

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

AUSTIN FIRE EQUIPMENT, LLC,

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Respondent,

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and

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Case No. 15-CA-19697

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

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Charging Party.

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**CHARGING PARTY LOCAL 669’S BRIEF IN REPLY TO THE
OPPOSITONS BY RESPONDENT AND THE ACTING GENERAL
COUNSEL TO ITS EXCEPTIONS**

Charging Party Road Sprinkler Fitters Local 669, U.A., AFL-CIO (“Local 669” or “the Union”) submits this single reply to the answering briefs by Respondent Austin Fire Equipment, LLC (“Respondent” or “Austin Fire”) and by the Acting General Counsel (“G.C.”) in opposition to the Union’s Exceptions to the Administrative Law Judge’s decision in this case (“ALJD”).

1. Introduction

Respondent and the G.C. contend that the Board should overrule longstanding NLRB precedent holding that the *same* rules of law govern the validity of NLRA Section 9(a) recognition agreements in non-construction and construction industry cases, as exemplified by the Board’s decision in *Central*

Illinois, 335 NLRB 717 (2001), and substitute *in lieu* of existing precedent a new and less enforceable Section 9(a) rule applicable to construction industry cases only based on the D.C. Circuit decision in *Nova Plumbing v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). G.C. Br. In Opp. to Union Except. 5-6; Resp. Br. In Opp. to Union Except. 21-25; ALJD 27-29.

The relevant undisputed facts confirm that Respondent prematurely executed the parties' NLRA Section 9(a) recognition agreement, arguably in violation of NLRA Section 8(a)(2). Specifically, Respondent: advised its unit employees in July 2008 that they would be required to join the Union; voluntarily executed the recognition agreement on July 8, 2008, which expressly granted unconditional NLRA Section 9(a) recognition to the Union "on the basis of objective and reliable information, confirm[ing] that a clear majority of the sprinkler fitters in its employ are members of , and represented by [the Union];" and only then, three days later, did a majority of the thirteen unit employees affirmatively demonstrate their support for the Union. Ritchie 74, 78-79; GCX4; GCX23(a)-(m).¹

Under well-settled NLRB principles, Respondent's premature execution of the Section 9(a) recognition agreement was arguably in violation of NLRA Section 8(a)(2), *Komatz Construction Co.*, 191 NLRB 846, 850, 852 (1971), *enf'd in part*. *part* 458 F.2d 317 (8th Cir. 1972), but Respondent is time-barred from challenging

¹ References to the hearing transcript are cited as "(Ritchie __);" exhibits are indicated as "GCX __." Emphasis is supplied unless otherwise indicated.

the validity of its premature execution of that recognition agreement after six months by operation of NLRA Section 10(b). *Local Lodge 1424 v. NLRB (Bryan Mfg.)*, 362 U.S. 411, 419 (1960).

As we show below, in order to even consider the G.C.'s postulation that *Nova Plumbing* should apply to the facts of this case, the Board would first need to:

- overrule the Supreme Court's decision in *Bryan Mfg.* that NLRA Section 10(b) precludes a challenge to the validity of that recognition agreement beyond six months after it was entered into;
- then proceed to adopt in its place an arbitrarily bifurcated Section 10(b) policy, limiting *Bryan Mfg.* to bar challenges to union recognition in non-construction industry cases while devising another, less restrictive Section 10(b) policy for the construction industry;
- then formulate yet another dichotomy of precedents, applying established NLRB Section 9(a) precedent to non-construction industry cases, while devising another, less-enforceable Section 9(a) rule for the construction industry under the D.C. Circuit's decision in *Nova Plumbing*; and
- thereby construct a convoluted, two-story rule of law that would violate yet another well-settled NLRB principle that the rules of law

governing NLRA Sections 10(b) and 9(a) are precisely the *same* for non-construction and construction industry cases. *John Deklewa & Sons*, 282 NLRB 1375, 1382 n. 53 (1987), *enf'd* 843 F.2d 770 (3d Cir. 1988), *cert. den.* 488 U.S. 889 (1988).

We then show that the G.C. and the Administrative Law Judge are advancing a fundamental misreading of NLRA Section 8(f), and that the only conceivable conclusion to be reached is that the parties' 2008 recognition agreement is governed by NLRA Sections 9(a) and 10(b), and *not* by Section 8(f).

2. Settled NLRA Section 10(b) Precedent

Over fifty years ago, the Supreme Court ruled in *Bryan Mfg.* that an employer is precluded by the six-month limitation period in NLRA Section 10(b) from raising an untimely challenge to the validity of its own recognition of a union on the claim raised by Respondent here that the recognition was not supported by appropriate majority support in the bargaining unit. 362 U.S. at 419; *Alpha Associates*, 344 NLRB 782, 782 (2005). G.C. Br. in Opp. to Union Except. 10.²

Then, twenty-five years ago, the Board affirmed the corollary principle that, unions in the construction industry are to be treated the same as non-construction

² While the G.C. has conceded the issue, Respondent claims that even under existing law, Section 10(b) is not a bar to its challenge to its 2008 Section 9(a) recognition of the Union. Resp. Br. in Opp. to Union Except. 8-11. Respondent's contention, in this regard, is baseless as a matter of law under *Casale Industries*, *Triple A Fire Protection* and other NLRB precedents discussed above.

industry unions with respect to NLRA Section 9(a) recognition, *Deklewa*, 282 NLRB at 1382 n. 53 -- a principle of law the Board has repeatedly reaffirmed in NLRA Section 10(b) construction industry cases, *Casale Industries*, 311 NLRB 951, 953 (1993); *Central Illinois*, 335 NLRB at 719 n.10; *Oklahoma Installation*, 325 NLRB 741, 742 (1998), including in a series of cases involving the same Section 9(a) recognition language at issue in this case. *Triple A Fire Protection*, 312 NLRB 1088, 1088 (1993), *enf'd* 136 F.3d 727 (11th Cir. 1998), *cert. den.* 544 U.S. 948 (2005); *MFP Fire Protection*, 318 NLRB 840, 842 (1995), *enf'd* 101 F.3d 1341 (10th Cir. 1996); *American Automatic Sprinkler Systems, Inc.*, 323 NLRB 920, 920-21 (1997), *enf. den. in part*, 163 F.3d 209 (4th Cir. 1998), *cert. den.* 528 U.S. 821 (1999).

Thus, to even entertain the attempts by the G.C. and the Administrative Law Judge to re-write the law as to the validity of the parties' Section 9(a) recognition agreement on the basis of the D.C. Circuit's holding in *Nova Plumbing*, the Board would need to overcome the settled *Deklewa* principle that Section 10(b) applies with equal force to Section 9(a) recognition in the non-construction industries as it does to the construction industry; and then double down and overrule the Board's holdings in *Casale Industries*, *Oklahoma Insulation*, *Triple A Fire*, *MFP Fire* and *American Automatic Sprinkler* and other like decisions holding specifically that *Bryan Mfg.* governs the application of Section 10(b) to

preclude untimely challenges to Section 9(a) recognition in the construction industry.

We are unaware of any rule of statutory construction, any legislative intent, or any Board policy that would remotely support the arbitrary, dichotomized re-interpretation of NLRA Section 10(b) proposed by the G.C. and the Administrative Law Judge.

Ironically, the D.C. Circuit decision in *Nova Plumbing* is inapposite on this point -- the Court was careful to note that the preclusive effect of NLRA Section 10(b) upon an untimely challenge to a Section 9(a) recognition was *not* an issue presented by that case. 330 F.3d at 539.

3. Settled NLRA Section 9(a) Precedent

The Board has long held that NLRA Section 9(a), as applied to recognition agreements in non-construction *and* construction cases, is governed by precisely the same legal principles:

[A] union . . . is not required to show the employer any evidence of majority status unless the employer requests to see the evidence ... If an employer voluntarily recognizes a union based solely on that union's assertion of majority status, without verification, an employer is not free to repudiate the contractual relationship that it has with the union outside the 10(b) period, i.e., beyond the 6 months after initial recognition, on the ground the union did not represent a majority when the employer recognized the union... Moreover, where an employer outside the construction industry expressly recognizes a union

as the 9(a) representative, the union becomes the 9(a) representative of the unit employees, unless the employer timely produces affirmative evidence of the union's lack of majority at the time of recognition, i.e., within the 10(b) period . . .

Oklahoma Installation, 325 NLRB at 742 (citations omitted).

In *Central Illinois*, the Board restated the corollary and settled NLRA principle -- governing non-construction and construction industry cases alike -- that, where, as here, the parties' recognition agreement, on its face, plainly indicates that the union showed or offered to show majority support, that assertion is sufficient to establish the NLRA Section 9(a) nature of the parties' relationship.

Central Illinois, 335 NLRB at 719-20 and n. 10 (citing authorities).

This rule of law has been affirmed and reaffirmed including in a series of cases involving precisely the same Section 9(a) recognition language at issue in this case, *Triple A Fire Protection*, 312 NLRB at 1088-1089; *MFP Fire Protection*, 318 NLRB at 842; *American Automatic Sprinkler Systems, Inc.*, 323 NLRB at 920-921, as the Administrative Law Judge and G.C. both acknowledge. ALJD 15; G.C. Br. in Opp. to Union Except. 4.

By urging the Board to re-write these well settled precedents, in favor of the D.C. Circuit's decision in *Nova Plumbing*, the G.C. and the Administrative Law Judge are advancing a new rule of NLRA Section 9(a) law to govern recognition in the construction industry -- without any statutory, Congressional or other rational,

much less persuasive basis for doing so, and in direct violation of the Board's holding in *Deklewa* that Section 9(a) recognition is to be subject to the *same* rule of law irrespective of whether or not it is obtained in the construction industry.

Deklewa, 282 NLRB at 1382 n. 53; *Oklahoma Installation*, 325 NLRB at 742.

4. The Recognition Agreement Is Not A Section 8(f) Agreement

The legal argument by the G.C. and the finding by the Administrative Law Judge (ALJD 29) that the express NLRA Section 9(a) recognition agreement entered into by the parties in this case is, in reality, merely an NLRA Section 8(f) pre-hire agreement is premised upon a fundamental misreading of the latter provision.

As noted, the undisputed facts confirm that Respondent entered into the Section 9(a) recognition agreement several days before the bargaining unit employees expressed their support for the Union. *Ritchie* 74, 78-79; *GCX4*; *GCX23(a)-(m)*. Thus, although an arguable violation of NLRA Section 8(a)(2) may have occurred at that time, that violation would have occurred irrespective of whether or not the case arose in the construction industry. *Special Service Delivery, Inc.*, 259 NLRB 993, 994 (1982) (non-construction industry); *Komatz Construction*, 191 NLRB at 850, 852 (construction industry).

An agreement that is “established, maintained, or assisted by any action defined in [Section 8(a)] of this Act as an unfair labor practice” is expressly

excluded from Section 8(f) and, under fifty-year-old NLRB principles, such an agreement *cannot* be converted into “a Section 8(f) agreement” as the G.C. and the Administrative Law Judge have mistakenly attempted. *Oilfield Maintenance*, 142 NLRB 1384, 1385-86 (1963); *Bear Creek Construction Co.*, 135 NLRB 1285, 1286 (1962). *See also Clock Electric*, 338 NLRB 806, 826 (2003); *Bell Energy Management Corp.*, 291 NLRB 168, 169 (1988).

The rationalization advanced by the G.C. -- that construction industry employers and employees are not similarly situated in that “in the construction industry, recognition of a union that has not been selected by a majority of the bargaining unit ‘shall not be an unfair labor practice’” (G.C. Br. in Opp. to Union Except. 13) -- is simply wrong.

By its own terms, Section 8(f) *does* allow construction industry employers and unions to enter into “agreements,” without regard to majority support of unit employees, but *does not* authorize “recognition” of a minority union or even an “agreement” that has been entered into through conduct that is implicated “by any action ... defined in [Section 8(a) of the NLRA] ... as an unfair labor practice...” *Oilfield Maintenance*, 142 NLRB at 1385-86; *Bear Creek Construction Co.*, 135 NLRB at 1286. The July 8, 2008, recognition agreement between the parties is therefore governed by NLRA Sections 9(a), 8(a)(2) and 10(b) and *not* by Section 8(f).

5. Conclusion

For the reasons stated above and previously, the Administrative Law Judge's conclusion that the parties entered into a Section 8(f) agreement and not a Section 9(a) recognition agreement should be overturned.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on March 7, 2012, I electronically filed Local 669's Brief in Reply to the Oppositions by Respondent and the Acting General Counsel to Its Exceptions via the e-filing portal on the NLRB's website, and also forwarded a copy by electronic mail to the Parties as listed below:

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