

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

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

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

ANSWERING BRIEF OF RESPONDENT G&L ASSOCIATED, INC.
D/B/A USA FIRE PROTECTION IN OPPOSITION
TO CHARGING PARTY LOCAL 669'S EXCEPTIONS

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I. STATEMENT OF THE CASE

A. Undisputed Record

The Respondent, G&L Associated, Inc. d/b/a USA Fire Protection (hereinafter "Respondent") is a construction industry employer. While the Respondent is an employer member of the National Fire Sprinklers Association (hereinafter "Association"), it has not authorized the Association to represent it in negotiating and administering the collective bargaining agreement with the Union. Therefore, the Respondent is a single employer. (R. 12-15).¹

The Charging Party, 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 (hereinafter "Union") has been a labor organization within the meaning of Section 2(5) of the Act. (R. 12-15).

On or about November 24, 2008, Respondent granted recognition to the Union as the exclusive collective-bargaining representative of the Unit in an agreement dated November 24, 2008.

General Counsel's Exhibit 2, in relevant part, states as follows:

AGREEMENT

THIS AGREEMENT made this 24th day of

¹ Throughout this brief, reference to the record and exhibits are as follows: Record: R.(followed by page number); Joint Exhibits: Exhibit (followed by exhibit number); Respondent's Exhibits: Respondent's Exhibit (followed by exhibit number); General Counsel Exhibits: General Counsel's Exhibit (followed by the exhibit number); Administrative Law Judge's Decision: JD (followed by page number); Union's Brief in Support of Exceptions: UB (followed by page number).

November, 2008, by and between the Road Sprinkler Fitters Local Union 669 (hereinafter called "Union") and G&L Assoc. Inc. dba USA Fire Protection (hereinafter called "Employer").

* * * * *

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

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

On or about September 8, 2009, Respondent withdrew its recognition of the Union as the exclusive collective bargaining representative of the unit. The Union alleges that the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act and in violation of Sections 8(a)(1), and (5) of the Act. (R. 6 and Exhibit 1(c)).

In its Answer, Respondent asserted that it lawfully withdrew its recognition to the Union and its actions did not violate Sections 8(a)(1) and (5) of the Act. Also, at the hearing, the Administrative Law Judge (hereinafter "ALJ") granted the Respondent's Motion to Amend its Answer to assert that, if an agreement was created between the Respondent and the Union, it was a Section 8(f) collective bargaining relationship (R.55).

At all material times, or as specified, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent

within the meaning of Section 2(13) of the Act: (a) Linda Duncan- President; (b) Gregg Duncan- Secretary/Treasurer; and (c) Dale Young- Field Supervisor (October 20, 2008 to January 9, 2009). (R.6 and Exhibit 1(c))

B. Linda Duncan

1. Start Up of Respondent's Company

Linda Duncan testified at the hearing. Linda Duncan is the Respondent's president. Respondent's only other corporate officer is her son, Gregg Duncan. (R. 19-20). The Respondent was incorporated and licensed to do construction in May, 1989. The Respondent engaged in general residential and light commercial construction for a few years after incorporation. Thereafter, the Respondent was an inactive corporation until 2007. When the Respondent was engaged in general residential and light commercial construction, it did not have a contractual relationship with a union. (R. 40-41).

In October, 2008, Respondent decided to start a new business, a fire sprinkler business. Neither Linda Duncan, nor the other corporate officer, Gregg Duncan, had any previous experience in the fire protection business. Further, its president, Linda Duncan has a high school education. (R. 33; 40-41).

The Respondent was looking to get into government work in the area and was introduced to Dale Young. Mr. Young told Linda Duncan that the Respondent had to recognize the Union in order to get government work. (R. 41-42).

In July, 2008, the Respondent received a packet from Mr. Young. Mr. Young

provided this documentation to the Respondent because Mr. Young was a “working partner” during the start up of Respondent’s company. (R. 42-45 and Respondent’s Exhibit No. 1).

2. Field Supervisor, Dale Young

As a “working partner”, the Respondent was paying Mr. Young a salary of \$80,000.00 per year. On January 9, 2009, Mr. Young wrote his “working partner” compensation requests down and submitted them to the Respondent (R. 45-46; 49-50 and Respondent’s Exhibit No. 2). During the period of time that Mr. Young worked for the Respondent as a “working partner”, he held himself out as a “field supervisor”. (R. 51 and Respondent’s Exhibit No. 3). Respondent’s Exhibit No. 4 reflects that Dale Young was employed by Respondent from October 20, 2008 to January 9, 2009 at a salary of \$80,000.00 per year. (R. 57-58).

As a “working partner” or a “field supervisor”, Mr. Young had authority to hire. In fact, he hired Mr. Scoggins. (R. 86). Mr. Young also purchased equipment and materials for the Respondent, including tools and other excess materials. Mr. Young also assisted in the preparation of the Respondent’s employee handbook, safety manual and Q&A manual. Mr. Young also found the building that the Respondent eventually rented as a warehouse. Mr. Young further purchased a vehicle for Respondent for his use. Mr. Young, however, did not perform any of the sprinkler installation work in the field during his employment with the Respondent. He was the field supervisor. (R. 79; 85-87).

3. November 24, 2008

On November 24, 2008, Linda Duncan took part in a meeting with Gregg Duncan, Dale Young and Mark Davis at Respondent's office in Powell, Tennessee. (R. 58). At the time of the November 24, 2008 meeting, the Respondent had not yet received its general contractor's license with a fire sprinkler specialty designation. The Respondent did not receive its general contractor's license and fire sprinkler specialty designation until December 1, 2008 (R. 60-62; Respondent's Exhibits No. 5 and 6). Under Tennessee law, Respondent needed the general and specialty licensing before they could solicit or bid any type of fire sprinkler work in Tennessee. As a result, the Respondent did not have any unit employees on November 24, 2008. (R. 62-63).

Regarding the documents Ms. Duncan signed on behalf of the Respondent on November 24, 2008, these documents were handed to her by Mark Davis. At the time these documents, General Counsel Exhibits 2 and 3, were handed to her, Mark Davis did not provide her any additional documentation, in the form of authorization cards, petitions, or anything else which established that the Union had majority support. (R. 64). Mr. Davis told Ms. Duncan that these documents constituted an "assent and enter" agreement which would protect the Respondent from strikes. (R. 63-64).

Regarding the Respondent's intent in signing General Counsel's Exhibit 2 and 3, Ms. Duncan testified as follows:

Okay, we were going to, once we were licensed, then we were going to start soliciting work and doing bidding in that the Union would at some point in time in the future send us sprinkler fitters for us to interview and hire.

(R. 65-66).

After the recognition was signed by the Respondent, the Respondent never informed the National Labor Relations Board that the recognition had been made to the Union. (R. 69). The Respondent first bid on a job in December, 2008. Respondent's Exhibit 7 documents the Respondent's employees from December, 2008 to January, 2010. (R. 74).

C. Mark Davis

1. Subpoena

Mark Davis also testified at the hearing. He is the local business agent for the Union. Although Federal Express delivered subpoenas to his home on January 26, 2010, Mr. Davis claimed he never received the subpoenas. (R. 7-8). Although Mr. Davis' wife resides with him, he claimed that his wife never called him to inform him that he received a Federal Express package. (R. 91). Further, when questioned more specifically regarding his whereabouts and whether he received the subpoenas, Mr. Davis was evasive and had difficulty getting his story straight. (R. 89-91). Mr. Davis also claimed that he mailed Joint Exhibit No. 1 to the Respondent in October, 2008, but Mr. Davis did not have any proof to support his claim. (R. 101).

2. Respondent's Start Up Company

In September-October, 2008, Mr. Davis heard from Dale Young that the Respondent was "interested in possibly starting a union sprinkler company." (R. 91). When Mr. Davis first heard about the Respondent's interest in starting a sprinkler company from Dale Young, Mr. Davis was aware that the Respondent's company had

not yet been in business. (R. 91-92).

3. November 24, 2008

On November 24, 2008, Mr. Davis met with the Respondent's corporate officers, Linda Duncan, Gregg Duncan and Dale Young. According to Mr. Davis, "they had called" and "said they wanted to be a union sprinkler contractor and wanted to sign a contract." (R. 93). Mr. Davis claimed that the Respondent employed one sprinkler fitter, Dale Young, on November 24, 2008. (R. 94). However, on November 24, 2008, to Mr. Davis' knowledge, Respondent had not done any sprinkler fitting work in the field or submitted any bids for any work. (R. 97).

Mr. Davis is familiar with the licensing in Tennessee of businesses engaged in fire protection. (R. 93). When asked if Respondent was licensed on November 24, 2008, Mr. Davis testified "not to my knowledge" (R. 93). Therefore, when Mr. Davis handed General Counsel Exhibit No. 3 to Linda Duncan, he told her the document was showing that the union "was to" represent the members, the sprinkler fitters working in the field. (R. 96). When Mr. Davis gave Linda Duncan General Counsel Exhibit No. 2, he told her "this is a local 669 contract." (R. 95).

When Mr. Davis handed General Counsel Exhibits 2 and 3 to Ms. Duncan, he never gave her any authorization cards, petitions, or any other documentation showing that the union had majority status. (R. 96). Further, Mr. Davis never offered to show Ms. Duncan any authorization cards, petitions, or other documentation that the union had majority status. (R. 96-97).

After Ms. Duncan signed General Counsel Exhibits 2 and 3, Mr. Davis never sent

these Exhibits to the National Labor Relations Board. (R. 98). As a result, the National Labor Relations Board never certified the union's majority status with the Respondent. (R. 98).

II. STATEMENT OF THE ISSUES

- A. Whether the ALJ correctly concluded that the Union failed to rebut the presumption that the agreement between the Respondent and the Union was a Section 8(f) collective bargaining relationship?
- B. Alternatively, if the ALJ failed to correctly conclude that the Respondent and the Union intended to enter into a Section 9(a) collective bargaining relationship, whether this agreement is void and unenforceable because it is an unlawful clear abridgment of Respondent's employees' Section 7 rights?

III. ARGUMENT

A. Introduction

In its Brief, the Union claims that the Administrative Law Judge (ALJ) erred by concluding that the Respondent and the Union established a Section 8(f) collective bargaining relationship. (UB, p.1). The Union's claim is without merit.

The Section 8(f) collective bargaining relationship conclusion by the ALJ was fully supported by the undisputed evidence in the record and governing case law. The Board is invited to reference the Brief of Respondent to the ALJ as an aid in locating passages in the record and exhibits which support the ALJ's Section 8(f) conclusion.

The Union filed 33 exceptions to the ALJ's decision. This Brief will

comprehensively address those exceptions by topic rather than by specific exception.

1. Sections 7, 8(f) and 9(a) of the Act

Section 7 of the Act states as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Section 8(f) of the Act states as follows:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organizations after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience

qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: *Provided further*, That any agreement which could be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

Section 9(a) of the Act states as follows:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representations of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

B. The ALJ Correctly Followed the Governing Principle That There is a Rebuttable Presumption of a Section 8(f) Bargaining Relationship in the Construction Industry

As the ALJ noted, there is a substantial difference between a union's representative status in the construction industry under Section 8(f) and under Section 9(a) of the Act. (JD, p.5) Under Section 8(f), an employer may terminate the bargaining relationship upon the expiration of the agreement. *Central Illinois Construction*, 335 NLRB 717, 718 (2001). Under Section 9(a), an employee must continue to recognize and

bargain with the union after the agreement expires unless the union is shown to have lost majority support. *Id.*

Section 8(f) allows a contractor to sign a “pre-hire” agreement with the union regardless of the union’s majority status. *Central Illinois*, 335 NLRB at 718. In the construction industry, there is a rebuttable presumption that a bargaining relationship is governed by Section 8(f). *John Deklewa & Sons*, 282 NLRB 1375, 1385 n.41 (1987) *enfd.* 843 F. 2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988). As a result, the party asserting the existence of a Section 9(a) relationship has the burden of proving it. *Central Illinois*, 335 NLRB at 721. The ALJ correctly followed this governing law placing the burden of proof on the Union to prove Section 9(a) status. (JD,p.5).

In *Central Illinois*, the Board held that contract language alone can establish section 9(a) status if “the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3)the employer’s recognition was based on the union’s having shown, or having offered to show, evidence of its majority support.” *Id.* at 720.

The ALJ correctly followed the controlling law of *Madison Industries*, 349 NLRB 1306, 1308 (2007). (JD, p.6). In *Madison*, the Board stated “in determining whether the presumption of a 8(f) status has been rebutted, the Board first considers whether the agreement, examined in its entirety, ‘conclusively notifies the parties that a 9(a) relationship is intended.’ Where it does so, presumption of a 8(f) status has been

rebutted. Where the parties' agreement does not do so, the Board considers any relevant extrinsic evidence bearing on the parties' intent as to the nature of their relationship. *Madison Industries*, 349 NLRB 1306, 1308 (2007) (citing *NLRB v. Oklahoma Insulation Co.*, 219 F. 3d. 1160, 1165 (10th Cir. 2000), enf. denied 325 NLRB 741 (1998) and *Central Illinois*, 335 NLRB at 720, n. 15)(emphasis added).

In *Madison Industries*, the Board held that the "judge erred by limiting his analysis solely to the language of that contractual provision. As discussed above, the *Staunton Fuel* standard requires examination of the parties entire agreement to determine whether a 9(a) relationship was intended." *Id.* at 1308 (emphasis added). In addition, if the parties contractual language is ambiguous, the Board must next consider any extrinsic evidence concerning the parties' intent. *Id.* at 1309 (citing *Central Illinois*, 335 NLRB at 720 n. 15).

C. The ALJ Correctly Concluded That the Union Failed to Rebut the Presumption That the Agreement Between the Respondent and the Union Was a Section 8(f) Bargaining Relationship

1. The ALJ Correctly Found That Agreement "In Its Entirety" Did Not Unequivocally Show That the Respondent and the Union Intended to Create a 9(a) Relationship

General Counsel Exhibit 2, in relevant part, states as follows:

AGREEMENT

THIS AGREEMENT made this 24th day of November, 2008, by and between the Road Sprinkler Fitters Local Union 669 (hereinafter called "Union") and G&L Assoc. Inc. dba USA Fire Protection (hereinafter called

“Employer”).

* * * * *

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

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

The ALJ correctly relied upon this “preamble to the separate Agreement, signed contemporaneously, pursuant to which the Respondent adopted the NFSA contract as its own.” (JD, p.6) Further, the ALJ correctly noted that the NFSA Agreement adopted by the Respondent also contains a union security clause requiring employees to join the Union 7 days after hiring. As the ALJ pointed out, such language is indicative of a Section 8(f) rather than a Section 9(a) agreement. (JD, p.6, footnote 7).

Because the agreement, “in its entirety” between the Union and the Respondent was ambiguous, the ALJ correctly considered extrinsic evidence concerning the parties’ intent. *Madison Industries*, 349 NLRB 1306, 1309 (2007) (citing *Central Illinois*, 335 NLRB at 720 n. 15). (JD, p.6-7).

2. The ALJ’s Examination of The Relevant Extrinsic Evidence Correctly Revealed That the Respondent and the Union Intended to Create a Pre-Hire or Section 8(f) Bargaining Relationship

a. The ALJ Correctly Found That The Respondent Was a Start-up Company

As the ALJ found, there was substantial undisputed evidence presented at the hearing. (JD, p.6-7). This “relevant extrinsic evidence” was dispositive of the parties’ intent. First, the testimony from the Respondent’s president, Linda Duncan, and the Union’s local business agent, Mark Davis, establishes that the Respondent was still in

the process of forming its new company when the agreement was signed. (R. 62-63; 91-93; and 97). At the time the agreement was signed by the Respondent's president, it still had not been licensed by the State of Tennessee. As a result, it had not submitted any bids for work, performed any sprinkler fitter work, or hired any unit employees.(R. 60-63; Respondent's Exhibits No. 5 and 6).

Second, as Mark Davis testified, the recognition "was to" represent sprinkler fitters. (R. 96). Mr. Davis' testimony clearly indicates that the recognition "was to" apply to "future" employees. Third, the language in General Counsel Exhibit 2 also clearly shows the parties' intent. It states that "the said employer is desirous of hiring and employing Journeyman Sprinkler Fitters and Apprentices" and "the Union has competent and skilled Journeymen and Apprentice Sprinkler Fitters".

As concluded by the ALJ, it is clear that, at the time of the November 24, 2008 agreement, the Respondent and the Union intended to enter into a "pre-hire" or Section 8(f) bargaining relationship. (JD, p.7).

b. The ALJ Correctly Found That, At the Time of the Agreement, Dale Young Was a Statutory Supervisor of the Respondent Within the Meaning of Section 2(11) of the Act

In its brief and during the hearing, the Union claims that Dale Young was a unit employee at the time of the agreement. (UB, p.5)(R. 94). This claim is without merit.

First, in the Complaint, General Counsel stated that Dale Young, as a field supervisor, was a supervisor of the Respondent within the meaning of Section 2 (11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

(R.6 and Exhibit 1(c)). Second, Mark Davis admitted during the hearing that Respondent had not done any sprinkler fitting work in the field or submitted any bids for any work when the agreement was signed. (R. 91-93; and 97).

Finally, the testimony from Linda Duncan at the hearing clearly established that Dale Young was a supervisor of the Respondent within the meaning of Section 2(11) of the Act, not a unit employee, at the time of the signing of the agreement. Mr. Young performed the following duties for the Respondent at a salary of \$80,000.00 per year: (1) hired employees; (2) purchased a vehicle, equipment and materials; (3) assisted in preparation of an employee handbook, safety manual and Q&A Manual; and (4) located property to rent. Mr. Young never performed any sprinkler installation work in the field. (R. 79; 85-87).

In sum, there was no relevant extrinsic evidence offered by the Union that Dale Young was anything but a statutory supervisor for the Respondent within the meaning of Section 2(11) of the Act. Although the Union could have presented Dale Young to testify live at the hearing, it failed to do so.

3. The ALJ Correctly Relied Upon *Madison Industries*, 349 NLRB 1306 (2007)

This case is similar to *Madison Industries*, 349 NLRB 1306 (2007). In *Madison Industries*, the judge determined that the recognition clause in the parties agreement established a 9(a) relationship. The judge also found that the Respondent was barred under Section 10(b) from challenging the Union's majority status at the time the agreement was executed. *Id* at 1306-1307.

On appeal, the Respondent argued to the Board that the judge erred by focusing his analysis solely on the agreement's recognition clause. Respondent asserted that other provisions of the agreement created ambiguity concerning the nature of the relationship. *Id.* at 1307.

Specifically, in *Madison Industries*, the Respondent contended that the exclusive hiring hall arrangement between the parties was indicative of an 8(f) relationship. Similarly, in the instant case, the ALJ found that Joint Exhibit 1 contains a similar exclusive hiring hall arrangement under Article 5. *Id.* at 1307; and 1309 n. 11.(JD, p.6-7, footnote 7).

The Board in *Madison Industries* further stated as follows:

[w]e are called on to decide whether a majority of the unit employees have "designated or selected" the Union as their exclusive representative for the purpose of collective bargaining. Sec. 9(a). This determination implicates the employees' section 7 right of self-organization and self-determination. See *Ladies Garment Workers*, *supra* at 731. Consistent with these principles and the importance of the statutory rights involved, extant Board law requires proof that an agreement "unequivocally demonstrates that the parties intended to be given by 9(a)" before 9(a) status may be found on the basis of contractual language.

Id. at 1309 (citations omitted).

The Board in *Madison Industries* held that the parties' agreement failed to satisfy that standard. As a result, the Board held that Section 8(f) governed the parties' relationship. Similarly, in the instant case, given the ambiguous language in the agreement between the Respondent and the Union, the ALJ correctly found that

relevant extrinsic evidence demonstrates that the parties intended to enter into a “pre-hire” or Section 8(f) agreement, not a Section 9(a) relationship.(JD, p.6-7).

D. Alternatively, if the ALJ Failed to Correctly Conclude That Respondent and the Union Intended to Enter into a Section 9(a) Bargaining Relationship, this Agreement is Void and Unenforceable Because it is an Unlawful Clear Abridgment of the Respondent’s Employees’ Section 7 Rights

The Union argues that Respondent and the Union intended a Section 9(a) relationship on November 24, 2008. The Union argues this proposition even though the Respondent had no unit employees on November 24, 2008 and was never presented any authorization cards, petitions, or other documentary evidence that it represented a majority of Respondent’s employees. (R. 63-64 and 96-97). Without evidence of majority status, the agreement purporting to establish a Section 9(a) relationship between the Respondent and the Union is void and unenforceable.

International Ladies’ Garment Workers’ Union v. NLRB, 366 U.S. 731 (1961).

In *International Ladies’ Garment Workers’*, the Supreme Court of the United States was asked to decide whether it was an unfair labor practice for both an employer and a union to enter into an agreement under which the employer recognized the union as the exclusive bargaining representative of certain of its employees when, in actuality, only a minority of its employees had authorized the union to represent its interests. *Id.* at 732. The Supreme Court of the United States held “on the facts shown, the agreement must fail in its entirety.” *Id.* at 737. The Union claimed that its own good-faith belief as to its majority status was a complete defense. In response, the Supreme

Court of the United States stated as follows:

[t]o countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act- that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.

Further, the Supreme Court of the United States held as follows:

[w]e fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorizatrion cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so.

Id. at 739-40.

Similarly, in the instant case, any agreement purporting to establish the existence of a Section 9(a) relationship without evidence of majority status runs roughshod over the principles established in *Garment Workers* because it completely fails to account for employee rights under Section 7 and 8(f) of the Act. Therefore, an agreement between an employer and a union is void and unenforceable, *Garment Workers'* holds, if it purports to recognize a union that actually lacks the majority support of its employees' exclusive representative. *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 536-37(D.C. Cir. 2003).

The Court of Appeals in *Nova Plumbing* stated as follows:

The Board's ruling that contract language alone can establish the existence of a section 9(a) relationship and thus trigger the three-year "contract bar" against election

petitions by employees and other parties-creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and *Garment Workers'* holding by colluding at the expense of employees and rival unions. By focusing exclusively on employer and union intent, the Board had neglected its fundamental obligation to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistake at issue in *Garment Workers*.

Id. at 537.

Further, in *Nova Plumbing*, the Board argued that, under Section 10(b), the employer may not dispute that the contract created a Section 9(a) relationship because the employer failed to raise the issue within six months of the contract's signing. In response, the *Nova Plumbing* Court stated as follows:

[w]e think this argument begs the question, however. The fundamental issue at the heart of this case is whether the 1995 contract was subject to section 8(f) or 9(a); only if the parties formed a section 9(a) relationship in 1995 did Nova commit an unfair labor practice in 1997 and thereby trigger the six-month time limit.

Id. at 538-39 (citations omitted).

Therefore, the Respondent submits that any agreement between the Respondent and the Union attempting to establish a Section 9(a) relationship is void and unenforceable under the Supreme Court of the United States' decision in *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961).

IV. CONCLUSION

The ALJ correctly relied upon the governing principle that, in construction industry cases, there is a rebuttable presumption that any agreement between the

Respondent and the Union is a Section 8(f) collective bargaining relationship. (JD, p.5). As the ALJ noted, the Union has the burden of proving a Section 9(a) collective bargaining relationship. (JD, p.5). The Union has failed to rebut the presumption of a Section 8(f) collective bargaining relationship in this case. When the ALJ reviewed the agreement "in its entirety", he correctly found that it was ambiguous.(JD, p. 6).

Further, when the ALJ reviewed the relevant extrinsic evidence, in light of the agreement's ambiguity, he correctly concluded that the Respondent and the Union intended to, and in fact did, establish a Section 8(f) relationship. (JD, p.6-7).

On November 24, 2008, the Respondent was still in the process of forming its company and had not yet been licensed to perform any work in the fire protection industry. The Respondent, at the time of the agreement, had no unit employees. The Respondent's only "employee" was a statutory supervisor. (JD, p.6-7)

Alternatively, if the ALJ failed to correctly conclude that the Respondent and the Union attempted to create a Section 9(a) agreement, this agreement is void and unenforceable under the Supreme Court of the United States' ruling in the *International Ladies' Garment Workers' v. NLRB*, 366 U.S. 731 (1961) because the Union did not, in fact, represent a majority of the Respondent's employees on the date of recognition, November 24, 2008.

WHEREFORE, the Respondent, G&L Associated, Inc. d/b/a USA Fire Protection, states that the ALJ's conclusion that the Respondent and the Union established a Section 8(f) collective bargaining relationship is clearly and fully

supported by the record and governing case law. The Union raises no exceptions or arguments which warrant the Board overturning the ALJ's well-reasoned finding of a Section 8(f) collective bargaining relationship. Consequently, the Respondent respectfully requests that the Board affirm the portions of the ALJ's Decision to which the Union has taken exceptions.

Respectfully submitted this 18th day of August, 2010.

**Respondent G&L Associated, Inc.
d/b/a USA Fire Protection**

By: 

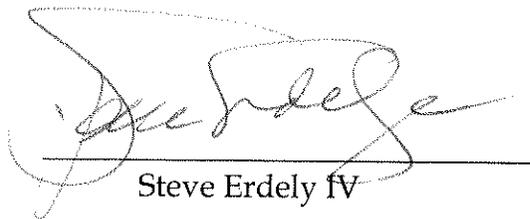
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief of Respondent, G&L Associated, Inc. d/b/a USA Fire Protection, was served electronically on the 18th day of August, 2010 on:

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