

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:)
)
G & L ASSOCIATED, INC.,)
d/b/a USA FIRE PROTECTION,)
)
Respondent,)
)
and) NLRB Case No. 10-CA-38074
)
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,)
)
Charging Party.)

CHARGING PARTY LOCAL 669'S BRIEF IN SUPPORT OF EXCEPTIONS

Dated: August 4, 2010

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29 U.S.C. §158(f) *passim*

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CHARGING PARTY LOCAL 669'S BRIEF IN SUPPORT OF EXCEPTIONS

Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669" or "the Union"), respectfully submits this Brief in Support of Exceptions in this case, pursuant to Rule 102.46(c) of the Rules and Regulations of the National Labor Relations Board. For the reasons stated below, Local 669 submits that the Administrative Law Judge erred by concluding that Local 669 was not the exclusive NLRA Section 9(a) representative of the bargaining unit employees employed by Respondent USA Fire Protection ("Respondent" or "USA"). Accordingly, Local 669's Exceptions should be sustained, and the ALJ's decision on this issue reversed.

I. Statement of the Case

A. The Undisputed Facts

Respondent USA is an employer engaged in the construction/fire protection industry. GC Exh. 1(c), ¶¶2, 6; G.C. Exh. 1(e), ¶¶ 2, 6; January 20, 2010 Stipulation; ALJD, p. 2.¹

Local 669 is a national labor organization representing construction workers known as sprinkler fitters, who install and maintain fire protection systems in forty-six states and the District of Columbia. G.C. Exh. 1(e), ¶ 7; G.C. Exh. 1(c), ¶ 7; Jt. Exh. 1, ¶¶ 8-10; ALJD, p. 2.

On November 24, 2008, USA voluntarily granted recognition to Local 669 as the exclusive bargaining representative of its fire protection employees, pursuant to Section 9(a) of the Act by signing a stand-alone recognition agreement with Local 669. G.C. Exh. 3. This Agreement, which is titled “Acknowledgment of the Representative Status of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO” states that:

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. *Id.*; ALJD, p. 4.

On the same date, by a separate document, USA voluntarily executed the 2007-2010 national collective bargaining agreement between Local 669 and the National Fire

¹ Exhibits are cited to as “G.C. Exh. ____;” testimony is cited by witness and page, i.e., “Duncan ____;” and the Administrative Law Judge’s decision is cited to as ALJD, p. ____.
Emphasis is supplied herein unless otherwise indicated.

Sprinkler Association (“NFSA”) (“the Local 669 national agreement”). G.C. Exh. 2; Jt. Exh. 1; ALJD, p.4. The Local 669 national agreement restated USA’s recognition of the Union as the Section 9(a) representative of its bargaining unit employees. Jt. Exh. 1, Article 3 at p. 4.

From November, 2008 until September 2009, USA employed sprinkler fitters represented by the Union in the bargaining unit, pursuant to the terms and conditions of the Local 669 national agreement. G.C. Exh. 4; C.P. Exh. 1; Duncan 107. However, in or around September of 2009, Respondent determined to renege on its NLRA Section 9(a) relationship with the Union and to repudiate the terms of the Local 669 national agreement through the expedient of laying off its unionized sprinkler fitters, declaring its relationship and agreement with Local 669 null and void, and then hiring non-union sprinkler fitters in violation of the terms of the Local 669 national agreement. Duncan 29-31; ALJD, p. 4. To that end, on September 8, 2009, Respondent’s President Linda Duncan attempted to execute this plan by writing to Local 669 and purporting to “formally withdraw recognition of Local Union 669 as *the exclusive bargaining representative of its employees.*” G.C. Exh. 5.

The *sole* reason cited in Respondent’s September 8, 2009 letter as the basis for Respondent’s ostensible “withdrawal of recognition” was “that more than 50% of its employees are not members of or represented by [Local 669] for purposes of collective bargaining” (G.C. Exh. 5) (emphasis in original), and that reason was ultimately shown to be factually untrue at the hearing.

On September 18, 2009, Local 669 filed unfair labor practice charges against the Respondent, alleging that its withdrawal of recognition violated the Act, and on

November 20, 2009, NLRB Region 10 issued a Complaint on the Union's charges. ALJD, p. 1.

On December 3, 2009, in its Answer to the Complaint, USA alleged for the first time an entirely *different* justification for its withdrawal of recognition -- that its voluntary Section 9(a) recognition of the Union over one year before was unlawful from its inception and violated the NLRA Section 7 rights of USA bargaining unit employees. G.C. Exh. 1(e), ¶¶ 12, 13, 16. However, it is undisputed that no unfair labor practice charge has ever been filed alleging that USA's voluntary Section 9(a) recognition of the Union was unlawful, and the General Counsel's Complaint makes no such assertion. G.C. Exh. 1(c).

Importantly, USA *did not* claim that its original 2008 relationship to the Union was merely a Section 8(f) relationship either at the time it attempted to repudiate its relationship to the Union in September 2009, or in its December 2009 Answer to the Complaint. *Compare* G.C. Exhs. 5; 1(e).

B. Respondent's Irrelevant Revisionist "Evidence" Presented at the Hearing.

On January 28, 2010, a hearing was held before Administrative Law Judge Michael Marcionese in Knoxville, Tennessee. ALJD, p.1. After the foregoing undisputed facts were introduced into the record, USA attempted to substantiate its *post hoc* assertion that its voluntary Section 9(a) recognition of the Union was unlawful from its inception by alleging certain facts at the hearing concerning its recognition of Local 669. This "evidence" was elicited subject to Local 669's continuing objection, discussed in greater detail below, that it was irrelevant and should be rejected because USA's legal challenge to its own voluntary Section 9(a) recognition of the Union is time-barred

by NLRA Section 10(b). ALJD, p. 2. In any event, the record confirms that Respondent's factual assertions are not only time-barred, but are also refuted by its own contemporaneous business records.

First, Respondent claimed that it was privileged to withdraw recognition from the Union because it had no bargaining unit employees on its payroll at the time it granted Section 9(a) recognition. *E.g.*, Tr. 47-48; ALJD, p.2, 4-5. However, this "defense" was disproven by its contemporaneous payroll records confirming that it had hired at least one employee by the name of Dale Young at the time. C.P. Exh. 2; Davis, 94.²

As Respondent was well aware, Young was a journeyman sprinkler fitter and a Local 669 member (Duncan 37, 76-77; C.P. Exh. 1), who was apparently consulted by Respondent at the time it commenced initial business operations in November 2008. In January, 2009, according to Respondent, Young attempted (unsuccessfully) to negotiate a written employment agreement providing for a salary and a company vehicle. Resp. Exh. 2; Duncan 46-48, 50. Nevertheless, at all material times, according to Respondent's contemporaneous business records, Young was an *hourly paid journeyman* sprinkler fitter. Duncan 37; C.P. Exh. 1; C.P. Exh. 2.³

Second, Respondent's claim that it was "confused" or "misled" at the time it voluntarily signed the Section 9(a) recognition agreement and/or the Local 669 national

² Local 669 reserved an objection to Respondent's Exhibit 7, an ostensible summary of USA payroll records, subject to review of the underlying records. Respondent's summary is not representative of, but is contradicted by its underlying business records and should therefore have been rejected by the ALJ. *Compare* Resp. Exh. 7, p. 1 ("no employees" - November 2008) and C.P. Exh. 2.

³ The wage rate paid to Young reflects the very same \$23.40 hourly journeyman's wage rate for Tennessee under the Local 669 national agreement, plus the additional \$5.00/hr. foreman's rate also required by that agreement. See Jt. Exh. 1, pp. 10, 14.

agreement in November of 2008 (Duncan 63-64, 66-67), was refuted by its President and only witness, Linda Duncan, who testified that she well understood that Respondent was bound to *both* the Local 669 national agreement *and* the Section 9(a) recognition agreement that she signed on behalf of USA. Duncan 35, 107-108. Indeed, Ms. Duncan had previously reconfirmed that understanding in the September 8, 2009 letter she wrote to Local 669 purporting to withdraw recognition from the Union as "the exclusive bargaining representative" of USA's sprinkler fitter employees. G.C. Exh. 5.

Third, Respondent has claimed that, although it admittedly *signed* the signature page of the Local 669 national agreement on November 24, 2008, it did not receive a copy of the actual agreement until February 2009. Duncan 102-103. This improbable and false assertion was refuted at the hearing by one of Respondent's exhibits indicating that it *had* received a copy of the agreement long before Respondent signed it (Resp. Exh. 1) and is completely discredited by a simple examination of the document Respondent admittedly signed on November 24, 2008 (G.C. Exh. 2), which consists of pages 79-80 of the Local 669 national agreement -- the very same document that Respondent disingenuously claims it had not received. *Compare* Jt. Exh. 1, pp. 79-80; See ALJD, p. 4.

Finally, USA's contention that it was privileged to withdraw recognition from the Union because it alleges that it had a stable bargaining unit of one employee was also flatly contradicted by the record evidence, which confirmed that Respondent had consistently employed a complement of Local 669 members since November of 2008. Duncan 107. Indeed, on September 8, 2009, the very same date it purported to withdraw recognition from the Union, USA submitted a contractually-required fringe

benefit reporting form to the National Automatic Sprinkler Industry (“NASI”) benefit funds indicating an employment complement of two bargaining unit members -- admitted Local 669 members working respectively as a journeyman and as an apprentice. G.C. Exh. 4 (September 2009 Report); Duncan 32, 37; ALJD, p. 7. And, as of the date of its letter falsely asserting that “...more than 50% of its employees are not members of or represented by [Local 669] for purposes of collective bargaining,” Respondent had yet to hire a single non-union sprinkler fitter. G.C. Exh. 6.

C. The Administrative Law Judge’s Decision.

On June 21, 2010, the Administrative Law Judge issued his decision in this case. In his decision, the ALJ concluded at the outset that the voluntary recognition agreement signed by USA met the three-part test for voluntary recognition pursuant to Section 9(a) of the Act as required by the Board’s decision in *Central Illinois Construction*, 335 NLRB 717, 721 (2001), *i.e.* that the recognition agreement signed by USA in this case unequivocally demonstrated that (i) the Union requested recognition as the majority or Section 9(a) representative of the bargaining unit; (ii) the Respondent granted recognition to the Union; and (iii) the recognition was based on the Union’s offer to show evidence of majority support. ALJD, p. 6.

However, the ALJ further concluded that the parties’ “agreement” on the issue of voluntary recognition was not limited to the recognition agreement USA signed, but *also* included the separate Local 669 National Agreement that USA signed on November 24, 2008. ALJD, p. 8, n.7. The Judge then proceeded to look beyond the four corners of the parties’ voluntary recognition agreement, and examined the signature page of the separate collective bargaining agreement, leading him to conclude that the language in

the "preamble" of the Local 669 national agreement signature page "seems to suggest" that the "parties intended to establish a pre-hire agreement." *Id.* at 6.

This unspecified language is what created the "ambiguity" that the Judge relied on to admit and consider the extrinsic evidence offered by Respondent over the Charging Party's objections at the hearing, allegedly concerning whether USA intended to create a Section 9(a) relationship with Local 669, including the contention that Respondent was in the process of establishing its business when it recognized Local 669; it did not have a sprinkler license and that it ostensibly had no work on the books; that the one employee Respondent had when it recognized Local 669 was an alleged supervisor; and that the Local 669 national agreement contains a union security clause requiring membership in the Union seven days after hire. ALJD, p. 6-7. Based on this evidence, the judge found "that the parties intended to, and in fact did, establish a Section 8(f) collective bargaining relationship." *Id.* at 7.

The ALJ's conclusion that USA's relationship to the Union in 2008 was merely a pre-hire Section 8(f) relationship and not a majority-based Section 9(a) relationship is independently refuted by (i) the Section 9(a) language in the recognition agreement; (ii) the Section 9(a) language in the Local 669 national agreement; (iii) USA's assertion in September 2009 that Local 669 had lost its status as the majority representative of its employees; and (iv) USA's Answer which alleged that its recognition of the Union as the majority Section 9(a) representative of its employees was unlawful.

Nevertheless, the ALJ went on to hold that Respondent violated Section 8(a)(5) of the Act by withdrawing recognition from the Union and repudiating the collective bargaining agreement during its term and, in so holding, rejected USA's contention that

it was privileged to do so in any event because it had a stable, one-man collective bargaining unit. *Id.* Accordingly, the judge recommended a make whole remedy and a restoration of the terms and conditions of employment in the Local 669 national agreement, up until that agreement expired on March 30, 2000, but left to the compliance stage the determination of whether USA gave Local 669 timely notice of its intent to terminate the contract upon expiration, or whether it continues to be bound to any succeeding collective bargaining agreement based upon the automatic renewal provisions contained therein. *Id.* at 8-10.⁴

II. Issues to Be Decided

Whether the Administrative Law Judge erred by concluding that the collective bargaining relationship between Local 669 and USA was governed by Section 8(f) of

⁴ The ALJ found “it unnecessary to address the General Counsel’s argument that the Board should re-visit precedent and modify the principles established in *Central Illinois Construction* supra and *Casale Industries*, supra.” ALJD, p.7. Over Local 669’s objection, the General Counsel apparently intended to argue to the Board that the precedents cited above, which are based upon and include the Supreme Court’s decision in *Bryan Manufacturing*, 362 U.S. 411 (1960) were wrongly decided and that the voluntary Section 9(a) recognition in this case should be subject to challenge outside the six-month Section 10(b) period. *Id.*; Cline 52. However, not only does the General Counsel’s Complaint not contain such an allegation, but the Complaint itself affirmatively alleges that the recognition in this case was lawful and that “...by virtue of Section 9(a) of the Act, the Union has been and is the exclusive representative of the employees in the Unit...”. GC Exh. 1(c), ¶12. Therefore, the General Counsel is precluded from even advancing such a contention in this case. See, e.g., *Dana Corp.*, 2005 NLRB LEXIS 174, at *12–13 (Apr. 11, 2005) (“Section 102.15 of the Board’s Rules and Regulations requires that the General Counsel issue a complaint that contains ‘a clear and concise description of the acts which are claimed to constitute unfair labor practices ...’ The General Counsel did not plead the ‘act’ of recognition as unlawful. The General Counsel has failed to comply with the Board’s Rules by failing to plead unlawful recognition in the complaint.”); *Earthgrains Co.*, 351 NLRB 733, n.4 (2007) (Board reversed ALJ’s finding of violation because the “[c]onduct was not alleged in the complaint, and the General Counsel did not move to amend the complaint to add such an allegation.”). Local 669 reserves the right to fully oppose this argument if either the General Counsel or Respondent files Exceptions or Cross-Exceptions to the Judge’s Decision.

the Act, when the Respondent failed to challenge its grant of Section 9(a) recognition to the Union within six months after the fact, and even when all the relevant evidence in the record confirms that the parties unequivocally intended to create a Section 9(a) relationship. This issue relates to all of the Charging Party's Exceptions in this case.

III. Argument

As we show herein, the ALJ's decision that the parties' collective bargaining relationship in this case was not governed by Section 9(a) of the Act is clearly erroneous and contrary to long-standing NLRB precedent. It should therefore be reversed.

A. The ALJ Erred by Permitting USA to Challenge its Voluntary Section 9(a) Recognition of Local 669 More Than Six Months Beyond the Grant of Recognition.

It is an entirely settled principle of NLRA jurisprudence, including in a number of cases involving the Charging Party here, that challenges to the legality of a grant of exclusive recognition under NLRA Section 9(a) must be made within the six month time limit mandated by Section 10(b) of the Act. *Local Lodge 1424 v. NLRB (Bryan Manufacturing)*, 362 U.S. 411, 419 (1960); *MFP Fire Protection, Inc.*, 318 NLRB 840, 842 (1995), *en'd*, 101 F.3d 1341 (10th Cir. 1996); *Triple A Fire Protection, Inc.*, 312 NLRB 1088, 1089 (1993), *en'd*, 136 F.3d 727 (11th Cir. 1998); *Casale Indus., Inc.*, 311 NLRB 951, 953 (1993); *Reichenbach Ceiling and Partition Co.*, 337 NLRB 125, 126 (2001); *Raymond F. Kravis Ctr. for the Performing Arts*, 351 NLRB 143, 144 (2007), *en'd* 550 F.3d 1183 (D.C. Cir. 2008). This is so because such a challenge necessarily alleges that an unfair labor practice was committed at the time the employer granted recognition, given that unlawful minority recognition violates Sections 8(a)(2) and

8(b)(1)(A) of the Act -- or, as Respondent phrased the allegation in its Answer, that “ ... the November 24, 2008 recognition was an unlawful clear abridgement of the Respondents’ employees Section 7 rights ...” G.C. Exh. 1(e), ¶¶ 11, 12, 13.

The Supreme Court’s decision in *Bryan Manufacturing* established and applied these principles some fifty years ago: the NLRB argued (unsuccessfully) to the Court that a collective bargaining agreement between Bryan Manufacturing and the International Association of Machinists was unlawful, because recognition was granted via a recognition clause in that agreement at a time when the union did not represent a majority of employees in the bargaining unit, which recognition occurred at least ten months prior to the unfair labor practice charge in that case. *Bryan Mfg.*, 362 U.S. at 414. In rejecting the Board’s argument, the Supreme Court issued some very clear instructions to be applied in these types of cases:

Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement’s original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10 (b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. *Id.* at 419.

Likewise, it is also well settled that the above precedents apply with equal force when exclusive Section 9(a) recognition is voluntarily granted in the construction industry:

...parties in nonconstruction industries, who have established and maintained a stable Section 9 relationship, are entitled to protection against a tardy attempt to disrupt their relationship. Parties in the construction industry are entitled to no less protection. Accordingly, if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or a petition, the Board should not entertain a claim that majority status was lacking at the time of recognition.

Casale Indus., Inc., 311 NLRB at 953; *Triple A Fire Protection, Inc.*, 312 NLRB at 1089 (1993), *enf'd*, 136 F.3d 727 (11th Cir. 1998); *John Deklewa & Sons*, 282 NLRB 1375, 1387 n. 53 (1987), *enf'd* 843 F.2d 770 (3d Cir. 1988); *Reichenbach Ceiling and Partition*, 337 NLRB at 126.

As noted earlier, it is undisputed that no unfair labor practice charge has ever been filed against either Respondent or Local 669, the parties to the supposedly illicit NLRA Section 9(a) recognition agreement, within six (6) months of the Respondent's voluntary grant of recognition (or at any other time for that matter); to this end, the General Counsel's Complaint not only makes no reference of any kind to such an allegation, but instead affirmatively alleges by implication that the voluntary recognition in this case was lawful to begin with. See GC Exh. 1(c), ¶¶11-12.

Therefore, as USA did not object to or otherwise challenge its grant of Section 9(a) recognition to Local 669 within the time limit proscribed by Section 10(b), it is precluded from raising this challenge now. Accordingly, the ALJ erred by failing to apply these precedents to bar Respondent from challenging Local 669's status as the exclusive Section 9(a) collective bargaining representative of its sprinkler fitter employees.

B. USA's Claim that its Collective Bargaining Relationship With Local 669 was Governed by Section 8(f) Should Have Been Rejected a Self-Serving Post-Hoc Justification.

As memorialized in USA's September 8, 2009 letter purporting to withdraw recognition from the Union as the "exclusive representative" of its employees on the basis that the Union had *lost* its majority status, USA did not claim that its initial

recognition of the Union was *unlawful* and further admitted at the hearing that it believed its initial recognition and ensuing relationship with the Union was entirely valid. As that letter confirms, when Respondent purported to withdraw recognition from Local 669, it did so based *only* on the allegation that Local 669 lost its majority status; USA did *not* rely on the argument that its exclusive recognition of Local 669 under Section 9(a) of the Act was illegal from its inception at the time it illegally withdrew recognition from Local 669. G.C. Exh. 5. Indeed, the record confirms that the Respondent *actually believed* its exclusive recognition of Local 669 was valid at the time it was granted (Duncan 35, 107-108), which belief is also consistent with the terms of Ms. Duncan's letter purporting to withdraw recognition from Local 669 as the "exclusive representative" of USA's sprinkler fitter employees. G.C. Exh. 5.

Thus, the record also establishes that Respondent's 8(f) argument is a classic example of an "...after the fact justification[], which Respondent has managed to find in preparation for this proceeding[],]" *The Electric Group, Inc.*, 327 NLRB 504, 505 (1999), and it should be rejected on this independent basis as well.⁵

C. The ALJ Erred by Concluding That the Recognition Agreement in This Case Was "Ambiguous," And by Permitting USA to Introduce Extrinsic Evidence Concerning the Agreement.

1. The Parties' Recognition Agreement Was Unambiguous, Unequivocal, and Unconditional On Its Face.

As noted above, the recognition agreement that established and governs the relationship between USA and Local 669 was introduced into evidence as G.C. Exh. 3.

⁵ Respondent's argument that there was only one employee in the unit at the time of voluntary recognition -- which the ALJ properly rejected (ALJD, p. 7) -- is a similar legally irrelevant, after-the-fact attempt to justify its illegal actions here, given that "[t]here is nothing in the Act that prohibits an employer from voluntarily recognizing and bargaining with a union for a unit consisting of one employee." *S.M. Lorusso & Sons, Inc.*, 297 NLRB 793, 797 (1990).

It is a stand-alone and relatively concise document, consisting of just the following two paragraphs:

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. *Id.*

Below these two paragraphs are lines for a date, signature, and identifying information for the company. *Id.* And, it should be noted that the document makes no references to the Local 669 national agreement.

Local 669 submits that this recognition agreement could not be any more unambiguous -- it recites and confirms in no uncertain terms the parties' intent to create a Section 9(a) relationship. *Donaldson Traditional Interiors*, 345 NLRB 1298, 1299 (2005). Importantly, the ALJ did not find any "ambiguity" with this document; to the contrary, the Judge concluded that this recognition agreement satisfied the *Central Illinois Construction* test for written, voluntary Section 9(a) recognition in the construction industry. ALJD, p. 6. Accordingly, the analysis should have ended there.

However, relying on the Board's decision in *Madison Industries, Inc.*, 349 NLRB 1306, 1308-1309 (2007), the ALJ ignored these principles and concluded that the parties' "agreement" on the issue of voluntary recognition *also* consisted of the Local 669 National Agreement that USA signed on November 24, 2008. ALJD, p. 8, n.7. Thus, the Judge took the initiative to look beyond the four corners of the parties' separate recognition agreement, proceeded to examine the signature page of the

separate collective bargaining agreement and concluded that general language in the "preamble" of that page -- which does not make reference to recognition at all -- "seems to suggest" that the "parties intended to establish a pre-hire agreement." *Id.* at 6. The ALJ then concluded that the recognition agreement itself was ambiguous, and that it was therefore necessary to admit and consider the extrinsic evidence offered by Respondent on whether the parties intended to create a Section 9(a) relationship. ALJD, p. 6. However, this approach constitutes reversible error, as even *Madison Industries* does not permit such a wide-ranging, after-the-fact reexamination of written agreements.

In *Madison Industries*, voluntary recognition was granted only by way of a recognition clause set forth in the parties' collective bargaining agreement. As such, the Board majority examined some of the other provisions of the collective bargaining agreement to analyze whether the parties in that case intended to create a Section 9(a) relationship. *Id.* at 1306, 1308. Here, the separate voluntary recognition agreement is the one and only operative document that needs to be examined in order to answer that question.

And in any event, even if the ALJ properly considered both documents that USA signed on November 24, 2008, nothing in either the collective bargaining agreement or the general preamble to its signature page can even arguably be read as conflicting with the terms set forth in the parties' voluntary recognition agreement itself, in a manner that would render the recognition agreement ambiguous. As Chairman Liebman noted in dissent in *Madison Industries*,

This approach stretches the entire-agreement rule too far. This is not a dispute over a single term that could arguably be interpreted in two

different ways. Where, as here, a contract provision clearly addresses an issue with an unambiguous meaning, there can be no ambiguity unless another provision squarely contradicts it. *Id.* at 1310.

In other words, general language in a separate agreement cannot be relied upon to render the unambiguous language in the recognition agreement here null and void, as such general provisions "...simply do[] not negate or contradict the recognition clause in a manner that creates a genuine ambiguity." *Id.* at 1310 (footnote omitted).

Therefore, since the parties' voluntary recognition agreement was unambiguous on its face, any extrinsic evidence concerning the circumstances surrounding the signing of the document is irrelevant and inadmissible, and the Judge erred by considering it. See *Quality Building Contractors, Inc.*, 342 NLRB 429, 430 (2004); *Dutchess Overhead Doors, Inc.*, 337 NLRB 162, 166 (2001).

D. Even if it was Proper to Consider Extrinsic Evidence, it All Supports the Conclusion That Local 669 and USA had Established a Section 9(a) Relationship.

Even if the precedents discussed above could somehow be ignored, and Respondent's extrinsic "evidence" concerning the grant of exclusive recognition could be considered at this late date under the circumstances of this case, that extrinsic "evidence" is of no help to USA.

First and foremost, leaving the unambiguous nature of the parties' recognition agreement aside for the moment, the record confirms that the Respondent *affirmatively believed* its exclusive recognition of Local 669 was valid at the time it was granted (Duncan 35, 107-108), and USA also confirmed as much in its letter purporting to withdraw recognition from Local 669 as the exclusive representative of its employees. G.C. Exh. 5. These repeated acknowledgements and reaffirmations -- coupled with

Respondent's contemporaneous failure to question the Union's representative status at the time it chose to voluntarily grant exclusive recognition to Local 669 or at any other time until after the Complaint issued in this case -- are independently sufficient to preclude USA from challenging Local 669's Section 9(a) status now. See *Alpha Associates*, 344 NLRB 782, 783-84 (2005), *enf'd* 195 Fed. Appx. 138 (4th Cir. 2006) (Employer equitably estopped from belatedly challenging the Union's majority status at the time of voluntary Section 9(a) recognition); *Donaldson Traditional Interiors*, 345 NLRB 1298, 1299 (2005) ("The Board also requires a contemporaneous showing of the union's majority support among the employer's employees, or a showing that the employer acknowledged and accepted that the union enjoyed majority support."), citing *H.Y. Floors & Gameline Painting, Inc.*, 331 NLRB 304 (2000) ("[A]n employer acknowledgment of such [majority] support is sufficient to preclude the employer from challenging majority status.") (footnote omitted); *Oklahoma Installation Co.*, 325 NLRB 741, 741-42 (1998), *enf. denied* 219 F.3d 1160 (10th Cir. 2000) ("[W]e find no warrant to deny the legal effect of the express terms of the letter of assent because of the Union's failure to submit additional evidence of its majority status..."); *Golden West Electric*, 307 NLRB 1494, 1495 (1992) ("The voluntary recognition agreement signed by the Employer by its terms unequivocally states that the union claimed it represented a majority of the employees and [the] Employer acknowledged that this was so.").⁶

⁶ Respondent's additional, eleventh-hour contentions -- that it did not "understand" the documents it signed, and/or that it did not have complete copies of them, and/or that the Union representative said that the document "meant something different" -- not only strain credulity, but would not excuse Respondent's illegal activities even if they were not barred from consideration by Section 10(b), and could be believed. *W.J. Holloway & Sons*, 307 NLRB 487, n.1 (1992) (Board affirmed ALJ's decision that the terms of written agreement control, not alleged oral "modification," and rejection of employer

Second, even if it were proper to examine the parties' collective bargaining agreement in this case for additional evidence of whether they intended to create a Section 9(a) relationship, Article 3 of that agreement also confirms, yet again in no uncertain terms, that they did:

RECOGNITION: The National Fire Sprinkler Association, Inc. for and on behalf of its contractor members that have given written authorization and all other employees contractors becoming signatory hereto, recognize the Union as the sole and exclusive bargaining representative for all Journeymen Sprinkler Fitters and Apprentices in the employ of said Employers, who are engaged in all work as set forth in Article 18 of this Agreement with respect to wages, hours and other conditions of employment pursuant to Section 9(a) of the National Labor Relations Act.

While the ALJ did not recognize *this* contractual provision in his decision, the Judge seized on the fact that that parties' agreement contained a union security clause requiring Union membership within seven days of hire to conclude that "[s]uch language is indicative of a Section 8(f) rather than 9(a) agreement." ALJD, p. 6, n.10; *Madison Industries*, 349 NLRB at 1309, n. 11. However, a seven-day union security clause does not indicate an intent -- clearly or otherwise -- to create a Section 8(f) relationship.

Rather, all that provision indicates is that the parties' agreement applies to an employer in the construction industry, as seven-day union security provisions are expressly authorized by Sections 8(f)(2) and (4) of the Act. In *Howard Immel, Inc.*, 317 NLRB 1162, 1166 (1995), *enfd* 102 F.3d 948, 950 (7th Cir. 1996), the Board affirmed the ALJ's conclusion finding "no warrant in this record for ignoring the express terms of the 9(a) recognition agreement signed by Respondent and the Operating Engineers... That the parties' agreement includes a 7-day rather than a 30-day union-security clause and

defense that it did not read the contract before signing). Thus, they were properly rejected by the ALJ. ALJD, p.4.

a hiring hall referral procedure (as authorized for agreements covering employees in the building and construction industry by Sec. 8(f)(2) and (3)), does not place their relationship under Section 8(f)(1) or negate the recognition agreement they signed." See also *Madison Industries*, 349 NLRB at 1310, n.5 (Chairman Liebman, Dissenting).

Third, the general and vague verbal assertions that USA did not "intend" to grant Section 9(a) recognition to local 669 because it was just beginning operations, or that it only had one employee at the time it recognized Local 669 is classic parol evidence that cannot trump the specific contractual language set forth in the recognition agreement that USA signed. *W.J. Holloway & Son*, 307 NLRB 487, 487 n.1 (1992) (parol evidence cannot invalidate a written agreement); *Madison Industries*, 349 NLRB at 1310, n.1 (specific terms "...take precedence over general terms.") (and cases cited therein) (Chairman Liebman Dissenting).

Fourth, we note that even in circumstances where extrinsic evidence is properly admissible to clarify or explain a term that is legitimately ambiguous, that evidence *cannot* be used as a means to "invalidate and nullify the parties' written agreement." *W.J. Hallway and Son*, 307 NLRB 487, n.1 (1992) (citing *Beech & Rich, Inc.*, 300 NLRB 882, 882 (1990)). At bottom, Respondent cannot be permitted to rely on extrinsic "evidence" to "invalidate and nullify" the parties' recognition agreement.

Thus, even if it were proper to consider extrinsic evidence in this case, when viewed as a whole the record overwhelmingly establishes that Local 669 and USA intended that their collective bargaining relationship be governed by Section 9(a) of the Act.

Finally, the ALJ's recommended Order contained remedial language regarding the make whole remedy running to the Union's fringe benefit funds, pursuant to *Meriwether Optical Co.*, 240 NLRB 1213 (1979). ALJD, p. 8. However the Judge's recommended remedy appeared to be limited only to interest on delinquent pension fund contributions, rather than also requiring liquidated damages as provided for in the *Meriwether Optical* decision. ALJD, p.8. Accordingly, Local 669 respectfully requests that this oversight be corrected in any remedy ordered by the Board.

IV. Conclusion

Local 669's Exceptions should be sustained in their entirety, and Respondent should be ordered to adhere to its NLRA Section 9(a) recognition of the Union and all of the attendant obligations following from the parties' Section 9(a) relationship, bargain in good faith with Local 669 as the exclusive collective bargaining representative of USA's sprinkler fitter employees, restore the terms and conditions of the Local 669 national agreement, resume participation in the Union's fringe benefit funds, and to make whole both the bargaining unit employees and the Union's fringe benefit funds according to the terms of that agreement.

Respectfully submitted,

/s/

Dated: August 4, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2010, I electronically filed Local 669's Brief in Support of Exceptions with the Executive Secretary of the National Labor Relations Board via the e-filing portal on the NLRB's website, electronically served a copy via the e-filing portal on the NLRB's website with Region 10, and also forwarded a copy by electronic mail to the Parties as listed below:

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