

G&L Associated, Inc. d/b/a USA Fire Protection and Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Case 10-CA-038074

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On June 21, 2010, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Charging Party Union filed exceptions and a supporting brief, and the Respondent filed an answering brief, cross-exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below,¹ and to substitute a new notice to conform to the Order as modified.

We agree with the judge's conclusion that the collective-bargaining relationship between the Respondent and the Union was governed by Section 8(f) rather than Section 9(a) of the Act. But in so finding, we do not agree with the judge's subsidiary finding that the language of the one-page "Acknowledgement of Representative Status" (Acknowledgement), signed by the parties on November 24, 2008, satisfied the three-part test set forth in *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001). In *Staunton*, the Board held that a written agreement would be sufficient to establish a 9(a) bargaining relationship

if its language unequivocally indicates that the union requested recognition as majority representative, the employer recognized the union as majority representative, and the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support.

Id. at 717. We find that the Acknowledgement failed to meet the third element of the above standard.

The Acknowledgement stated in full:

¹ We shall modify the judge's recommended Order to conform to the violations found and the Board's standard remedial language, and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

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.A., AFL-CIO, for 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.

According to this document's express terms, the basis for the Respondent's recognition of the Union was unit employees' membership in or representation by the Union. However, the Board explicitly stated in *Staunton Fuel* that language concerning union membership and representation, without more, would not establish the parties' intent to form a 9(a) relationship because such language is also consistent with Section 8(f). *Id.* at 720.² Rather, in order to satisfy the *Staunton* test, the parties' agreement must confirm that the union has the support or authorization of a majority of unit employees. *Id.* The Acknowledgement here contains no such confirmation. As the Union relies only on the Acknowledgement to support its assertion of 9(a) status and does not contend that any other evidence substantiates its position,³ we find that the parties' relationship is governed by Section 8(f).⁴

AMENDED REMEDY

Having found that the Respondent unlawfully withdrew recognition from the Union, we shall order the Respondent to make employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest

² Member Griffin acknowledges that his colleagues accurately characterize this aspect of *Staunton Fuel*. He notes, however, that this case arises in Tennessee, a State where, as permitted by Sec. 14(b) of the Act, State law prohibits a collective-bargaining clause requiring union membership. In his view, union membership in such a State is evidence of support for the union, and an employer could appropriately rely on evidence of union membership, if numerically sufficient, to extend 9(a) recognition. These circumstances are not presented here.

³ We therefore find it unnecessary to consider other evidence relied on by the Respondent or to pass on the judge's discussion of *Madison Industries*, 349 NLRB 1306 (2007).

⁴ In its exceptions, the Union argues that Sec. 10(b) precludes a challenge to the Respondent's voluntary grant of 9(a) recognition more than 6 months after that recognition. Because we find that the Respondent did not extend recognition under Sec. 9(a), we find it unnecessary to pass on that contention. See *Staunton*, *supra* at 718 fn. 4.

at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

As part of the make-whole remedy, we shall order the Respondent to make all delinquent benefit fund contributions on behalf of unit employees that have not been made from September 8, 2009, until the expiration of the parties' 2007–2010 collective-bargaining agreement on March 31, 2010, and any automatic renewal or extension of that contract, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).⁵

Further, the Respondent shall be required to reimburse unit employees for any expenses ensuing from its failure to make the required fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts should be computed in the manner set forth in *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, G&L Associated, Inc. d/b/a USA Fire Protection, Clinton, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (the Union) and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees during the term of the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor the terms and conditions of the parties' 2007–2010 collective-bargaining agreement until its expiration on March 31, 2010, and any automatic renewal or extension of that contract.

⁵ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

(b) Make employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful withdrawal of recognition from the Union, plus interest, as set forth in the remedy section as amended.

(c) Make all contributions, including additional amounts due, that it was required to make to contractual fringe benefit funds during the term of the collective-bargaining agreement, but which it has not made since September 8, 2009, and reimburse its unit employees, with interest as provided in the remedy section as amended, for any expenses resulting from its failure to make the required payments.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and benefits due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Clinton, Tennessee facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2009.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit during the term of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL honor the terms and conditions of our 2007-2010 collective-bargaining agreement with the Union until its expiration on March 31, 2010, and any automatic renewal or extension of that contract.

WE WILL make employees whole for any loss of earnings and other benefits resulting from our unlawful withdrawal of recognition, plus interest.

WE WILL make all contributions that we were required to make to contractual fringe benefit funds during the term of the collective-bargaining agreement, but which we have not made since September 8, 2009, and WE WILL reimburse you, with interest, for any expenses resulting from our failure to make the required payments.

G&L ASSOCIATED, INC. D/B/A USA FIRE PROTECTION

Sally R. Cline, for the General Counsel.

Steve Erdely IV, for the Respondent.

William W. Osborne Jr., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A MARCIONESE, Administrative Law Judge. I heard this case in Knoxville, Tennessee, on January 28, 2010. Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL-CIO (the Union), filed the charge on September 18, 2009.¹ The complaint issued on November 20, alleging that G&L Associated, Inc. d/b/a USA Fire Protection (the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) on September 8 by withdrawing recognition of the Union as exclusive collective-bargaining representative of its journeymen sprinkler fitters and apprentices. On December 3, the Respondent filed its answer, admitting that it had withdrawn recognition from the Union but denying that this violated the Act. As an affirmative defense, the Respondent asserted that the recognition was unlawful because the Union never demonstrated that it represented a majority of the Respondent's unit employees.

The primary issue raised by the pleadings is whether the Respondent and the Union had an 8(f) or 9(a) relationship. This turns on an interpretation of the language used by the parties in the recognition agreement and contract they signed on November 24, 2008. In addition, counsel for the General Counsel, over the objections of the Charging Party, indicated that the General Counsel is seeking, via this case, a re-examination and modification of certain precedent regarding when and how construction industry employers and unions form 9(a) relationships and whether a challenge to initial recognition in the construction industry should be barred if raised more than 6 months after recognition.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the business of installing, maintaining, and repairing fire sprinkler systems from its facility in Clinton, Tennessee. The Respondent stipulated at the hearing that it annually purchases and receives at the Clinton facility goods valued in excess of \$50,000 directly from points located outside the State of Tennessee. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The parties stipulated at the hearing that the Respondent is an employer in the construction industry. The parties also stipu-

¹ All dates are in 2009, unless otherwise indicated.

lated that the Respondent is a member of the National Fire Sprinkler Association (NFSA), a multiemployer association that has a collective-bargaining agreement with the Union, but that the Respondent has never authorized the association to bargain on its behalf. Instead, the Respondent recognized the Union and signed an independent agreement on November 24, 2008. It is undisputed that, from November 24, 2008, until it withdrew recognition on September 8, the Respondent complied with all the terms and conditions of the collective-bargaining agreement.

Counsel for the General Counsel and the Charging Party argue that, under current Board law, these facts are sufficient to establish a violation of Section 8(a)(5) of the Act because the collective-bargaining agreement was still in effect on September 8. The contract was not scheduled to expire until March 31, 2010. Although the complaint alleges that the Respondent and the Union had a 9(a) relationship, the General Counsel argues that the withdrawal of recognition midterm of the collective-bargaining agreement would be unlawful even if the parties' relationship was governed by Section 8(f). The Respondent has raised a number of defenses in an attempt to absolve itself of the consequences of having initially recognized the Union, most of which relate to its claims that the recognition was illegal because the Respondent had no employees on November 24, 2008, and because the Union never demonstrated, or even offered to demonstrate, that it had the support of a majority of unit employees.² As an alternative defense, the Respondent argues that, even assuming there was a valid 9(a) or 8(f) recognition, it was privileged to withdraw recognition on September 8 because it had a stable one-person unit.

With the issues thus joined, I shall review the essentially undisputed facts. The Respondent was first incorporated in 1989 by Linda Duncan and her son, Greg Duncan, and licensed as a general contractor to perform residential and light commercial construction. At some point, the corporation became inactive. The Duncans reactivated the corporation sometime in 2008 when they decided to get into the fire sprinkler business. In order to do so, the Respondent acquired the name USA Fire Protection and applied for the specialty license required by the State of Tennessee to perform such work. Documents in the record show that the Respondent obtained such a license on December 1, 2008.

Because neither Linda nor Greg Duncan had any experience in the fire sprinkler business, they hired a gentleman by the name of Dale Young to help them get started. Linda Duncan testified that he was a "working partner," paid an annual salary of \$80,000. There is no dispute that Young was a member of the Union and a journeyman sprinkler fitter. The General Counsel has alleged and the Respondent has admitted that Young was a statutory supervisor and agent of the Respondent.

² The Charging Party strenuously objected to the Respondent's proffer of any evidence regarding the initial recognition, relying on well-established Board law that an employer can not attack the legality of recognition that occurred more than 6 months before an unfair labor practice charge was filed. See *Machinists Local 1424 v. NLRB (Bryan Mfg. Co.)*, 366 U.S. 731 (1961). The General Counsel did not object to this evidence based on its desire to raise before the Board whether that precedent should continue to apply in the construction industry.

The Charging Party objected to this, claiming that he was a unit employee. The fringe benefit contribution reports filed by the Respondent in December 2008 and January 2009 identify Young as a journeyman unit employee. The Respondent's payroll records for that period also show that Young was paid under the terms of the collective-bargaining agreement. Young left the Respondent's employ in mid-January in a dispute over the terms of his compensation as a "working partner." Linda Duncan testified that, contrary to what the fund reports showed, Young did not work as a sprinkler fitter in the field. He hired the Respondent's first employee, Brandon Scoggins, and supervised his work. According to Linda Duncan, Young also worked in a sales capacity, soliciting work for the Respondent. He bought a vehicle and material, found warehouse space, and otherwise assisted the Duncans in starting their business.

On November 24, 2008, Linda and Greg Duncan met with the Union's business agent, Mark Davis, at the Respondent's facility. Young was also present. Linda Duncan testified that the meeting lasted 30–45 minutes while Davis testified it lasted 3–4 hours. In any event, there is no dispute that Davis presented the Duncans with several documents to sign to become a union contractor.³ One of the documents Linda Duncan signed as the Respondent's president is entitled, "Agreement," and contains the following preamble:

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

WHEREAS, the Union has competent and skilled Journeymen and Apprentice Sprinkler Fitters;

NOW, THEREFORE, it is mutually agreed as follows:

The Agreement contains three paragraphs that follow this preamble. In the first paragraph, the Respondent and the Union agreed to be bound by the terms and conditions of the current collective-bargaining agreement between the Union and NFSA, effective April 1, 2007. The parties adopted that Agreement as their own and agreed that journeymen and apprentice sprinkler fitters hired by the Respondent would be employed according to the contract's terms. In the second and third paragraphs, the parties agreed to be bound by the health and welfare, pension, and education fund trust agreements and the Employer agreed to make the contributions required by the collective-bargaining agreement to those funds. Although the document signed by Linda Duncan states that the NFSA master agreement was attached and made part of the Agreement, Linda Duncan claimed it was not and that she did not actually receive a copy of the complete collective-bargaining agreement until late January or early February. This testimony is inconsistent with other documents the Respondent placed in evidence and contradicted earlier testimony she gave about getting a copy of the collective-bargaining agreement from Young before this meeting.

In addition to the above Agreement, Linda Duncan signed a one-page document entitled: "Acknowledgement of the Representative Status of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO," which states, in its entirety:

³ Duncan admitted that the Respondent intended to become a union contractor when it started the fire sprinkler business.

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.A., AFL-CIO, for 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.

Linda Duncan testified, over the Charging Party's objections, that Davis told her the purpose of this document was to protect the Respondent in the event there was a strike in another part of the State. She acknowledged having read the document before signing it and conceded the document says nothing about strikes. Linda Duncan claimed she didn't understand what all the "numbers" meant. Counsel for the Respondent also elicited testimony from Linda Duncan, over the Charging Party's objections, that Davis did not show her any union authorization cards, petitions or other documentation establishing majority support.

The uncontradicted evidence in the record shows that, on November 24, 2008, the only individual employed in any unit capacity was Young, whom the Respondent and the General Counsel contend was a supervisor. There is also uncontradicted testimony from Linda Duncan that the Respondent had no sprinkler work yet and that it could not even begin to bid on such work until it got its specialty license on December 1. Payroll records and fund reports in evidence show that the Respondent did begin hiring sprinkler fitters in December 2008, and paid them in accordance with the contract until early September when, according to Linda Duncan, the last two unit employees were laid off.

On September 8, about 9 months into the Respondent's agreement with the Union, Linda Duncan sent the following letter to the Union:

Please accept this letter as formal notification that G & L Associated, Inc. d.b.a. USA Fire Protection has, on the basis of objective and reliable information, confirmed that more than 50% of its employees are not members of or represented by Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, for purposes of collective bargaining.

Therefore, G & L Associated, Inc. d.b.a. USA Fire Protection hereby formally withdraw recognition of Local Union 669 as the exclusive representative of its employees.

At the hearing, Linda Duncan testified that the Respondent had laid off its last two union employees at the time she wrote this letter. However, she admitted on cross-examination by the Charging Party's counsel that the Respondent still had two incomplete jobs that were on hold. Moreover, as shown by records obtained by the General Counsel via subpoena, the Respondent hired two employees to do work covered by the collective-bargaining agreement within days of sending this letter. These two employees, Charles Webb and Jeffrey Widmer, worked for the Respondent for several months after September 8 but were not paid in accordance with the terms of the

collective-bargaining agreement, nor were any fringe benefit contributions made on their behalf. The Respondent hired two more employees in January 2010, shortly before the hearing in this case, who were also not receiving the contractual wages and benefits. Duncan admitted that she did not contact the Union for additional labor when work became available after the last two unit employees were laid off in September, even though she was aware that she could have done so. In fact, Linda Duncan made a conscious decision not to employ union members after September 8.

The Board, in *John Deklewa & Sons*,⁴ set forth the governing principles for collective-bargaining agreements in the construction industry. The Board held, inter alia, that there is a rebuttable presumption that a bargaining relationship between a construction industry employer and union is governed by Section 8(f) of the Act and that the party asserting 9(a) status has the burden of proof. *Id.* at 1385 fn. 41. Accord: *Central Illinois Construction*, 335 NLRB 717, 721 (2001), and cases cited therein. The distinction between 8(f) and 9(a) status is significant because an employer can withdraw recognition upon expiration of an 8(f) contract while a union enjoys a rebuttable presumption of continuing majority support after expiration of the collective-bargaining agreement which can only be overcome by a showing of the actual loss of majority support. See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001).⁵

The Board, in *Central Illinois Construction*, supra, held that written contract language standing alone could be sufficient to establish the existence of a 9(a) relationship. The Board set forth a three-part test for analyzing such language. According to the Board, the language in question must unequivocally show (1) that the union requested recognition as the majority or 9(a) representative of the unit; (2) that the employer granted such recognition; and (3) that the employer's recognition was based on the union's showing, or offer to show, evidence of majority support. In *Nova Plumbing, Inc.*,⁶ the Board further refined the *Central Illinois* test to make clear that an explicit statement that a union requested recognition is unnecessary. The Board further held that, once it was established that the employer had recognized the union as a 9(a) representative, the union enjoyed a presumption of majority status. *Nova Plumbing*, 336 NLRB at 636. Finally, the Board has held that, if the contract language establishes a 9(a) relationship, then the principles of *Bryan Mfg.*, supra, and its progeny apply and an employer may not challenge the legality of the initial recognition outside the 6-month 10(b) period. *Casale Industries*, 311 NLRB 951, 953 (1993). Accord: *Triple A Fire Protection, Inc.*, 312 NLRB 1088, 1089 (1993), enf. 136 F.3d 727 (11th Cir. 1998); *Central Illinois Construction*, 335 NLRB at 720 fn. 14.

More recently, the Board revisited the parties' rights and obligations under Section 8(f) and 9(a) and summarized the law in this area. *Madison Industries*, 349 NLRB 1306 (2007). While

⁴ 282 NLRB 1375 (1987), enf. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1989).

⁵ Of course it is axiomatic that, regardless of whether a contract is governed by Sec. 8(f) or 9(a), an employer may not withdraw recognition or repudiate the agreement during its term. *John C. Deklewa & Sons*, 282 NLRB at 1385-1386.

⁶ 336 NLRB 633 (2001), enf. denied 330 F.3d 531 (D.C. Cir. 2003).

reiterating its holdings in *Central Illinois Construction*, supra, and other cases cited above, the Board held,

. . . . [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. []

349 NLRB at 1308 [citations omitted]. See also *Allied Mechanical Services*, 351 NLRB 79, 81–82 (2007).

Applying this precedent to the facts here, I find that the language of the one-page “Acknowledgement of Representative Status . . .,” signed by Linda Duncan on November 24, 2008, satisfies the three-part test of *Central Illinois Construction*, supra. The fact that it does not explicitly state that the Union is demanding recognition as the 9(a) representative of the unit is not fatal for, as the Board recognized in *Central Illinois*, such a demand is fairly implied by the language granting such recognition. Moreover, notwithstanding the evidence to the contrary, the language of the agreement explicitly states that the Respondent’s recognition of the Union was based on a showing of majority support. However, I also note that the Board in *Central Illinois* and subsequent cases indicated that it is not enough to read such language in isolation. Rather, the agreement must be examined “in its entirety.” *Id.*, 335 NLRB at 720 fn 15; *Madison Industries*, 349 NLRB at 1308.

In the present case, the Respondent relies upon the preamble to the separate “Agreement,” signed contemporaneously, pursuant to which the Respondent adopted the NFSA contract as its own. That language, looking to the future, seems to suggest the parties intended to establish a prehire agreement. Because of this “ambiguity,” the Respondent would argue that the extrinsic evidence it offered regarding the circumstances surrounding the signing of the agreement should be considered to determine the nature of the relationship. I agree.⁷

Having found that the parties’ agreement, in its entirety, did not conclusively establish that the parties intended to establish a 9(a) relationship, I shall consider the extrinsic evidence offered by the Respondent. This evidence, which is essentially undisputed, shows that the Respondent was in the process of starting its business when it recognized the Union, that it did not yet have a license to perform work covered by the agreement and in fact had no work, and that the only “employee,” other than the corporate officers, was a statutory supervisor. Considering the language of the parties’ agreement⁸ in its entirety and the

extrinsic evidence, I find that the parties intended to, and in fact did, establish an 8(f) collective-bargaining relationship.

As previously noted, the fact that the parties had an 8(f) relationship does not relieve the Respondent of liability for an unfair labor practice. The Respondent withdrew recognition while the collective-bargaining agreement was still in effect. Under the principles announced in *Deklewa*, supra, an untimely withdrawal of recognition violates Section 8(a)(5) of the Act. The Respondent argues that it could withdraw recognition on September 8 either because it had no employees or because the unit had consisted of no more than one employee on a consistent basis. *Stack Electric*, 290 NLRB 575, 577 (1988). See also *McDaniel Electric*, 313 NLRB 126 (1993). The evidence offered by the Respondent to establish the existence of a stable one-man unit is not persuasive and is contradicted by the fringe benefit reports it submitted to the Union and its own payroll records. These documents show that, from the time the Respondent began performing work as a fire sprinkler contractor until September 8, it usually employed at least one journeyman and one apprentice. On a number of occasions, the Respondent employed two journeymen. Rarely did the Respondent have only one unit employee on its payroll. Moreover, within a week of repudiating the collective-bargaining agreement, the Respondent hired two employees who were employed consistently for several months after the Respondent withdrew recognition. Accordingly, I find that the evidence does not establish the existence of a stable one person unit that would permit withdrawal of recognition on September 8.⁹

Having considered the evidence and the arguments of the parties, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and repudiating its 8(f) collective-bargaining agreement on September 8, 2009. I find it unnecessary to address the General Counsel’s argument that the Board should revisit precedent and modify the principals established in *Central Illinois Construction*, supra, and *Casale Industries*, supra. Under the facts of this case, it makes no difference whether the Respondent and the Union had a 9(a) or 8(f) relationship because its withdrawal of recognition occurred midterm of the collective-bargaining agreement, conduct which is unlawful under either relationship. This case is not the proper vehicle to address the issues raised by the General Counsel. Moreover, as an administrative law judge, I am bound to follow existing precedent until overruled by the Board. *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964). Even assuming the General Counsel’s

⁷ I note that the NFSA Agreement adopted by the Respondent also contains a union-security clause requiring employees to join the Union 7 days after hiring. Such language is indicative of a Sec. 8(f) rather than 9(a) agreement. At least one Board member indicated that such a provision, while not dispositive, would suggest an intent to create an 8(f) relationship. See *Madison Industries*, supra at 1309 fn. 11.

⁸ Regardless of what the Charging Party may believe, the parties’ “agreement” on November 24 consists of the “Agreement” adopting the NFSA agreement and the NFSA collective-bargaining agreement itself, as well as the “Acknowledgement of Representative Status.”

⁹ The Respondent also argues that, because the Union failed to demonstrate majority status when it sought recognition on November 24, the collective-bargaining agreement was void ab initio, relying on the Supreme Court’s decision in *Ladies Garment Workers v. NLRB (Bernhard-Altman)*, 366 U.S. 731 (1961). See also *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 536–537 (D.C. Cir. 2003). *Bernhard-Altman*, which did not involve a construction industry employer, is inapposite. Sec. 8(f) explicitly allows employers and unions in the construction industry to enter into a collective-bargaining agreement even though the union has not demonstrated majority support.

arguments were relevant to this case, I would have to defer to the Board.

CONCLUSION OF LAW

By withdrawing recognition from Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL-CIO on September 8, 2009, during the term of its 8(f) collective-bargaining agreement with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that the Respondent be ordered to recognize and, upon request, bargain with the Union and restore the terms and conditions of employment that existed under the April 2007 NFSA Agreement that was adopted by the Respondent on November 24, 2008. Because I have found that the parties' relationship is governed by Section 8(f) rather than Section 9(a), the Respondent had the right to terminate its relationship upon expiration of that agreement on March 30, 2010. There is no evidence in the

record before me whether the Respondent in fact gave the Union timely notice of its desire to terminate the bargaining relationship upon the contract's expiration. I shall leave the determination whether the Respondent is obligated under any succeeding agreement, pursuant to the renewal provisions of the collective-bargaining agreement, to the compliance stage of this proceeding.

Because the record shows that the Respondent employed individuals in unit positions after it withdrew recognition from the Union, I shall also recommend that it be ordered to make employees whole for any wages and benefits lost as a result of the unlawful withdrawal of recognition, including payment to the contractual fringe benefit funds any amounts that would be owed for the hours performed by these unit employees. Employees shall also be entitled to reimbursement for any medical, dental and other expenses incurred as a result of the Respondent's failure to make the contractual fringe benefit fund contributions on their behalf. *Kraft Plumbing & Heating, Inc.*, 252 NLRB 891 fn. 2 (1980). Any backpay owed the employees shall be paid with interest as computed in *New Horizons*, 283 NLRB 1173 (1987). With respect to any fringe benefit fund contributions owed, interest shall be computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[Recommended Order omitted from publication.]