

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRIPLE A FIRE PROTECTION, INC.

Respondent

and

**UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPEFITTING INDUSTRY OF THE UNITED
STATES AND CANADA, ROAD SPRINKLER
FITTERS LOCAL UNION NO. 669, AFL-CIO**

Charging Party Union

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Case No. 15-CA-11498

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

June 8, 2010

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TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	p5
II.	STATEMENT OF FACTS AND ANALYSIS	p10
A.	Background	p10
B.	Response to Respondent’s Exceptions	p13
1.	The ALJ properly recognized and followed the Board’s January 30, 2009, Supplemental Decision and Order (Exception Nos. 1, 2, 6 and 13)	p13
2.	The ALJ correctly rejected Respondent’s assertions that had already been considered and rejected by the Board (Exception Nos. 32-35 and 94-97)	p14
3.	The ALJ properly focused on the compliance proceeding that was before him (Exception No. 24)	p14
4.	The compliance specifications were properly prepared with content based upon enforced Board decisions finding Respondent violated the National Labor Relations Act (Exception Nos. 3, 7-8 and 18-20)	p14
5.	The ALJ properly found that the General Counsel proved the allegations raised in the Specification (Exception Nos. 36-40)	p15
6.	Respondent is estopped from asserting that the ALJ incorrectly found it reduced wages for employees after April 22, 1991 and that the contract rate was based on a union security provision that did not survive expiration of the contract (Exception Nos. 10, 14, 16-17, 26 and 31)	p16
7.	Respondent is estopped from asserting that the ALJ failed to find that any employee of Respondent had a non-speculative economic interest in the Union’s trust funds and that any relief granted is punitive and results in windfalls to the Union funds and each employee (Exception Nos. 9, 11-12, 15, 60, 84-86 and 90-92)	p17
8.	The Board’s Executive Secretary correctly did not submit Respondent’s September 8, 2009 Motion for Reconsideration to the Board (Exception No. 27)	p18
9.	The ALJ correctly found that the Union did not abandon the bargaining unit (Exception Nos. 5, 22, 25, 30 and 41-46)	p19
10.	The ALJ properly found that Respondent’s unlawful unilateral changes likely cause employees to be disaffected with the Union and regard the Union as ineffectual (Exception Nos. 47 and 48)	p20
11.	The ALJ properly found that Respondent admits it has not remedied its unfair labor practices (Exception No. 49)	p20
12.	The ALJ correctly discounted Respondent’s inability to pay claims (Exception Nos. 23, 50-59 and 61-81)	p21

13. The ALJ properly received testimony regarding Respondent’s obligation to pay liquidated damages and interest to the Union trust funds (Exception No. 4)p23

14. The ALJ correctly found that Respondent’s make whole obligations, including liquidated damages with interest, continue to accrue (Exception Nos. 21, 28-29, 82-83, 87-90, 93, and 98)p23

III. CONCLUSION

p25

TABLE OF AUTHORITIES

<i>Centra</i> , 314 NLRB 814, 819-20 (1994)	p16
<i>Church Homes</i> , 349 NLRB 829, 838 (2007)	p16
<i>Coal Rush Mining, Inc.</i> , 341 NLRB 32, 33 N.2 (2004)	p21
<i>Ethan Enterprises Inc.</i> , 342 NLRB 129, 133 (2004)	p20
<i>Fayard Moving & Transportation</i> , 300 NLRB 209, 210 (1990)	p14
<i>J.R.R. Realty Co.</i> , 301 NLRB 473, 475 fn. 16 (1991)	p24
<i>Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB</i> , 564 F.3d 469 (D.C. Cir. 2009)	p13
<i>Mastro</i> , 136 NLRB 1342, 1356 (1962)	P15
<i>Merryweather Optical Co.</i> , 240 NLRB 1213 (1979)	p23, 24
<i>National Labor Relations Board v. Triple A Fire Protection, Inc.</i> , 136 F. 3d 727 (1998), <i>cert. den. sub nom. Triple A Fire Protection v. NLRB</i> , 325 U.S. 1067 (1999)	p15
<i>New Horizons for the Retarded</i> , 283 NLRB 1173 (1987)	p23
<i>Ohio Car & Truck Leasing, Inc.</i> , 169 NLRB 198, 201-202 (1968)	p20
Rule 102.48(d)(1) and (2) of the Board’s Rules and Regulations	p18
<i>Ryan Iron Works</i> , 345 NLRB No. 56 (2005)	p24
Section 102.53 of the Board’s Rules and Regulations	p23
Section 102.56(b)(c) of the Board’s Rules and Regulations	p15, 16
<i>Star Grocery Co.</i> , 245 NLRB 196, 197 (1970)	p21
<i>Triple A Fire Protection, Inc.</i> , 353 NLRB No. 88 (2009)	p14, 17
<i>Triple A Fire Protection, Inc.</i> , 315 NLRB 409 (1994)	p15
<i>United States Can Company</i> , 328 NLRB 334, 338 (1999)	p15, 16

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COMES NOW Beauford D. Pines, Counsel for the General Counsel (General Counsel) in the above-styled matter and files this brief with the National Labor Relations Board (NLRB).

I. STATEMENT OF CASE:¹

On October 31, 1994, the National Labor Relations Board (Board) issued its Supplemental Decision and Order affirming the administrative law judge’s decision that Triple A Fire Protection, Inc. (Respondent) violated Sections 8(a)(1) and (5) of the National Labor Relations Act (Act) by, *inter alia*, unilaterally changing terms and conditions of employment for bargaining unit employees without first bargaining to impasse with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL-CIO (Union)

¹ Reference to the ALJD and transcript are designated as “ALJD” and “Tr.,” respectively. An Arabic numeral(s) after “ALJD” or “Tr.” is a spot cite to a particular page of the ALJD or the transcript. An Arabic numeral(s) following a page spot cite references specific lines of the page cited. For example, ALJD 7 at 3-7 is page 7 of the ALJD, lines 3-7. Reference to the exhibits of the General Counsel are designated as “GCX.” Reference to the Charging Party Union exhibits are designated as “UX.” Reference to exhibits of the Respondent are designated as “RX.” All exhibits have

after the expiration of the Parties' 1988-1991 collective bargaining agreement (GCX 2a). The Board directed Respondent to make whole its employees and the benefit funds of the Union for their losses resulting from Respondent's unfair labor practices.

The Board submitted an Application for Enforcement of its Order (GCX 2b), and on March 3, 1998, the Court of Appeals for the Eleventh Circuit (Eleventh Circuit) entered its judgment enforcing in full the provisions of the Board's Order (GCX 2c). On July 1, 2008, the Eleventh Circuit denied Respondent's Petition for Rehearing on the Board's Application for Enforcement (GCX 2d).

On August 3, 1998, Respondent submitted a Motion to Stay the Eleventh Circuit's mandate enforcing the Board Order while Respondent applied to the Supreme Court of the United States for a writ of certiorari (GCX 2e), and on September 29, 1998, Respondent filed its writ of certiorari (GCX 2f).

On November 5, 1999, the Board filed its Petition of the National Labor Relations Board for Adjudication in Civil Contempt and for Other Civil Relief with the Eleventh Circuit (GCX 2g) due to Respondent's failure and refusal to comply with the Eleventh Circuit's March 3, 1998 judgment. The Board filed a Motion for an Order of Reference to a Special Master on December 7, 1999 (GCX 2h).

A controversy having arisen over the total of Respondent's liability due under the terms of the enforced Supplemental Board Order, the Regional Director of the Board for Region 15 (Regional Director) issued the initial Compliance Specification and Notice of Hearing in this case on April 18, 2000 (GCX 2r). Respondent filed its Answer on May 10, 2000 (GCX 2t).

After subsequent related proceedings before a Special Master appointed by the Eleventh Circuit in March 2003 (GCXs 2n-p), the Regional Director issued the Second Amended Compliance Specification and Notice of Hearing on July 28, 2005 (GCX 2u). On August 17, 2005, Respondent requested an enlargement of time to respond to the Second Amended Compliance Specification (GCX 2w), and the Regional Director granted Respondent an extension of time to file its answer (GCX 2x).

the appropriate number or numbers for those exhibits. A "pg" and an Arabic numeral(s) after the exhibit number is a spot cite to a particular page(s) of the exhibit.

On October 18, 2005, the Regional Director issued an order rescheduling the hearing from November 7, 2005 to March 13, 2006 (GCX 2z). Thereafter, on February 13, 2006, the Regional Director indefinitely postponed the March 13, 2006 due to settlement discussions (GCX 2bb). A settlement did not materialize and on July 1, 2008, the Regional Director issued the Third Amended Compliance Specification and Notice of Hearing notifying Respondent it should file a timely answer complying with the Board's Rules and Regulations (GCX 2dd). On July 21, 2008, Respondent requested an enlargement of time to respond to the Third Amended Compliance Specification (GCX 2ff), and the Regional Director granted Respondent an extension of time to file its answer (GCX 2gg).

On August 18, 2008, Respondent filed its Answer to the Third Amended Compliance Specification and Notice of Hearing (Specification) (GCX 2ii). Thereafter, Respondent filed a Motion to Continue Hearing on September 8, 2008 (GCX 2jj), and the Regional Director partially granted a continuance of the hearing from October 6, 2008 to December 8, 2008 (GCX 2kk). Respondent requested a postponement of the December 8, 2008, hearing and the Regional Director issued an order rescheduling the hearing from December 8, 2008 to February 2, 2009 (GCX 2nn).

On November 12, 2008, the Union filed a Motion to Strike portions of the Respondent's Answer to the Third Amended Compliance Specification and Motion for Partial Summary Judgment (GCX 2ggg), and the General Counsel filed a Motion in Support of the Union's motions on November 21, 2008 (GCX 2pp). On December 5, 2008, the Board issued an Order granting in part the Motion to Strike and granting in full the Motion for Partial Summary Judgment (GCX 2rr). On December 11, 2008, Respondent filed a Motion to File an Out of Time Response to the Union's motions (GCX 2ss). The General Counsel and the Union filed oppositions to Respondent's motion (GCX 2tt and 2uu). On December 17, 2008, the Board issued an Order rescinding the December 5, 2008 Order, transferring the proceeding to the Board and issuing a Notice to Show Cause why the Union's motions should not be granted (GCX 2vv).

On December 22, 2008, Respondent filed a Response to Local 669's Motion for Partial Summary Judgment, which the Board treated as a response to the Notice to Show Cause (GCX 2hhh). The Union filed a reply to Respondent's response on December 30, 2008 (GCX 2ww). On January 5, 2009, Respondent filed

a Motion for Summary Judgment, and the General Counsel and the Union filed oppositions to Respondent's motion (GCX 2xx). On January 23, 2009, Respondent filed a response to the oppositions to Respondent's motion (GCX 2yy).

On January 29, 2009, Respondent filed an Emergency Motion to Continue Hearing (GCX 2zz), and the Board's Division of Judges issued an Order postponing the hearing date until March 30, 2009 (GCX 2aaa). Thereafter, on February 3, 2009, the General Counsel filed a Motion to Reschedule the Hearing Date (GCX 2bbb), and the Board's Division of Judges issued an Order rescheduling the hearing from March 30, 2009 to May 4, 2009 (GCX 2ccc).

On January 30, 2009, the Board issued its Supplemental Decision and Order in this case (GCX 2hhh). The Board noted that pursuant to Section 102.56(b) and (c) of the Board's Rules and Regulations, "a general denial is insufficient to refute allegations pertaining to gross backpay calculations." Further, the Board noted that Respondent, in its answer to the Specification, "failed to provide alternative figures or calculations, or to specify the basis for its disagreement with the General Counsel's calculations" and "failed to deny that the data at issue is within its knowledge and control." The Board concluded Respondent's answer failed to meet the specificity requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations (GCX 2hhh, pg. 2). The Board reasoned, however, that "a respondent in a compliance proceeding may properly cure defects in its answer before a hearing by an amended answer or a response to a notice to Show Cause." Accordingly, the Board considered Respondent's additional arguments it raised in response to the Union's motion and treated Respondent's arguments as a response to the Board's Notice to Show Cause.

The Board considered Respondent's argument that it is only required to make fringe benefit payments for unit employees who have a vested interest in receiving the benefits the funds provide, and the Board rejected such argument. The Board noted it "has never made such a distinction in awarding a make-whole remedy to benefit funds. Rather, if a respondent unilaterally stops making required payments to benefit funds on behalf of any employee, the standard remedy is to require that the funds be made whole for the missed payments, without regard to the 'eligibility status' of the employees to actually receive benefits

from the funds” (GCX 2hhh, pg. 3). After due consideration, the Board concluded Respondent’s answer or response did not specifically admit, deny or explain the allegations set forth in paragraphs 7-10 of the Specification, and accordingly, the Board granted the motion for partial summary judgment with respect to the calculations and found the allegations to be substantiated.

Furthermore, the Board noted “it is well settled that a respondent in a compliance proceeding may not re-litigate issues previously decided in an underlying unfair labor practice proceeding” and struck the following affirmative defenses from Respondent’s answer to the Specification as the issues had been litigated and decided in the underlying unfair labor practice proceeding: that the Regional Director did not have the authority to allege in the underlying complaint that the Union was the 9(a) representative of an appropriate unit; that the Union engaged in a strike on March 31, 1991; that the journeyman’s rate contained in the expired collective-bargaining agreement is based upon a union-security clause; that the Union bargained in bad faith by engaging in piecemeal bargaining or otherwise had no intention to agree to a contract other than one which mirrored the national agreement between Local 669 and the National Fire Sprinkler Association; and that Respondent did not unilaterally reduce wages. The Board concluded Respondent is barred from raising such defenses in this proceeding (GCX 2hhh, pg. 4).

The Board did not strike Respondent’s affirmative defense that the Union lost its majority status on or before January 17, 1992 and that on November 15, 1999, a decertification petition was filed on behalf of Respondent’s bargaining unit employees. The Board noted Respondent could raise such arguments before the administrative law judge.

The Board denied Respondent’s Motion for Summary Judgment (GCX 2hhh, pg. 4).

On April 24, 2009, the Union filed a Motion in Limine (GCX 2ddd), and on April 28, 2009, Respondent submitted its response to the motion (GCX 2eee).

On May 4 and 5, 2009, Administrative Law Judge (ALJ) Keltner J. Locke presided over a hearing in which the General Counsel, the Union and Respondent had an opportunity to present evidence in support of their respective positions.

On September 8, 2009, Respondent filed a Motion for Reconsideration of the Board's Supplemental Decision and Order. On September 10, 2009, the Board's Office of Executive Secretary rejected the Motion as untimely filed.

On February 10, 2010, ALJ Keltner J. Locke (hereinafter the ALJ) issued the Supplemental Decision (hereinafter ALJD) in this matter in which he concluded Respondent will discharge its obligations by making payment of \$3,846,526.81 in backpay and \$5,238,854.54 in back benefit fund contributions, together with interest (ALJD at 2). The ALJ noted the amount of backpay and benefits has continued to accrue since Respondent has not remedied the unfair labor practices (ALJD at 1).

On April 5, 2010, Respondent filed Exceptions to the ALJD excepting to virtually all the ALJ's findings and conclusions.

On April 14, 2010, the Union filed a Motion for Enlargement of Time to File Cross Exceptions and Answering Brief. The Board granted an extension until May 11, 2010.

On April 28, 2010, the Union filed a Motion for Enlargement of Time to File Cross Exceptions and Answering Brief. The Board granted an extension until May 18, 2010.

On May 12, 2010, the Union filed a Motion for Enlargement of Time to File Cross Exceptions and Answering Brief. The Board granted an extension until May 25, 2010.

On May 24, 2010, the General Counsel filed a Motion for Extension of Time to File Answering Brief to Respondent's Exceptions. The Board granted an extension until June 8, 2010.

II. STATEMENT OF THE FACTS AND ANALYSIS:

A. Background

Respondent acknowledges it is bound by a collective-bargaining agreement effective April 1, 1988 to March 31, 1991 between National Fire Sprinkler Association, Inc. and Road Sprinkler Fitters Local Union No. 669, U.A. (Union) (Tr. 62; GCX 3). Article 18 of the agreement provides the jurisdiction of work for the bargaining unit (Unit) employees includes "installation, dismantling, maintenance, repairs, adjustments, and corrections of all fire protection and fire control systems including the unloading, handling by hand, poser equipment and installation of all piping or tubing, appurtenances and equipment pertaining thereto, including

both overhead and underground water mains, fire hydrants and hydrant mains, standpipes and hose connections to sprinkler systems, sprinkler tank heaters, air lines and thermal systems used in connection with sprinkler and alarm systems, also all tanks and pumps connected thereto, also included shall be CO-2 and Cardox Systems, Dry Chemical Systems, Foam Systems and all other fire protection systems, but excluding steam fire protection systems.” Article 18 does not make a differentiation between field construction employee and shop employee (Tr. 36; GCX 3). The employees listed in Respondent’s payroll documents for the year 2008 through March 2009 (GCX 6-9) performed work covered by Article 18 (Tr. 210).

The calculations for Unit employees set forth in Appendix B (GCX 4) of the Specification is based upon the collective-bargaining agreement (GCX 3) between the National Fire Sprinkler Association, Inc. and the Union and accurately reflects the amounts due to Unit employees and Local 669 funds between April 21, 1991 and April 22, 2008 (Tr. 27). The names and totals set forth in Appendix C (GCX 5) of the Specification is a compilation of the total amounts of back pay and fund contributions for each unit employee Respondent employed between April 21, 1991 and April 22, 2008 (Tr. 31). Further, the calculations set forth in Appendix B (GCX 4) and Appendix C (GCX 5) are consistent with the Board’s January 30, 2009 Supplemental Decision and Order (Tr. 32; GCX 2hh).

The back pay period, and the corresponding interest due, are ongoing and continue until Respondent resumes paying Unit employees the contract wage rate and resumes the contract contributions to the Union funds on behalf of the Unit employees (Tr. 34.) Respondent has not paid the Unit employees the contract rate or resumed contributions to the Union funds on behalf of the Unit employees (Tr. 34).

Article 23 of the collective-bargaining agreement provides Respondent shall submit contributions to the Pension, Welfare and Education Funds in accordance with rules, regulations and procedures established by the Trustees of the funds (GCX 3). The agreement further provides Respondent agrees that in the event the Trustees institute or participate in legal proceedings to collect payments or contributions, Respondent shall also be required to pay reasonable attorney fees, expenses of collection and interest at the highest rate

permitted by the laws of the State where the legal proceeding is instituted. The agreement contains a provision for liquidated damages (Tr. 36).

Michael Jacobson, Administrator of the National Automatic Sprinkler Industry Trust Funds since 1984, has overall responsibility of the day-to-day operations of the National Automatic Sprinkler Industry Pension Plan, the National Automatic Sprinkler Industry Welfare Plan and the National Automatic Sprinkler Local 669 UA Education Fund. (Tr. 49-50). All the employee benefit plans are multi-employer plans and are collectively bargained and cover Sprinkler Fitters and Apprentices covered by various collective-bargaining agreements around the country. Each plan has a separate Board of Trustees composed of fifty percent management trustees and fifty percent union trustees, and each plan has its own trust agreement (Tr. 50).

The Restated Agreement and Declaration of Trust National Automatic Sprinkler Industry Pension Fund (UX 1), effective as of April 22, 1991, applies to the pension fund referenced in Article 20 of the collective-bargaining agreement (Tr. 52, 57). The Restated Agreement and Declaration of Trust National Automatic Sprinkler Industry Welfare Fund (UX 2a), in effect as of April 22, 1991, applies to the welfare fund referenced in Article 19 of the collective-bargaining agreement (Tr. 57), and Amendments to the Restated Agreement and Declaration of Trust National Automatic Sprinkler Industry Welfare Fund (UX 2b) were in effect as of April 22, 1991 and thereafter to the extent the amendments were signed after April 22, 1991 (Tr. 53). The Restated Agreement and Declaration of Trust National Automatic Sprinkler Local 669 UA Education Fund (UX 3), in effect as of April 22, 1991, applies to the education fund referenced in Article 21 of the collective-bargaining agreement (Tr. 54, 57).

The Guidelines for Participation in the Sprinkler Industry Trust Funds (UX 4), which summarizes the rules governing Respondent's participation and responsibilities with the trust funds, was in effect as of April 22, 1991 (Tr. 55). The Union's Pension, Welfare and Education trusts all provide for imposition of liquidated damages (Tr. 58). Liquidated damages are monies added to delinquent contributions to recover damages, such as the cost of collecting delinquent contributions and corresponding investment losses, when contributions required by the collective-bargaining agreement are not made on time (Tr. 57). The Trust Agreements and the Guidelines for Participation grant the Trustees the authority to assess damages at ten

percent for delinquent contributions plus another five percent for contributions that are fifteen days delinquent plus an additional five percent for contributions that are thirty days delinquent (Tr. 52, 58).

The Union routinely collects liquidated damages from employers who are delinquent in submitting contributions to the Pension, Welfare and Education Funds as required by the collective-bargaining agreement (Tr. 60; UX 5). Dating back to August 1, 1984, Respondent has been assessed liquidated damages by the Union's Board of Trustees for delinquent contributions (Tr. 64). Respondent was assessed liquidated damages of twenty percent in August and September 1984 (UX 6).

In addition to liquidated damages, the Pension, Welfare and Education trust agreements all provide for interest at twelve percent per annum for delinquent contributions (Tr. 58).

B. Response to Respondent's Exceptions

1. The ALJ properly recognized and followed the Board's January 30, 2009, Supplemental Decision and Order (Exception Nos. 1, 2, 6 and 13)

Respondent excepts to the validity of the Board's January 30, 2009 Supplemental Decision and Order issued by Board members Wilma B. Liebman and Peter C. Schaumber and cites *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). In *Laurel Baye*, the employer petitioned for a review of an order of the Board finding the employer engaged in unlawful labor practices and imposing a remedy. The Employer challenged the Board's authority to enter the order at all as the Board had only two members. The court determined that the two member Board did not meet the statutory Board quorum requirement of three members.

In this matter, Respondent's business office, as was the location of the hearing before the ALJ, is in Mobile, Alabama. As such, any appeal of the Board's decision in this matter is appropriately heard by the United States Court of Appeals for the Eleventh Circuit, not the D.C. Circuit. Accordingly, the D.C. Circuit's *Laurel Baye* decision is not controlling authority for the Board, or the ALJ, in this matter. As such, the ALJ has no basis, or authority, to disregard the Board's January 30, 2009 Supplemental Decision and Order in this matter. Therefore, the ALJ properly recognized and followed the Board's Supplemental Decision and Order.

2. **The ALJ correctly rejected Respondent's assertions that had already been considered and rejected by the Board (Exception Nos. 32-35 and 94-97)**

Respondent excepts to the ALJ's finding that Respondent may not resurrect and re-litigate assertions the Board duly considered and rejected earlier. The ALJ correctly stated it is neither necessary nor proper for him to entertain arguments which the Board already has considered and rejected (ALJD at 15). *Triple A Fire Protection, Inc.*, 353 NLRB No. 88, *slip Op. at 1-4* (2009).

3. **The ALJ properly focused on the compliance proceeding that was before him (Exception No. 24)**

Respondent excepts to the failure of the ALJ to consider the decisions of the Special Master and the Eleventh Circuit in the contempt proceeding the Board brought against Respondent. Respondent asks the Board to ignore the differences between a contempt proceeding and a compliance proceeding. Respondent asks the ALJ, and now the Board, to focus in this compliance proceeding on its ability to comply with the enforced Board order rather than determine the extent of its liability pursuant to the enforced Board order. It is established that in a compliance proceeding involving backpay, such as the instant proceeding, the issue is the amount due and not Respondent's ability to comply with the extent of its liability. *Fayard Moving & Transportation*, 300 NLRB 209, 210 (1990) The ALJ properly noted that his responsibility in this compliance proceeding is simply to measure Respondent's liability (ALJD at 11). Thus, whether Respondent is able to comply with the extent of its liability was not an issue before the ALJ, and accordingly, is not an issue before the Board in this compliance proceeding.

4. **The compliance specifications were properly prepared with content based upon enforced Board decisions finding Respondent violated the National Labor Relations Act (Exception Nos. 3, 7-8 and 18-20)**

Respondent excepts to the failure of the ALJ to find that the compliance specifications were improperly prepared and, as such, fail to state a claim upon which relief can be granted. Respondent asks the Board to ignore the enforced Board order upon which the compliance specifications are based. The ALJ correctly noted the United States Court of Appeals for the Eleventh Circuit entered its judgment enforcing the Board's Order finding that Respondent unilaterally changed wage rates and stopped making contributions to fringe-benefit funds effective April 22, 1991 and ordering Respondent to make whole the unit employees

and fringe-benefit funds (ALJD 2). *National Labor Relations Board v. Triple A Fire Protection, Inc.*, 136 F.3d 727 (1998), *cert. den. sub nom. Triple A Fire Protection v. NLRB*, 325 U.S. 1067 (1999); *Triple A Fire Protection, Inc.*, 315 NLRB 409 (1994).

5. **The ALJ properly found that the General Counsel proved the allegations raised in the Specification (Exception Nos. 36-40)**

Respondent excepts to the ALJ's finding that Respondent had to set forth specific details and supporting figures in its answer to the Specification and that the General Counsel proved the allegations raised in each paragraph of the Specification. Section 102.56(b) of the Board's Rules and Regulations provides, in pertinent part, as to all matters within the knowledge of the respondent relating to factors entering into the computation of gross backpay, if the respondent disputes either the accuracy of the figures in the specification or the premises on which the figures are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to applicable premises and furnishing the appropriate supporting figures. Further, Section 102.56(c) of the Board's Rules and Regulations provides, in pertinent part, that if the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by Section 102.56(b), such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation.

It is well established Board law that in a compliance proceeding, "the sole burden on the General Counsel is to show the gross amounts of backpay due, that is the amounts the employees would have received but for the employer's unlawful conduct." *United States Can Company*, 328 NLRB 334, 338 (1999). The gross backpay due is computed by the General Counsel through a backpay specification which shows the money and benefits the employees would have received but for the employer's unlawful conduct. Such calculations must be formulated in a reasonable and non-arbitrary manner that complies with accepted procedures and is supported by appropriate documentation. *Mastro*, 136 NLRB 1342, 1356 (1962). In computing gross backpay, the Board recognizes it may be impossible to arrive at precise figures. *United States Can Company*, 328 NLRB at 338. Once the General Counsel has shown the gross backpay due to

each discriminatee, the burden shifts to the employer, as the proponent for a different result than that advocated by the General Counsel, to establish any affirmative defenses based on proof of facts which would negate or limit its liability or otherwise show why any modifications should be made to the General Counsel's backpay specification. *Church Homes*, 349 NLRB 829, 838 (2007); *Centra*, 314 NLRB 814, 819-20 (1994). In this matter, the Board noted Respondent's answer failed to provide alternative figures or calculations, or to specify the basis for its disagreement with the General Counsel's calculations. Further, the Board noted Respondent failed to deny that the data at issue in this matter is within its knowledge and control. *Triple A Fire Protection, Inc.*, 353 NLRB No. 88 at 2 (2009). The Board concluded that Respondent's answer failed to meet the specificity requirements of Section 102.56(b) and (c). *Id.*

Moreover, the record evidence in this case establishes the General Counsel has met its burden in establishing the gross amount of wage backpay, funds contributions and liquidated damages and interest Respondent is obligated to pay to the Unit employees and to the Union Pension, Welfare and Education funds. The Specification issued on July 1, 2008, and in its January 30, 2009, Supplemental Decision and Order, the Board substantiated the formulas and calculations used to determine the amount of wage backpay and contributions due the funds. Further, the record testimony of Compliance Officer Debra Warner and Administrator of the National Automatic Sprinkler Industry Trust Funds Michael Jacobson comports with the Board's Supplemental Decision and establishes the amount of liquidated damages and interest Respondent is obligated to pay to make whole the Unit employees and the funds. Accordingly, the ALJ, based upon the Board's Supplemental Decision and Order and the record evidence, correctly found that the General Counsel has proven the allegations contained in the Specification. Furthermore, the record evidence reflects Respondent has failed to establish any facts which would negate or limit its liability.

6. **Respondent is estopped from asserting that the ALJ incorrectly found it reduced wages for employees after April 22, 1991 and that the contract rate was based on a union security provision that did not survive expiration of the contract (Exception Nos. 10, 14, 16-17, 26 and 31)**

Respondent excepts to the ALJ's finding it unilaterally reduced wage rates for bargaining unit employees, particularly those hired on or after April 22, 1991, and asserts that the contract rate of \$15.47 per

hour is based upon a union security provision that did not survive expiration of bargaining agreement. The Board has specifically rejected such contentions. In its January 30, 2009, Supplemental Decision and Order, the Board struck Respondent's denial that it reduced wages and its assertion that the contract wage was based on a union security clause in the collective-bargaining agreement that expired with the contract on March 31, 1991. *Triple A*, 353 NLRB No. 88 at 4 (2009).

7. **Respondent is estopped from asserting that the ALJ failed to find that any employee of Respondent had a nonspeculative economic interest in the Union's trust funds and that any relief granted is punitive and results in windfalls to the Union funds and each employee (Exception Nos. 9, 11-12, 15, 60, 84-86 and 90-92)**

Respondent excepts to the failure of the ALJ to find that the relief sought by the General Counsel in the Specification is punitive and would result in windfalls to each Union fund and to each employee for whom the General Counsel seeks backpay. The ALJ's finding that Respondent had a contractual obligation to make contributions to the employee benefit trust funds in accordance with its agreement with the Union is supported by Board law. Established Board law supports the ALJ's finding that Respondent's obligation to make contributions to the employee benefit trust funds continued even after the expiration date of the collective-bargaining agreement. Indeed, in its January 30, 2009 Supplemental Decision and Order, the Board ordered that when Respondent unilaterally stopped making required payments to the Union's benefit funds on behalf of employees, the standard remedy applicable is to require the funds be made whole for the missed payments without regard to the "eligibility status" of the employees to actually receive benefits from the funds. *Triple A*, 353 NLRB No. 88 at 3 (2009). The Board has spoken. Respondent is obligated to make the contributions to the funds and to rescind the changes in wage rates and make employees whole. Accordingly, the ALJ properly found that Respondent's failure to satisfy any obligation created by the collective-bargaining agreement constituted a unilateral change in the terms and conditions of employment. Requiring Respondent to honor terms of the agreement it unilaterally changed restores the status quo ante and is not punitive.

8. The Board's Executive Secretary correctly did not submit Respondent's September 8, 2009 Motion for Reconsideration to the Board (Exception No. 27)

Respondent excepts to the failure of the Executive Secretary of the Board to submit Respondent's Motion for Reconsideration dated September 8, 2009 to the Board for the Board's consideration. Essentially, Respondent asks the Board to ignore Rule 102.48(d)(1) and (2) of the Board's Rules and Regulations. Rule 102.48(d)(1) provides that a party to a proceeding before the Board may, because of "extraordinary circumstances," move for reconsideration, rehearing, or reopening of the record after the Board decision or order. However, Rule 102.48(d)(2) provides that any such motion "shall" be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order. Additionally, the rule provides that any request for an extension of time "shall" be served promptly on the parties.

The Board's Supplemental Decision and Order issued January 30, 2009. Respondent did not file a motion for reconsideration of the Supplemental Decision and Order between January 31, 2009 and September 7, 2009. Furthermore, within the 28 days after the Supplemental Decision and Order issued and was served, Respondent did not promptly file or serve on the parties a request for an extension of time to file a motion for reconsideration. Moreover, even upon filing its untimely motion on September 8, 2009, Respondent failed to set forth any "extraordinary circumstances" that justifies consideration of its motion. To the extent Respondent re-asserts in its motion that it is only required to make fringe benefit payments for unit employees who have a vested interest in receiving the benefits provided by the funds, the Board, as reflected in the Supplemental Decision and Order, has already duly considered and rejected such argument and noted it "has never made such a distinction in awarding a make-whole remedy to benefit funds. Rather, if a respondent unilaterally stops making required payments to benefit funds on behalf of any employee, the standard remedy is to require that the funds be made whole for the missed payments, without regard to the 'eligibility status' of the employees to actually receive benefits from the funds." Thus, Respondent did not only fail to set forth "extraordinary circumstances" in its motion that would justify the Board reconsidering its Supplemental Decision and Order; Respondent's motion itself is grossly untimely. Respondent's motion did not and does not merit the Board's reconsideration. The Board's Executive Secretary acted properly.

9. **The ALJ correctly found that the Union did not abandon the bargaining unit (Exception Nos. 5, 22, 25, 30 and 41-46)**

Respondent asserts the ALJ incorrectly found that the Union has represented a unit of Respondent's employees at all material times. Respondent argues the Union terminated the collective bargaining effective midnight, March 31, 1991 and abandoned the bargaining unit. The record evidence reflects that Respondent focused most of its case in chief at the hearing attempting to establish the Union abandoned Unit employees. Yet despite Respondent's efforts, the record evidence reflects Respondent has always retained its interest in representing the Unit employees employed by Respondent. Tracey Owens, an organizer for the Union since May 1, 2003, spoke with Respondent's employees about membership in the Union (Tr. 107). Likewise, Richard Beckham, an organizer for the Union since October 1, 2008 who covers Mississippi and Alabama (Tr. 77), communicated with Respondent's employees in April 2009 (Tr. 85).

Keith Hedgepeth, who worked for Respondent in 1988 to 1989 and again from 1996 and at the time of the May 4, 2009 compliance hearing, received correspondence from the Union in 1999 (RX 3), and Hedgepeth has never received any communications from the Union informing him the Union was not interested in representing him (Tr. 123). Likewise, Andrew Scott Burt, first employed by Respondent on June 27, 2000, confirmed that Union organizer Tracey Owens met with Respondent employees and told them the benefits of union membership and encouraged the employees to sign up with the Union (Tr. 170, 172). Burt, along with Respondent employees Wade Wilson and Alan Thames, met with Union organizer Tracey Owens on another occasion. (Tr. 173-174). Burt also acknowledged that he never received any written communications from the Union informing him the Union no longer desired to represent him (TR 176). Further, Philip Alan Thames, who worked with Respondent for nine years beginning in 1986, was rehired by Respondent and worked with Respondent up to about two years preceding the May 4, 2009 compliance hearing, confirmed that he received correspondence from the Union while employed with Respondent. (Tr. 181, 183). Thames also acknowledged that he did not receive any communication from the Union informing him the Union longer desired to represent him (Tr. 184). Moreover, Steve Turner, son of Respondent's owner who does the hiring and firing of Respondent's employees, did not present any evidence during his

testimony that the Union disavowed interest in representing Respondent's Unit employees. (Tr. 121, 127, 131).

The record evidence reflects that Respondent did not present any evidence that the Union disavowed interest in representing Respondent's Unit employees. Rather, the collective record evidence, including correspondence the Union sent to Unit employees in 1999 (RX 3) and the Union's contact and communications with Unit employees since 2000, reflects with certainty the Union remained committed to representing the Unit employees and informing employees of their rights. Accordingly, the ALJ properly found that the Union has represented a unit of Respondent's employees at all material times.

10. The ALJ properly found that Respondent's unlawful unilateral changes likely cause employees to be disaffected with the Union and regard the Union as ineffectual (Exception Nos. 47 and 48)

Respondent excepts to the ALJ's finding that its unfair labor practices and unilateral changes likely cause employees to be disaffected with the Union and regard the Union as ineffectual. Respondent's exceptions are legally flawed. The Board will not entertain such an assertion when it is made in the face of Respondent's failure to remedy its unfair labor practices, which in this case is Respondent's reduction in contract wages and Respondent's cessation of contributions to employee benefit funds. Such unremedied unfair labor practices tend to cause employee disaffection with the union. *See Ohio Car & Truck Leasing, Inc.*, 169 NLRB 198, 201-202 (1968); *Ethan Enterprises Inc.*, 342 NLRB 129, 133 (2004).

11. The ALJ properly found that Respondent admits it has not remedied its unfair labor practices (Exception No. 49)

Respondent excepts to the ALJ's finding that Respondent admits it has not remedied the unfair labor practices. However, the record evidence reflects Respondent admits it has not made the contract wage rate of \$15.47 per hour to Unit employees it employed between April 21, 1991 and March 23, 2009 (Tr. 212). Likewise, the record evidence shows Respondent admits it has not made the payments to the Union's Pension, Welfare and Education Funds on behalf of Unit employees it employed between April 21, 1991 and March 23, 2009 (Tr. 211). The ALJ's finding is supported by the record evidence.

12. The ALJ correctly discounted Respondent's inability to pay claims (Exception Nos. 23, 50-59 and 61-81)

Respondent excepts to the ALJ's finding that Respondent's ability to pay is not within his purview and is immaterial to determining the extent of Respondent's make whole obligations. To the extent Respondent asserts it is not financially able to comply with the enforced Board ordered remedy to make whole Unit employees and the Union Pension, Welfare and Education funds, such an assertion is not a valid basis to prevent Respondent from being held accountable per the Board's January 30, 2009 Supplemental Decision and Order. It is a well-settled principle that an employer's ability, or lack thereof, to ultimately pay the amount of any remedy is not a defense to the determination of the amount of backpay Respondent owes. *See Star Grocery Co.*, 245 NLRB 196, 197 (1970); *Coal Rush Mining, Inc.*, 341 NLRB 32, 33 N.2 (2004). As such, Respondent's assertion as to its financial condition and its inability to comply with the enforced Board ordered remedy is irrelevant.

Moreover, the record evidence reflects Respondent failed to substantiate its claim that it is unable to make whole the Unit employees and the Union Pension, Welfare and Education funds. Respondent elicited testimony from accountants Jerome Olsen and James Hecker in an effort to establish Respondent's financial condition and its inability to make the Unit employees and the funds whole. However, the only reliable information that can be gleaned from the testimony of Olsen and Hecker is Respondent utilized Olsen and Hecker to rubber stamp Respondent's purported financial condition.

Jerome C. Olsen, a certified public accountant since 1975, has had Respondent as a client since about 1993 (Tr. 137). Olsen testified an audited financial statement means that he tested source documents to make sure the numbers on a financial statement are correct (Tr. 138), which is significantly different from a reviewed financial statement. A reviewed financial statement means Olsen did not test source documents but merely used ratios and analysis to deem a financial statement as accurate (Tr. 138). Olsen prepared Respondent's financial statement for the year ending December 31, 2008, along with the attached letter dated February 9, 2009, that indicates Olsen reviewed the financial statement (Tr. 196-7; RX 5). Olsen testified it was the same for the years ending December 1, 2007 and December 31, 2006 (Tr. 201; RX 6 and 7). Olsen

acknowledged, nevertheless, that he did not take test samples of the underlying documents on which his letters and financial statements are based and confirmed he was not expressing an audited opinion in the documents (Tr. 201). Notably, Respondent did not present any record testimony to explain why Olsen did not conduct an audit of Respondent's financial documents in the years ending 2006 through 2008, which would have required Olsen to test samples of the underlying source documents to ensure the accuracy of the numbers on Respondent's financial statements. Moreover, Olsen acknowledged he did not inspect Respondent's bank statements in forming his opinion as to Respondent's operating cycle (Tr. 151).

Similar to Olsen, James Hecker, a certified public accountant, completed an investigation of Respondent about a week before the May 4, 2009 hearing as requested by Respondent's counsel (Tr. 158). Hecker reviewed Respondent's audited financial statements for years ending December 31, 2004 and December 31, 2005 (RX 8) and Respondent's reviewed financial statements for years ending December 31, 2006 (RX 7), December 1, 2007 (RX 6) and 2008 (RX 5) and certain years of the Appendix B of the Specification (RX 9; Tr. 159). Hecker, based upon his review, prepared a document that purports to reflect Respondent's financial condition for the years ending 2004 through 2008 (Tr. 161, 186; RX 4). Hecker acknowledged, nonetheless, that he did not review Respondent's bank statements to confirm Respondent's cash assets for the years ending December 31, 2008, December 31, 2007, December 31, 2006, December 31, 2005 or December 31, 2004 (Tr. 187; RX 5-8). In fact, Hecker acknowledged he did not review Respondent's books themselves at all when he prepared the document to reflect Respondent's financial condition (Tr. 194; RX 4).

In spite of the opinion testimony offered by Olsen and Hecker, both admitted they did not even review Respondent's bank statements in forming their opinions as to Respondent's financial condition. In fact, Hecker's acknowledgement that he did not even review Respondent's books themselves at all when he prepared the document (RX 4) that purportedly reflects Respondent's financial condition in the years ending 2004 through 2008 establishes Respondent solicited Hecker to rubber stamp Respondent's purported financial condition.

Accordingly, the ALJ correctly discounted Respondent's inability to pay claims.

13. The ALJ properly received testimony regarding Respondent's obligation to pay liquidated damages and interest to the Union trust funds (Exception No. 4)

Respondent's exception to the failure of the ALJ to find that the Union was barred by Section 102.53 of the Board's Rules and Regulations from offering testimony in support of claims not included in the Specification is misguided. Section 102.53 of the Board's Rules and Regulations provides that a charging party may request that the General Counsel review a written statement of compliance determination issued by a Regional Director. In this matter, the Regional Director initiated a formal compliance proceeding by issuing a compliance specification and notice of hearing before an administrative law judge. The Specification (GCX 2dd) summarized the facts and case law upon which Respondent's make whole obligations to Unit employees and the fringe benefit funds are based under the Supplemental Board Order and Court Judgment. The Specification notes Respondent can discharge its make whole obligations by making backpay payments to Unit employees and interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus such further amounts due and owing which continues to accrue until Respondent resumes the payment of the correct wage rates. The Specification further notes Respondent is also required to make payments to fringe benefit funds and any additional amounts owed with respect to these fund contributions pursuant to *Merryweather Optical Co.*, 240 NLRB 1213 (1979), plus such further amounts due and owing which continues to accrue until Respondent resumes the payment of the fringe benefit contributions. The "additional amounts owed" in this case includes liquidated damages and interest on delinquent payments to the Union funds. The language of the collective-bargaining agreement (GCX 3) and the fund's trust agreements (UX 1-3) provide for Respondent to pay liquidated damages and interest on delinquent payments to the Union funds. Accordingly, the ALJ properly received evidence regarding Respondent's make whole obligations pursuant to *Merryweather Optical*.

14. The ALJ correctly found that Respondent's make whole obligations, including liquidated damages with interest, continue to accrue (Exception Nos. 21, 28-29, 82-83, 87-90, 93, and 98)

Respondent excepts to the ALJ's finding that Respondent's obligation to pay liquidated damages was a term and condition of employment. The record evidence supports the ALJ's finding that Respondent

agreed to contractual provisions requiring the payment of liquidated damages to the trust funds. The Board has required payment of liquidated damages and/or interest on delinquent payments to union funds where the language of the parties' collective-bargaining agreement or the fund's trust agreements allow for the payment of liquidated damages. *Merryweather Optical Co.*, 240 NLRB 1213, 1217 fn. 7 (1979); *J.R.R. Realty Co.*, 301 NLRB 473, 475 fn. 16 (1991); *See also Ryan Iron Works*, 345 NLRB No. 56 (2005). The record testimony of Compliance Officer Debra Warner and Administrator of the National Automatic Sprinkler Industry Trust Funds Michael Jacobson establishes the collective-bargaining agreement (GCX 3) and the Pension Fund, Welfare Fund and Education Fund trust agreements provide for Respondent to pay liquidated damages and interest on delinquent payments to the Union funds. As well, the evidence reflects the National Automatic Sprinkler funds routinely collect liquidated damages and interest from employer's subject to the collective-bargaining agreement, including Respondent who, dating back to August 1, 1984, was assessed with liquidated damages and interest for delinquent contributions to the Union funds. Respondent did not present any evidence to rebut Warner or Jacobson's testimony.

Thus, based upon the record evidence and Board law, the amount of backpay and trust funds contributions Respondent must pay continues to accrue. Not only does the record evidence support the ALJ's Calculations, Conclusions and ORDER regarding Respondent's obligations to make payments of \$3,846,526.81 and \$5,238,854.54 in back benefit fund contributions as of March 23, 2009, together with interest, (GCX 2hh, 4-9; Tr. 24, 27, 31-34, 36, 62, 208, 210-212) the evidence, and the ALJ's findings, support the conclusion that Respondent, to discharge its make whole obligations, must also pay liquidated damages and interest to the trust funds on behalf of the discriminatees (GCX 3; UX 1, 2a-b, 3, 4, 6, 7; Tr. 36, 49-50, 52, 54-55, 57-58, 64, 67). In the Analysis portion of the ALJD, the ALJ concluded " 'liquidated damages and interest' properly should be included as part of Respondent's backpay obligation" (ALJD at 13). The Calculations, Conclusions and ORDER portions of the ALJD, however, do not include liquidated damages and interest to trust funds as part of Respondent's make whole obligations (ALJD at 5-27). The General Counsels urges the Board to correct this procedural discrepancy by modifying the ALJ's Calculations, Conclusions and ORDER to require Respondent to pay liquidated damages and interest as part

of its make whole obligations. As of March 23, 2009, such liquidated damages and interest, which are still accruing, includes \$1,054,084.20 in liquidated damages and \$10,705,953.06 in interest to the trust funds (UX 7).

III. CONCLUSION

Based upon the foregoing, the General Counsel submits that the ALJD is supported by the Board's January 30, 2009, Supplemental Decision and Order and the record evidence. Accordingly, the General Counsel respectfully urges the Board to reject the Respondent's exceptions to the ALJD and to adopt the ALJ's findings in their entirety and to modify the ALJ's Calculations, Conclusions and ORDER to the extent necessary to require Respondent to pay liquidated damages and interest in addition to backpay and benefits as part of its make whole obligations. As of March 23, 2009, such liquidated damages and interest include \$1,054,084.20 in liquidated damages and \$10,705,953.06 in interest to the trust funds and, like the backpay and benefit amounts, are still accruing.

Dated at New Orleans, Louisiana this 8th day of June 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2010, I electronically filed a copy of the foregoing Counsel for the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge with the National Labor Relations Board and forwarded a copy by electronic mail to the following:

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