

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC**

TRIPLE A FIRE PROTECTION, INC.)	
)	
Respondent)	
)	
and)	Case 15-CA-1 1498
)	
UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, AFL-CIO)	
)	
Charging Party)	

**TRIPLE A FIRE PROTECTION, INC.’S RESPONSE TO
GENERAL COUNSEL’S MOTION FOR AFFIRMANCE**

The January 30, 2009, Order of the two member Board is fatally flawed. The two member decision seeks to enforce an expired collective bargaining agreement,¹ *ad infinitum*. Neither the Board nor the courts have authority to enforce an expired contract. The two member decision ignores *Arandess Management Company*, 337 NLRB 245, 247 (2001), where the Board held that:

. . .our starting point is the settled principle that affirmative relief under Section 10(c) of the Act must be **remedial, not punitive**.

(emphasis added), citing *Carpenters Local 60 v. NLRB*, 365 U.S. 651 and *Iron Workers Local 377 (Alamillo Steel Corp.)*, 326 NLRB 375. The two member decision not only fails to follow *Arandess Management Company*, *supra*, it asserts

. . .the Respondent’s argument appears to rely in part on the assumption that the Respondent is only required to make fringe benefit payments for employees who have a vested interest in receiving the benefits that the funds provide. However, the Board has never made such a distinction in awarding a make-whole remedy to benefit

¹Triple A complied with the terms of the expired collective bargaining agreement during its entire term from April 1, 1988, through March 30, 2001.

funds.

The Board, however, held in *Arandess Management Company*, “where an individual’s economic interest in a union fund is merely speculative, contributions to that fund may not be ordered on the individual’s behalf.” 337 NLRB at 248. Likewise the Board’s *Casehandling Manual*, Section 10528.5 entitled *Make-Whole Benefit Funds*, provides in relevant part:

When a respondent has unlawfully unilaterally discontinued payments to benefit trust funds, it is typically ordered to make whole the union funds on behalf of employees possessing a **nonspeculative future economic interest in those funds.**

...

On the other hand, **if an individual’s economic interest in the future viability of a union fund is merely speculative, contributions to that fund may not be ordered on the individual’s behalf.** Examples of individuals who have a nonspeculative economic interest in the funds would include **individuals who have obtained pension vesting rights**, individuals who would have obtained vesting rights absent the unfair labor practice, or individuals who are currently employed by an employer that is contributing to the same funds. *Systems Management, Inc. v. NLRB*, 901 F.2d 297 (3d Cir. 1990); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 154 LRRM 2684, 2690 (D.C. Cir. 1997), quoting *Manhattan Eye, Ear & Throat Hosp. v. NLRB*, 942 F.2d 151, 160, 138 LRRM 2238 (2d Cir. 1991). Compare, *Carpenter’s Sprinkler Corporation v. NLRB*, 605 F.2d 60, 69 (2d Cir. 1979).

(emphasis added).

This proceeding does not involve any discharge, refusal to reinstate or hire or a breach of contract. This proceeding involves the appropriate remedy for unfair labor practices which occurred on April 22, 1991, twenty-two (22) days after the last collective bargaining agreement terminated pursuant to Notice from the Charging Party, Sprinkler Fitters Local 669 (Sprinkler Fitters, Union or Charging Party). This case involves the jurisdiction (power) of the Board to enforce the letter of an expired collective bargaining agreement.

Unlike the usual case (termination, refusal to hire or reinstate), there is no yard stick, *i.e.*, “wage rate.” Here, the employees hired after April 22, 1991 (“new employees”), had “no economic interest” in the expired agreement on April 22, 1991, or at any other time.²

The Board has the following documents before it now:

1. Supplemental Decision of Administrative Law Judge, Keltner W. Locke dated February 10, 2010.
2. Exceptions of Triple A Fire Protection, Inc.
3. Briefs of Triple A Fire Protection, Inc., in Support of Exceptions.
4. Cross-Exceptions of Sprinkler Fitters.
5. Brief of Sprinkler Fitters in Support of Cross-Exceptions.
6. Exceptions of General Counsel.
7. Briefs in Support of Exceptions of General Counsel.
8. Triple A’s Response to Exceptions of Sprinkler Fitters and General Counsel.
9. Reply Brief of Sprinkler Fitters.
10. General Counsel’s Motion for Affirmance dated August 23, 2010.

In addition to the reasons heretofore enunciated by Triple A, Triple A asserts that the provision of the expired collective bargaining agreement which provides that if:

. . .the Employer employs men not members of the United Association, these employees shall be paid the Journeyman’s rate provided in the Agreement and contributions shall be made on such employees to the various fringe benefit funds as provided in this Agreement. GC Exhibit 20, Article IV, page 5,

² Indeed, some, but not all of the new employees, could not have been employed by Triple A Triple A in 1991 because of the child labor provisions of the *Fair Labor Standards Act*, 29 U.S.C. § 212. Some of these new employees were still in grade school.

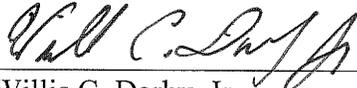
is actually a provision for “liquidated damages” and not enforceable under *Priebe & Sons, Inc. v. U.S.*, 332 U.S. 407 (1947):

The provision [for liquidated damages] was included not to make a fair estimate of damages to be suffered, but to serve only as an added spur to performance. It is well settled contract law that courts do not give their imprimatur to such arrangements. All provisions for damages are, of course, deterrents of default. But an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust.

(internal citations omitted). Here, the compliance specifications do not allege nor is there any proof that any new employee suffered any damage by being hired at a mutually satisfactory rate of pay.

The Board, or a three member panel thereof, should not affirm the two member Board’s Supplement Decision without considering all of the ten (10) documents now before the Board. Triple A further asserts that the Board should request its Executive Secretary to submit a copy of Triple A’s Motion for Reconsideration which was filed by Triple A on or about September 8, 2009, but not forwarded by the Executive Secretary to the Board.

Dated at Mobile, Alabama this 19th day of August, 2010.



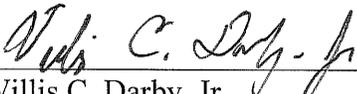
Willis C. Darby, Jr.
Willis C. Darby, Jr, LLC
Post Office Box 2565
Mobile, Alabama 36652
Telephone: (251) 432-2635

CERTIFICATE OF SERVICE

I, Willis C. Darby, Jr., attorney for Triple A Fire Protection, Inc., hereby certify that on the 19th day of August, 2010, I served a copy of the foregoing Response to General Counsel’s Motion for Affirmance on the several parties to these proceedings by e-mailing each a copy thereof, as follows:

1. Beauford D. Pines, Esq.
National Labor Relations Board
Region 15
F. Edward Hebert Federal Building
600 South Maestri Place
7th Floor, Room 714
New Orleans, LA 70130
bpines@nlrb.gov

2. Jason J. Valtos, Esq.
Osborne Law Offices, P.C.
4301 Connecticut Avenue, NW
Suite 108
Washington, DC 20008
jvaltos@osbornelaw.com



Willis C. Darby, Jr.