and not an unlawful 9(a) agreement) was intended. Evidence supporting this conclusion includes: (i) the parties' prior 8(f) agreement which adopted the very same CBA; (ii) Respondent's *future needs* purpose for signing an agreement with the Union; (iii) the CBA's union security provision that is indicative of a Section 8(f) agreement; (iv) the circumstances surrounding the signing of the Acknowledgement and the lack of any Union explanation as to its purpose or significance; (v) the lack of any evidence that the Union enjoyed majority support at the time of signing; (vi) the *undisputed* fact that the Union did not represent any employee of Respondent at the time of recognition; (vi) the absence of any testimony (and silence of multiple testifying Union officials) that the Union intended on entering into a 9(a) agreement; (vii) the absence of a long term relationship; and (viii) the certainty that the factual recitations contained in the Acknowledgement were *not* true, and known by both parties not to be true. Furthermore, even if the Board does not find the evidence of intent convincing either way, the burden of proving 9(a) intent was not met by Counsel for the Acting General Counsel or the Union and the presumption of 8(f) intent must prevail.

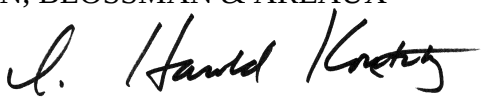
Entering into an agreement with the Union, even for its limited term, turned out to be a financial disaster for Respondent and its owner. To further impose 9(a) obligations upon Respondent, and the financial liability that would result, against the great weight of evidence that demonstrates a limited, 8(f) relationship was intended, would result in an *injustice* that would be devastating to Respondent and other unsuspecting employers, and harmful to the Section 7 rights of both Respondent's employees and other employees.

Finally, the Agency would be well served to heed the following concern of the D.C. Circuit of Appeals: ". . . by neither introducing such proof [of majority status] nor explaining its absence, the Board and union have failed to demonstrate majority representation under the very boilerplate language on which they rely to overcome the *Deklewa* presumption. 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 employee support. Otherwise, unions and employers would be free to agree to such self-serving language with no threat of challenge." *Nova Plumbing*, 330 F.3d at 538.

The determination by the ALJ that the parties' agreement and relationship was governed by Section 8(f) should be affirmed.

Respectfully submitted, this 20th day of February, 2012.

CARVER, DARDEN, KORETZKY, TESSIER,
FINN, BLOSSMAN & AREAUX



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondent's Answering Brief in Opposition to Charging Party's Exceptions to the Decision of the Administrative Law Judge has been served via e-mail on the following this 20th day of February, 2012:

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