

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

RESPONDENT G&L ASSOCIATED, INC.
D/B/A USA FIRE PROTECTION'S
BRIEF IN SUPPORT OF CROSS-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
November, 2008, by and between the Road Sprinkler
Fitters Local Union 669 (hereinafter called "Union") and

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).

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 incorrectly concluded that the agreement between the Respondent and the Union satisfied the three-part test of *Central Illinois*?
- B. Whether the ALJ failed to correctly conclude that the Respondent lawfully withdrew recognition from the Union because the Respondent employed a stable one-person unit?

III. ARGUMENT

A. Introduction

In his decision, the Administrative Law Judge (ALJ) concluded:

Applying this precedent to the facts here, I find the language of the one page "Acknowledgment of Representative Status. . ." signed by Linda Duncan on November 24, 2008, satisfies the three part test of *Central Illinois*. . .

(JD, p.6).

The ALJ further found that "the evidence offered by the Respondent to establish the existence of a stable one-man unit is not persuasive and is contradicted by the fringe benefit reports it submitted to the Union and its own payroll records." (JD. p. 7)

B. 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).

C. The ALJ Incorrectly Concluded That the Three-Part Test of *Central Illinois* Was Satisfied.

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.

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; . . .

General Counsel's Exhibit 3 states as follows:

ACKNOWLEDGMENT OF THE REPRESENTATIVE STATUS OF ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO

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.

The language in the recognition clause in General Counsel's Exhibit 3 fails to satisfy the requirements of *Central Illinois*. First, the recognition clause language at issue is conclusory in nature. Second, the recognition clause language does not evidence an "unequivocal demand for" voluntary recognition based upon a contemporaneous showing of majority support.

Third, the recognition clause language does not evidence an "unequivocal grant of" voluntary recognition based upon a contemporaneous showing of majority support. Fourth, the recognition clause language does not purport to establish recognition as the "majority" representative, but rather only as the "exclusive" representative.

Finally, the recognition clause language does not specifically state that the Respondent's recognition was "based on" the Union's submission of evidence that it represented a majority of the Respondent's employees. It states only that the Respondent's recognition was "on the basis on objective and reliable information". It fails to state, however, the source of the "objective and reliable information". Under this recognition clause language, the "objective and reliable information" could have come from any source, including the employer's own personal knowledge, the Union, or a third party. Since the Respondent's recognition was not unequivocally "based on" the Union's submission of evidence that it represented a majority of Respondent's

employees, it failed to satisfy the requirements of *Central Illinois*.

Similarly, in *Central Illinois*, the contractual language did not state that the recognition was based on “a contemporaneous showing, or offer by the Union to show, that the Union had majority support.” Therefore, the Board in *Central Illinois* held that “we cannot adopt that the judge’s finding that a 9(a) relationship was established by the contract language at issue, even though her finding was clearly supportable under the authority she cited.” *Central Illinois*, 335 NLRB 717, 720 (2001).

In sum, the agreement between the Respondent and the Union does not unequivocally satisfy the requirements of *Central Illinois*. The ALJ was erroneous to conclude otherwise.

D. The Respondent Lawfully Withdrew Recognition Because Respondent Employed a Stable One-Employee Unit

1. Respondent’s Payroll Records

Employers may lawfully withdraw recognition during the term of a Section 8(f) relationship if the bargaining unit is a stable one-employee unit. *Crescendo Broadcasting*, 217 NLRB 697 (1975).

Respondent’s Exhibit No. 7 was introduced into evidence at the hearing. (R. 74-75). Respondent’s Exhibit No. 7 constitutes a calendar summary of the payroll records of the Respondent. It shows the number of employees that worked for the Respondent from November, 2008 through January, 2010. Respondent’s Exhibit No. 7 reveals that the Respondent employed the following number of unit employees on a monthly basis:

1. November, 2008 - 0;
2. December, 2008 - 0 or 1;
3. January, 2009 - 0 or 1;
4. February, 2009 - 0;
5. March, 2009 - 0 or 1;
6. April, 2009 - 0 or 1;
7. May, 2009 - 0 or 2;
8. June, 2009- 0, 1 or 2;
9. July, 2009 - 0 or 2;
10. August, 2009 - 0, 1 or 2;
11. September 2009 - 0, 1 or 2;
12. October, 2009 - 0, 1 or 2;
13. November, 2009 - 1;
14. December, 2009 - 0 or 1; and
15. January, 2010 - 1 or 2.

The Respondent's payroll records reveal that the Respondent employed a stable one-employee unit. The Respondent's employment of a second employee, as seen by Respondent's Exhibit No. 7, was only occasional, not permanent. Further, under Article 16 of Joint Exhibit 1, the Respondent was forced to employ a journeyman for every apprentice hired. Given the required employment, although the Respondent technically had two employees at times, it still constituted a stable one-employee unit.

Based on these facts, the Respondent lawfully withdrew Section 8(f) recognition.

2. This Case is Similar to *D&B Masonry*, 275 NLRB 1403 (1985)

This case is similar to *D & B Masonry*, 275 NLRB 1403 (1985). In *D&B Masonry*, the Board affirmed the judge's conclusion that the employer had not violated Section 8(a)(5) because there was as stable one-person unit. *Id.* at 1403.

The Board analyzed the employment pattern. It found that the employer regularly had one unit employee and a second employee was only employed occasionally. Since the second employee's employment was "casual and intermittent", the second employee was not a permanent employee. As a result, the employer had a stable one-person unit. *Id.* at 1409-10.

In the instant case, Respondent's Exhibit No. 7 reveals that Respondent also had a stable one-person unit. When the Respondent's employment records are analyzed, it reveals that Respondent regularly had 0 or 1 employee in its unit. On occasion, the Respondent had a second employee, but the second employee's employment was "casual and intermittent", not permanent.

Therefore, Respondent lawfully withdrew its Section 8(f) recognition because it had a stable one-employee unit.

IV. CONCLUSION

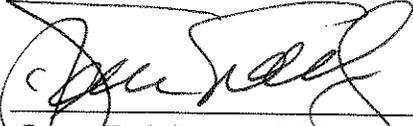
The ALJ incorrectly concluded that the agreement between the Respondent and the Union satisfied the three-part test of *Central Illinois*. The agreement fails to unequivocally satisfy the requirements of *Central Illinois*. Further, the ALJ erroneously found that the Respondent unlawfully withdrew recognition from its Section 8(f) collective bargaining relationship with the Union. To the contrary, Respondent's Exhibit No. 7 reveals that the Respondent had a stable one-person unit from November, 2008 through January, 2009. Therefore, there was no violation by the

Respondent of Sections 8(a)(1) and 8(a)(5) of the Act.

WHEREFORE, the Respondent, G&L Associated, Inc. d/b/a USA Fire Protection, respectfully requests that the complaint against it be DISMISSED.

Respectfully submitted this 18th day of August, 2010.

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

By: 

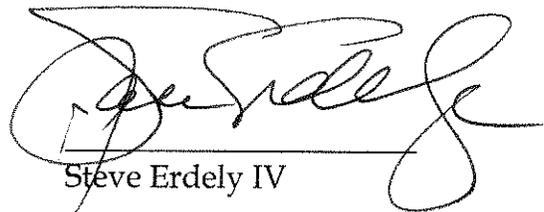
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief in Support of Cross-Exceptions 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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