UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AUSTIN FIRE EQUIPMENT, LLC	*	**359 NLRB No. 3 (9/28/12)**
Respondent	*	
and	*	**JD (ATL) – 32-11 (11/29/11)**
	*	
ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO	*	**Case No. 15-CA-19697**
Union	*	
	*	
* *		

AUSTIN FIRE'S MEMORANDUM IN OPPOSITION
TO UNION'S MOTION FOR RECONSIDERATION AND CONSOLIDATION

Respondent, Austin Fire Equipment, LLC ("Austin Fire" or "Respondent") submits this Memorandum in Opposition to Motion for Reconsideration filed by Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Union"). The Union has not raised any extraordinary circumstances warranting reconsideration of the Board's decision under Section 102.48(d)(1) of the Board's Rules and Regulations. The Board's prior decision denying reconsideration, which was set aside in accord with the Supreme Court's decision in *NLRB v. Noel Canning*, No. 12-1281 (June 26, 2014), should be reissued. The parties have exhaustively briefed these issues. The Union's Second Motion for Reconsideration should be denied for the same reasons articulated in the Board's February 7, 2013 denial. Additionally, the Union's Motion for Consolidation should be denied because there are separate and distinct questions of law and fact between this case and *G&L Associated, Inc. d/b/a USA Fire Protection*, 358 NLRB No. 162 (2012).

One of the three documents signed by the construction industry parties establishing their bargaining relationship in this case was an Acknowledgement form which stated:

> The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ are members of, and are represented by Road Sprinkler Fitters Local Union No. 669, U.S., AFL-CIO, for the purposes of collective bargaining.
>
> The Employer therefore unconditionally acknowledges and confirms that Local Union 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

Despite the fact that the recitals in the first paragraph were false, and were known to be false at the time the Acknowledgement form was entered into by Respondent, the Union contended (and still contends) that this Acknowledgement language is sufficient to create of a 9(a) relationship under *Staunton Fuel & Material, Inc. (Central Illinois),* 335 NLRB 717 (2001). The Board *twice* rejected the Union's contention, finding the Acknowledgement language, standing alone, does not meet the three-prong test set forth in *Staunton Fuel*. 359 NLRB No. 3 (2012); 359 NLRB No. 60 (2013). [1] Absent any evidence to the contrary, the Board determined that the parties' relationship was governed by Section 8(f). The Union previously requested reconsideration of this ruling, which the Board denied. 359 NLRB No. 60 (2013). The Union once *again* asks the Board to reconsider its 2012 ruling. The Board should once again deny the Union's Motion.

1. <u>The Board Correctly Found that the Acknowledgment Language Fails to Satisfy *Staunton Fuel*</u>.

Under Board law, there is a presumption that bargaining relationships in the construction industry are governed by Section 8(f). *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf'd sub nom, *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3rd Cir 1988), cert. denied, 488 U.S. 889 (1988). To overcome this presumption of an 8(f) relationship, a construction industry union can achieve 9(a) status "from voluntary recognition accorded to the union by the employer of a stable

[1] In a case decided the same day, *G&L Associated, Inc*., 358 NLRB No. 162, the Board similarly found that the same Acknowledgement was insufficient to satisfy *Staunton Fuel*.

work force where that recognition is based on a clear showing of majority support among unit employees." 282 NLRB at 1387, n. 53.

In *Staunton Fuel*, the Board established that such voluntary recognition under 9(a) could be established in the construction industry by a written agreement. The language must unequivocally establish that (1) the union requested recognition as the majority or 9(a) representative of the unit; (2) the employer granted such recognition; and (3) the employer's recognition was based on the union's showing, or offer to show, evidence of majority support. *Staunton Fuel*, supra at 1155-56. Here, the Board correctly determined that the Acknowledgement relied upon by the Union fails to satisfy the third prong of the *Stanton Fuel* three-part test, *i.e.*, that it could demonstratively prove that it enjoyed majority support at the time it requested recognition. The Acknowledgement is devoid of any language demonstrating that the Union had shown or offered to show evidence of majority support.

The Union argues that the "majority support" prong was satisfied by the language reciting that a majority of employees are "members of" and "represented by" the Union. The Board's decision correctly points out that neither membership nor representation prove majority support of the unit employees. In fact, *Staunton Fuel* expressly makes this point:

> To the extent that any post-Deklewa cases may be read to imply that an agreement indicating that the Union "represents a majority" or has a majority of "members" in the Unit, without more, is independently sufficient to establish 9(a) status, these cases are overruled.

335 NLRB at 720.

2. <u>The Board's Decision Is Consistent With Prior Precedent</u>.

The Union incorrectly argues that the Board's decision represents a rejection of the Tenth Circuit's decisions in *Oklahoma Installation* and *Triple C Maintenance*.

In *NLRB v Triple C Maintenance, Inc*., 219 F.3d. 1147 (10th Cir. 2000), the agreement that the Court found sufficient to establish a 9(a) relationship contained language establishing that the Employer's recognition was "predicated on a clear showing of majority support for [the named union] indicated by bargaining unit employees." 219 F.2d. at 1155. The absence of such a representation in the Acknowledgement in this case is precisely why the Board found that it fails to satisfy the third prong of *Staunton Fuel*.

In *NLRB v Oklahoma Installation Co*., 219 F.2d 1160 (10th Cir. 2000), the Court rejected the Board's finding that the recognition agreement was sufficient to establish a 9(a) relationship. In doing so, among other reasons, the Court stated that unlike in *Triple C Maintenance*, "the agreement here does not recite that the Union submitted proof of majority status or that the employer acknowledged the proof of majority support as the basis for its 9(a) recognition of the Union." 219 F.3d. at 1165. Thus, the Board's decision in this case is entirely consistent with the Court's decision in *Oklahoma Installation*.

And, as recognized in the Board's February 7, 2013 denial, the Board's 2012 decision comports with other precedent interpreting substantively different recognition clauses. *MFP Fire Protection, Inc*., 318 NLRB 840 (1995) (recognition clause contained "have designated" language absent here); *Triple A Fire Protection, Inc*., 312 NLRB 1098 (1993) (recognition clause contained "have designated" language absent here); *see also American Automotive Sprinkler Systems, Inc.*, 323 NLRB 920 (1997) (recognition language expressly stated that it was based upon "[m]embers that have given written authorization").

3. Reference to 9(a) in the Acknowledgement is Insufficient to Satisfy Third Prong of *Staunton Fuel* Test.

Contrary to the Union's argument, the reference to 9(a) in the second paragraph of the Acknowledgement does not overcome the fundamental deficiency found by the Board, *i.e.*, failure to establish that recognition was based upon the Union's showing, or offering to show, evidence of majority support. While the reference to 9(a) in the second paragraph may be used to satisfy the first and second prongs of the *Staunton Fuel* test,[2] it is not a substitute for satisfying the third prong. In *Triple C*, the court, after finding that the employer expressly granted recognition under Section 9(a), further stated, "Significantly, the agreement also represents that '[t]he Employer agrees that this recognition is predicated on a clear showing of majority support for [the Union] indicated by bargaining unit employees.'" 219 F.3d at 1155. Given that the Acknowledgement and the record as a whole is totally devoid of *any* evidence that the Union was supported by a majority of unit employees at any time, the mere recitation of Section 9(a) in the Acknowledgement was insufficient to meet the Union's burden. The Board agreed, and properly held in the February 7, 2013 denial that "[i]f, as the Union here contends, the reference to Section 9(a) were sufficient to establish a relationship under that section of the Act, the [*Triple C*] court's additional finding would have been superfluous rather than significant."

4. The Board Should Not Consolidate.

The Union argues that the "two decisions present identical and important issues of law;"[3] however, these two decisions involve different employers, with different facts that are relevant to the Board's determination. The Union cites *no* authority supporting consolidation, which the Union raises for the first time in its second motion for reconsideration. The authority to

[2] The overwhelming evidence in the record established that notwithstanding the Acknowledgement, Austin Fire did not intend on entering into a 9(a) relationship, as found by the ALJ.

[3] Union's Motion for Reconsideration at p. 4.

consolidate cases is vested in the General Counsel under Section 102.33 of the Board's Rules and Regulations. *Beck Corp., d/b/a Jessie Beck's Riverside Hotel*, 231 NLRB 907, 909 (1977); *see also Electric Motors and Specialties, Inc.*, 149 NLRB 1432, 1436 (1964) (General Counsel, not Trial Examiner, has authority to consolidate; therefore Trial Examiner found he "should not arrogate to myself authority which the rules vest elsewhere.") General Counsel has not consolidated these cases, and the Union cites no authority or rationale why the Board should consolidate these cases *now*.

The *Connecticut Light & Power Co.* decision cited by the Union was consolidated, at the employer's request, because two separate proceedings concerned the same employer and election. 222 NLRB 1243 (1976). Here, the Union is involved in two separate proceedings, with two separate employers, involving separate facts. These cases have remained separate throughout the proceedings thus far. There is *no* reason to consolidate the two separate proceedings, involving separate employers, and different facts *now*, when considering the Union's second request for reconsideration. Additionally, consolidation is directly contradicted by the *Sperti Sunlamp Div.* case cited by the Union, which held that consolidation is appropriate when there are not "separate and distinct questions of law and fact." 162 NLRB 1148, 1148 n. 1 (1967). Here, as in *Sperti*, the *Austin Fire* and *G&L Associated* facts are different, "and consolidation is not necessary in order to make a proper determination." *Id. See also Hercules, Inc. v. NLRB*, 833 F.2d 426, 430 (2nd Cir. 1987) (Board does not abuse discretion in denying motion to consolidate when there are factual differences between the two cases). Consolidation is not warranted and would complicate the Board's ruling on the Union's motion for reconsideration because the two cases involve different facts, which are relevant for its determination in each of the cases.

Likewise, the Union fails to provide *any* support for its request that the Board "allow further briefing by the parties on the legal issue. . ." that is dispositive in this case. Union's Motion for Reconsideration at p. 2. The parties have exhaustively briefed the relevant legal issues, and there are no new cases that are relevant for the Board's ruling. The Board should deny the Union's request for consolidation and adopt the Board's earlier February 7, 2013 Decision denying the Union's request for reconsideration for the reasons stated therein.

For these reasons, and as fully articulated in the Board's February 7, 2013 denying the Union's First Motion for Reconsideration, the Union's Second Motion for Reconsideration should also be denied. The Union has not raised any extraordinary circumstances warranting reconsideration of the Board's decision under Section 102.48(d)(1) of the Board's Rules and Regulations.

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

I. HAROLD KORETZKY, T.A. (LA #7842)
RUSSELL L. FOSTER (LA #26643)
SARAH E. STOGNER (LA #31636)
1100 Poydras Street, Suite 3100
New Orleans, Louisiana 70163-3100
Telephone: (504) 585-3800
Facsimile: (504) 585-3801

ATTORNEYS FOR RESPONDENT
AUSTIN FIRE EQUIPMENT, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondent's Memorandum in Opposition to Motion for Reconsideration have been served via e-mail on this 15th day of July, 2014:

Caitlin Bergo
Kevin McClue
Region 15
National Labor Relations Board
600 South Maestri Place, 7th Floor
New Orleans, LA 70130-3413
Caitlin.Bergo@nlrb.gov
Kevin.McClue@nlrb.gov

Natalie C. Moffett
William W. Osborne, Jr.
OSBORNE LAW OFFICES, P.C.
4301 Connecticut Avenue, N.W.
Suite 108
Washington, D.C. 20008
(202) 243-3200 Phone
(202) 243-3207 Fax
bosborne@osbornelaw.com
nmoffett@osbornelaw.com

I. Harold Koretzky

4843-3995-1644, v. 1